Circuit Court for Prince George's County
Case No.: CT181075X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1762

September Term, 2019

BENSON THORNE, JR.

v.

THE STATE OF MARYLAND

Berger,
Wells,
Gould,
JJ.

Opinion by Gould, J.

Filed: August 19, 2021

A jury sitting in the Circuit Court for Prince George's County convicted the appellant of second-degree murder, manslaughter, and the use of a firearm in the commission of a felony or a crime of violence. The appellant appeals his conviction on two grounds: (1) the court erroneously refused to instruct the jury on first- and second-degree assault as the lesser included crimes of second-degree murder; and (2) the court erroneously instructed the jury on flight as consciousness of his guilt. Finding no error, we affirm.

BACKGROUND

On August 10, 2017, around 9:00 p.m., appellant Benson Thorne met with Troy Foster at a walking path in Lanham, Maryland to purchase marijuana. Shortly after, a resident of the neighborhood heard multiple gunshots, and the next day another resident found Mr. Foster's body in the pathway. Mr. Foster's death was determined to be a homicide from a gunshot wound to the head. Multiple bullet cartridges and a firearm were found on the scene. Mr. Thorne was arrested and charged with Mr. Foster's murder.

Cellphone tower records showed that Mr. Thorne's cell phone was near the cell tower closest to the neighborhood in Lanham where and when the shooting occurred. The evidence showed multiple phone calls between Mr. Thorne and Mr. Foster leading up to the shooting. Mr. Thorne's phone revealed over twenty text and photo messages with Mr. Foster to arrange their meeting at the time and place where Mr. Foster was killed. Mr. Thorne's phone showed internet searches from the day after the shooting for a "shooting in Lanham" and for instructions on "how to remove gunpowder from your body." There were also text messages on his phone from the day after the shooting in which Mr. Thorne

stated that he was in some "serious s**t" the night before, and other text messages informing potential buyers that he had cheap marijuana for sale.

When first questioned by police, Mr. Thorne was less than candid. He claimed that he did not know Mr. Foster, gave multiple false stories about his whereabouts, and stated that he did not remember specific details about the evening Mr. Foster was killed. Mr. Thorne changed his story at trial.[1]

At trial, Mr. Thorne testified that on the night of the killing, he met with Mr. Foster in the neighborhood to buy $2,600 worth of marijuana and was ambushed by Mr. Foster and an unnamed assailant. Mr. Thorne testified that Mr. Foster accompanied him down the pathway where an additional person jumped out from behind the trees on the path. Mr. Thorne claimed that the unnamed assailant held him at gunpoint, and to protect himself, Mr. Thorne pushed the gun down, and in the process was shot in the leg. Mr. Thorne claimed that the unnamed assailant yelled "shoot that [expletive]" to Mr. Foster, and he saw Mr. Foster aiming a gun at him. Mr. Thorne, who had been in a "tussle" with the unnamed assailant, testified that he wrestled the gun from him and fired two shots at Mr. Foster. Immediately after firing the shots, he ran 40 yards to get to his car, drove away,

[1] Mr. Thorne claimed he lied to the police when questioned out of fear because he never "had a good relationship with the police" and did not believe that police officers "treat drug dealers fairly." He also claimed he was "high on Percocet" when he was questioned.

and went to his sister's house in Oxon Hill, Maryland.[2] He testified that he did this because he was afraid that he would be shot.

After the evidence closed, the court was prepared to instruct the jury on the charges of first-degree premeditated murder, first-degree felony murder, second-degree murder, voluntary manslaughter, robbery with a deadly weapon, and the use of a handgun in the commission of a felony or crime of violence. Mr. Thorne requested additional instructions for perfect and imperfect self-defense as well as for first- and second-degree assault. Mr. Thorne argued that the first- and second-degree assault instructions should be included as lesser-included offenses of the charge of murder, but his counsel acknowledged that he did not have any case that supported his request. The court granted Mr. Thorne's request for the self-defense instructions, but denied his request for the first- and second-degree assault instructions.[3]

