Circuit Court for Wicomico County
Case No. C-22-CR-21-000254

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1639

September Term, 2021

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BRITANI ELBURN

v.

STATE OF MARYLAND

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Arthur,
Reed,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Sharer, J.

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Filed: August 8, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A jury sitting in the Circuit Court for Wicomico County found appellant, Britani Elburn, guilty of affray and disorderly conduct. The court sentenced her to three years' imprisonment, all suspended except for time served, in favor of five years' supervised probation, for affray, and it merged disorderly conduct into affray for sentencing purposes. She then noted this appeal, raising the following issues:

1. Whether the trial court erred in instructing the jury on the crime of affray; and

2. Whether the evidence was sufficient to sustain a conviction for affray.

We hold that the trial court erred in its instruction and that the error was not harmless. We further hold that the evidence of affray was sufficient. Accordingly, we reverse the conviction for affray and remand for further proceedings.

**BACKGROUND**

This case began as an altercation between appellant and two others, Miguel Valderas and Brooke Joseph, in the parking lot of a Walmart in Salisbury, Wicomico County. Appellant and Mr. Valderas previously had been in a relationship and had a daughter together, but, at the time of the altercation, they were no longer together. Appellant had custody of their daughter and was supposed to meet Mr. Valderas for a brief visitation and exchange of Christmas presents when the altercation broke out. At the time of the altercation, Mr. Valderas and Ms. Joseph were in a relationship, although, by the time of trial in this case, they, too, were no longer together.[1]

[1] Although there was no testimony that Mr. Valderas and Ms. Joseph were no longer together at the time of trial, the prosecutor told the jury, during closing argument (and (continued…)

As a result of that altercation, appellant was charged, in the District Court of Maryland for Wicomico County, with two counts of assault in the second degree, affray, disorderly conduct, theft of property having a value at least $100 but less than $1,500, robbery, and theft of a credit card. The case subsequently was transferred (minus the robbery charge) to the Circuit Court for Wicomico County upon appellant's demand for a jury trial.

A one-day jury trial was held in November 2021. The State called four witnesses to testify: Mr. Valderas; Ms. Joseph; Robert Fillis, a bystander to the altercation; and Private First Class Brian Barr of the Salisbury Police Department, who responded to the scene shortly after the altercation had concluded. Appellant testified on her own behalf.[2]

There were, essentially, two narratives concerning what occurred on the night in question, December 18, 2020, one version set forth through the testimony of Mr. Valderas and Ms. Joseph, and the other set forth through appellant's testimony. According to Mr. Valderas, appellant had sent him a text message that day offering to drop off their daughter at his house. As a condition of doing so, however, appellant "kept on insisting on meeting Ms. Joseph[,]" who, for her part, "indicated she did not want to talk to" appellant. Because

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without objection), that Ms. Joseph was "no longer in a relationship with" Mr. Valderas and that the jury should regard that as evidence that she had no motive to testify falsely.

[2] In addition, appellant had subpoenaed a Salisbury Police officer to testify to her physical condition when she was arrested, several days after the altercation. Because that officer failed to appear, despite having been properly served, the trial court permitted appellant to introduce into evidence a report filed by that officer, stating in relevant part that, although appellant was not suffering from any "visible injuries" at the time of her arrest, she did complain of a "knot on [her] head from assault" but that the officer "did not observe any bruising."

appellant "kept on pushing back the time limit[,]" Mr. Valderas told her that he and Ms. Joseph would not be at home for the exchange but, instead, were going to the North Salisbury Walmart to shop for groceries, to which appellant purportedly replied, "okay, I'll be there[.]" However, according to Mr. Valderas, because appellant repeatedly called him, "threatening" him and Ms. Joseph, he decided to call off their meeting.

After Mr. Valderas and Ms. Joseph had completed their shopping and were leaving the Walmart with a cart full of groceries, they discovered appellant's car in the parking lot, next to the passenger side of his truck. Mr. Valderas told Ms. Joseph to go "to the driver's side and stand in front of the car" and that he "would deal with it." He then "opened the doors" and started to put their groceries in his truck.

