UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0489

September Term, 2015

JOSE ARMANDO MEJIA ACOSTAS

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: June 27, 2016

After a three-day jury trial in the Circuit Court for Frederick County, José Armando Mejia Acostas was convicted of attempted murder in the second degree, and first-degree assault. Appellant was sentenced to a term of 25 years of incarceration for attempted murder, and a concurrent 25 years for assault. Appellant presents three issues on appeal:

> 1. Did the trial court err in refusing to instruct the jury as requested on mistake of fact?
>
> 2. Did the trial court err in instructing the jury on self-defense and the retreat rule?
>
> 3. Did the trial court err in imposing separate sentences for attempted murder and assault in the first degree?

For the reasons that follow, we shall affirm the appellant's convictions, but vacate the sentence for first-degree assault.

Background

On April 7, 2014, Frederick County Police received a call about an assault in progress at the Hickory Hill Apartments. Upon arriving at the location, Officer Randy Lawson encountered the victim, José Mandugano. Mandugano had his hand up to his neck. As the officer approached him, Mandugano dropped his hand, at which time the officer observed blood "pretty much pouring" out of a "very large gash" in his neck. Mandugano's clothing was soaked in blood. Officer Lawson administered first aid until EMS personnel arrived. Mandugano was taken to the hospital, where he underwent surgery to repair the laceration, which was 17 centimeters (nearly 6.75 inches) in length.

The parties stipulated that Mandugano had sustained an injury to his external jugular vein, that he had suffered substantial preoperative blood loss, and that he would have continued to hemorrhage and bleed had he not received medical treatment. The parties further stipulated that the external jugular vein is located millimeters from the internal jugular vein and carotid artery and, had either been cut during the assault, Mandugano would have died within two to four minutes.

The police investigation traced a trail of blood to one of the apartments in the complex that was leased to Pedro Rivera. Rivera testified that he lived in the apartment, and, to help cover the rent, he sublet rooms to several other individuals, including appellant and his brother.[1] On the date in question, Rivera was in the apartment with several individuals, including appellant, appellant's brother and Nelson "Ruby" Rodriguez. According to Rivera, appellant had "drank a lot[,]" and was smoking marijuana. Ruby said something to appellant that appellant "didn't like" and "they went to blows." Rivera saw appellant put his hand in his pocket, where Rivera knew appellant kept a switchblade. Rivera put appellant in a bear hug "so that he wouldn't be able to pull out that switchblade," then forcibly removed appellant from the apartment.

[1]Rivera, Mandugano, and appellant testified through an interpreter.

Two of Ruby's female friends arrived at that point and let appellant back into the apartment, where they started hitting and kicking him because "they wanted to defend Ruby." Rivera threw himself on top of appellant so that they wouldn't keep kicking him.

While the fight was happening, Mandugano arrived at the apartment along with a friend who lived in the apartment. Mandugano told appellant not to hit the women, and then left. Rivera again removed appellant from the apartment. He did not see what happened after Mandugano and appellant left the apartment.

Mandugano testified that he was visiting a friend, who lived in Rivera's apartment, when a fight broke out between Ruby and appellant. Mandugano told them not to fight because someone would call the police. He then left the apartment so that he would not be involved in the fight. Appellant "got away from" Rivera, came outside and asked Mandugano "what's your problem?" Mandugano answered, "Why?", whereupon appellant took out a knife and cut Mandugano's throat. Mandugano ran away and appellant ran after him, threatening that he was going to kill him. Mandugano managed to escape to a nearby apartment building and knocked on one of the doors to get help.

Appellant testified that he and his brother shared a bedroom in Rivera's apartment. When he got home from work on the day in question, Rivera and four other people were drinking in the living room. Appellant went into his bedroom to rest. Rivera knocked on his bedroom door and invited him to have a beer. Appellant accepted the beer and joined the

others for a while, but went back to his room when he saw that they were "actually mixing too much drinks[.]" According to appellant, Mandugano then knocked on his bedroom door, and asked him for money to buy more beer. When appellant told Mandugano he had no money, Mandugano got mad and started insulting him. Mandugano then pushed appellant and started to fight with him.