[2] As to his injuries, Mr. Thorne testified that he did not seek medical treatment, but that he conducted self-treatment by bandaging and cleaning. The next day he texted someone that he had sprained his ankle. His sister testified that when he arrived at her home, Mr. Thorne had an injury that was akin to a scrape on the knee and that it did not require stiches or significant home care. Mr. Thorne did not tell his sister he had been shot; however, his sister testified that she believed the injury to be a gunshot wound when she saw it. The officer who questioned Mr. Thorne three days after the shooting stated that he did not appear to have any injuries and had no problem walking, although Mr. Thorne testified that he was still injured at the time.

[3] Mr. Thorne raised this issue again in his motion for a new trial. In that motion, he cited to case law, including *State v. Dixon* and *State v. Sifrit* (which we will address later in this opinion), supporting his arguments that first- and second-degree assault are lesser-included offenses of second-degree murder. The court responded:

> It certainly is an interesting issue that you have raised, [Mr. Thorne's counsel], but that's merely from an academic standpoint. To be frank with

(continued)

The State requested a "flight" instruction based on the evidence that Mr. Thorne ran from the scene immediately after the shots were fired. Mr. Thorne's counsel objected and argued that the "evidence is insufficient to show flight." The court granted the State's request and gave the flight instruction.

The jury found Mr. Thorne guilty of second-degree murder, manslaughter, and the use of a firearm in the commission of a felony or a crime of violence. The court sentenced him to 50 years' imprisonment with 10 years suspended.[4]

Mr. Thorne presents the following two questions on appeal:

1. Whether the trial court's failure to give First[-]Degree and Second[-]Degree Assault jury instructions was an abuse of discretion[.]

2. Whether the trial court's giving a flight instruction was an abuse of discretion[.]

DISCUSSION

I.

PRESERVATION

Before we reach the merits of this appeal, we will first address the State's contention that Mr. Thorne's first question was not preserved. The State argues that (1) Mr. Thorne's

> you[,] based on the facts and circumstances of this case[,] I don't believe that an instruction for first-degree assault was properly generated and therefore it wasn't given by the Court and that's still my position post-trial. Your motion for a new trial is denied.

[4] Mr. Thorne was sentenced to 30 years for second-degree murder, which merged with the manslaughter conviction, and 20 years for use of a handgun in the commission of a felony, with 10 years suspended, which merged with the use of a handgun in the commission of a crime of violence.

failure to cite to adequate authority to support his argument at trial precludes our review, and that (2) "[b]y failing to request that the verdict sheet include [first- and second-degree assault] . . . , he waived any complaint that the court erred when it declined to give the requested instructions."

We ordinarily "will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). Generally, "a defendant's failure to make a timely objection to the court's instructions, or to its omission to give an instruction precludes appellate review of any error relating to the instructions." *Bates v. State*, 127 Md. App. 678, 699-700 (1999) (quoting *Jenkins v. State*, 59 Md. App. 612, 620–21 (1984)), *overruled on other grounds by Tate v. State*, 176 Md. App. 365 (2007). Here, Mr. Thorne objected to the instructions both before and after the court instructed the jury. He was not required to make a futile objection to the verdict sheet's exclusion of first- and second-degree assault in order to preserve the issue for appeal.

We will now turn to the merits of Mr. Thorne's appeal.

II.

ANALYSIS

Jury instructions are governed by Maryland Rule 4-325(c), which states that the court, upon a party's request, "shall[] instruct the jury as to the applicable law[.]" A trial court must give a jury instruction requested by a party if it correctly states the law, has factual support in the admissible evidence, and is not adequately covered in other instructions. *Ware v. State*, 348 Md. 19, 58 (1997) (citing Md. Rule 4-325(c)). "Whether the evidence is sufficient to generate the requested instruction in the first instance is a

question of law for the judge." *General v. State*, 367 Md. 475,487 (2002). In contrast, the court is not required to give an instruction as to the permissible inferences the jury may draw based on the evidence; such instructions are committed to the discretion of the trial court. *Harris v. State*, 458 Md. 378, 406 (2018). That discretion is abused if the court commits an error of law or if the "defendant's rights were not adequately protected." *Id*. (quoting *Cost v. State*, 417 Md. 360, 368-69 (2010)).

