UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

KENNY MORRIS

v.

STATE OF MARYLAND

No. 1373, September Term, 2015

PATRICIA JOHNSON

v.

STATE OF MARYLAND

No. 1078, September Term, 2015

Graeff,
Kehoe,
Arthur,

JJ.

Opinion by Graeff, J.

Filed: June 22, 2016

Kenny Morris and Patricia Johnson, appellants, were tried jointly in the Circuit Court for Charles County on charges relating to the assault and attempted murder of Tyrone Jeter. On February 6, 2015, at the conclusion of a five-day trial, a jury found Mr. Morris guilty of attempted second degree murder, first degree assault, second degree assault, and openly wearing or carrying a dangerous weapon with intent to injure. The court sentenced Mr. Morris to 30 years, all but nine years suspended, for the conviction of attempted second degree murder, one year, concurrent, for the conviction of carrying a deadly weapon with intent to injure, and 4 years of probation following his release.[1]

The jury found Ms. Johnson guilty of second degree assault. The circuit court sentenced her to 10 years, all but 60 days suspended, and 5 years of probation upon release.

On appeal, Mr. Morris presents six questions for this Court's review, which we have modified slightly, as follows:

1. Did the circuit court err in not instructing the jury on imperfect self-defense, imperfect defense of others, and imperfect defense of habitation?

2. Was the evidence insufficient to convict Mr. Morris of wearing or carrying a deadly weapon openly with intent to injure?

3. Did the circuit court err in emphasizing to the jury that Mr. Morris elected not to testify?

4. Did the jury render legally inconsistent verdicts by convicting Mr. Morris of attempted second degree murder but acquitting him of attempted voluntary manslaughter?

5. Did the circuit court err in permitting two witnesses to reference Ms. Johnson's pre-arrest silence?

[1] Mr. Morris' convictions for first and second degree assault merged for sentencing purposes with his conviction for attempted second degree murder.

6. Should this Court recognize plain error due to the admission of extrinsic evidence of prior inconsistent statements and prior consistent statements?

Ms. Johnson presents two questions for this Court's review. The first question is the same as Mr. Morris' fifth question, which she phrases as follows:

> Did the trial court err by admitting evidence that Ms. Johnson chose to remain silent when questioned by Detective Williams?

Ms. Johnson's second question presented is as follows:

> Was the evidence sufficient to sustain Ms. Johnson's conviction of second degree assault?

For the reasons set forth below, we shall reverse the judgments of the circuit court with respect to Mr. Morris, and affirm the judgment of the circuit court with respect to Ms. Johnson.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. Jeter's Testimony

The prosecution and the defense presented two very different scenarios of the events that occurred on January 31, 2014, in a townhouse community in Waldorf, Maryland. Mr. Jeter testified that he lived with his girlfriend, Janice Johnson ("Janice"), three doors down from Janice's sister, Ms. Johnson.[2] Mr. Jeter characterized his relationship with Ms. Johnson as "very close," stating that he would spend time with her three or four times per week. Mr. Morris, Ms. Johnson's longtime boyfriend, frequently would visit

[2] For the sake of clarity, throughout this opinion we will refer to Patricia Johnson, appellant, as "Ms. Johnson" and her sister, Janice Johnson, as "Janice."

Ms. Johnson and stay at her house. Although Mr. Jeter and Mr. Morris typically did not spend time together, he characterized their relationship as cordial.

The townhouse community in which Mr. Jeter and Ms. Johnson lived provided assigned parking to each house in the development, which could be identified by the owner's address painted on the parking space. There also were "open" parking spaces that were not assigned to any particular person and "where anybody can park." Notwithstanding the official parking system, Mr. Jeter was aware of certain parking spaces that typically were used by Ms. Johnson and her daughter, Brianna Williams, which he avoided as a courtesy.

On January 31, 2014, at approximately 5:45 p.m., Mr. Jeter returned home after work and parked in an "open" parking space. At approximately 6:00 p.m., Ms. Johnson and Mr. Morris rang Mr. Jeter's doorbell. Mr. Jeter answered his front door and asked what was wrong. Ms. Johnson asked him why he was "parked in Kenny's parking spot." Mr. Jeter testified that he was "shocked." He replied: "[W]hat, are you kidding? [T]hat's an open parking spot. . . . [I]s this your idea or his idea?" Ms. Johnson replied that it was her idea. Mr. Jeter then stated: "Patty, it's an open parking spot. [E]verybody parks there. It's just an open spot." He explained that he normally parks in two or three other parking spaces before using that spot, but those were "always taken." He claimed that he "probably parked there hundreds and hundreds of times."[3]

[3] Tyrone Jeter noted that he had parked in that parking spot during the two days before the January 31, 2014, incident.

At that point, Mr. Morris became "irate." He repeatedly swore at Mr. Jeter and stated that he would "kick your f'in [sic] ass." Mr. Jeter told Mr. Morris to leave, but Mr. Morris continued to curse at him. Eventually, they left. Mr. Jeter testified that, although Mr. Morris became very loud, he remained calm during the exchange at his front door and simply told Mr. Morris "that it was ridiculous for grown people to be arguing over a parking spot that doesn't belong to anybody."

