Circuit Court for Baltimore County
Case No. C-03-CR-20-002996

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 1787

September Term, 2021

XAVIER DAMON BYRD

v.

STATE OF MARYLAND

Leahy,
Beachley,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.
Dissenting Opinion by Beachley, J.

Filed: January 23, 2023

In the early morning of August 16, 2020, Gary Melvin was killed by a single shot to the abdomen outside of an Exxon gas station in Reisterstown, Maryland. Appellant, Xavier Damon Byrd, was indicted for the murder of Mr. Melvin and stood trial before a jury in the Circuit Court for Baltimore County. Ultimately, the jury found Mr. Byrd guilty of second-degree murder, use of a firearm in the commission of a crime of violence in violation of Maryland Code (2002, 2021 Repl. Vol.), Criminal Law Article ("CL"), § 4-204(b), and possession of a regulated firearm by a person under 21 years of age in violation of Maryland Code (2003, 2018 Repl. Vol.), Public Safety Article ("PS"), § 5-133(d). Mr. Byrd was sentenced to 35 years imprisonment: 40 years, with 10 suspended, on the charge of second-degree murder as well as five years each on the two weapons offenses—to be served concurrently with each other, but consecutive to the 30-year sentence on the second-degree murder charge. Mr. Byrd noted a timely appeal and presents the following questions for our review:

I. "Did the court err or abuse its discretion in not permitting the jury to consider manslaughter as an alternative charge and in not instructing the jury on manslaughter and imperfect self-defense?"

II. "Did the court err in admitting inadmissible hearsay?"

III. "Did the court abuse its discretion in not severing Byrd's case from his co-defendant for trial or granting a postponement?"

IV. "Did the court abuse its discretion in declining to grant a mistrial when the jury erroneously received and began to view during its deliberations a recorded interview of a jailhouse informant that was submitted only for in camera review, was not admitted as evidence, and was never provided to the defense, and was this error harmless beyond a reasonable doubt?"

For the reasons that follow, we hold that the trial court erred in refusing to instruct the jury on imperfect self-defense. Mr. Byrd met the low threshold required to generate an instruction on this issue and we must conclude that the trial court's failure to instruct the jury constituted reversible error. Therefore, we reverse Mr. Byrd's conviction for second-degree murder and remand for a new trial. Because we reach that conclusion, we must also reverse Mr. Byrd's conviction for use of a firearm in the commission of a crime of violence because Mr. Byrd's second-degree murder conviction served as the predicate for that companion charge. We affirm, however, Mr. Byrd's conviction for possession of a regulated firearm by a person under 21 years of age. Since our holding on Mr. Byrd's first claim of error is dispositive of this appeal, we decline to address his remaining claims of error.

BACKGROUND

Indictment

A Baltimore County grand jury returned an indictment against Mr. Byrd for the following criminal offenses: (1) first-degree murder, (2) two counts of first-degree assault, (3) robbery with a dangerous weapon, (4) robbery, (5) theft of property valued between $1500 and $25,000, (6) use of a firearm in a crime of violence, (7) possession of a firearm by a person under 21 years of age, (8) two counts of carrying a loaded handgun on the person, and (9) conspiracy to commit armed robbery. On November 3, 2020, the State moved for a joint trial of Mr. Byrd and his co-defendant, Marvin Washington. That motion was granted by the Circuit Court for Baltimore County on November 23, 2020.

Jury Trial

Mr. Byrd was tried before a jury in the Circuit Court for Baltimore County over five days from September 20 through September 27, 2021. As part of its case-in-chief, the State called ten witnesses and proceeded upon a theory that Mr. Melvin's death occurred during the course of an alleged robbery perpetrated by Mr. Washington and Mr. Byrd. By contrast, Mr. Byrd and Mr. Washington argued that Mr. Melvin's death occurred as a result of a botched drug transaction. After the State concluded its case-in-chief on September 23, 2021, Mr. Byrd and Mr. Washington moved for judgments of acquittal and elected to not call any witnesses or present evidence in their defense.

The following account is derived from the evidence adduced at trial, viewed in the light most favorable to the State. *Molina v. State*, 244 Md. App. 67, 87 (2019). Our summary of the trial record provides the necessary background for our discussion of the dispositive issue in this appeal, rather than a comprehensive review of the evidence presented.

On the night of August 15, 2020, Mr. Byrd, Mr. Washington, and Jamon Murphy traveled to attend a party at a hotel room in New Town, Maryland, arriving between 12:00 and 1:00 A.M on August 16, 2020. Mr. Murphy drove the group to the hotel in his Honda Coupe after picking up Mr. Byrd and Mr. Washington and departing from the east side of Baltimore City. Mr. Murphy and Mr. Washington had played football together at Franklin High School in Baltimore County and had remained friendly. According to Mr. Murphy's testimony, he had not met Mr. Byrd—a friend of Mr. Washington's—prior to this occasion.

The trio stayed at the party for "roughly two to three hours" and then departed in Mr. Murphy's car to drive around and listen to music. They made a couple stops at gas stations along the way "just to kill time." Eventually, the parties made their way to an Exxon gas station on Reisterstown Road, arriving around 5:00 A.M. Mr. Murphy entered the gas station's convenience store to grab a snack, after which the trio was to return to Mr. Murphy's house. Mr. Murphy returned to his car after purchasing a Gatorade and sunflower seeds, but Mr. Byrd and Mr. Washington continued to mill about and converse with two other persons present at the Exxon station.

