Circuit Court for Baltimore City
Case No. 115110006

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2268

September Term, 2015

EDGAR BROCKMAN

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Kenney, James, A., III
(Senior Judge, Specially Assigned),
JJ.

Opinion by Kehoe, J.

Filed: August 2, 2017

On October 8, 2015, a jury sitting in the Circuit Court for Baltimore City convicted Edgar Brockman of possession of a regulated firearm after being convicted of a disqualifying crime, and wearing, carrying, and transporting a handgun. The court sentenced him to a total of ten years of incarceration and suspended five years of that sentence.[1] The court placed him on supervised probation for three years upon release. Brockman presents the following questions for our review:

1. Did the trial court err in denying Brockman's request for a jury instruction on duress?

2. Did the trial court err when it instructed the jury on "concealment or destruction of evidence?

For the reasons discussed below, we will affirm.

Background

Appellant does not argue that the evidence presented to the jury was insufficient to support the verdicts against him, so we will summarize the evidence in the light most favorable to the State in order to place appellant's contentions in context. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

[1] The court sentenced Brockman to ten years of incarceration on the possession of a regulated firearm after being convicted of a disqualifying crime count and suspended five years of that sentence. The five active years of incarceration were ordered to be served without the possibility of parole. The court sentenced Brockman to three years of incarceration on the wearing, carrying, and transporting a handgun and ordered that it run concurrent to the possession of a regulated firearm count.

On the morning of March 24, 2015, Edgar Brockman received a phone call from Montae Boykin asking him for a ride to the Broadway Diner on Eastern Avenue. Brockman agreed to drive him. Brockman drove to Boykin's house and picked up Boykin and another man named Gary Fayall, and the three men then drove to the diner. Along the way, Boykin, who was sitting in the front passenger seat, pulled out a gun and placed it in the glovebox. Brockman testified that he then "pulled over immediately and locked the gun away for safety reasons." He retained possession of the key to the glove box.

Once at the diner, the trio waited in the car for another man who had not yet arrived. Boykin then asked Brockman to take them to the Eastpoint Mall, and Brockman agreed. When they arrived at the mall, Boykin and Brockman exited the vehicle and went their separate ways while Fayall stayed in the car. Brockman took the keys to his car, and to the glove compartment, with him. After visiting the food concession stand at the entrance, Brockman reunited with Boykin who informed Brockman that he was ready to go. The three men went back to the diner where Brockman and Fayall remained in the car, and Boykin went inside. Boykin then emerged from the diner with another man whom Brockman did not know. The other man got in a white Mustang, which Brockman followed to the parking lot on O'Donnell Street at Boykin's request. Boykin, Fayall and the man in the Mustang were planning to rob the Horseshoe Casino in Baltimore.

In the parking lot, Boykin engaged in a conversation with the man in the Mustang. It was unknown at this time to Brockman and his co-defendants that the man in the Mustang was a confidential informant ("CI") working for the Bureau of Alcohol,

Tobacco, Firearms, and Explosives in collaboration with the Baltimore City Police Department. During the conversation, Brockman overheard the CI informing Boykin of the need to change his license plates. Boykin asked Brockman if he had a screwdriver, after which Brockman got out of his car. Shortly after, ATF agents and Baltimore City Police officers appeared on the scene and arrested Brockman and his co-defendants. Brockman was charged with attempted armed robbery, conspiracy to commit robbery, use of a firearm in the commission of a crime of violence, and other related firearm offenses.

Brockman testified in his own defense that he became nervous and scared when Boykin pulled out the gun because he had a felony record and was "not allowed to be around a firearm." He also testified that although he did not fear Boykin, he did "fear the uncertainty of knowing what [was] going on and whether anybody else has a weapon in [his] vehicle." Brockman requested a duress instruction, and the court refused to grant the instruction. On the other hand, the prosecutor asked the court to instruct the jury that it could infer guilt from a defendant's concealment or destruction of evidence. The court granted this request.

The jury convicted Brockman of possession of a regulated firearm after being convicted of a disqualifying crime, and wearing, carrying, and transporting a handgun. Boykin and Fayall were not charged with the handgun offenses and were acquitted of all the other charges.

Analysis

I. Brockman's request for a duress instruction

Brockman argues that the trial court erred in denying Brockman's request for an instruction on duress. He argues that the trial court "erroneously interpreted" the duress instruction as requiring Brockman to specifically express "'fear' of another person." The State responds that the "trial court soundly exercised its discretion to refuse to instruct the jury on duress," because the "facts adduced at trial did not generate the issue." The State is correct.

A 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." Md. Rule 4-325(c). As the Court of Appeals stated in *Dickey v. State*, this rule requires that a trial court 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.

404 Md. 187, 197-98 (2008) (internal citations omitted). A trial court "need not give the instruction, however, unless the defendant has produced 'some evidence' sufficient to give rise to a jury issue on the defense." *Marquardt v. State*, 164 Md. App. 95, 131 (2005) (quoting *Dykes v. State*, 319 Md. 206, 216 (1990)). Specifically,

> 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.

