UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1968

September Term, 2014

JAMES EARL DOBY

v.

STATE OF MARYLAND

Krauser, C.J.,
Graeff,
Friedman,

JJ.

Opinion by Graeff, J.

Filed: April 4, 2016

A jury in the Circuit Court for Prince George's County convicted appellant, James Doby, of: (1) possession of a firearm by a person with a felony conviction; and (2) wearing, carrying, or transporting a handgun.[1] The court sentenced appellant to ten years, all but five years suspended, without the possibility of parole, for the conviction of possession of a firearm with a felony conviction, and it merged for sentencing purposes the conviction for carrying a handgun.

On appeal, appellant presents the following two questions for this Court's review:

1. Did the circuit court abuse its discretion in refusing to instruct the jury on self-defense, defense of others, and necessity in relation to the charge of possession of a firearm as a felon?

2. Did the circuit court err in refusing to instruct the jury on mistake of fact?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On January 7, 2014, a fight occurred between appellant and William Johnson, the landlord of appellant's cousin, Iesha D.[2] Earlier that evening, Iesha told her boyfriend, Tevin Burrow, that Mr. Johnson sexually assaulted her. When Mr. Burrow asked Mr. Johnson if he had touched Iesha, Mr. Johnson responded: "Yes." A fight then broke out between Mr. Burrow and Mr. Johnson, and Iesha called 911. When the police responded,

[1] Appellant was found not guilty of first degree assault, second degree assault, and conspiracy to commit first degree assault.

[2] Because Ms. D. was a victim of sexual assault, we will not list her last name, and we will refer to her as Iesha.

Iesha told them about the fight, stating that Mr. Johnson had a gun and had sexually assaulted her.

After the police left, Mr. Johnson went to the Commissioner's office to file a petition for a peace order. Iesha called appellant and told him what had happened. She stated that Mr. Johnson had sexually assaulted her, beat up Mr. Burrow, and pointed a gun at her. She asked if she could stay at appellant's house. Appellant responded that Iesha could not stay at his place, but he offered to stay with Iesha at her place if Iesha came to pick him up.

Iesha and Mr. Burrow went to pick up appellant at his house. While in the car, appellant used Mr. Burrow's phone to call Mr. Johnson. Appellant told Mr. Johnson that he wanted to talk to him, and he asked Mr. Johnson if he had a gun. Although Mr. Johnson testified that he told appellant over the phone that he did not have a gun, appellant testified that, because Iesha had told him that Mr. Johnson had a gun, appellant called a friend and "obtain[ed] a gun for protection."

Mr. Johnson left the Commissioner's office and went back to his home, accompanied by a Sheriff, who intended to serve two interim peace orders. Mr. Johnson walked down the stairs and saw that the light was on in Iesha and Mr. Burrow's room, and the door was open. Mr. Johnson testified that appellant asked if he was the landlord, and Iesha said "that's him right there, get his ass." Mr. Johnson saw that appellant had a gun and he ran outside. He told the Sheriff that the "dude got an AK," and the Sheriff called for backup.

Backup officers responded and interviewed appellant and the others inside the house. Appellant directed the officers to the kitchen drawer where he had placed the gun. The officers recovered the gun and arrested appellant.

Appellant admitted that he had a gun with him on the night in question, and that the gun was exposed, but he testified that he never pointed the gun at Mr. Johnson, he never fired the gun, he did not intend to threaten Mr. Johnson with the gun, and he brought the gun with him only for protection, in case Mr. Johnson had a gun. According to appellant, he tried to talk to Mr. Johnson, but Mr. Johnson ran away. Appellant testified that he placed the gun in the kitchen drawer because he heard police officers outside the house.

After the jury convicted appellant of the firearm charges, this appeal followed.

DISCUSSION

I.

Appellant contends that the circuit court erred in failing to instruct the jury that the defenses of self-defense and defense of others applied, not only to the assault charges, but also to the charge of possession of a firearm after being convicted of a felony. He asserts that, because Maryland permitted a justification defense for the charge of unlawful possession of a handgun in *State v. Crawford*, 308 Md. 683, 697 (1987), the instruction was a correct statement of law. He further asserts that there was sufficient evidence to generate the instruction, and the requested instruction was not fairly covered elsewhere, and therefore,

the circuit court erred in failing to give the self-defense and defense of others justification instruction regarding the felon in possession charge.

The State contends that "the trial court properly exercised its discretion when it refused to extend the defenses of self-defense and defense of others to the non-assaultive crimes" of "felon in possession of a firearm and when it declined to propound a necessity instruction." It argues that, even if there was an abuse of discretion, any error was harmless and does not require reversal of appellant's convictions.