Meanwhile, appellant "had come around the corner with" their six-year-old daughter and said, "here's your daughter," while addressing Ms. Joseph as a "bitch." At that moment, according to Mr. Valderas, the situation "just escalated." As he took his cell phone out of his pocket to call 911, appellant "smacked" it out of his hand, "grabbed" it, and "took off with [his] phone over to her vehicle" while their daughter "was standing there[,]" watching.[3]

Mr. Valderas then "turned around" and "grabbed" the child. Meanwhile, appellant approached from behind and struck him in the back of his head. According to Mr. Valderas, he then ran with his daughter "towards the entrance of" the Walmart, hoping to

[3] Mr. Valderas further asserted that his cell phone was contained in a case, which "had an attached wallet[,]" containing his driver's license, credit cards, and debit cards. The jury, however, acquitted appellant of the theft counts.

come into view of the surveillance cameras, and, when he got there, he "huddled" over the child while appellant "continued to hit" him, "six to eight" times.

By that time, according to Mr. Valderas, a crowd had gathered. Ms. Joseph then "pushed" appellant away from Mr. Valderas "to break up the fight" and to prevent appellant from "hitting" him. Appellant "grabbed" their daughter, "started running back towards her car[,]" entered her car with the child, and drove away.

According to Ms. Joseph, that same day, appellant had called Mr. Valderas and asked whether he wanted to see his daughter, and he and Ms. Joseph replied affirmatively. There was a catch, however—appellant, according to Ms. Joseph, conditioned the visit on meeting Ms. Joseph outside, where the exchange would take place, but Ms. Joseph refused. Then, "a few hours" later, while Ms. Joseph and Mr. Valderas were at the Walmart shopping for groceries, appellant called again, asking whether they wanted to see Mr. Valderas's daughter. According to Ms. Joseph, Mr. Valderas told appellant that they would call her back "as soon as" they had finished grocery shopping.

As Mr. Valderas and Ms. Joseph were "coming outside [the Walmart] with the cart[,]" he spotted appellant and whispered to Ms. Joseph, "that's her." Mr. Valderas told Ms. Joseph "to go to the truck." He told her that he would hand the groceries to her and that she should put them in the truck but that she should not "say anything."

Appellant, according to Ms. Joseph, came behind the car and said, "hey, whore," and "push[ed]" the child towards either Ms. Joseph or Mr. Valderas. Mr. Valderas picked up his daughter "to put her in the car seat[,]" and, as he bent over to do so, appellant "reach[ed] over, grab[bed] his cell phone [and] wallet," and "[took] off running" towards

her car. The scared child then also "[took] off running towards" the Walmart, with Mr. Valderas chasing her from behind. "[R]ight in front of everybody[,]" according to Ms. Joseph, he picked up the child and "huddled" over top of her, while appellant was "hitting him left, right, left, right."

At that point, according to Ms. Joseph, Mr. Valderas was "screaming help, help, someone help," and there were "witnesses all around[,]" but "nobody would help." Ms. Joseph therefore "took off running" and "shoved" appellant away from Mr. Valderas. In response, appellant, according to Ms. Joseph, "slapped" her in the face. "Somehow," appellant "got" her daughter, and "then they took off." According to Ms. Joseph, "it was a huge thing[,]" viewed by "probably 30 people[,]" just in front of the main entrance to the Walmart.

Robert Fillis was a passerby who had gone to the Walmart that evening to purchase a belt. After making his purchase, Mr. Fillis was leaving the Walmart when he came upon "an altercation" in the parking lot. Approximately 150 feet away, he could hear "a woman say hey, whore, here's your child." There was, according to Mr. Fillis, "a bunch of yelling, screaming and arguing."

Initially, he sought to avoid the "commotion" and tried "not to pay a whole lot of attention to it," but he "heard a man scream for help[,]" prompting Mr. Fillis to approach. The "next thing" he knew, he "saw punches being thrown." According to Mr. Fillis, he stumbled upon the altercation near its conclusion, and, during the portion of it that he observed, he could see two women (matching the descriptions of appellant and Ms. Joseph) fighting, although he could not discern, in the darkness, "who exactly was throwing the

first punch[,]" nor did he "witness any punches actually connect." After the fighting had concluded, Mr. Fillis saw appellant "get in a car and leave[.]"

By then, the man (that is, Mr. Valderas) "was an emotional wreck[.]" Mr. Fillis decided "to stay with him and spend time with him, pray with him and everything, ask what was going on."