The other people that were in the living room came over and started hitting and kicking appellant. Appellant "crouched down" and covered his head. He then took a knife from his pocket, stood up and saw that it was Mandugano who had been hitting his head. He grabbed Mandugano, put the knife to Mandugano's neck and told him to stop hitting him. Mandugano moved and got away. Appellant stated that he did not know Mandugano had been cut, and that he never had the intention of cutting him - he just wanted Mandugano and the others to stop hitting him.

Appellant left the apartment and spent five days sleeping outside. He did not report the incident to the police because he feared being deported. To avoid being apprehended by the police, he went to New Jersey, where he lived with friends and worked under an assumed name.

After his eventual arrest, appellant gave a statement to police in which he explained that he was drinking beer at home with his brother. Other people in the apartment asked him for beer and he gave them some, but when they asked for more, he refused and they began

arguing. The others began to hit him and would not stop. In the statement, appellant acknowledged that he cut Mandugano's throat, but claimed it was an accident. He stated:

> So, then I took out a knife. By accident, I cut the man's throat. He had been drinking, he was drunk. I put the blade or the knife on the neck, because the people would not stop hitting me. When the man turned around, by, by accident I cut his throat.

Additional facts will be introduced in the discussion as necessary.

Analysis

I. Jury Instructions

a. Standard of Review

Maryland Rule 4-325(c) provides: "The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." "We review a trial court's decision to give a particular jury instruction under an abuse of discretion standard." *Appraicio v. State*, 431 Md. 42, 51 (2013) (citation omitted). The trial court's decision whether to give a jury instruction "will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Atkins v. State*, 421 Md. 434, 447 (2011) (citation and internal quotation marks omitted).

In determining whether a trial court has abused its discretion, we consider "(1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions

actually given." *Bazzle v. State*, 426 Md. 541, 549 (2012) (citation and internal quotation marks omitted).

The evidentiary threshold the defendant must surmount is low. *Id*. at 551. "[A] defendant needs only to produce 'some evidence' that supports the requested instruction[.]" *Id*. "Some evidence" simply means "any evidence," as the Court of Appeals has explained:

> *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 a reasonable doubt" "clear and convincing" or "preponderance." . . . If there is any evidence relied on by the defendant which, if believed, would support his claim . . . the defendant has met his burden.

Id. at 551 (quoting *Dykes v. State*, 319 Md. 206, 216-17 (1990) (emphasis in *Dykes*)).

"Whether a particular instruction must be given depends upon whether there is any evidence in the case that supports the instruction; if the requested instruction has not been generated by the evidence, the trial court is not required to give it." *General v. State*, 367 Md. 475, 486-87 (2002) (citations omitted). "In evaluating whether competent evidence exists to generate the requested instruction, we view the evidence in the light most favorable to the accused." *Id*. at 487 (citation omitted).

b. The Requested Mistake of Fact Instruction

Appellant first contends that the circuit court erred in failing to instruct the jury on mistake of fact. In *General, supra*, the Court of Appeals described mistake of fact as follows:

> As a general rule, mistake of fact is a recognized common law defense to certain crimes. Mistake or ignorance of fact exists when the actor does not know what the actual facts are or believes them to be other than as they are. In essence, a mistake of fact is a defense when it negates the existence of the mental state essential to the crime charged.

General, 367 Md. at 483-84 (citations and footnote omitted).

Defense counsel requested that the court propound the following jury instruction:

> You have heard evidence that the defendant's actions were based on a mistake of fact. Mistake of fact is a defense. You are required to find the defendant not guilty if:
>
> > (1) the defendant actually believed that Jose Gonzalez Mandugano was the one who attacked him;
> >
> > (2) the defendant's belief and actions were reasonable under the circumstances; and
> >
> > (3) the defendant did not intend to commit the crimes of Attempted First Degree Murder, Attempted Second Degree Murder, First Degree Assault and Second Degree Assault and the defendant's conduct would not have amounted to the crimes of Attempted First Degree Murder, Attempted Second Degree Murder, First Degree Assault and Second Degree Assault if the mistaken belief had been correct, meaning that, if the true facts were what the defendant thought them to be, the defendant's conduct would not have been criminal.
>
> In order to convict the defendant, the State must prove beyond a reasonable doubt that at least one of the three factors was absent.