Maryland Rule 4-325(c) provides, in relevant part: "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." As such, "[a] trial court must give a requested jury 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.'" *Cost v. State*, 417 Md. 360, 368-69 (2010) (quoting *Dickey v. State,* 404 Md. 187, 197-98 (2008)). We review a trial court's decision not to give a requested jury instruction under the abuse of discretion standard. *Carroll v. State*, 428 Md. 679, 689 (2012). An abuse of discretion occurs "'where no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles.'" *Thomas v. State*, 213 Md. App. 388, 405 (2013) (quoting *Hajireen v. State*, 203 Md. App. 537, 552 (2012)), *cert. denied*, 437 Md. 640 (2014).

Here, we perceive no abuse of discretion by the circuit court. Even if we agreed with appellant's argument that justification was a defense to the charge of possession of a firearm after conviction of a felony, appellant did not elicit sufficient evidence to support such a defense pursuant to the test set forth in *Crawford*.[3] In that case, the Court of Appeals made clear that, although "necessity may be a defense to the charge of unlawful possession of a handgun," the defense was limited to extraordinary circumstances. *Crawford*, 308 Md. at 696.

Crawford testified that he was in his apartment when an assailant suddenly opened fire in this direction. *Id.* Crawford first hid in a bathroom shower before moving across his living room to the phone. *Id.* Realizing that his phone service was cut off because he was behind on paying the bill, Crawford began beating on the floor with a piece of wood and turned up his stereo in an attempt to attract his neighbors' attention. *Id.* After waiting behind the bar in his house for a period of time, he decided to crawl to his bedroom, intending to lock himself inside. *Id.* As he was entering his bedroom, the assailant fired again and a second assailant appeared. *Id.* at 686-87. Crawford struck one of the assailants with a stick, grabbed the gun, and during the ensuing struggle, Crawford fell out a window onto the ground below. *Id.* at 687. Crawford then heard footsteps coming toward him. *Id.* He "realized the gun was there," picked it up to defend himself, and tried to crawl away. *Id.* Crawford encountered the assailants in the parking lot, and he was shot several times in the

[3] In *State v. Crawford*, 308 Md. 683, 693-95 (1987), the crime was possession of a handgun without a permit, not possession of a firearm after a prior conviction of a felony.

legs. *Id.* at 688. He subsequently was apprehended by the police and charged with unlawful possession of a handgun. *Id.* at 685.

In holding that the trial court erred in refusing to instruct the jury on the defense of necessity, the Court explained that the necessity defense "arises when an individual is faced with a choice of two evils, and one is the commission of an illegal act." *Id.* at 691. In that situation, "'the greater good for society will be accomplished by violating the literal language of the criminal law.'" *Id.* (quoting WAYNE R. LAFAVE, CRIMINAL LAW § 50 (1972)). The Court stated that when a person

> finds himself in sudden, imminent danger of loss of life or serious bodily harm, or reasonably believes himself or others to be in such danger, and without preconceived design on his part a handgun comes into his possession, he may temporarily possess the weapon for a period no longer than the necessity or apparent necessity requires him to use it in self-defense.

Id. at 696.

In limiting the defense of necessity to only extraordinary circumstances, the Court set forth a five-prong test that must be met before the necessary defense is available:

> (1) the defendant must be in present, imminent, and impending peril of death or serious bodily injury, or reasonably believe himself or others to be in such danger; (2) the defendant must not have intentionally or recklessly placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct; (3) the defendant must not have any reasonable, legal alternative to possessing the handgun; (4) the handgun must be made available to the defendant without preconceived design, and (5) the defendant must give up possession of the handgun as soon as the necessity or apparent necessity ends.

Id. at 699.

Here, appellant did not satisfy the *Crawford* test. Initially, there was no evidence to satisfy the first factor, i.e., reasonable belief of "present, imminent, and impending peril of death or serious bodily injury" to himself or others. *Crawford* and other cases that have found the defense of necessity applicable have involved a much greater degree of immediacy than was present in this case. *See, e.g., United States v. Paolello*, 951 F.2d 537, 538-39 (3d Cir.1991) (defense of necessity generated where defendant seized gun to neutralize attacker); *People v. King*, 582 P.2d 1000, 1003 & n.3 (Cal.1978) (defense of necessity generated where defendant was handed gun to defend himself, his habitation, and others during a home invasion). Here, by contrast, as the State notes, appellant's fear was "an attenuated and generic belief that some unspecified harm of an unclear nature may befall him at some uncertain time in the future."