Mr. Murphy testified that, after "roughly three to five minutes," he beeped his car's horn to signal Mr. Washington and Mr. Byrd that he was ready to leave. Mr. Washington and Mr. Byrd, however, did not get back in the car and another five minutes passed before a white vehicle pulled up behind Mr. Murphy's Honda. Mr. Murphy understood the individual driving the white vehicle to be a "weed dealer."

As shown on the Exxon station's video surveillance—entered into evidence as State's Exhibit 1[1]—an individual in a hooded sweatshirt, later identified by Mr. Murphy as Mr. Washington, approached the white SUV and entered the front passenger seat at approximately 5:03 A.M. Moments later, Mr. Washington exited the vehicle and an

[1] Detective Michael Zellers testified that he arrived at the Exxon around 6:00 A.M. on August 16, 2020 and obtained the store's video surveillance footage. Detective Zellers explained that he watched the footage and then downloaded it onto a thumb drive to provide to the lead investigators on the case. Through Detective Zellers' authenticating testimony, the State moved into evidence a CD copy of the surveillance footage and played it for the jury.

individual in a dark jacket and white shirt, identified by Mr. Murphy as Mr. Byrd, entered the passenger seat, leaving the passenger-side door open.

At this point, Mr. Washington returned to the front passenger side of Mr. Murphy's car and briefly conversed with him. According to Mr. Murphy, Mr. Washington asked Mr. Murphy if he wanted anything, a statement which Mr. Murphy claimed he did not understand as an offer to buy marijuana for him. The surveillance video shows Mr. Washington then returned to the driver-side of the white vehicle for nearly two minutes. At approximately 5:07 A.M., Mr. Washington reached inside the driver-side window of the white vehicle, grabbed an item with a black strap, and walked back to Mr. Murphy's car. Almost immediately, the driver of the white vehicle—identified as the victim, Gary Melvin—exited the vehicle, as did Mr. Byrd from the front passenger seat.

Around this time, Mr. Murphy heard "a commotion" behind his vehicle as Mr. Byrd and Mr. Melvin exchanged words "at a loud tone." Another witness, Joshua Manning, was at the scene and claimed to have heard Mr. Melvin exclaim "I'm not going out like that" at approximately this point.[2] As the parties exchanged words, Mr. Byrd walked from the passenger side of the white vehicle with his right hand at his hip holding a handgun. The video showed Mr. Byrd walking in roughly a straight line away from the white vehicle while Mr. Melvin advanced around the front bumper of the SUV immediately towards Mr. Byrd. As Mr. Melvin crossed to the passenger side, Mr. Byrd turned to face him. At this

[2] On cross-examination, Mr. Manning conceded that he had previously told police that Mr. Melvin said "Nah, bro, it's not going to happen." According to Mr. Manning, the difference in wording was immaterial because "I meant the same thing though."

point Mr. Melvin appeared to lunge at Mr. Byrd, cocking his right arm back. As he did so, Mr. Byrd fell back and fired a single shot into Mr. Melvin's abdomen as he hit the ground.

After the shot was fired, Mr. Melvin stumbled backwards while Mr. Byrd dove into Mr. Murphy's car as it sped away from the Exxon station. Mr. Murphy drove the trio of young men to a nearby apartment complex, where they called an Uber to return to Baltimore City. Upon their return, Mr. Murphy went to his father's house and "told him everything that happened." Thereafter, Mr. Murphy went to speak with detectives at the Baltimore County Police Headquarters along with his father and legal counsel. Mr. Murphy signed a proffer agreement and provided information which led to the eventual arrests of Mr. Washington and Mr. Byrd for the murder of Mr. Melvin.

Dr. Nicole Harvilla, who performed the autopsy of Mr. Melvin, offered her expert opinion that Mr. Melvin was killed by a gunshot wound to the abdomen. She also related that, during the course of the examination, she found an "old bullet" inside Mr. Melvin's body from a previous gunshot wound and that a toxicology screen showed "oxycodone, methamphetamine, fentanyl in the blood, as well as amphetamine in the urine." Dr. Harvilla noted that Mr. Melvin was thirty-years old at the time of his death and weighed 161 pounds. Mr. Byrd, in contrast, was sixteen-years old and weighed 140 pounds at the time of shooting.

Request for Voluntary Manslaughter and Imperfect Self-Defense Instruction Denied

Based primarily on the Exxon surveillance video, Mr. Byrd requested that the court instruct the jury on voluntary manslaughter as a lesser offense on the grounds of imperfect self-defense. Mr. Byrd's counsel explained:

> We feel that the evidence in this case reasonably and fairly suggests that that particular charge, that is voluntary manslaughter, should be sent back. And I make particular reference to the gripping surveillance tape from the Exxon Station, showing the Rav-4 Mr. Melvin was in and looks like Mr. Byrd was in also, looks like Mr. Washington was in that vehicle as well, or at the side of it.
>
> And I have played that footage repeatedly and each time I look at it, what strikes me as pertinent and serving as a basis to give the voluntary manslaughter charge is this. What our eyes tell us upon looking at that footage is that Mr. Byrd comes out of the SUV, appearing to have his hand at his right side, is walking toward the front of the SUV and then Mr. Melvin comes out and he's making a direct line towards my client, Mr. Byrd.
>
> And the two of them just about literally come together. We can't really see and don't see an extended arm from my client, Mr. Byrd, where a firearm is pointed and directed at Mr. Melvin. But what we do see is Mr., Mr. Melvin, who outweighs him a good deal, who is a good bit shorter, but more stout in build and almost twice his age.
>
> My client is, according to the detective, I think he's accurate, a hundred and forty pounds and six foot one, he's lanky, he's young. As I stated in the opening statement, it looks like Mr. Melvin got a head of steam and he's, he's ticked off about something and he's rolling toward Mr. Byrd.
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> * * *
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> Now, Mr. Melvin appears to be getting ready to throw a punch. And he's in close proximity to Mr. Byrd. Could it be the discharge, if it wasn't accidental, was an overuse of force, an imperfect self-defense? As unfortunate as it sounds, could it be that?

The circuit court declined to give the requested instruction, finding that "I don't believe that, with the case law and what the evidence is in this case, that that has been generated sufficiently to submit the requested instruction." The Judge explained, with regard to the video evidence:

> And that's objectively what is there. I mean, I . . . agree with counsel, [who] has said the evidence is what it is. The video is what it is. To go beyond that, to take an objective standard in, in this, which would require the, getting into Mr. Byrd's head, into his mind, as to what he was thinking in all of this, which happened so quickly, is, is subjective.
> And, at least, subjective with what has been submitted in evidence. And it does require speculation as to what was in anybody's mind.

The circuit court instructed the jury on first-degree felony murder, second-degree murder, robbery, robbery with a dangerous weapon, use of a firearm in the commission of a felony or crime of violence, possession of a firearm under the age of 21 with respect to Mr. Byrd. The State elected to nolle prosequi the remaining counts under the indictment.

Conviction and Notice of Appeal

On September 27, 2021, the jury returned its verdicts. Mr. Washington was acquitted of all charges. Mr. Byrd was found not guilty of robbery with a dangerous weapon and first-degree felony murder, but guilty of second-degree murder, use of a firearm in a felony or crime of violence, and possession of a regulated firearm by a person under 21 years of age. Mr. Byrd timely noted an appeal to this Court.

DISCUSSION

I.

Denial of Imperfect Self-Defense Instruction

Standard of Review

An appellate court reviews "whether a trial court abused its discretion in refusing to offer a jury instruction under well-defined standards." *Cost v. State*, 417 Md. 360, 368 (2010). Although the trial court possesses discretion, the trial court must give a requested instruction where "(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given." *Dickey v. State*, 404 Md. 187, 197-98 (2008). Whether "some evidence" supports the delivery of a jury instruction is a question of law for the judge, which, in turn, we review without deference. *Holt v. State*, 236 Md. App. 604, 621 (2018). The Supreme Court of Maryland[3] has instructed, more broadly, that "we will reverse the decision [to not give an instruction] if we find that the defendant's rights were not adequately protected." *Cost*, 417 Md. at 369.

[3] In the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland . . . .").

A. Parties' Contentions

Mr. Byrd complains that he met his "minimal" burden of producing "some evidence" to support his imperfect self-defense theory and was therefore entitled to an instruction on that defense. He asserts that the "source of the evidence" need not be the defendant's testimony and that an instruction is mandated when the "record reflects, from whatever source, that at [the time of the incident], the defendant subjectively believed that he or she was in imminent danger of death or great bodily harm." Mr. Byrd contends that his trial counsel "pointed to more than sufficient evidence" to justify an instruction in the form of the surveillance video showing the confrontation between Mr. Byrd and Mr. Melvin.

The State responds that Mr. Byrd's request for the imperfect delf-defense instruction "was missing two key elements: there was no evidence that [Mr.] Byrd *actually* believed that he was in danger, and there was no evidence that he did not instigate the fatal fight." According to the State, this Court's ruling in *Holt v. State*, 236 Md. App. 604 (2018), controls Mr. Byrd's argument that he produced "some evidence" to support a finding that he subjectively believed himself to be in imminent danger of death or great bodily harm. In the State's view, *Holt* stands for the proposition that the convergence of two mutual combatants, standing alone, "is not 'some evidence' of a defendant's state of mind vitiating imperfect self-defense." The surveillance video was not sufficient to generate an imperfect self-defense instruction, according to the State, especially considering that, contrary to the circumstances in *Holt,* Mr. Melvin was indisputably unarmed. Likewise, the State urges,

the video evidence was insufficient to prove that he was not the aggressor. Accordingly, the State contends that the evidence presented offered no insight into whether Mr. Byrd was actually in fear of death or bodily harm, or that he "was not an aggressor in the conflict with Melvin."

B. Imperfect Self-Defense and the "Some Evidence" Standard

It is well established that imperfect self-defense "is not a complete defense" to criminal homicide but rather "operates to negate malice, an element the State must prove to establish murder." *State v. Faulkner*, 301 Md. 482, 486 (1984). As a result, "the successful invocation of the defense does not result in complete exoneration of the defendant but mitigates murder to voluntary manslaughter." *Roach v. State*, 358 Md. 418, 430-31 (2000). Imperfect self-defense, of course, shares many of the same basic elements as perfect self-defense, which requires:

> (1) The accused must have had reasonable grounds to believe himself in *apparent* imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant;
> (2) The accused must have in fact believed himself in this danger;
> (3) The accused claiming the right of self-defense must not have been the aggressor or provoked the conflict; and
> (4) The force used must have not been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded.