After Ms. Johnson and Mr. Morris left, Mr. Jeter called Janice because he "knew that if anybody could control [Ms. Johnson,] she could." He then put on his shoes and went outside to verify that he was properly parked and to make sure no one had vandalized his car. Mr. Jeter was disturbed by his exchange with Ms. Johnson, stating that they were "just so close" and he "just didn't understand" why she would act that way. He decided to knock on her door "[j]ust to make sure she was okay" because he "knew it wasn't her idea to come there, although she said it was." When Ms. Johnson answered her door, he asked her "what's going on? Are you okay?" She responded that she was. They talked for approximately 30 seconds before Mr. Morris came to the door yelling and swearing at him. Mr. Jeter then stated: "Kenny, . . . we're grown. I mean, you know better than this. We know better than this. It doesn't make sense." At that point, Mr. Morris calmed down. He retrieved a white bucket from inside the house, brought it outside onto Ms. Johnson's front porch, and sat down on the bucket. The three began to talk in a cordial manner.

Mr. Jeter stated that everyone was "acting like kids over a parking spot." Mr. Morris stated that he "figured [Mr. Jeter] was being disrespectful" by parking in that spot, to which

Mr. Jeter replied that it was not his intention to be disrespectful. After about two minutes of discussing the parking situation, Ms. Johnson opened her front door and motioned for Mr. Jeter to come inside. "She walked in first and she opened the door so [he] walked in behind her." Mr. Morris also came inside, and at that point, all three were standing in the foyer just inside Ms. Johnson's house.

The conversation about the parking situation continued in the foyer, with Mr. Jeter stating that their argument was foolish, and he loved Ms. Johnson and her family. Ms. Johnson then became "very loud" and yelled: "[W]ell, Kenny is my family, too." Mr. Jeter then stated: "I know he is. I'm not saying that. [B]ut you are arguing over a parking space that doesn't even belong to him. He doesn't live here." Ms. Johnson replied: "[W]ell, he does f-in' [sic] live here." Mr. Jeter repeated that Mr. Morris did not live there but only visited Ms. Johnson. At that point, Ms. Johnson walked up to Mr. Jeter, got right in his face, and pushed him in the chest three times with both of her hands.[4] When Ms. Johnson came at Mr. Jeter a fourth time, he pushed her, and she fell backwards onto the floor. He testified that he did not feel like he needed to defend himself against Ms. Johnson, but rather, "it was just like a . . . reflex, an instinct . . . to get somebody off of you. That's all it was." Mr. Jeter testified that Mr. Morris was right next to him when he pushed Ms. Johnson.

[4] On cross-examination, defense counsel asked Mr. Jeter if Ms. Johnson was attempting to push him out of her house because she wanted him to leave, to which Mr. Jeter responded: "No, sir. It wasn't a push like that."

Ms. Johnson then stood up and yelled: "I can't believe you put your fucking hands on me." Mr. Jeter turned around and was attempting to walk out of Ms. Johnson's house when Mr. Morris punched him in the side of his face with his right hand. He did not recall seeing a knife at the time. Mr. Jeter raised his arms to protect himself and tried to leave, but Mr. Morris again attacked him from behind, jumping onto Mr. Jeter's back. At the same time, Ms. Johnson continued to "get [him] from the front," and he remembered "trying to push her off" and "get her hands off" of him. Then, "out of the corner of [his] eye," Mr. Jeter saw that Mr. Morris had a knife. Mr. Jeter did not know where the knife came from, and he did not see it until after Mr. Morris had punched him and latched onto his back, but before they "tumbled to the floor."[5] Mr. Jeter tried to turn around and grab Mr. Morris' hand to avoid being stabbed by the knife, but he was unable to do so because Mr. Morris was holding him and he was still struggling with Ms. Johnson.

Mr. Jeter and Mr. Morris then "rolled around on the ground for a while." At some point during the struggle, Mr. Jeter backed up into Ms. Johnson's front room. Mr. Jeter "kept backing up," pushing Mr. Morris into some furniture in an attempt to get Mr. Morris off his back.

While Mr. Jeter was on the ground, Ms. Johnson "kicked at [him] like twice. But other than that she wasn't involved at all." On cross-examination, Mr. Jeter stated: "She

[5] Mr. Jeter later told Officer Christopher Shankster that he and Mr. Morris "immediately went to the ground" in the foyer "after [Mr. Morris] punched him, and he started getting stabbing by [Mr. Morris]."

kicked me twice, but it didn't hurt me." Defense counsel asked whether it was a violent kick, and Mr. Jeter responded: "Well, not to me it wasn't, but she did kick me."[6] He clarified that Ms. Johnson kicked him in the "shoulder area" when he was lying on the ground on his stomach with Mr. Morris on top of him.

During the fight, Mr. Morris cut Mr. Jeter with the knife numerous times on his arm, back, face, and neck. Mr. Jeter eventually managed to turn over with Mr. Morris positioned on top of him. Mr. Morris continued stabbing at Mr. Jeter's chest, but Mr. Jeter did not recall seeing anything in Mr. Morris' hand. It appears that, unbeknownst to Mr. Morris, the knife blade had, at some point during the fight, separated from its handle and become lodged in Mr. Jeter's neck.

Mr. Jeter stated that the fight "seemed like it took a while," estimating that it took "maybe a minute or so." The fight ended when Mr. Morris "stopped all of a sudden and . . . just sat up in the middle of the floor[,] was like rocking" and saying "I'm sorry . . . things just got out of hand . . . and I'm sorry."[7] At that point, Mr. Jeter positioned himself behind and on top of Mr. Morris, and he grabbed Mr. Morris around the chest because he "didn't know if he still had the knife or not." Mr. Jeter denied ever grabbing Mr. Morris' neck or striking him.