When asked to characterize the scope and size of the altercation, Mr. Fillis stated that "there was a large crowd of people that were around at that time[.]" He further explained that he thought that "some of [those people] were trying to intervene but didn't want to get too involved."

Pfc. Barr, a K-9 patrol officer with the Salisbury Police Department, "was dispatched to" the North Salisbury Walmart "in reference to a domestic related incident." By the time Pfc. Barr responded to the scene, "there were numerous people around but it didn't appear as if a crowd had formed to observe an incident that was ongoing." Pfc. Barr "met with" Mr. Valderas and Ms. Joseph and observed that Mr. Valderas "had some noticeable swelling to the left side of his face." After speaking with Mr. Valderas, Pfc. Barr identified appellant (who by then already had left the scene) as "a suspect."

Appellant testified in her defense and stated that she and Mr. Valderas "had planned on meeting" on the evening of the altercation so that he could take their daughter into Walmart to buy her Christmas presents. She pulled into the parking lot, parked next to Mr.

Valderas's truck, and called him to inform him that she had arrived "as per [their] agreement."[4]

A "verbal altercation" between appellant and Ms. Joseph ensued. According to appellant, Ms. Joseph was unaware of the agreement to allow the child to go Christmas shopping with Mr. Valderas and "was mad" because appellant "was ruining their plans for the evening."

That verbal altercation "became physical very quickly." According to appellant, Ms. Joseph "came around" from the rear of Mr. Valderas's truck and "immediately started striking [appellant] from behind" while Mr. Valderas "took off with [their daughter] to the front entrance" of the Walmart. Appellant "immediately" followed. There were "four or five" Walmart security personnel "standing in front of the entrance[,]" asking what was happening and "why [was] the child screaming." According to appellant, her daughter was "screaming mommy, help, please help, because [Mr. Valderas] was taking her away, and she's never been with him alone, which obviously scared her" and appellant "tremendously."

[4] Mr. Valderas had a prior conviction that required him to register as a sex offender. Appellant did not allow him to have unsupervised custody of their daughter. Thus, according to appellant, the agreement was that Mr. Valderas and Ms. Joseph would accompany the child while they bought Christmas presents, but that, after they had finished doing so, appellant would leave with the child.

The court attempted to shield the jury from this collateral, highly prejudicial, information. Appellant, however, blurted out, during cross-examination, the following non-responsive testimony: "He's a registered sex offender, I can't allow my kid to go be with him." Although the court sustained the State's objection and struck that testimony, it takes little imagination to believe that the jury, in all likelihood, discredited Mr. Valderas's testimony as a result.

"Immediately thereafter[,]" Ms. Joseph struck appellant "in the back of the head[,]" which, appellant claimed, was visible on a video recording, obtained from a Walmart security camera and admitted into evidence. Then, according to appellant, the Walmart security guards "stopped" Mr. Valderas from entering the store, whereupon he "dropped" his daughter on the ground. Appellant picked up her daughter "off the ground screaming and crying[,]" and appellant and her daughter returned to her vehicle. The security guards asked appellant whether she needed to call "the cops[,]" and she replied, "no," she "just need[ed] to get away" from Mr. Valderas and Ms. Joseph. Appellant denied hitting either Mr. Valderas or Ms. Joseph, nor, she claimed, did she take any of his property.

Following the close of the State's case, defense counsel moved for judgment of acquittal, asserting as follows:

> I'm making it to all counts. I think the video, particularly the video evidence, despite what their testimony was, I understand the standard is in the light most favorable to the State, and I understand that, however, the video evidence, no reasonable trier of fact could conclude after watching that video evidence that their story is what it is. He denied jumping on her and hitting her, and the video clearly shows that.
>
> Mr. Fillis's testimony doesn't make it sufficient, when you consider the fact that he didn't actually see her hit Mr. Valderas. He didn't see how everything started.
>
> * * *
>
> As to affray, there's been no testimony of terror to the people, which it's an old common law offense but the element is still it's got to be to the terror of the people. There's been no testimony that anyone was terrified.
>
> Same thing with disorderly conduct, there's been no testimony that the public was incited to, you know, or there was -- it's the old statute with old definition, but they remain elements. And there's been no testimony about the feelings of anyone. Interest, just pure curiosity is not disorderly

> conduct. They could have been watching out of intrigue, and so we don't know.