Bazzle v. State, 426 Md. 541, 551 (2012) (internal citations, punctuation, and quotations omitted).

The parties do not dispute that the requested instruction was a correct statement of the law that was not covered by the other instructions. Therefore, our task is to decide whether there was "some evidence" from which the jury could have rationally concluded that he was acting under duress. The court denied counsel's request for the instruction because, in its view, the evidence did not support the instruction:

> Well, just for the record, I do not find that his explanation was reasonable. I don't even think he's at the low threshold to the extent that this is going to be reviewed by an appellate court. If there was any fear that he had, it was not of Mr. Boykin. His fear was of a situation in which there was a gun in his glove compartment.
>
> And if he's a 48 year old man with a 21 year old young man in the car, and if that's what his fear is, all he has to do is say, sir, I have – T, his friend, good friend – say, I have a felony record, please get the gun out of my car. That is the reasonable thing to do, it is the only reasonable thing to do, and there's nothing at all reasonable about his reaction to this. That's why I said I'm not going to give the instruction. Just for the record.
>
> The defense of duress requires evidence of a threat against the defendant that was:
>
> present, imminent, and impending, and of such a nature as to induce well grounded apprehension of death or serious bodily injury if the act is not done. It must be of such a character as to leave no opportunity to the accused to escape. Mere fear or threat by another is not sufficient nor is a threat of violence at some prior time.

McMillian v. State, 428 Md. 333, 354 (2012) (internal citations and quotations omitted).

This requirement is reflected in the Maryland Pattern Jury Instructions, although articulated differently:

(1) the defendant actually believed that the duress placed [him][her] in immediate and impending danger of death or serious bodily harm;
(2) the defendant's belief was reasonable;
(3) the defendant had no reasonable opportunity for escape; and
(4) the defendant committed the crime because of the duress.

Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 3:26, at 40 (MSBA 2d ed. 2012).

When Brockman asked for these jury instructions, the court appropriately analyzed whether he met the "low threshold" of evidence that warranted an instruction of duress to the jury. The court denied Brockman's request because his belief that the duress placed him in immediate and impending danger or death was not reasonable. Brockman testified he had known Boykin for about seven months, would see him a "couple times a week," and that their relationship was "friendly." Brockman had been in Boykin's home and had driven him around. Brockman testified that when Boykin took out the gun and placed it in his glove compartment box he was "nervous" and "scared" and that he "locked the gun away for safety reasons, [he] didn't want any problems." Brockman further testified that he never told Boykin that he was prohibited by law from possessing a firearm, because he was "scared" and "didn't know what was going to happen." Brockman testified that he was scared because he "felt something was going on and didn't want to be a part of it." After locking the gun in the glove compartment box, Brockman continued driving to the diner, and upon discovering the CI was not there, Brockman drove Boykin and Fayall to the mall. Brockman left the car and went inside the mall, separating himself from Boykin. When asked why he didn't call the police

Brockman responded that he didn't have his phone. When asked why he didn't run away, Brockman responded that he "didn't know what could happen," and that they knew where he lived, and that he "didn't want to get nobody in trouble." After going to the mall, Brockman then drove Boykin and Fayall back to the diner and eventually to the parking lot on O'Donnell Street. During cross-examination, the State questioned Brockman regarding his fear:

[THE STATE]: You didn't fear Mr. Boykin, correct?

[BROCKMAN]: I wasn't sure what was going on at that point, all I know is there was two kids with a gun in my car.

[STATE]: Right. But you didn't fear Mr. Boykin at that stage, correct?

[BROCKMAN]: Did I fear him? I feared the situation.

* * *

[STATE]: So this man that you've known for seven months, you've been to his house, seen him two or three times a week, you still won't say you didn't fear him, correct?

* * *

[BROCKMAN]: Did I fear him at that time? No.

[STATE]: No?

[BROCKMAN]: No, I did not.

[STATE]: Okay.

[BROCKMAN]: I had no reason to fear Mr. Boykin, I feared the situation, among other things.

In short, Brockman failed to present "some evidence" that he acted under duress. *Marquardt*, 164 Md. App. at 131 (quoting *Dykes*, 319 Md. at 216). Brockman's fear that "something was going on" that he didn't want to be a part of, or that he could be caught with a handgun, is not enough. In order to warrant the duress instruction, he needed to present evidence that he had an actual, and reasonable, fear of immediate and impending danger of death or serious bodily harm at the hands of Boykin or Fayall, and that he was unable to escape. When asked specifically, several times, if he was fearful of Boykin, Brockman responded that he was not, and that he had "no reason to fear [him]." Brockman also testified that he went into the mall by himself, thereby giving him an opportunity to escape. The court committed no error in denying Brockman's request that the jury be instructed on duress.