Porter v. State, 455 Md. 220, 235 (2017) (emphasis in original).

Yet, as the Supreme Court of Maryland has emphasized, imperfect self-defense requires the defendant "must only show that he **actually believed** that he was in danger, even if that belief was unreasonable." *Id.* (emphasis in original). That subjective analysis applies to each of the basic elements and thus "to assert imperfect self-defense, the

defendant is not required to show that he used a reasonable amount of force against his attacker—only that he **actually believed** the amount of force used was necessary." *Id.* (emphasis in original). Correspondingly, "a defendant must have only 'subjectively believe[d] that retreat was not safe'—that belief need not be reasonable." *Id.* (quoting *Burch v. State*, 346 Md. 253, 284 (1996)).

To generate an instruction on imperfect self-defense, the defendant must produce "some evidence to support each element of the defense's legal theory before the requested instruction is warranted." *Marquardt v. State*, 164 Md. App. 95, 131 (2005), *overruled in part on other grounds by Kazadi v. State*, 467 Md. 1, 27 (2020)). Our decisional law stresses only "***some*** evidence" is required, and thus the defendant's burden of production is not onerous:

> *Some evidence* is not strictured by the test of a specific standard. It calls for no more than what it says- "some," as that word is understood in common, everyday usage. It need not rise to the level of "beyond reasonable doubt" or "clear and convincing" or "preponderance." The source of the evidence is immaterial; it may emanate solely from the defendant. It is of no matter that the self-defense claim is overwhelmed by evidence to the contrary. If there is any evidence relied on by the defendant which, if believed, would support his claim that he acted in self-defense, the defendant has met his burden. Then the baton is passed to the State. It must shoulder the burden of proving beyond a reasonable doubt to the satisfaction of the jury that the defendant did not kill in self-defense.

Dykes v. State, 319 Md. 206, 216-17 (1990). The evidence necessary to generate an instruction may emanate from any source and need not come from the defendant's testimony. *Holt*, 236 Md. App. at 623. Indeed, the necessary belief can be shown

circumstantially by "'a consideration of his acts, conduct and words.'" *Id.* (quoting *State v. Martin*, 329 Md. 351, 361-63 (1993)).

It is clear that when the "trial judge resolves conflicts in the evidence, in the face of the 'some' evidence requirement, and refuses to instruct because he believes that the evidence supporting the request is incredible or too weak or overwhelmed by other evidence, he improperly assumes the jury's role as fact-finder." *Dykes*, 319 Md. at 224. In *Wilson v. State*, the Supreme Court of Maryland found that an imperfect self-defense instruction was improperly refused when Wilson testified that the victim "pulled out a gun, looked at [Wilson] and 'smiled,'" causing him to grab the victim's weapon and shoot him fifteen seconds later because the situation was "[k]ill or be killed." *Wilson v. State*, 422 Md. 533, 537 (2011). Despite evidence that Wilson had initiated the encounter with the victim after arming himself with a knife, the evidence presented—the encounter with the gun and Wilson's testimony that he viewed the situation as "kill or be killed"—was legally sufficient to require a jury finding on imperfect self-defense. *Id.* at 543.

Likewise, in *Roach v. State*, the failure to give an imperfect self-defense instruction constituted an abuse of discretion when the defendant produced "some evidence" that he was threatened with deadly force during the fatal confrontation outside of a liquor store. *Roach v. State*, 358 Md. 418, 432 (2000). There, Roach testified that the victim "came straight to me and start[ed] beating [me] to the ground so I seen the gun on the ground and [the victim] seen the gun so I thought that he was going to kill me right there on the scene." *Id.* at 422-23. Despite conflicting evidence as to who was the aggressor in the encounter,

"a reasonable jury could have found that Petitioner had a subjective actual belief that his life was in danger and that he had to react with the force that he did." *Id.* at 432.

Recently, in *Porter v. State*, the Supreme Court of Maryland held that the defendant had produced "some evidence" to generate an imperfect self-defense instruction. *Porter*, 455 Md. at 252-54. In *Porter*, the trial court incorrectly instructed the jury on imperfect self-defense by directing the jury to evaluate Ms. Porter's conduct "against an objective standard." *Id.* at 253-54. We held that the court's erroneous instruction amounted to harmless error because the evidence was insufficient to generate an instruction on imperfect self-defense in the first place. *Porter v. State*, 230 Md. App. 288, 327-28 (2016). The Supreme Court of Maryland reversed. The Court explained that the evidence showed that Ms. Porter had suffered abuse at the hands of her husband and hired another man to kill him because, she testified, "In my mind, I knew he was going to kill me at any point." *Porter*, 455 Md. at 227-28. The Court found that Ms. Porter had satisfied her burden to produce "some evidence" considering her testimony that her husband's "physical and verbal abuse had escalated and that, in the month before his death, he threatened to kill her at gunpoint." *Id.* at 252. The Court noted that this subjective belief was supplemented by expert testimony as to Ms. Porter's mental state as well as her statement that on the morning of the killing, she believed her husband was going to kill her at any moment. *Id.* at 253. Accordingly, the Court concluded that Ms. Porter "certainly presented 'some evidence' that she actually believed that she was in imminent danger" at the time of her husband's death. *Id.*