The trial court denied the motion for judgment of acquittal, declaring that there was "ample evidence as described by the State that would support a conviction on all counts[,]" and the defense presented evidence. Following the close of all the evidence, defense counsel renewed his motion for judgment of acquittal and argued as follows:

> I don't think there's been, particularly with respect to the affray, it isn't the same, quite the same as the disorderly conduct. It does require the terror on the people element. And that has not been established. There's a crowd but there's been no testimony about what the crowd's mental state was, were they terrified. We even had a witness in here and he didn't testify that he was terrified. He testified that he stayed in order to help someone.
>
> There was no incitement to violence as to the disorderly conduct charge that was, you know, there was curious onlookers. That does not affray or disorderly conduct make, and so my argument specific as to them is that.

Once again, the trial court denied the motion.

Defense counsel submitted in his written suggested jury instructions a non-pattern instruction[5] for affray:

> The defendant is charged with the crime of Affray. In order to convict the defendant of [affray],[6] the State must prove:
>
> (1) that the defendant willfully engaged in a fight with Brooke Joseph
> (2) that the fight occurred in a public place
> (3) that the fight caused terror to the public[.]

[5] There is no Maryland pattern jury instruction for affray.

[6] The defense's written instruction stated "theft," which we deem a typographic error.

The State submitted in its written suggested jury instructions its own non-pattern instruction for affray:

> The defendant is charged with the common law crime of Affray. In order to convict the defendant of affray, the State must prove:
> (1) that there was a fight;
> (2) that the fight was between two or more persons;
> (3) that the fight involved the use of assaultive physical activity or the use of a weapon directed at a victim;
> (4) that the fight was in a public place; and
> (5) **that the fight caused a disturbance to others**.

(Emphasis added.)

The trial court instructed the jury on disorderly conduct as follows:

> Disorderly conduct. The Defendant is charged with the crime of disorderly conduct. In order to convict the Defendant of disorderly conduct the State must prove: that the Defendant acted in a disorderly manner; and two, that the Defendant's conduct was willful; and three, that the Defendant's conduct offended, disturbed, incited or tended to incite a number of people to violence.

Then, over objection, the court instructed the jury on affray as follows:

> Affray. The Defendant is charged with the common law crime of affray. In order to convict the Defendant of affray the State must prove: one, that there was a fight; two, that the fight was between two or more persons; three, that the fight involved the use of assaultive physical activity or the use of a weapon directed at a victim; four, that the fight occurred in a public place; and five, **that the fight caused a disturbance**.

(Emphasis added.)[7]

After deliberating a little more than two hours, the jury found appellant guilty of affray and disorderly conduct, and it acquitted her of both counts of second-degree assault

[7] There is no preservation issue here. The principal allegation of error concerns the instruction for affray. Appellant objected in full compliance with Maryland Rule 4-325(f), the rule governing jury instructions and objections thereto.

and the counts charging theft and credit card theft. The court sentenced appellant to three years' incarceration for affray, all suspended except for time served, and five years' supervised probation, and it merged disorderly conduct for sentencing purposes. This timely appeal followed.

## DISCUSSION

### I.

Appellant contends that the circuit court erred in its jury instruction on affray and that the error was not harmless. Moreover, she claims, the instruction for disorderly conduct was so "intertwined" with the instruction for affray that the error tainted her conviction for disorderly conduct as well. The State counters that the circuit court's gloss on the "terror of the people" element of affray was not error,[8] that if the instruction was erroneous, any error was harmless because the evidence of "terror to the people" was "overwhelming"; and that appellant's claim regarding disorderly conduct is meritless.