II. The instruction on the concealment or destruction of evidence

At trial, the State requested the court to instruct the jury as to concealment or destruction of evidence as consciousness of guilt as provided in Maryland Criminal Pattern Jury Instructions 3:26 which reads as follows:

> You have heard that the defendant [concealed or destroyed] evidence in this case. Concealment or destruction of evidence is not enough by itself to establish guilt, but may be considered as evidence of guilt. Concealment or destruction of evidence may be motivated by a variety of factors, some of which are fully consistent with innocence.
>
> You must first decide whether the defendant [concealed or destroyed] evidence in this case. If you find that the defendant [concealed or destroyed] evidence in this case, then you must decide whether that conduct shows a consciousness of guilt.

The State then withdrew its request for the whole instruction and instead asked the court to give only the first paragraph. Brockman's trial counsel agreed that the second paragraph should be omitted but additionally objected to the first paragraph "because it's a misstatement. [T]he evidence is that the CI was the one who was trying to change [the license plate], and he didn't even do it." Ultimately, the court decided to give the abridged instruction because the CI "asked Mr. Boykin [for a screwdriver], Mr. Boykin then asked Mr. Brockman, that's what the evidence is."

The court ultimately instructed the jury as to concealment or destruction of property as follows:

> You have heard that one or more defendants were attempting to change the license plates on the vehicle to be used in a robbery and/or concealed a handgun. Concealment or destruction of evidence is not enough by itself to establish guilt, but may be considered as evidence of guilt. Concealment or destruction of evidence may be motivated by a variety of factors, some of which are fully consistent with innocence.

Brockman makes several contentions regarding the concealment of evidence instruction.

First, he argues that the court erred by instructing the jury that it could find that one or more defendants concealed a handgun in the locked glove box, and that such evidence may be considered evidence of guilt, because this theory was never raised by either party at trial. Brockman failed to present this objection at trial and it is not preserved for appellate review. *See* Md. Rule 4-325(e) "No party may assign as error the giving or the 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.").

Second, Brockman contends that it was misleading to instruct the jury that one or more defendants engaged in concealment or destruction of evidence merely because the informant asked codefendant Boykin for a screwdriver, and Boykin simply relayed that request to Brockman. Brockman further argues that there was no evidence that Brockman knew why Boykin requested a screwdriver. Brockman also contends the trial court erred by omitting the second paragraph of the pattern jury instructions.

In response, the State argues that the court properly instructed the jury that it could find that one or more defendants concealed evidence by attempting to change the license plates.

The CI testified that while sitting outside of Brockman's car in the diner's parking lot, he told all three defendants that he "had to go down and change the tags on [his] car," and asked them to follow him. Brockman then followed the CI in his car to the parking lot on O'Donnell Street. The CI testified that once they reached the O'Donnell Street parking lot, he told Boykin that he needed to change the tags on his car, but that he didn't have a screwdriver. The CI testified that Boykin then asked Brockman if he had a screwdriver whereupon Brockman exited his car and went to the rear of the vehicle. This testimony provided some evidence that Brockman knew the CI was attempting to conceal his license plate and that Brockman began to assist him in that endeavor. Therefore, the evidence presented supported the giving of the concealment of evidence instruction.

Third, Brockman alleges that it was plain error for the court to omit the second paragraph of the jury instruction. The State responds that plain-error review is not available because at trial, Brockman agreed to the deletion of the paragraph that he now says should have been given. We agree with the State on this point. *See Carroll v. State*, 202 Md. App. 487, 509, (2011), a*ff'd*, 428 Md. 679 (2012) (discussing distinction between "between forfeiture, which is 'the failure to make a timely assertion of a right,' and waiver, which is the 'intentional relinquishment or abandonment of a known right.'" (quoting *State v. Rich*, 415 Md. 567, 578–80 (2010)). After explicitly agreeing to the omission of the second paragraph at trial, appellant cannot now argue that the second paragraph should not have been omitted.

Moreover, any suppositional error was regarding the instruction was harmless. An error is harmless when the appellate court concludes beyond a reasonable doubt that the error did not contribute to the jury's verdict. *Dionas v. State*, 436 Md. 97, 121 (2013); *Dorsey v. State*, 276 Md. 638, 659 (1976).

Brockman stipulated that he was prohibited from carrying a handgun. He testified that he knew he "couldn't be around a gun," and that upon seeing Boykin place the gun in the glove compartment box, he "locked the gun away for safety reasons." He also testified that he retained possession of the only key to the glove compartment. In other words, Brockman admitted on the stand that he was in constructive possession of the firearm. *See, e.g. Smith v. State*, 374 Md. 527, 545–56 (2003) (Evidence that there was a handgun hidden in the trunk of a car that defendant leased and was driving at the time of

his arrest was sufficient to support conviction of possession of a firearm.). It is impossible for us to conceive how an error as to the concealment of evidence instruction jury could have affected the jury's verdict in light of this unchallenged evidence.

THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE AFFIRMED; COSTS TO BE PAID BY APPELLANT.