A.

FIRST- AND SECOND-DEGREE ASSAULT

As a general proposition, jury instructions on a lesser-included offense should be given "only when the elements differentiating the . . . crimes are in sufficient dispute that the jury can rationally find the defendant innocent of the greater but guilty of the lesser offense." *Dishman v. State*, 352 Md. 279, 293-94 (1998) (quoting *United States v. Elk*, 658 F.2d 644, 648 n.6 (8th Cir. 1981)). Mr. Thorne argues that the trial court should have granted his request for jury instructions on first- and second-degree assault because both are lesser-included offenses of second-degree murder.

The jury was instructed on second-degree murder as follows:[5]

> Second[-]degree murder is the killing of another person **either with the intent to kill or the intent to inflict such serious bodily harm that death would be the likely result**. Second[-]degree murder does not require premeditation or deliberation. In order to convict the Defendant of second[-]degree murder, the State must prove, number one, that the Defendant caused the death of Troy Bernard Foster; number two, that the Defendant engaged in the deadly conduct **either with the intent to kill or with the intent to inflict such serious bodily harm that death would be the likely result**;

[5] We have bolded the parts relevant to Mr. Thorne's argument for ease of reference.

> number three, that the killing was not justified; and number four, that there were no mitigating circumstances.

(Emphasis added.)

Second-degree assault is criminalized by the Maryland Annotated Code, Criminal Law Article ("CL") § 3-203 (2002, 2021 Repl. Vol.).[6] There are three species of second-degree assault, namely, "the common law crimes of assault, battery, and assault and battery." *Quansah v. State*, 207 Md. App. 636, 646 (2012). Mr. Thorne argues that the battery variety of second-degree assault was applicable here because the "harmful[,] offensive, or unlawful touching" that supports the battery form of assault is "less than a fatal slaying."[7]

[6] CL § 3-203(a) states: "A person may not commit an assault."

[7] Maryland Criminal Pattern Jury Instruction—Criminal 4:01 describes the battery variety of second-degree assault, and states, in relevant part:

> Assault is causing offensive physical contact to another person. In order to convict the defendant of assault, the State must prove:
>
> (1) that the defendant caused [offensive physical contact with] [physical harm to] (name);
> (2) that the contact was the result of an intentional or reckless act of the defendant and was not accidental; and
> (3) that the contact was [not consented to by (name)] [not legally justified].
>
> "Reckless act" means conduct that, under all circumstances, shows a conscious disregard of the consequences to other people and is a gross departure from the standard of conduct that a law-abiding person would observe.

Mr. Thorne also contends that the first-degree assault was a lesser-included offense of second-degree murder. First-degree assault has been statutorily defined in CL § 3-202.[8] Mr. Thorne notes that the jury was instructed that in order to find Mr. Thorne guilty of second-degree murder, it would have to find that Mr. Thorne committed the deadly act with one of two possible states of mind: the "intent to kill" or "the intent to inflict such serious bodily harm that death would be the likely result[.]" Those options, Mr. Thorne argues, embrace the mens rea for first-degree assault— to "intentionally cause or attempt to cause serious physical injury." CL § 3-202(b)(1). Thus, he contends, first-degree assault is a lesser-included offense, and the jury should have been instructed accordingly.