*Whether the Court Erred in Instructing on Affray*

The common law offense of affray is '"the fighting together of two or more persons, either by mutual consent or otherwise, in some public place, to the terror of the people."' *Dashiell v. State,* 214 Md. App. 684, 689 (2013) (quoting 2 Joel Prentiss Bishop, *Bishop on Criminal Law* § 1, at 1 (9th ed.1923)). It is "an **aggravated** disturbance of the public peace[.]" *Hickman v. State,* 193 Md. App. 238, 252 (2010) (emphasis added) (citation and quotation marks omitted). "Although affray shares common elements with common law

[8] Twice in its brief, the State asserts that the circuit court's decision to modify the instruction for the "terror of the people" element of affray was "within its discretion."

assault and battery, it is, unlike assault and battery, not a crime against the person; rather, affray is 'a crime against the public and its aim is to protect the peace.'" *Nottingham v. State,* 227 Md. App. 592, 602 (2016) (quoting *Hickman,* 193 Md. App. at 252).

In *Nottingham*, we held that "public place" and "to the terror of the people" are "distinct elements of the crime of affray," *id.* at 604, although, as we stated in *Dashiell*, they "are closely related[,]" such that "evidence that a fight occurred in a 'public place' may be sufficient to establish, ipso facto, that the fight resulted in 'terror to the people.'" 214 Md. App. at 690. In *Nottingham*, the trial court declined to instruct at all on the "to the terror of the people" element, believing it sufficient to instruct only on the "public place" element, and we held that it had erred in doing so. 227 Md. App. at 603-04, 606. Here, in contrast, the trial court did give an instruction of a sort on the "to the terror of the people" element, but it eschewed what it regarded as an "antiquated" expression and instead instructed the jury that this element is satisfied if the State proves that there was a "disturbance." The question before us, therefore, is whether the trial court erred in applying this gloss to the instruction we suggested in *Nottingham*.

"Disturbance" is defined as "an interruption of a state of peace or quiet: an agitating or agitation esp. of the mind or feelings" or as a "COMMOTION." *Webster's Third New Int'l Dictionary* ("*Webster's*") 661 (1976). It also is defined as "[t]he interruption and breaking up of tranquility, peace, rest, or settled condition; agitation (physical, social, or political)." *IV The Oxford English Dictionary* ("*OED*") 872 (2d ed. 1989).

"Terror" is "a state of intense fright or apprehension: stark fear[.]" *Webster's* at 2361. It further is defined as "[t]he state of being terrified or greatly frightened; intense fear, fright, or dread." *XVII OED* at 820.

Plainly, "disturbance" and "terror" are not synonymous. Indeed, *Hickman* noted that an affray is "an aggravated disturbance of the public peace[,]" not merely a "disturbance." 193 Md. App. at 252 (citation and quotation marks omitted). The trial court, by instructing the jury that the State may prove an affray by showing that mutual fighting was likely to cause a mere disturbance, rather than "an aggravated disturbance" or that it was "to the terror of the people," lessened the State's burden of proof as to the "terror of the people" element of affray. The trial court erred in adding this gloss to the jury instruction. We therefore turn to consider whether that weakening of the State's burden was harmless error.

*Effect of the Instructional Error on the Verdicts*

The instructional error here is distinguishable from the errors in *Nottingham* and *Neder v. United States,* 527 U.S. 1 (1999), the authority which guided our analysis in *Nottingham*. 227 Md. App. at 610-11. In those cases, the instructional error involved the omission of an element of a charged offense, whereas here, the error is a misstatement of an element which had the effect of diminishing the State's burden of proof. Although there are, of course, Maryland reported decisions examining the circumstances under which an

instructional error is harmless,[9] the most directly analogous decision we could find is not a Maryland decision. In *Pope v. Illinois,* 481 U.S. 497 (1987), the Supreme Court considered the same issue presently before us[10] and articulated the following standard: "if a reviewing court concludes that no rational juror, if properly instructed, could find" differently as to the disputed element, "the convictions should stand." *Id.* at 503.

Applying that standard, we cannot say that the error here was harmless. This was a case where there was essentially no forensic evidence. The State's case depended almost entirely upon the testimony of Mr. Valderas and Ms. Joseph and especially the jury's assessment of their credibility. Given the jury's acquittal of appellant on both counts of

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[9] In *Graham v. State,* 151 Md. App. 466 (2003), we addressed whether a *Sandstrom v. Montana,* 442 U.S. 510 (1979), error, improperly shifting the burden of persuasion to the defendant, was harmless. In *Dashiell,* 214 Md. App. 684, we addressed whether the refusal to instruct that self-defense was a defense to affray was harmless. In *Nottingham,* 227 Md. App. 592, we addressed whether omission of an element of an offense was harmless. And in *Hall v. State,* 437 Md. 534 (2014), the Court of Appeals held that a trial court's error in giving an "anti-CSI effect" jury instruction was harmless where that instruction "was of no significance to the verdict[.]" *Id.* at 540. A few other decisions of the Court of Appeals address whether an unconstitutional instruction is plain error, *Savoy v. State,* 420 Md. 232 (2011), or structural error so fundamental as to warrant vacatur of a conviction in a postconviction proceeding, *Unger v. State,* 427 Md. 383 (2012), but neither of those cases is applicable here.