[6] On cross-examination, defense counsel asked Mr. Jeter if Ms. Johnson landed any of her kicks. Mr. Jeter initially stated that he could not remember, but if she did, "it wasn't bad enough to hurt [him]." When defense counsel raised the subject again, he testified that she did in fact kick him in the shoulder.

[7] Mr. Jeter testified that he did not overpower Mr. Morris, but rather, Mr. Morris spontaneously quit fighting.

Mr. Jeter noted that both Mr. Morris and Ms. Johnson smelled of alcohol, and therefore, he knew that they had been drinking. He also noted that, after they had entered Ms. Johnson's house and gathered in the foyer, Mr. Morris never left that area until the fight began, and Mr. Jeter never lost sight of him.

After the fight ended, Mr. Jeter left Ms. Johnson's house and walked back to his house. He called Janice and asked to her come home because he needed to go to the hospital. While tending to his wounds, he noticed the knife blade sticking out of the back of his neck. He pulled out the blade, set it down on a counter, and covered his neck with a towel. When Janice arrived with Ms. Johnson's daughter, Ms. Williams, they called 911, and paramedics arrived to take Mr. Jeter to the hospital.

Ms. Johnson's Testimony

After the State rested, Ms. Johnson testified in her own defense, providing a different account of what occurred on the evening of January 31, 2014. She testified that, at approximately 5:00 p.m., she and Mr. Morris went to a restaurant to get something to eat. While she was there, she consumed two beers with some chicken wings. They returned home at approximately 5:50 p.m. and observed Mr. Jeter's car parked in the space in which Mr. Morris typically parks. Although it technically was an "open" parking space, it was a common courtesy for residents not to park in the "spot next to your assigned parking spot" because it is "right in front of your house."

Ms. Johnson asked Mr. Morris to go to Mr. Jeter's house with her and ask if he could move his vehicle because "his assigned spot was open." When Ms. Johnson knocked

on Mr. Jeter's door and "asked him, could he please remove his vehicle that was in front of [her] house, because his was open," Mr. Jeter responded: "No, . . . [h]e doesn't even live there. I will do anything for you and Brianna, Patty." He then yelled: "But for him, no." Ms. Johnson testified that Mr. Jeter continued yelling, saying that he did not like Mr. Morris. Eventually, Ms. Johnson and Mr. Morris left because they "weren't getting anywhere." Ms. Johnson denied ever hearing Mr. Morris curse at Mr. Jeter.

Shortly after they returned home, Ms. Johnson heard a knock at her front door and banging and yelling outside." At that point, she and Mr. Morris had not yet left the foyer of her house.[8] Ms. Johnson opened the door, and Mr. Jeter was standing on the sidewalk in front of her stoop "yelling for Mr. Morris to come out and fight him." Ms. Johnson told Mr. Jeter to go home, and Mr. Morris said that he was not going to come outside to fight him. Ms. Johnson denied that she invited Mr. Jeter into her home or that Mr. Morris brought a bucket outside to sit on while they had a conversation.

Ms. Johnson tried to close her screen door, but "Mr. Jeter pushed the door" and "burst through" into her house, hitting her in the arm with the front door. Ms. Johnson backed up and then took a step forward and pushed Mr. Jeter with both hands, stating: "[G]et out of our house." Mr. Jeter did not leave, but instead, he grabbed Ms. Johnson's clothes around her collar and "threw [her] to the floor." He pushed her with "a lot of force," and she fell down on her "derriere, legs in the air."

[8] Ms. Johnson expressly stated that they did not go to other parts of the house before Mr. Jeter began knocking on her door.

Before Ms. Johnson could get up, Mr. Jeter "proceeded to go into . . . [her] front room, after Mr. Morris." Mr. Jeter began fighting with Mr. Morris. Ms. Johnson observed Mr. Jeter choking Mr. Morris, and they were "fighting all around the room," demolishing furniture in the process. She stated that "Mr. Jeter struck the filing cabinet, because he was behind, choking Mr. Morris." Then, Mr. Morris, who "was choking," asked Ms. Johnson to call 911. Ms. Johnson tried to use her phone, but it "was out of the socket," and she could not put it back together. Ms. Johnson was crying and yelling for Mr. Jeter to stop and to get out. The fight ended suddenly when "Mr. Jeter stopped . . . choking Mr. Morris," sat down on her couch for a "couple of seconds," and left.

Ms. Johnson denied kicking anyone during the incident, and she denied being intoxicated that night. She testified that she never saw the knife that injured Mr. Jeter, but she noted that it was possible that the knife could have been in the front room because it was common for them to eat in that room.

State's Rebuttal

The State called as a rebuttal witness Lieutenant Benjamin Voorhaar, one of the officers who responded to investigate the January 31, 2014, incident. Lt. Voorhaar testified that, when he interviewed Ms. Johnson immediately after the incident, she did not tell him that Mr. Jeter had choked Mr. Morris, nor did she inform him that Mr. Jeter had "busted" through her front door. She did tell him that Mr. Jeter had grabbed her by the throat and started to choke her, and Mr. Morris had to separate them. Lt. Voorhaar described

Ms. Johnson's demeanor as "confrontational," and she stated that "she [did not] want to talk about the incident."