We disagree with Mr. Thorne as to both of his requested instructions. As noted above, an instruction must be given if it states correctly the law, is supported by the evidence, and is not adequately covered by other instructions. *Ware,* 348 Md. at 58. The key issue here is whether the jury could have rationally convicted Mr. Thorne on either

[8] CL § 3-202(b) states:

> (1) A person may not intentionally cause or attempt to cause serious physical injury to another.
>
> (2) A person may not commit an assault with a firearm, including:
> (i) a handgun, antique firearm, rifle, shotgun, short-barreled shotgun, or short-barreled rifle, as those terms are defined in § 4-201 of this article;
> (ii) an assault pistol, as defined in § 4-301 of this article;
> (iii) a machine gun, as defined in § 4-401 of this article; and
> (iv) a regulated firearm, as defined in § 5-101 of the Public Safety Article.
>
> (3) A person may not commit an assault by intentionally strangling another.

first- or second-degree assault, but not on second-degree murder. *See Dishman*, 352 Md. App. at 293-94. If not, then giving the jury that option would have been a misstatement of the law.

Here, Mr. Thorne does not attempt to explain how the jury, on the evidence before it, could have found him guilty of first or second-degree assault, but not for second-degree murder. And from our review of the record, we perceive no basis for such a result either.

Under the facts of this case, the element that separates first- and second-degree assault (of the variety urged by Mr. Thorne) from second-degree murder was the resulting death of Mr. Foster. Here, there was no dispute that Mr. Thorne fired the shots that killed Mr. Foster. This case does not present a situation where, for example, a group of several people set upon and beat the victim, and one of the attackers, to the surprise of the other attackers, pulls a knife and fatally stabs the victim. In such a situation, if the jury concludes that the person who fatally stabbed the victim was not the defendant, the defendant could be conceivably convicted of assault but not of murder. That's because although the defendant participated in the assault, the death was caused by an intervening act—the other attacker's use of the knife to stab the victim. *See, e.g.*, *Middleton v. State*, 238 Md. App. 295, 307-13 (2018). But that was not the case here, as there was no dispute that Mr. Thorne fired the fatal shots. Thus, the instructions requested by Mr. Thorne would have incorrectly stated the law.

Mr. Thorne claims support for his position in *Sifrit v. State*, 383 Md. 116 (2004). There, a husband and wife were alleged to have murdered and dismembered the bodies another couple that they had met one evening. *Id.* at 123-25. There were no eyewitnesses

to the killings. *Id.* Relevant here, the husband was convicted of and separately sentenced for both first-degree assault and second-degree murder. *Id.* at 127-28. Applying the required evidence test (and alternatively, the rule of lenity), the Court of Appeals concluded that the conviction for first-degree assault merged with the conviction for second-degree murder. *Id.* at 138-39.

It is unclear why Mr. Thorne seeks refuge in *Sifrit*. The issue in that case was not whether the jury should have been instructed on the assault charges; rather, the issue was whether the sentences for the two crimes should have been merged. That the Court of Appeals concluded that the assault charge was a lesser-included offense of the murder charge and therefore should have been merged for sentencing purposes does not speak to whether a rational jury could have, under the specific facts of that case, convicted the husband for assault but not for murder.[9]

Mr. Thorne also relies on *Dixon v. State*, 364 Md. 209 (2001). For similar reasons as in *Sifrit*, *Dixon* strikes us as inapposite. The relevant holding in *Dixon* was that the "intentionally caus[ing] or attempt[ing] to cause serious injury" form of assault was a lesser-included offense of attempted voluntary manslaughter, and therefore that the sentence for the former should have been merged with the sentence for the latter. *Id*. at 239-40. As in *Sifrit*, the issue in *Dixon* was not whether the jury would have had a rational

[9] Because the issue wasn't addressed, we do not know why the trial court in *Sifrit* gave the assault instruction. However, given the multiple parties involved, it seems plausible that the court concluded that, based on the evidence, the jury could have found that the husband assaulted the couple, and that the wife killed them.

basis to convict the defendant for assault but not for attempted voluntary manslaughter, but instead whether the two crimes should have been merged for sentencing purposes. *Id.*

Our holding here is consistent with the holdings in *Sifrit* and *Dixon* because it is based on the presumption—seemingly uncontested by Mr. Thorne—that if the trial court had given the requested assault instructions and the jury had found Mr. Thorne guilty of those crimes, the jury would have also found him guilty of second-degree murder. Thus, under those circumstances, the former would have been merged into the latter for sentencing purposes as required by *Sifrit* and *Dixon*. And in that scenario, Mr. Thorne would have wound up in the same place he finds himself now—convicted of second-degree murder.