The State objected, stating that there was no evidence of any mistake of fact on the part of the appellant. The court declined to give the instruction, stating, "I believe we've adequately covered everything in the instructions we are about to give."

Appellant maintains that the proposed instruction was applicable to the facts of the case because the jury reasonably could have concluded that appellant's belief that Mandugano was one of his attackers was reasonable and, had the appellant been correct, his actions would have been justified as self-defense. The State responds that there was no evidence that appellant's actions were based upon a mistaken belief that Mandugano had attacked him. We agree with the State.

Appellant's testimony was that Mandugano started the fight and that the others joined in. According to appellant, when he stood up, he saw that it was Mandugano who had been hitting him in the head, so he put the knife to Mandugano's neck and told him to stop hitting him:

> [PROSECUTOR]: So, [Mandugano's] the one that you grabbed and held a knife to his neck, correct?
>
> [APPELLANT]: When they were hitting me. I had my hands like this. And, then when I couldn't take it anymore, I put my hand in my pocket, and I was out on this side. The people were hitting my head, and when I got up, I saw he was the one there who had been hitting my head.

At no time did appellant indicate that he was mistaken about Mandugano's involvement in the fight. Accordingly, the requested instruction regarding mistake of fact

was not generated by the evidence and was therefore not applicable to the facts of the case. The court did not abuse its discretion in declining to give the instruction.

c. The Requested Duty to Retreat Instruction

Appellant requested, and the court agreed, to instruct the jury on the defense of self-defense. The court further instructed the jury that, before using deadly force in self-defense, appellant was required to make a reasonable effort to retreat, but was not required to do so if he was in his home. Defense counsel had also requested that the court include additional language from the pattern jury instruction that states that a defendant does not have a duty to retreat if retreat was unsafe, arguing that it would be "another alternative for the jury" if they did not find that the apartment where the incident occurred was appellant's home.[2] The State objected, stating that there was no testimony that the apartment was not appellant's home and the State did not intend to make such an argument. The court denied the request to include the additional language, stating, "I think the instruction, as written, is appropriate."

[2] Maryland Criminal Pattern Jury Instruction 5:07 provides, in pertinent part:

> [B]efore using deadly force, the defendant is required to make a reasonable effort to retreat. The defendant does not have to retreat if [the defendant was in [his] [her] home], [retreat was unsafe], [the avenue of retreat was unknown to the defendant], [the defendant was being robbed], [the defendant was lawfully arresting the victim]]. [If you find that the defendant did not use deadly-force, then the defendant had no duty to retreat.]

On appeal, appellant contends that the trial court erred by refusing to include language from the pattern jury instruction that states that a defendant does not have a duty to retreat if retreat was unsafe, arguing that "it was appropriate in light of the evidence that appellant had been violently attacked and kicked in the head by several people in his home, moments before he cut Mandugano." The State responds, preliminarily that the issue is not properly before this Court, because the argument on appeal is different than the argument made to the trial court. The State responds on the merits, that the instructions given adequately covered the subject of appellant's duty to retreat.

We agree with the State that appellant's claim is unpreserved. Maryland Rule 4-325(e) provides, in pertinent part: "No party may assign as error the giving or failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects *and the grounds of the objection.*" (Emphasis added). As we have previously observed:

> It is clear that the purpose and design of the rule is to correct errors while the opportunity to correct them still exists. Only thus is an error preserved for appellate review. It is not the purpose and design of the rule to provide an avenue for a party to lay away ammunition in the arsenal of appeal.