Contrastingly, in *Cunningham v. State*, we emphasized that the defendant could not have "his partial proof of one component of self-defense divert attention from his utter failure to produce even a *prima facie* case as to the other necessary element." *Cunningham v. State*, 58 Md. App. 249, 257 (1984). In *Cunningham*, the defendant had "his Moped taken from him earlier in the day by the ultimate homicide victim . . . and ultimately went looking for the victim." *Id.* at 254. When Cunningham eventually found the victim, he "drew [a] gun from a bag and ordered a group of bystanders to move out of the way." *Id.* As he did so, the "victim [was] leaning on the Moped and 'putting his hands by his pants.'" *Id.* Mr. Cunningham alleged that the victim 'was apparently grabbing for something' and that he was 'afraid that he would be killed' and assumed that his victim had 'a gun or something.'" *Id.* On these facts, we found that an imperfect self-defense instruction was not warranted because even crediting Cunningham's "thought process as enough to generate an honest, though unreasonable, belief that he was in deadly peril, all of the testimony establishe[d] unequivocally that the appellant was the aggressor and there was no shred of evidence to indicate otherwise." *Id.* at 257.

Similarly, in *State v. Martin*, the Supreme Court upheld the refusal to give an imperfect self-defense instruction when Martin had not "offered any evidence whatever specifically addressing his state of mind *when* the fatal shot was fired." 329 Md. 351, 362 (1993) (emphasis in original). There, Martin was involved in an earlier verbal altercation with the victim at the location of the shooting in which the victim threatened physical violence against Martin. *Id.* at 354. Sometime later, the victim returned to the area, saw

Martin's vehicle, and approached "carrying a beer cup in one hand and 'a party ball' in the other." *Id.* at 355. Then, "immediately afterward a shot was heard, [the victim] was seen falling, and [Martin] was seen leaving the scene." *Id.* at 364. Martin could not remember any details of the incident due to his level of severe intoxication. *Id.* at 355. At trial, an expert witness testified on Martin's behalf that, based on Martin's level of intoxication, an "'explosive rage syndrome', characterized by very aggressive, assaultive, and out of control conduct could have resulted." *Id.* at 356.

The Supreme Court found that an instruction was not generated by this evidence because the first encounter could not substitute for "details of, or insight into, the circumstances of the shooting from [Martin's] perspective" at the time of the critical second encounter. *Id.* at 365. In particular, the Court stressed that "neither direct nor circumstantial evidence of the [Martin's] state of mind *at the time of the second encounter* was presented" particularly because "no one witnessed the encounter itself" and "[t]he testimony did not describe the manner in which [the victim] approached [Martin's] car or the manner in which he carried the party ball and beer cup." *Id.* at 364 (emphasis added). Accordingly, the Court concluded that "there was nothing from which to draw an inference as to what [Martin] subjectively believed or felt when he fired the fatal shot." *Id.* For that reason, the Court also rejected the expert testimony regarding the effects of Martin's intoxication because, standing alone, it could not corroborate his state of mind in the absence of any other evidence concerning the circumstances directly preceding the shooting. *Id.* at 366-67.

Before we conclude our summary of cases applying the "some evidence" standard, we examine the case on which the State relies substantially. In *Holt v. State*, we reemphasized that the "some evidence" standard still requires the defendant "to establish a prima facie case that would allow a jury to rationally conclude that the evidence supports" a defense of imperfect self-defense. *Holt*, 236 Md. App. at 621. In *Holt*, the defendant and his friend, Cakus, engaged in two separate physical confrontations with individuals named Thornton and Hamlette on the same day. *Id.* at 610. During the initial confrontation, Hamlette pulled a handgun on Cakus, and then Holt and Thornton exchanged blows. *Id.* at 610. The combatants retreated, regrouped, and later converged in the same general area after Holt had been told that Thornton "wanted to fight." *Id.* at 610-11. Holt and his friend, Brown, and two other friends "advanced within the housing complex grounds" with Holt and Brown in front. *Id.* at 611. The Thornton group jumped a fence and ran towards the Holt group. *Id.* Members of the Thornton group were allegedly armed "with, at least, a knife and a baseball bat." *Id.* Immediately, without any exchange of words, Holt and Brown pointed handguns at the Thornton group and shots were fired. *Id.* Eyewitness testimony was in conflict as to whether Holt or Thornton fired the shots. *Id.* The jury ultimately convicted Holt of two attempted first-degree murders and related crimes. *Id.* at 609.

Defense counsel requested the trial court instruct the jury on imperfect self-defense as means to mitigate the murder charges to voluntary manslaughter. *Id.* at 619-20. The trial court denied the request, reasoning that "there is no evidence in the record with regard

to what [Holt] honestly but unreasonably believed with regard to the threat that was posed." *Id.* at 620. Holt noted a timely appeal to this Court and we affirmed the trial court's decision to not instruct the jury on imperfect self-defense considering the particular factual circumstances of the case.