Accordingly, for the foregoing reasons, we perceive no error in the trial court's refusal to instruct the jury on first- and second-degree assault.

B.

FLIGHT

As noted above, the court has the discretion, but is not required, to instruct the jury on the permissible inferences that may be drawn from the evidence. *Harris,* 458 Md. at 406. Mr. Thorne argues that the court abused its discretion in giving the "flight" instruction to the jury. Here, the court gave the pattern flight instruction—Maryland Criminal Pattern Jury Instruction 3:24—stating as follows:

> A person's flight immediately after the commission of a crime or after being accused of committing a crime is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt. Flight under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. You [must] first decide whether there is

> evidence of flight. If you decide there is evidence of flight, you must then decide whether this flight shows a consciousness of guilt.

Flight is defined as an "act or instance of fleeing, [especially] to evade arrest or prosecution. . . . [a]lso termed *flight from prosecution*; *flee from justice*." *Hoerauf v. State*, 178 Md. App. 292, 323 (2008) (quoting BLACK'S LAW DICTIONARY 670 (8th ed. 2004)). A flight instruction may be given only when:

> the following four inferences [can] reasonably be able to be drawn from the facts of the case as ultimately tried: [1] that the behavior of the defendant suggests flight; [2] that the flight suggests a consciousness of guilt; [3] that the consciousness of guilt is related to the crime charged or a closely related crime; and [4] that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.

Thompson v. State, 393 Md. 291, 312 (2006). Mr. Thorne argues that the evidence did not support an inference that he left the scene with a consciousness of guilt, thus the instruction was improper.

We have previously observed that:

> [a]n accused's departure from the scene of a crime, without any attendant circumstances that reasonably justify an inference that the leaving was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt, does not constitute 'flight,' and thus does not warrant the giving of a flight instruction.

Page v. State, 222 Md. App. 648, 669-70 (2015) (quoting *Hoerauf*, 178 Md. App. at 325-26).

The "classic case of flight is where a defendant leaves the scene shortly after the crime is committed and is running, rather than walking, or is driving a speeding motor vehicle." *Hoerauf*, 178 Md. App. at 324; *see also Page*, 222 Md. at 670 (finding a flight

instruction appropriate when "it would be fair to presume that authorities would be arriving to the scene shortly, given the number of gunshots fired in a public place").

In *Hayes v. State*, 247 Md. App. 252, 294-95 (2020), we found a "classic case of flight" where the shooting occurred in a public place and would be expected to draw police attention, and the defendant drove away from the scene immediately after the shooting. We held that a jury could have concluded that the defendant's departure was "motivated by fear" and that the act of immediately driving away could have "signified consciousness of guilt for the shooting and its aftermath." *Id.* at 295.

The same inference was permissible here. Trial testimony established that Mr. Thorne left the scene of the crime in a residential neighborhood and did not notify the authorities. Although he testified that he "ran in the opposite direction [of the shooting] immediately," because he "assumed that shots were about to be aimed towards" him, the jury was not required to believe him. *See Veney v. State*, 130 Md. App. 135, 143 (2000) ("In performing its fact finding role, the jury is free to accept the evidence that it believes and reject that which it does not."). Mr. Thorne fled the scene after shooting Mr. Foster, drove to his sister's home immediately after the killing, never sought medical treatment for his gunshot wounds, and searched the internet for information about the killing as well as instructions on "how to remove gunpowder from your body." Upon his arrest, he gave multiple false stories to authorities and claimed that he did not know Mr. Foster. The circumstances in the case could reasonably justify an inference that he fled the scene with

a consciousness of guilt. Thus, the trial court was within its discretion to give the flight instruction.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.