Circuit Court for Carroll County
Case No. 06-K-16-047000

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2743

September Term, 2016

CHRISTIAN SHENK

v.

STATE OF MARYLAND

Berger,
Arthur,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: December 19, 2017

Christian Shenk, appellant, was charged in the Circuit Court for Carroll County with attempted second-degree murder, first-degree assault, use of a firearm in the commission of a felony, and reckless endangerment. After a jury trial, appellant was acquitted of all charges except reckless endangerment. The court sentenced appellant to five years' imprisonment, with all but six months suspended, to be followed by a five year term of probation. On appeal, appellant presents the following questions for our review:

1. Was it error to refuse to give an instruction on wanton trespass?
2. Was it error or an abuse of discretion to deny [appellant's] motion for a new trial?

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

BACKGROUND

On December 22, 2015, Bruce Howard, a private process server, attempted to serve appellant with a summons and other civil process papers at appellant's residence at 4300 Salem Bottom Road in Westminster (the "Property"). The Property included a farmhouse that was located at the end of a long driveway. At approximately 7:00 p.m., Mr. Howard knocked on the front door of the residence, but no one answered. He left the residence and returned at approximately 9:30 p.m., but again no one answered when he knocked on the door. Expecting that the residents should be returning shortly, Mr. Howard parked his car at the top of the driveway at the edge of the grass, leaving room for another car to pass, and waited for approximately one and a half hours for the residents to return home.

As cars approached Mr. Howard's location, he illuminated the interior light of his car so that he was visible. Mr. Howard observed a white vehicle pass him slowly on the main road, and then return to Mr. Howard's location at the top of the driveway. As the vehicle approached, he observed a driver and a passenger inside. Mr. Howard exited his vehicle and "held the court papers in [his] hand," saying "I'm looking for [appellant], I have court papers here … [from] Baltimore County District Court." The white vehicle maneuvered around Mr. Howard without stopping, almost hitting his vehicle, before continuing down the driveway.

Mr. Howard waited at the top of the driveway for some time "to give them time to get down to the house," and then he drove down the driveway toward appellant's house. There was no vehicle in front of the house and no lights were on in the house when he reached the bottom of the driveway. Mr. Howard sat in his vehicle with his headlights on "for a second or so," and "tooted" his car horn, calling out for appellant, in an attempt to attract attention.

A few minutes later, Mr. Howard noticed someone standing to the left side of his vehicle smoking a cigarette. Mr. Howard exited his vehicle and announced to the individual that he had court papers for appellant. As the individual approached him, Mr. Howard realized that it was a woman, and that she was pointing a cell phone at him. He said to her, "oh, you are taking my picture … could I take your picture?" He told the woman that he had court papers and that he wanted to serve appellant. Once he determined that the woman was also a resident of the address, he told her "what the papers were about," and left the papers on the ground behind his vehicle.

As he was preparing to leave, Mr. Howard heard loud noises coming from the garage area, and realized that someone was running toward him "yelling" at him. Mr. Howard attempted to identify himself, offering to show his "ID." Although the fog made it difficult to see the individual approaching, Mr. Howard soon realized that he was "looking down the barrel of [appellant's] rifle." At that point, Mr. Howard got in his car "as fast as [he] could" and began to drive away, when he heard gunshots. He called 9-1-1 and waited at the top of the driveway for help to arrive. Mr. Howard's 9-1-1 call was played for the jury and admitted into evidence.

The exterior and interior of Mr. Howard's vehicle, including the steering column and the armrest, sustained multiple bullet holes. Mr. Howard was not struck by the bullets, but he testified that he continues to suffer from a long-term ringing sensation in his right ear as a result of the gunshots. Mr. Howard stated that he did not observe any "No Trespassing" signs posted on the Property, and that if he had seen such signs, he would have left a note on the mailbox with his contact information, asking appellant to contact him regarding a lawsuit.

A video recording taken from the cell phone of Sarah Morgan, appellant's then-girlfriend, was introduced into evidence by the State and played for the jury. In the recording, appellant can be heard demanding of Mr. Howard, "You hear, you hear, who the F are you? Huh? Who the F are you?" and after the firing of gunshots, appellant continued to demand, "Who the F are you? Who the F are you?"