Viewing this evidence in the light most favorable to Holt, we found that the issue of imperfect self-defense was not generated for several reasons. First, there was no evidence "from any source that appellant subjectively believed he was in imminent danger of death or serious bodily harm when shots were fired at the Thornton group" especially where "[n]o words were exchanged, and almost immediately, the shooting occurred." *Id.* at 624. Second, "evidence from the earlier encounter between appellant and Malachi Thornton [was not] sufficient to generate a jury instruction on imperfect self-defense" because Holt "voluntarily returned to a new field of battle with the Thornton group that very evening[,]" a circumstance which belied the notion that he had any lingering fear of death or severe bodily harm stemming from the first encounter. *Id.* at 625. Finally, we emphasized that "as mutual combatants, appellant and the other participants were all aggressors in the conflict." *Id.* Thus, even if Holt had a subjective fear of death or serious bodily harm during this second fight, he did not produce "some evidence" that he was not an aggressor when he "marshaled his forces" to confront the Thornton group, leading to the inevitable conclusion that "the fight did not come to appellant; appellant went to the fight." *Id.*

C. Analysis

With the foregoing cases and precepts in mind, we return to the present appeal. As an initial matter, we do not agree with the State's argument that *Holt* is "dispositive" of Mr. Byrd's argument on appeal. The cases summarized above demonstrate that the propriety of an instruction on imperfect self-defense is often an intensely fact-dependent inquiry. This point is illustrated by the fact that this case is materially different from *Holt* in several respects and in a way that leads to a different result. For example, unlike in *Holt*, there is no evidence that Mr. Byrd and Mr. Melvin were on opposite sides of a brawl earlier in the day during which a gun was pulled. Nor is there any evidence that Mr. Byrd was an aggressor who sought out Mr. Melvin to provoke a fight, marshalling his forces, as Holt did, to return to the scene of an earlier fight between warring factions. In fact, there is no evidence that Mr. Byrd sought *any* type of physical encounter with Mr. Melvin. And here, unlike in *Holt*, there is video surveillance which provided an unimpeachable account of the circumstances leading up to the shooting and from which a reasonable jury could have inferred, as we will explain, that Mr. Byrd was in actual fear of death or severe bodily harm. Accordingly, we cannot conclude, as the State urges, that the present case bears close resemblance to the type of mutual combat which established Holt as an aggressor and precluded him from making a claim of imperfect self-defense. In fact, contrary to the State's contentions, we reach the exact opposite result in this case and conclude that Mr. Byrd presented "some evidence" to generate a jury instruction on the issue of imperfect self-defense.

We restate the low threshold that Mr. Byrd was required to clear in this case. The "some evidence" standard means exactly what it says: *some*. Even if "overwhelmed by evidence to the contrary[,]" all that matters is whether Mr. Byrd can point to "*any* evidence relied on by the defendant which, if believed, would support his claim that he acted in self-defense[.]" *Dykes*, 319 Md. at 216-17 (emphasis added). Here, Mr. Byrd satisfied his burden of producing some evidence to support his claim of imperfect self-defense. Contrary to the State's argument, Mr. Byrd pointed to several sources of evidence which would support his claim of imperfect self-defense.

To start, as Mr. Byrd points out, the surveillance footage from the Exxon station provides evidence "which, if believed, would support his claim that he acted in self-defense[.]" *Dykes*, 319 Md. at 216-17. To be sure, the video could have ultimately been interpreted to point either way, but that judgment call should have been submitted to the jury as the ultimate finder of fact. At the least, the footage shows Mr. Melvin advancing briskly around the front bumper of the SUV immediately towards Mr. Byrd, seemingly to confront him. Although Mr. Byrd had his weapon drawn at this point, Mr. Melvin crossed to the passenger side. Mr. Byrd turned to face him with his handgun drawn. Then, the video shows Mr. Melvin appearing to lunge at Mr. Byrd and cocking his right arm back. As he did so, Mr. Byrd fell back and fired a single shot into Mr. Melvin's abdomen as he hit the ground.

From that video evidence, it is possible the jury could have found Mr. Byrd to have been in actual fear of severe bodily harm or death. We consider *Roach v. State* to be

instructive here; albeit, for the reason that cases applying the "some evidence" standard are so fact driven, we do not claim that we have an exact precedential analogue. In that case, Roach testified that the victim "came straight to me and start[ed] beating [me] to the ground so I seen the gun on the ground and [the victim] seen the gun so I thought that he was going to kill me right there on the scene." *Roach*, 358 Md. at 422-23. Despite conflicting evidence as to who initiated the encounter (*i.e.*, who had been the aggressor), that testimony was sufficient to provide "some evidence" that Roach subjectively believed his life was in danger. Here, we acknowledge that, unlike in *Roach*, Mr. Melvin had not struck Mr. Byrd. Still, at the critical juncture, Mr. Melvin lunged at Mr. Byrd and cocked his elbow back in a manner that Mr. Byrd—and the jury—may have perceived as to throw a strike. In that split-second occurrence, Mr. Byrd—like Roach—could have certainly feared that Mr. Melvin would gain control of the gun and fire it at him. Even if "overwhelmed by evidence to the contrary[,]" the jury could have inferred Mr. Byrd's state of mind in this brief moment and concluded that it was consistent with an actual fear of death or severe bodily harm.

Moreover, contrary to the State's position, the fact that Mr. Byrd armed himself prior to the fatal encounter did not unequivocally establish him as the aggressor. In *Wilson*, for example, an imperfect self-defense instruction was warranted even though Wilson had purportedly initiated the encounter with the victim after arming himself with a knife. *Wilson*, 422 Md. at 543. It is well-established that an individual's right to "self-defense is not necessarily forfeited by arming one's self in anticipation of an attack, but that right is

qualified by the proviso that the right only extends to 'one who [was] not in any sense seeking an encounter.'" *Marquardt*, 164 Md. App. at 141 (quoting *Perry v. State*, 234 Md. 48, 52 (1964)). Again, while the video evidence could be interpreted either way, a jury could certainly conclude that Mr. Melvin was the party seeking the encounter considering that he exited the vehicle and advanced towards Mr. Byrd before appearing to threaten a physical strike. Mr. Byrd, on the other hand, is clearly seen walking away from the vehicle.