[10] In consulting federal decisions that apply harmless error analysis, we must always be mindful that federal courts, unlike Maryland courts, apply two different harmless error standards, depending upon whether the claimed error is of constitutional dimension. *Nottingham,* 227 Md. App. at 610 n.7. The issue in *Pope* subsequently was described as application of *Chapman* harmless error analysis (the same standard applied in all Maryland criminal cases to preserved errors on direct appeal) to a case in which a trial court gave an "instruction misstating an element of the offense[.]" *Sullivan v. Louisiana,* 508 U.S. 275, 284 (1993) (Rehnquist, C.J., concurring). *See also Hedgpeth v. Pulido,* 555 U.S. 57, 61 (2008) (per curiam) (characterizing the error in *Pope* as "misstatement of an element of an offense"); *Neder,* 527 U.S. at 10 (characterizing the error in *Pope* as "misstatement of element").

second-degree assault and the counts charging theft and credit card theft, it appears doubtful that the jury fully credited the testimony of either Mr. Valderas or Ms. Joseph. In any event, we cannot say that no rational juror would have rendered a different verdict on affray had the trial court given a correct instruction. Therefore, we reverse the conviction for affray.

Appellant, however, insists that the instructional error here requires reversal of both the affray conviction and the disorderly conduct conviction. She contends that the trial court's instructions "intertwined the two offenses by taking the element of disturbance, which correctly belongs in the disorderly conduct instruction, and adding it to the offense of affray." Moreover, she asserts, the prosecutor's closing argument exacerbated the problem because she declared, "the only difference between" affray and disorderly conduct "is that affray is a fight in public that causes a disturbance[,]" whereas "disorderly conduct is just someone acting disorderly in a way that disturbs the public[.]" Appellant concludes that "the conflated instructions on these counts rendered the two verdicts inextricably intertwined and the disorderly conduct conviction was therefore tainted by the erroneous instruction on affray." We find no merit in this contention.

Disorderly conduct is proscribed by a statute that provides relevant to the matter before us:

> (a)(1) In this section the following words have the meanings indicated.
>
> * * *
>
> (3)(i) "Public place" means a place to which the public or a portion of the public has access and a right to resort for business, dwelling, entertainment, or other lawful purpose.
>
> (ii) "Public place" includes:

1. a restaurant, shop, shopping center, store, tavern, or other place of business;

* * *

3. a public parking lot;

* * *

[(c)](2) A person may not willfully act in a disorderly manner that disturbs the public peace.

* * *

(4) A person who enters the land or premises of another, whether an owner or lessee, or a beach adjacent to residential riparian property, may not willfully:

(i) disturb the peace of persons on the land, premises, or beach by making an unreasonably loud noise; or

(ii) act in a disorderly manner.

(5) A person from any location may not, by making an unreasonably loud noise, willfully disturb the peace of another:

(i) on the other's land or premises;

(ii) in a public place; or

(iii) on a public conveyance.

* * *

(d) A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 60 days or a fine not exceeding $500 or both.

Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 10-201.[11]

Because there is no pattern jury instruction for disorderly conduct, *Rollins v. State*, 236 Md. App. 353, 366 n.6 (2018), the trial court fashioned its own instruction, based upon the pertinent parts of this statute. As for the disturbance element of disorderly conduct, the trial court instructed the jury that the State must prove "that the Defendant's conduct offended, disturbed, incited or tended to incite a number of people to violence." Critically,

[11] We quote the version of this statute in effect at the time of the offense. We note, however, that the identical statute appears in the 2021 Replacement Volume.

defense counsel did not object at any time to this instruction, and we assume it is a correct statement of the law.