The State also called Ms. Johnson's daughter to testify as a rebuttal witness. Ms. Williams testified about a conversation that she had with Ms. Johnson about the January 31 incident:

> [MS. WILLIAMS:] . . . . [S]he said she went over to my uncle's house. And I asked her why did she go over there. And she said, "I know I shouldn't have. We shouldn't have went over there." And I said, "Okay." So she went back over to our house. And the door was closed. And then my uncle went over to our house. And then I asked her why did she open the door to let him in, or just to open the door to talk to him, you could have kept it closed. And she said, "Yes, I shouldn't have." And then I told her -- and then she asked, she said that I was interrogating her. And I just said, "No, I just would like to get the whole story." And then I said, "Also, it was wrong that my uncle went over there. He shouldn't have went over there as well." So, I wasn't like trying to take sides. And then she said that she opened the door, my uncle was trying to get into the house. She was blocking him and trying to push him out. And then, I don't know what happened, but my mom fell backwards. And that's when she said that her boyfriend came and like defended her. And that's when, I guess the altercation took place, in our front room. And then I said, "Was there a stabbing involved?" And then she said, "No. They were wrestling, and they fell on top of" -- like, we have a wooden filing cabinet where we like leave our phone on. And then that's when, like, I guess the injuries happened. They were wrestling on the filing cabinet, and fell on it. And then, I guess that's when, like they fell and got hurt. And then she said while they were fighting her boyfriend was on top of my uncle. And she said that there was a lot of blood. And then that's when Kenny Morris just like stopped, and said, whoa, you're bleeding too much, and let him go. And then that's when my uncle left.
>
> [PROSECUTOR:] Now, did Patricia Johnson say anything about Tyrone Jeter choking Kenny Morris?
>
> [MS. WILLIAMS:] No.
>
> [PROSECUTOR:] Did she say anything about Tyrone Jeter grabbing her collarbone area?

[MS. WILLIAMS:] No.

[PROSECUTOR:] Did she say anything about Tyrone Jeter choking her?

[MS. WILLIAMS:] I'm not sure.

Additional facts will be discussed as necessary in the discussion that follows.

DISCUSSION

I.

Pre-Arrest Silence

Appellants both argue that the circuit court erred in admitting evidence of Ms. Johnson's pre-arrest silence. They assert that it is well-established that pre-arrest silence is inadmissible as substantive evidence of guilt.

The State contends that this claim is not preserved for review, and therefore, this Court should decline to address it. It further asserts that, even if we were to conclude that the claim was preserved, the claim is without merit because the prosecutor "did not seek to admit [Ms.] Johnson's silence as substantive evidence of her guilt." Finally, the State argues that, even if there was preserved error, it was harmless error that does not require reversal of appellants' convictions.

A.

Proceedings Below

Ms. Johnson objects to the following colloquy that occurred during the testimony of Detective Rochelle Williams, who interviewed Ms. Johnson shortly after the incident:

> [PROSECUTOR]: After collecting Ms. Johnson's skirt, did you make any . . . well, did Ms. Johnson leave the Criminal Investigation Division?

> [DETECTIVE WILLIAMS]: Yes, I asked her if she would like to talk, and she stated, no.
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: Officer, just answer the question that is being asked of you, okay?
>
> [PROSECUTOR]: Did Ms. Johnson leave the Criminal Investigation Division?
>
> [DETECTIVE WILLIAMS]: Eventually, yes.

Mr. Morris objects to this testimony relating to Ms. Johnson's pre-arrest silence, as well as testimony that occurred during the State's rebuttal case when the State questioned Lt. Voorhaar about his conversation with Ms. Johnson. That colloquy was as follows:

> [PROSECUTOR:] In speaking with Ms. Johnson, at the end, what was Ms. Johnson's demeanor with you at the end?
>
> [LT. VOORHAAR:] She did not want to talk with me.
>
> [PROSECUTOR:] Okay. But what was her demeanor, her emotions?
>
> [LT. VOORHAAR:] Confrontational.
>
> [PROSECUTOR:] Okay. And what do you mean confrontational?
>
> [LT. VOORHAAR:] She didn't want to talk about the incident.
>
> [PROSECUTOR:] Did Ms. Johnson come back to the home -- well, let me -- strike that. Let me back up. Did you continue to speak with Ms. Johnson at that point?
>
> [LT. VOORHAAR:] I did not.

B.

Preservation

The State argues that appellants have failed to preserve their claims with respect to the alleged improper comments regarding Ms. Johnson's pre-arrest silence. With respect to Detective Williams' testimony, the State notes that Mr. Morris did not object to the testimony, and although Ms. Johnson initially objected, "the court neither overruled nor sustained Johnson's objection and she did not seek a ruling or object when none was made." It contends that, "[u]nder the circumstances, counsel's failure to request a ruling on his objection, renders [Ms.] Johnson's current complaint . . . unpreserved for appellate review." Moreover, the State argues that, "given the court's response to counsel's objection," it can be inferred that the court was sustaining the objection, and in any event, "it was incumbent upon counsel to seek clarification of the court's ruling, or, at minimum, to move to strike the non-responsive part of Detective Williams's testimony." With respect to the Lt. Voorhaar's testimony, which only Mr. Morris contends on appeal was improper, the State contends that the issue is not preserved because Mr. Morris failed to object to that testimony.