Finally, despite the State's contention that Mr. Byrd relied entirely on the surveillance footage, there was certainly other evidence before the trial court which bore on his state of mind. First of all, there was Mr. Murphy's testimony that a "commotion" in a "loud tone" immediately preceded the shooting and that the young men understood Mr. Melvin to be a "weed dealer." There was Detective Dunton's testimony that Mr. Byrd was sixteen-years old at the time of the offense and weighed only 140 pounds. There was Doctor Harvilla's testimony that Mr. Melvin, nearly twice Mr. Byrd's age, had a bullet lodged inside his body from a previous wound and was under the influence of a cocktail of narcotics on the morning in question. Although we in no way mean to denigrate Mr. Melvin, we must observe that in context a lanky sixteen-year-old such as Mr. Byrd could very well have been in actual fear of the older narcotics dealer advancing towards him and shouting at him while under the influence of numerous substances.[4]

[4] The dissent takes issue with the view that these attendant circumstances may constitute evidence of Mr. Byrd's state of mind. *Byrd v. State*, No. 1787, Sept. Term 2021, slip op. at 3 (Beachley, J., dissenting). Pointing to *State v. Martin*, the dissent emphasizes that the defendant must present "evidence tending *affirmatively* to prove what the defendant felt or believed at the relevant time." *Id.* (quoting *State v. Martin*, 329 Md. 351,

In sum, given the totality of the circumstances in this case, we conclude that Mr. Byrd presented "some evidence" that he actually believed, even if the belief was unreasonable, that: (1) he was in danger; (2) the amount of force used was necessary; and (3) retreat was not safe once Mr. Melvin was upon him. *Porter*, 455 Md. at 235. Even if there was conflicting evidence as to who the aggressor was, when the "trial judge resolves conflicts in the evidence, in the face of the 'some' evidence requirement, and refuses to instruct because he believes that the evidence supporting the request is incredible or too weak or overwhelmed by other evidence, he improperly assumes the jury's role as fact-finder." *Dykes*, 319 Md. at 224. While the jury could have very well rejected Mr. Byrd's claim of imperfect self-defense, it wasn't given the opportunity to do so here. Accordingly, because Mr. Byrd met his burden of producing "some evidence" to generate an instruction on imperfect self-defense and voluntary manslaughter, the trial court's refusal to do so did not adequately protect his rights and we must reverse his conviction and remand for a new trial. *Cost*, 417 Md. at 369.

Since we reverse Mr. Byrd's conviction for second-degree murder, we also must reverse his conviction for use of a firearm in a crime of violence because, as in *Porter*, the second-degree murder conviction served as a predicate for the weapons offense. *Porter*,

367 (1993)). At least on the latter point, we do not disagree. Nonetheless, we note that the factual posture in *Martin* differs considerably from the situation confronted here. In *Martin*, "neither direct nor circumstantial evidence of [Martin's] state of mind *at the time* of the second encounter was presented," *Martin*, 329 Md. at 364 (emphasis added), and therefore, the expert testimony regarding the effects of Martin's intoxication, standing alone, could not corroborate Martin's state of mind in the absence of any other evidence concerning the circumstances directly preceding the shooting. *Id.* at 366-67.

455 Md. at 255. With that conviction reversed, Mr. Byrd does not stand convicted of any crime of violence within the meaning of CL § 14-101(a). Accordingly, the two convictions must stand or fall together and here they must fall. However, because Mr. Byrd's conviction for possession of a regulated firearm while under 21 years of age has no connection to the other offenses, we affirm that conviction.

JUDGMENTS OF CONVICTION FOR SECOND-DEGREE MURDER AND USE OF A FIREARM IN A CRIME OF VIOLENCE REVERSED; JUDGMENT OF CONVICTION FOR POSSESSION OF A REGULATED FIREARM UNDER 21 YEARS OF AGE AFFIRMED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.

Circuit Court for Baltimore County
Case No. C-03-CR-20-002996

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND**

No. 1787

September Term, 2021

XAVIER DAMON BYRD

v.

STATE OF MARYLAND

Leahy,
Beachley,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Beachley, J.

Filed: January 23, 2023

* 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.

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

I respectfully dissent because in my view the circuit court correctly found that Mr. Byrd did not produce sufficient evidence to generate an imperfect self-defense jury instruction.

In *Prince v. State*, 255 Md. App. 640, 658 (2022), we recently articulated the "three key differences" between perfect and imperfect self-defense:

> *First*, for an imperfect self-defense, the defendant need "only show that he actually believed that he was in danger, even if that belief was unreasonable." [*Porter v. State*, 455 Md. 220,] 235, 166 A.3d 1044 [2017]. *Next*, the defendant is required only to prove that "he actually believed the amount of force used was necessary," and his belief doesn't have to be reasonable. *Id.* *Finally*, "a defendant must have only 'subjectively believe[d] that retreat was not safe'—that belief need not be reasonable." *Id.* (quoting *Burch v. State*, 346 Md. 253, 284, 696 A.2d 443 (1997)). Imperfect self-defense is not a complete defense against criminal charges, though—an imperfect defense negates the malice requirement and mitigates murder to voluntary manslaughter. *State v. Faulkner*, 301 Md. 482, 486, 483 A.2d 759 (1984).