Moreover, the trial court instructed the jury that it "must consider each charge separately and return a separate verdict for each charge." Jurors "are presumed to follow the court's instructions[.]" *Carter v. State*, 366 Md. 574, 592 (2001). *Accord Kazadi v. State*, 467 Md. 1, 36 (2020). Appellant asserts no reason why that presumption was rebutted here.

In sum, the trial court gave a correct instruction on disorderly conduct, which included "disturbance" as an element; an erroneous instruction on affray, which also included "disturbance" as an element but, instead, should have included either "aggravated disturbance" or "to the terror of the people" as the correct element; and a correct instruction that the jury was required to consider each charge separately. Under these circumstances, "we do not believe that the defective instruction [on affray] influenced the jury one whit in its decision that" appellant was guilty of disorderly conduct. *State v. Hawkins*, 326 Md. 270, 290 (1992).

**II.**

Although we are reversing the judgment of conviction for affray because of the instructional error, we must address appellant's preserved sufficiency claim,[12] because, if

[12] After the close of the State's case-in-chief, defense counsel moved for judgment of acquittal, asserting, among other things, that, "[a]s to affray, there's been no testimony of terror to the people, which it's an old common law offense but the element is still it's got to be to the terror of the people. There's been no testimony that anyone was terrified." Then, after the close of all the evidence, defense counsel renewed his motion for judgment (continued…)

she were correct, retrial would be barred under double jeopardy. *Rivera v. State*, 248 Md. App. 170, 181 (2020) (citing *Burks v. United States*, 437 U.S. 1, 18 (1978)).

Appellant contends that the evidence was insufficient to sustain her conviction for affray. She claims that this case involved nothing but "a brief scuffle" that "took place in the open public such that anyone nearby could easily remove themselves from the vicinity if they feared for their safety"; that "no weapons [were] involved that would make an onlooker feel unsafe"; and that this "scuffle was so inconsequential that no one involved required medical attention." Therefore, concludes appellant, the evidence was "insufficient to show that the fight was likely to strike terror in anyone observing it."

The State counters that appellant overstates what is minimally required to establish the "terror to the people" element of affray. The State further asserts that, "when compared to the facts in *Nottingham*, it is clear that the evidence in this case was sufficient."

"At the close of the evidence for the State, a defendant may move for judgment of acquittal on one or more counts or on one or more degrees of a crime, on the ground that the evidence is insufficient in law to sustain a conviction as to the count or degree." Md. Code (2001, 2018 Repl. Vol.), Criminal Procedure Article ("CP"), § 6-104(a)(1). "If the court denies the motion, the defendant may choose whether to offer evidence or not." *Kenney v. State,* 62 Md. App. 555, 568 (1985). If, however, "the defendant offers evidence after making a motion for judgment of acquittal, the motion is deemed withdrawn." CP § 6-104(a)(3).

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of acquittal, again emphasizing his belief that the State had failed to establish the "terror to the people" element because there was no testimony that anyone was "terrified."

"[I]n a criminal case tried by a jury, appellate review of evidentiary sufficiency is predicated upon a trial court's denial of a motion for judgment of acquittal." *Rivera,* 248 Md. App. at 178. *Accord Starr v. State,* 405 Md. 293, 302 (2008). Accordingly, to preserve for appeal the issue of evidentiary sufficiency, a defendant who offers evidence after making a motion for judgment of acquittal must renew his previous motion. *Warfield v. State,* 315 Md. 474, 482-90 (1989). Moreover, to ensure appellate review of evidentiary sufficiency, the original motion must be particularized, Md. Rule 4-324(a), and a bare motion, stating no particularized grounds, preserves nothing for appellate review. *Mosley v. State,* 378 Md. 548, 574 (2003) (Wilner, J., concurring).

An additional wrinkle comes into play where, as here, a defendant offers evidence. Whereas a defendant who declines to offer evidence but makes a particularized motion for judgment of acquittal is "entitled to a review of whether the evidence presented in the State's case alone was sufficient to survive a motion for judgment of acquittal[,]" a defendant who does present evidence (and preserves the issue of evidentiary sufficiency) is entitled only to a review of "whether the [trial] court erred in denying the motion for judgment of acquittal based on all the evidence—both the State's case and that of the defense." *Kenney,* 62 Md. App. at 569. *See also Purnell v. State,* 171 Md. App. 582, 609 (2006) (observing that "[o]nce a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution") (citation omitted), *cert. denied,* 398 Md. 315 (2007).