Ordinarily, an appellate court will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). *Accord Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 80 n.18 (2015), *cert. denied*, 446 Md. 293 (2016) (declining to address an argument that was not made below). Pursuant to Md. Rule 4-323, "[a]n objection to the admission of evidence shall be made at the time the evidence

is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." "'Cases are legion in the Court of Appeals to the effect that an objection must be made to each and every question . . . .'" *Fowlkes v. State*, 117 Md. App. 573, 588 (1997), *cert. denied*, 348 Md. 523 (1998) (quoting *Sutton v. State*, 25 Md. App. 309, 316 (1975)). Furthermore, if a defendant is not satisfied with the trial court's resolution of an issue, it is incumbent upon him or her to make that objection known to the trial court so that it can resolve it contemporaneously; failure to do so constitutes waiver of the issue. *See Gilliam v. State*, 331 Md. 651, 691 (1993) ("As [defendant] did not object to the course of action proposed by the prosecution and taken by the court, and apparently indicated his agreement with it, he cannot now be heard to complain that the court's action was wrong."), *cert. denied*, 510 U.S. 1077 (1994); *Watkins v. State*, 328 Md. 95, 99-100 (1992) (where party acquiesces in court's ruling, there is no basis for appeal of that ruling), *overruled on other grounds*, *Calloway v. State*, 414 Md. 616 (2010); *Grandison v. State*, 305 Md. 685, 765 (1986) ("By dropping the subject and never again raising it, [defendant] waived his right to appellate review of this issue.").

Here, as indicated, Detective Williams responded to the State's question whether Ms. Johnson left the Criminal Investigation Division by stating: "Yes, I asked her if she would like to talk, and she stated, no." Mr. Morris made no objection to this comment. Ms. Johnson did object, and the circuit court responded: "Officer, just answer the question that is being asked of you, okay?" The prosecutor then reworded the question and the Detective stated that Ms. Johnson eventually left. To the extent that Ms. Johnson was not

satisfied with that response to her objection or desired further action, it was incumbent upon her to let the court know by seeking clarification of the court's ruling or moving for an additional remedy, such as striking the detective's answer or directing the jury to disregard the comment. Appellants' argument that the court erred in "allowing Detective Williams' testimony to stand" is pure appellate afterthought.[9] The contention is not preserved for this Court's review.

Mr. Morris' request that this Court review Detective Williams' testimony, as well as Lt. Voorhaar's testimony, similarly is unpreserved for review. Recognizing this, he asks this Court to review his claims under the doctrine of plain error. The State argues that this issue is "not worthy of plain error review." We agree with the State.

To be sure, we have discretion under Md. Rule 8-131(a) to address an unpreserved issue. As the Court of Appeals has explained, however:

> It is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can

[9] We note that, in *Drake & Charles v. State*, 186 Md. App. 570, 592 (2009), *rev'd on other grounds sub nom. Charles v. State*, 414 Md. 726 (2010), when the trial judge instructed a witness to answer yes or no to the prosecutor's question whether the witness responded to the detectives' calls to discuss the case, the witness responded: "No, because I was afraid." (Emphasis omitted.). Counsel objected, and the trial court responded: "I didn't ask you why, the answer is no. Is that enough?" *Id.* (emphasis omitted). This Court held that, in responding to the objection, the court struck the non-responsive part of the answer, "the only feasible remedy available." *Id.* at 593-94. Similarly, here, the court's immediate response, directing the witness to answer only the questions asked, can be construed as sustaining the objection and striking the unresponsive answer. As indicated, any additional remedy desired by appellants was required to be requested to preserve any claim of error on appeal.

> be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

Chaney v. State, 397 Md. 460, 468 (2007). *Accord Robinson v. State*, 410 Md. 91, 104 (2009) (appellate court's "prerogative to review an unpreserved claim of error, however, is to be rarely exercised and only when doing so furthers, rather than undermines, the purposes of the rule").

This Court has pointed out the limits of plain error review:

> It is clear that, "when a defendant fails to object [to the actions of the trial court], an appellate court possesses plenary discretion to notice plain error material to the rights of a defendant, even if the matter was not raised in the trial court." *McMillan v. State*, 181 Md. App. 298, 359 (citation and internal quotation marks omitted), *cert. granted*, 406 Md. 744 (2008). But an appellate court should "intervene in those circumstances only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Richmond v. State*, 330 Md. 223, 236 (1993) (citations and internal quotation marks omitted). Even in cases where the error may be deemed to be "reversible," we have "reserve[d] our discretion to exercise plain error review for instances when the unobjected to error is 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Stone v. State*, 178 Md. App. 428, 451 (2008) (quoting *State v. Brady*, 393 Md. 502, 506-07 (2006) (further citation omitted)). It is only "'the extraordinary error and not the routine error that will cause us to exercise the extraordinary prerogative [of reviewing plain error].'" *Martin v. State*, 165 Md. App. 189, 195 (2005) (quoting *Williams v. State*, 34 Md. App. 206, 212 (1976) (Moylan, J., concurring)), *cert. denied*, 391 Md. 115 (2006).

James v. State, 191 Md. App. 233, 246-47 (parallel citations omitted), *cert. denied*, 415 Md. 338 (2010).

Here, we do not perceive the witness' comments on Ms. Johnson's pre-arrest silence to meet this test. Therefore, we will not exercise our discretion to conduct plain error review.

II.