Fischer v. State, 117 Md. App. 443, 458 (1997) (citation and internal quotation marks omitted). Accordingly, when reasons given for an objection to a jury instruction are different from that raised on appeal, the contention on appeal is not preserved for review. *Fearnow v. Chesapeake & Potomac Tel. Co.*, 342 Md. 363, 382-83 (1996). *See also Holmes v. State*,

209 Md. App. 427, 448 ("[W]hen a defendant fails to meet his or her duty of stating distinctly at the time the specific grounds of objection for a jury instruction, appellate consideration of such a claim will be forfeited."), *cert. denied*, 431 Md. 445 (2013) (citations and internal quotation marks omitted).

Even if the issue had been preserved, any error on the part of the trial court in refusing to add the requested language, would have been harmless in light of the uncontroverted evidence that appellant lived in the apartment where the altercation occurred and the court's instruction that there is no duty to retreat in one's home. The jury is presumed to follow the court's instructions. *Williams v. State*, 137 Md. App. 444, 459 (2001) (citations omitted). Assuming the jury considered whether appellant acted in self-defense, they would have found that he did not have a duty to retreat because he was in his home. An instruction that there is no duty to retreat unless retreat is a safe option would have been superfluous. "Reversal is not required where the jury instructions, taken as a whole, sufficiently protect the defendant's rights and adequately covered the theory of the defense." *Fleming v. State*, 373 Md. 426, 433 (2003).

II. Merger

Lastly, appellant contends that the trial court erred in imposing separate sentences for attempted murder and first-degree assault. The State agrees with this contention, as do we.

Merger of convictions for sentencing purposes is derived from the protection against double jeopardy afforded by the Fifth Amendment of the United States Constitution and Maryland common law, and protects criminal defendants from multiple punishments for the same offense. *Brooks v. State*, 439 Md. 698, 737 (2014). The test for determining whether separate charges constitute the "same offense" for double jeopardy purposes is the "required evidence" test. *Sifrit v. State*, 383 Md. 116, 137 (2004). "The test looks to the elements of the offenses and, if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." *Id*. (citation and internal quotation marks omitted).

Appellant was convicted of attempted second-degree murder, which is the taking of a substantial step beyond mere preparation toward the commission of murder in the second degree, with the intent to kill and the apparent ability to do so. MPJI-Cr. 4:17.13. Appellant was also convicted of the "serious physical injury" form of first-degree assault, which is assault with an intent to cause serious physical injury.[3] MPJI-Cr. 4:01.1(2). As the State points out, there is no case law holding that the specific crimes at issue here - attempted murder and first-degree assault - merge for sentencing purposes, but analyses in the two cases cited by the parties are instructive.

[3] First-degree assault may also be committed by assault with a firearm. MPJI 4:01.1(1).

In *Sifrit, supra*, the Court of Appeals held that, under the required evidence test, assault in the first degree of the serious physical injury variety merges for sentencing purposes into second-degree murder, reasoning that "[t]he two crimes have the same elements with the one additional element for murder, the death of the victim." *Id.* at 138. Similarly, in *Dixon v. State*, 364 Md. 209 (2001), the Court of Appeals held that, under the required evidence test, first-degree assault of the serious physical injury variety merges into attempted voluntary manslaughter, which requires an intent to kill. *Id.* at 241. The *Dixon* Court reasoned that "the evidence required to show an attempt to kill would demonstrate causing, or attempting to cause, a serious physical injury." *Id*. at 240.

Here, the jury found that appellant attempted to kill Mandugano by cutting his throat. The same evidence established assault with an intent to cause serious physical injury. In light of the reasoning in *Sifrit* and *Dixon*, we conclude that, under the required evidence test, appellant's conviction for first-degree assault should have merged into his conviction for attempted second-degree murder.

THE SENTENCE OF THE CIRCUIT COURT FOR FREDERICK COUNTY AS TO COUNT THREE (FIRST DEGREE ASSAULT) IS VACATED. THE JUDGMENTS ARE OTHERWISE AFFIRMED.

COSTS TO BE PAID TWO-THIRDS BY APPELLANT, AND ONE-THIRD BY FREDERICK COUNTY.