The test for determining sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). *Accord Howling v. State,* 478 Md. 472, 507 (2022). '"[I]t is neither our duty nor our role to assess the credibility of the witnesses who testified nor to weigh the evidence presented. Rather, we shall only review that evidence which supported the State's case in order to determine whether *any* rational trier of fact could have convicted the defendant of the crimes charged."' *Howling,* 478 Md. at 507 (quoting *State v. Albrecht,* 336 Md. 475, 487 (1994)). In other words, "[o]ur concern . . . is not whether the verdict was in accord with the weight of the evidence but rather, whether there was sufficient evidence produced at trial that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Schiff v. State,* 254 Md. App. 509, 525-26 (2022) (quotation marks omitted) (quoting *Galloway v. State,* 365 Md. 599, 649 (2001)).

According to Mr. Valderas, after appellant "smacked [his] phone from" his hand and fled to her vehicle with it, he "grabbed" his six-year-old daughter, whereupon appellant approached from behind and punched him in the back of the head. Then, he claimed, he ran "towards the entrance of" the Walmart, "screaming for help," and "huddled over" his daughter while appellant "continued to hit" him. While this happened, according to Mr. Valderas, "a crowd" of "maybe ten" people gathered.

According to Ms. Joseph, shortly after appellant arrived at the scene, she called Ms. Joseph a "whore" and "push[ed]" her daughter towards Ms. Joseph. Then, while Mr. Valderas was trying to place his daughter into his car seat, appellant "immediately reach[ed] over, grab[bed]" his cell phone and wallet, and "[took] off running" towards her car. The child was so "scare[d]" by this that she, too, "[took] off running towards" Walmart. Then, according to Ms. Joseph, Mr. Valderas followed and caught up with his daughter. "[R]ight in front of everybody[,]" while Mr. Valderas was "huddled over top of" his daughter, appellant started "hitting him left, right, left, right." At that point, according to Ms. Joseph, Mr. Valderas was "screaming help, help, someone help, and [there were] witnesses all around[,]" but "nobody would help." While this altercation was occurring, a "[h]uge crowd[,]" comprising "probably 30 people[,]" gathered to observe.

According to Mr. Fillis, upon leaving the Walmart, he overheard an argument taking place "150 feet" away. Among other things, he "heard a woman say hey, whore, here's your child[,]" followed shortly thereafter by "a bunch of yelling, screaming[,] and arguing[,]" and then followed by "a bunch of commotion." After he approached, the "next thing" he knew there were "punches being thrown." Although by then, "most of the fighting" had already concluded, "the man," that is, Mr. Valderas, "was an emotional wreck at that point." Mr. Fillis corroborated Ms. Joseph's observation about the size of the crowd that had gathered, declaring, "[t]here was a crowd, there was a large crowd of people that were around at that time and I think some of them were trying to intervene but didn't want to get too involved."

Finally, Defense Exhibit 2, which was admitted into evidence, included recordings of two 911 calls, placed at the time of the altercation. In one of those recorded calls, a plainly agitated woman told the dispatcher that "somebody needs to come to the Walmart" because "they're fighting over a child" and "they're fighting in the middle of the parking lot." The called urged, "please somebody come" and "hurry, please." Another woman called 911 at nearly the same time and told the dispatcher that there was "a man hollering in the parking lot" to "call the police because somebody's trying to steal my daughter," and "there's all these people running over there."

Based on this evidence, we have no difficulty in concluding that a "rational trier of fact could have found" that the "terror to the people" element of affray was established "beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. In reaching that conclusion, we emphasize that, "to establish an affray, the State need only show that the acts and surrounding circumstances were likely to strike terror in anyone, not that it actually has in any specific individual." *Dashiell*, 214 Md. App. at 691 (citation and quotation marks omitted). Therefore, the evidence was sufficient to sustain the conviction, and the State may retry appellant if it so chooses.

**JUDGMENT OF CONVICTION FOR AFFRAY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY WICOMICO COUNTY.**