Sufficiency of the Evidence

We next address appellants' arguments that the evidence was insufficient to support their convictions. In particular, Ms. Johnson contends that the evidence adduced at trial was legally insufficient to sustain her conviction for second degree assault. Mr. Morris contends that the "evidence was insufficient to convict [him] of wearing or carrying a deadly weapon openly with intent to injure." We will address each argument in turn.

A.

Standard of Review

This Court recently set forth the applicable standard of review in determining the sufficiency of the evidence on appeal:

> The test of appellate review of evidentiary sufficiency is whether, "'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Coleman*, 423 Md. 666, 672 (2011) (quoting *Facon v. State*, 375 Md. 435, 454 (2003)). The Court's concern is not whether the verdict is in accord with what appears to be the weight of the evidence, "but rather is only with whether the verdicts were supported with sufficient evidence -- that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994). "We 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference.'" *Cox v. State*, 421 Md. 630, 657 (2011) (quoting *Bible v. State*, 411 Md. 138, 156 (2009)). Further, we do not "'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Montgomery v. State*, 206 Md. App. 357, 385 (quoting *Morris v. State*, 192 Md. App. 1, 31 (2010)), *cert. denied*, 429 Md. 83 (2012).

Donati v. State, 215 Md. App. 686, 716, *cert. denied*, 438 Md. 143 (2014). *Accord Anderson v. State*, 227 Md. App. 329, 346-47 (2016).

B.

Ms. Johnson

Ms. Johnson argues that the evidence adduced at trial was legally insufficient to sustain her conviction for second degree assault. She contends that her "act of pushing Tyrone Jeter in an attempt to remove him from her own home did not amount to the type of behavior that should constitute the crime of assault in the second degree." In particular, Ms. Johnson argues that the State failed to prove the specific intent element of the offense, i.e., that she intended to cause harmful or offensive contact with Mr. Jeter.

The State contends that Mr. Jeter's testimony established that Ms. Johnson shoved Mr. Jeter three times without provocation and kicked him when he was engaged in the altercation with Mr. Morris. It contends that this evidence, viewed in the light most favorable to the State, was sufficient to permit a rational trier of fact to find that Ms. Johnson's actions satisfied all the elements of second degree assault. We agree.

This Court set forth the elements of second degree assault in *Rich v. State*, 205 Md. App. 227, 249 n.7 (2012), as follows:

> To convict a defendant of assault in the second degree, the State must prove the following elements: (1) the defendant caused offensive physical contact with, or harm to, the victim; (2) the contact was the result of an intentional or reckless act of the defendant and was not accidental; and (3) the contact was not consented to by the victim or was not legally justified.

All three of these elements was shown here. With respect to the first element, offensive contact, Mr. Jeter testified that Ms. Johnson pushed him in the chest three times and kicked him in the shoulder when he was on the ground. With respect to the third element, unconsented and unjustified contact, Mr. Jeter's testimony established that Ms. Johnson's conduct was not provoked, and his reaction, pushing Ms. Johnson back, clearly indicated that the contact was not consensual. With respect to the second element, that the contact was the result of an intentional act, it is well-established that "a finder of fact may . . . infer that the defendant intended the natural and probable consequences of the defendant's actions." *Jones v. State*, 440 Md. 450, 457 (2014). Here, the facts viewed in the light most favorable to the State demonstrate that Ms. Johnson, without provocation, extended her arms and made forceful contact with Mr. Jeter's chest, not once, not twice, but three times. This was sufficient for a reasonable factfinder to find that her conduct was intentional and not merely an accident. Accordingly, we hold that the evidence was sufficient to convict Ms. Johnson of second degree assault.

C.

Mr. Morris

Mr. Morris argues that the evidence was insufficient to convict him of wearing or carrying a deadly weapon openly with intent to injure "because producing a knife during a struggle in one's home does not constitute 'wearing or carrying' the weapon 'openly.'" He contends that his possession of the knife was merely "incidental" to the assault on Mr. Jeter, and there was no evidence that he "wore or carried the knife openly for any additional

amount of time." At most, he asserts, "[e]ven if the jury could infer that [he] possessed the knife before the assault, he would, at most, be concealing the knife, which is the opposite of wearing or carrying the knife openly."

The State argues that the evidence was sufficient to convict Mr. Morris of carrying a dangerous weapon openly with the intent to injure. It concedes that "no one testified that they saw [Mr.] Morris with the knife before he used it to stab [Mr.] Jeter," but it argues that the jury could "infer that [Mr.] Morris was elsewhere when retrieving the knife, or that he had previously retrieved it from the front room and armed himself for the independent purpose of using it against [Mr.] Jeter, *if* [Mr.] Jeter came into [Ms.] Johnson's house."

Appellant was convicted of violating Md. Code (2012 Repl. Vol.) § 4-101(c)(2) of the Criminal Law Article ("CR"), which states: "A person may not wear or carry a dangerous weapon . . . openly with the intent or purpose of injuring an individual in an unlawful manner." By contrast, CR § 4-101(c)(1) states: "A person may not wear or carry a dangerous weapon of any kind *concealed* on or about the person." (Emphasis added.).

In *Harrod v. State*, 65 Md. App. 128, 131 (1985), the defendant's wife testified that the defendant emerged suddenly from their bedroom with a hammer and threatened her and her friend with it. The defendant threw the hammer, reentered the bedroom, returned with a large hunting knife, and proceeded to threaten his wife and her friend with it. *Id.* On appeal, the defendant challenged his conviction for wearing or carrying a dangerous weapon with intent to injure. *Id.* at 138-140. We affirmed, concluding that the "record provide[d] ample evidence that appellant picked up the hammer, and then the knife, each

with the express intent or purpose of putting [his wife] and then [her friend] in fear of an imminent battery." *Id.* at 140.