Moreover, the evidence did not satisfy the second prong of the *Crawford* test, i.e., that appellant did not "intentionally or recklessly place[] himself in a situation in which it was probable that he would be forced to choose the criminal conduct." *Id.* at 699. Indeed, appellant purposefully went to Iesha's house and intentionally armed himself, making it "probable that he would be forced to choose the criminal conduct." *Id.* at 699.

With respect to the third factor, appellant had a "reasonable, legal alternative" to possessing the handgun. *Id.* at 697. Instead of getting a gun, and returning to the residence, he could have looked for another place for Iesha to stay or driven to the police station to ask for additional help.

With respect to the fourth factor, the Court of Appeals in *Crawford* explained that the circumstances of Crawford's possession satisfied the requirement that the handgun be made available to the defendant without preconceived design because Crawford's "possession of the handgun was merely fortuitous. The handgun originally was possessed by Crawford's assailant and became available to Crawford only after he disarmed the assailant. Thus, Crawford had no "preconceived design to gain possession of the handgun before being attacked." *Id.* at 700. Here, by contrast, appellant called a friend to obtain a gun for protection before returning to the apartment.

Accordingly, under these circumstances, even if we were to agree that *Crawford* applied here, appellant's claim would fail. We agree with the reasoning set forth in *United States v. Alston*, 526 F.3d 91 (3d Cir. 2008), a case where the United States Court of Appeals for the Third Circuit held that Alston was not entitled to a justification defense. The court stated:

> "We must take care not to transform the narrow, non-statutory justification exception to the federal anti-felon law into something permitting a felon to possess a weapon for extended periods of time in reliance on some vague 'fear' of street violence." The defendants who have been granted the defense faced split-second decisions where their lives, or the lives of others, were clearly at risk. Alston did not face such a situation.

Id. at 96-97 (citation omitted).

Because appellant failed to satisfy several of the *Crawford* factors, the circuit court did not err in refusing to instruct the jury regarding a justification defense to the charge of

possession of a firearm after being convicted of felony. Appellant states no claim for relief in this regard.

II.

Appellant's next contention is that the circuit court erred in refusing to give the jury an instruction on mistake of fact.[4] He argues that a mistake of fact instruction was applicable "because that defense would have been available to negate the *mens rea* for the crimes charged against [appellant]," asserting that his reliance on Iesha's statement that Mr. Johnson was hostile and armed justified him in possessing a gun.

[4] Defense counsel requested the Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") on the mistake of fact defense, which reads:

> 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 [alleged mistake];
>
> (2) the defendant's belief and actions were reasonable under the circumstances; and
>
> (3) the defendant did not intend to commit the crime of [crime] and the defendant's conduct would not have amounted to the crime of [crime] 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] [defendant would have the defense of (defense)].
>
> In order to convict the defendant, the State must show that the mistake of fact defense does not apply in this case by proving, beyond a reasonable doubt, that at least one of the three factors previously stated was absent.

MPJI-Cr 5:06.

The State contends that the circuit court did not abuse its discretion in refusing to instruct the jury on mistake of fact because the instruction was not generated by the facts of the case. It asserts that, any mistake by appellant about Mr. Johnson's having a gun did not negate the existence of the mental state essential to the crime charged.

As indicated, "[w]hether 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). "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. *Id.* at 484.

In *General*, 367 Md. at 480-81 n.4., the defendant was charged with violation of Maryland Code (2001 Supp.) § 20-102 of the Transportation Article (requiring a driver to remain at the scene of an accident resulting in bodily injury or death) and § 20-104 (establishing the duty to give information and render aid). The Court noted that "[s]ections 20-102 and 20-104 require knowledge that the accident resulted in injury or death to a person, or property damage, respectively." *Id.* Accordingly, because "knowledge that the defendant struck a person [was] an element of the charged offenses . . . [i]f petitioner did not know that he struck a person and reasonably believed that he merely struck a white bag, then his mistake of fact was a defense to those crimes." *Id.* at 488. In that circumstance, the

mistake of fact instruction was generated, and the trial court erred by failing to give the requested instruction. *Id.* at 490.

Here, although appellant was charged with various offenses, we are concerned on appeal only with the charges on which he was convicted, firearm possession charges. The mental state essential for a possession of a firearm charge "normally requires knowledge of the illicit item." *Parker v. State*, 402 Md. 372, 407 (2007).[5] Thus, whether appellant was mistaken about Mr. Johnson's possession of a gun was not relevant to, and did not negate, the existence of the mental state essential to the firearm possession charges of which appellant was convicted. Accordingly, the circuit court did not abuse its discretion in declining to give a mistake of fact instruction.

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

[5] Appellant admitted at trial that he possessed a gun and that he knew it was illegal for him to possess a gun in light of his prior conviction for distribution of cocaine.