The Majority essentially concludes that the video surveillance footage by itself satisfies the "some evidence" standard to generate an imperfect self-defense jury instruction. Slip op. at 20. The Majority states:

> At the least, the footage shows Mr. Melvin advancing briskly around the front bumper of the SUV immediately towards Mr. Byrd seemingly to confront him. Although Mr. Byrd had his weapon drawn at this point, Mr. Melvin crossed to the passenger side. Mr. Byrd turned to face him with his handgun drawn. Then, the video shows Mr. Melvin appearing to lunge at Mr. Byrd and cocking his right arm back. As he did so, Mr. Byrd fell back and fired a single shot into Mr. Melvin's abdomen as he hit the ground.

Id. at 20. I have no disagreement with the Majority's description of the video surveillance footage, but I disagree with the ensuing conclusion that "[f]rom that video evidence, it is

possible the jury could have found Mr. Byrd to have been in actual fear of severe bodily harm or death." *Id.*

Analyzing this case under the "three key differences" template set forth in *Prince* reveals that Mr. Byrd did not produce sufficient evidence for an imperfect self-defense jury instruction. *First*, I see no evidence that Mr. Byrd actually believed he was in danger of serious bodily harm or death. The Majority is correct that Mr. Melvin "advance[ed] briskly around the front bumper of the SUV" and that "Mr. Melvin appear[ed] to lunge at Mr. Byrd." *Id.* But the video does not inform us as to Mr. Byrd's subjective beliefs. Did Mr. Byrd have underlying animosity toward Mr. Melvin and, given that Mr. Melvin was unarmed, jumped at the opportunity to shoot him? Does Mr. Byrd generally carry a handgun in his day-to-day activities because he simply enjoys the power and authority a weapon provides, and will use that power irrespective of the level of threat that he encounters? I grant that it is possible Mr. Byrd actually believed he was in danger of serious bodily harm or death, but the fact remains that there is no affirmative evidence of *any* of his possible mental states at the time of the shooting.

Second, there is no evidence that Mr. Byrd "actually believed the amount of force used was necessary." *Prince*, 255 Md. App. at 658. This is a key inquiry here because Mr. Melvin was unarmed when he approached Mr. Byrd and therefore appeared to present a threat involving non-deadly force.

Finally, there is no evidence whether Mr. Byrd "subjectively believe[d] that retreat was not safe," an issue that is relevant in this case because Mr. Byrd was within a few steps

of Mr. Murphy's car when he shot Mr. Melvin. *Id.* (quoting *Burch*, 346 Md. at 284).

I am also unpersuaded by the Majority's reliance on "other evidence" to support an imperfect self-defense jury instruction. Slip op. at 22. That there was a "commotion" and "loud tone" prior to the shooting does not inform Mr. Byrd's subjective mental state. The Majority notes that Mr. Byrd was a 140-pound sixteen-year-old while Mr. Melvin was "nearly twice Mr. Byrd's age" and weighed approximately 160 pounds. *Id.* Those physical differences do not represent evidence of Mr. Byrd's subjective mental state, particularly under these circumstances where Mr. Byrd knows that he is wielding deadly force against Mr. Melvin's non-deadly threat. I also fail to see how it is relevant to Mr. Byrd's subjective mental state that Mr. Melvin "had a bullet lodged inside his body from a previous wound" and "was under the influence of a cocktail of narcotics." *Id.* This evidence came from the coroner only after an autopsy, and for this evidence to be relevant to Mr. Byrd's mental state, he would have had to know of these conditions at the time of the shooting. From this "other evidence," the Majority concludes that "Mr. Byrd could very well have been in actual fear of the older narcotics dealer advancing towards him and shouting at him while under the influence of numerous substances." *Id.* I acknowledge that Mr. Byrd could very well have been in actual fear, but that would be pure speculation because there was no evidence that he actually was in fear of serious bodily injury or death at the time he fired his gun.

In rejecting the defendant's argument that he was entitled to an imperfect self-defense instruction where he produced evidence of his severe intoxication causing memory

loss and corroborating expert testimony that he "might well have experienced a condition called 'explosive rage syndrome,'" the Supreme Court of Maryland stated,

> "Some evidence" sufficient to generate an issue of self-defense means to the respondent any evidence of circumstances permitting an inference to be drawn as to a defendant's state of mind at sometime prior to, not at, the relevant moment, and expert testimony as to what his or her state of mind might have been at that time. He would have us hold, in other words, that generation of the issue does not require production of, or reliance on, evidence tending *affirmatively* to prove what the defendant felt or believed at the relevant time. In short, he would sanction speculation as a substitute for evidence; under his formulation, unless there was evidence tending affirmatively to negate the requisite subjective belief, the issue of self-defense would be generated. We do not share this view.

State v. Martin, 329 Md. 351, 353, 367 (1993). Although the evidence produced in this case creates room for speculation as to Mr. Byrd's subjective beliefs, there is no "evidence tending *affirmatively* to prove what the defendant felt or believed at the relevant time." *See id.* at 367.

For these reasons, I do not share the Majority's view and would hold that the circuit court correctly denied the requested jury instruction.