In *Chilcoat v. State*, 155 Md. App. 394, 399 (2004), the defendant admitted that, during an argument, he grabbed a nearby beer stein and struck another person in the head with it. On appeal, he challenged his conviction for carrying a dangerous weapon with intent to injure on the ground that he did not "wear" or "carry" the weapon. *Id.* at 404. We agreed, quoting *Thomas v. State*, 143 Md. App. 97, 123 (2002), in which we explained:

> [T]he State was required to prove more than mere use of the weapons by appellant or recovery of them in his one-room residence, in the vicinity of the victim. If we were to adopt the State's position, it would mean that almost any time a person commits an offense with a dangerous weapon, he or she could also be convicted of having carried the weapon openly, with intent to injure.

Chilcoat, 155 Md. App. 409 (emphasis omitted). We noted that "most assaults of the battery type involve at least a few steps or other advancement toward the victim." *Id.* at 412. We distinguished *Harrod*, explaining that, in that case, "Harrod carried the hammer from the bedroom to the living room and then made another trip to the bedroom to retrieve the hunting knife and bring it back," whereas "Chilcoat's action [was] merely picking up a beer stein that was convenient to him and walking a few steps with it to reach the victim." *Id.* at 409. We concluded that this small amount of movement was merely "incidental" to the assault and not a separate crime of "carrying" a dangerous weapon. *Id.* at 412-13.

Here, the record contains virtually no evidence with respect to the knife other than that it spontaneously appeared during the fight between Mr. Morris and Mr. Jeter. In the absence of any evidence regarding where the knife came from, the jury was left to speculate

how Mr. Morris obtained possession of the knife and in what manner, if any, he was wearing/carrying it. Accordingly, we conclude that the evidence was insufficient to support the conclusion that Mr. Morris violated CR § 4-101(c)(2).

III.

Imperfect Defenses

Mr. Morris argues that he is "entitled to a new trial because the trial court erroneously refused to instruct the jury on imperfect self-defense, imperfect defense of others, and imperfect defense of habitation." He asserts that "evidence that [he] was being choked when he stabbed Mr. Jeter permitted the jury to infer that Mr. Morris acted in self-defense, and generating the perfect form of each defense necessarily generates the imperfect form of each defense."

The State contends that the circuit court "did not err when it declined to give the jury an instruction on imperfect self-defense." It asserts that Mr. Morris did not generate "some evidence" of self-defense "of any variety," and therefore, in succeeding in getting the court to instruct on perfect self-defense, Mr. Morris "received more than he was entitled to receive," and we should not "compound the error" with a "windfall" by giving Mr. Morris "another ungenerated defense instruction."

Maryland Rule 4-325(c) provides that the trial court must, upon the request of any party, instruct the jury regarding the applicable law. *Tucker v. State*, 407 Md. 368, 379 (2009). The court is required to give a requested instruction if: "'(1) the requested instruction is a correct statement of law; (2) the requested instruction is applicable under

the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given.'" *McMillan v. State*, 428 Md. 333, 354 (2012) (quoting *Thompson v. State*, 393 Md. 291, 302-03 (2006)).

In determining whether the evidence supports the giving of a requested instruction, there is "a relatively low threshold that must be met." *Id.* at 355. The defendant need only show "'some evidence' that supports the requested instruction," *Bazzle v. State*, 426 Md. 541, 551 (2012). "The source of the evidence is immaterial; it may emanate solely from the defendant." *Dykes v. State*, 319 Md. 206, 217 (1990). "[T]o ascertain whether 'competent evidence exists to generate the requested instruction, we view the evidence in the light most favorable to the accused.'" *Abbott v. State*, 190 Md. App. 595, 644 (2010) (quoting *Fleming v. State*, 373 Md. 426, 433 (2003)). "We review 'a trial court's refusal or giving of a jury instruction under the abuse of discretion standard.'" *Bazzle*, 426 Md. at 548 (quoting *Stabb v. State*, 423 Md. 454, 465 (2011)).

Perfect self-defense "is a complete defense to a charge of criminal homicide and, if credited by the trier of fact, results in an acquittal." *State v. Smullen*, 380 Md. 233, 251 (2004). Although imperfect self-defense is not a complete defense, it "'mitigates murder to voluntary manslaughter.'" *Wilson v. State*, 422 Md. 533, 541 (2011) (quoting *State v. Faulkner*, 301 Md. 482, 486 (1984)). Imperfect self-defense may also mitigate first degree assault to second degree assault in the same fashion. *See Christian v. State*, 405 Md. 306, 332-33 (2008).

There are four elements to a claim of perfect self-defense:

> (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.

State v. Marr, 362 Md. 467, 473 (2001) (quoting *Faulkner*, 301 Md. at 485-86). The difference between perfect and imperfect self-defense, aside from the consequences, "is that, in perfect self-defense, the defendant's belief that he was in immediate danger of death [or] serious bodily harm or that the force he used was necessary must be objectively reasonable. In all other respects, the elements of the two doctrines are the same." *Smullen*, 380 Md. at 253 (quoting *Burch v. State*, 346 Md. 253, 283 (1997)). *Accord Marquardt v. State*, 164 Md. App. 95, 139 n.22, *cert. denied*, 390 Md. 91 (2005).

Although the Court of Appeals has declined to establish a bright line rule mandating that, "where the defense of self-defense is generated, so too is the mitigator of imperfect self-defense," *Roach v. State*, 358 Md. 418, 433 (2000), it has noted the difficulty in contemplating "a situation where a defendant would be able to produce sufficient evidence to generate a jury issue as to perfect self defense but not as to imperfect self defense." *Faulkner*, 301 Md. at 502-03. *Accord Dykes*, 319 Md. at 214 (1990) (noting difficulty in envisioning circumstances sufficient to generate perfect self-defense but not imperfect self-defense, and stating that a defendant entitled to an instruction on perfect self-defense generally will be entitled to an instruction on imperfect self-defense). We agree. The

subjective elements of perfect self-defense and imperfect self-defense are the same; both require that the defendant actually believe there is a need to defend himself or herself. The choice between the two entails solely a determination of the reasonableness of the defendant's belief. Accordingly, we conclude, and the State commendably conceded at oral argument, that if the evidence here was sufficient to support an instruction on perfect self-defense, it was sufficient to support an instruction on imperfect self-defense.

As indicated, however, the State contends that Mr. Morris did not generate "'some evidence' of self-defense of any variety." It asserts that Mr. Morris failed to generate some evidence that he was not the initial aggressor, that he believed he was in imminent or immediate danger of death or serious bodily harm, or that deadly force was needed to repel Mr. Jeter's threatening behavior. We are not persuaded.

The evidence presented at trial, including the testimony of Ms. Johnson, permitted the jury to find the following facts:

1. Mr. Jeter was belligerent when Ms. Johnson and Mr. Morris knocked on his door and asked him to move his car.

2. Shortly after Ms. Johnson and Mr. Morris returned to Ms. Johnson's home, Mr. Jeter walked over and began banging on her front door and shouting for Mr. Morris to come out and fight him.

3. Ms. Johnson answered the door and told Mr. Jeter to go home.

4. Mr. Morris said he was not going to come outside to fight.

5. Mr. Jeter forced his way into Ms. Johnson's home, striking her with her front door in the process.

6. Ms. Johnson pushed Mr. Jeter, who responded by grabbing Ms. Johnson around the collar and throwing her to the ground.

7. Before Ms. Johnson could stand up, Mr. Jeter pursued Mr. Morris into the front room and began to choke him.

8. At some point while being choked by Mr. Jeter, Mr. Morris told Ms. Johnson to call 911.

9. A struggle in the front room ensued, which lasted for "a while."

10. Mr. Morris produced a knife, and he repeatedly stabbed Mr. Jeter until Mr. Jeter suddenly and spontaneously stopped choking Mr. Morris, whereupon the fight ended.

11. Mr. Jeter then left Ms. Johnson's home.

We disagree with the State that there was not "some evidence" that Mr. Jeter was the aggressor. Based on the above scenario, the jury could find that Mr. Jeter initiated the confrontation, demanded that Mr. Morris fight him, "busted" his way into Ms. Johnson's home, struck Ms. Johnson with the door, threw her to the ground, and then pursued Mr. Morris into the front room, where he proceeded to choke him. This constituted "some evidence" that Mr. Jeter was the aggressor.

We similarly disagree with the State's assertion that Mr. Morris failed to generate some evidence that he "used no more force than was reasonably necessary to defend himself in light of the threatened or actual harm." Ms. Johnson's testimony permitted the jury to find that Mr. Jeter, a large and fit individual,[10] was choking Mr. Morris during a fight in the front room. Under these circumstances, it was up to the jury to determine whether Mr. Morris' use of the knife was reasonable under the circumstances.

[10] Mr. Jeter testified that he was six feet tall, weighed 220 pounds, and exercised four to five times per week.

Accordingly, we conclude that there was "some evidence" that Mr. Morris' use of force was reasonably necessary under the circumstances.

Finally, the State argues that there was no evidence of Mr. Morris' state of mind to generate some evidence that he believed that he was in imminent danger of immediate bodily harm. Again, we disagree.

Clearly, the evidence that Mr. Morris was being choked permitted the jury to infer that he was in danger of bodily harm. *See People v. Vasquez*, 39 Cal. Rptr. 3d 433, 435 (Ct. App. 2006) (where witness testified that the victim was choking appellant when appellant drew his gun and shot him, the court should have instructed on imperfect self-defense because it was for the jury "to decide whether appellant actually feared serious injury or death from being choked"). Moreover, Mr. Morris told Ms. Johnson to call 911, a fact that suggests his concern, and which constituted some evidence that he believed that he was in danger of serious bodily harm or even death.

In sum, we conclude that there was "some evidence" of each element of imperfect self-defense such that Mr. Morris was entitled to a perfect self-defense instruction, and therefore, an imperfect self-defense instruction. Accordingly, the circuit court abused its discretion in declining to instruct the jury on imperfect self-defense. Because we are

reversing Mr. Morris' convictions, and because the other issues may not arise on retrial, we will not address them.

JUDGMENTS OF THE CIRCUIT COURT FOR CHARLES COUNTY INVOLVING MR. MORRIS REVERSED.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY INVOLVING MS. JOHNSON AFFIRMED.

COSTS TO BE PAID 80% BY CHARLES COUNTY AND 20% BY MS. JOHNSON.