On December 23, 2015, Carroll County Sheriff's Detective Richard Harbaugh interviewed appellant at the Sheriff's Office in Hampstead. Following his interview of

appellant, Detective Harbaugh obtained and executed a search warrant at the Property. Detective Harbaugh located five spent firearm shell casings and two live rounds on the ground outside the garage. Detective Harbaugh also testified that he did not observe any "No Trespassing" signs on appellant's driveway. Several Carroll County Sheriff's Office deputies testified that they were dispatched to the Property on the night in question, and that they had not observed any "No Trespassing" signs on the driveway leading to appellant's residence, but also stated that they had not looked for any such signs.

Testifying on his own behalf, appellant stated that on December 22, 2015, he returned home sometime after 9:00 p.m., using a second driveway located on the back entrance to the Property. He testified that he was in bed in his home when he heard Ms. Morgan driving down his driveway. He looked outside and saw Ms. Morgan and "a large black man" speaking in loud voices and gesturing with their hands. Appellant went downstairs to his garage and retrieved his loaded .357 rifle from his tool box. He exited the house through his garage yelling, "get the F off my property," and "Who are you?" and "[G]et the F off my property." When he received no response, he again yelled, "Get the F off my property" and fired the rifle twice in the air.

Appellant stated that his gun misfired because he had forgotten to turn the safety off. Appellant removed the safety and fired multiple shots in the air and at the ground until the gun stopped firing. Appellant explained that "[a]s excited" as he was, and "as much adrenaline as he had popping," he had no idea how many shots he had fired. Appellant stated that he did not intend to injure Mr. Howard, but intended to force him to

leave the Property because appellant was concerned for his safety, the safety of Ms. Morgan, and the protection of his home.

The defense introduced into evidence two photographs of "POSTED-No Trespassing" signs, which appellant identified as signs that were posted on his driveway on December 22, 2015. Appellant stated that one of the signs had "grown into the tree" and that "vines had grown over the top of the signs." Several of appellant's friends and a neighbor testified that there were two No Trespassing signs on appellant's property on December 22, 2015.

DISCUSSION

I.

Jury Instructions

Appellant contends that the trial court erred in refusing to give his requested jury instruction for "wanton trespass,"[1] which stated as follows:

> WANTON TRESPASS ON PRIVATE PROPERTY
>
> Should you find that Mr. Howard trespassed upon the posted property of [appellant] on December 22, 2015 at approximately 10:45 p.m., you are instructed as follows:
>
> The intentional infliction upon another of a harmful or offensive contact or other bodily harm by a means not intended to cause … serious bodily harm is privileged for the purpose of preventing or terminating another's intrusion upon the actor's possession of land or chattels, if (1) such intrusion is not privileged, and (2) the actor reasonably believes that

[1] In Maryland, the criminal offense of "wanton trespass" prohibits a person from entering, crossing over, or remaining on the private property of another after having been notified by the owner not to do so. Maryland Code (2002, 2012 Repl. Vol, 2017 Supp.), Criminal Law Article ("C.L.") § 6-403.

> the intrusion can be prevented or terminated only by the immediate inflict[ion] of the bodily harm, and (3) the means he uses are reasonable, and (4) he has first requested the other to desist from the intrusion and the other has disregarded the request, or he reasonably believes that a request will be useless, or it will be dangerous to make a request, or substantial harm will be done to the land or chattel before a request can be made. 1 Restatement, Torts, sec. 77.
>
> You should also know that the rule that the privilege to intentionally inflict bodily harm upon another for the purpose of preventing or terminating the other's intrusion upon the actor's possession of land or chattels is not affected by the fact that the other reasonably but mistakenly believes that he has a right or privilege to intrude, unless the actor intentionally or negligently causes the other's mistake.
>
> It is your determination whether [appellant's] use of force was unreasonably excessive. In arriving at your decision, keep in mind that it is the State's burden to prove beyond a reasonable doubt that [appellant's] use of force under the circumstances of the events of December 22, 2015 was unreasonable.

In denying appellant's request for the "wanton trespass" instruction, the court stated:

> And the request and instruction on wanton trespass, the [c]ourt, again, does not believe that that is an accurate statement of the law in criminal cases particularly as it applies to this case so the Court will decline to give those requested instructions.

Pursuant to Maryland Rule 4-325(c), a trial 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." The court shall give a requested instruction if (1) it is a correct statement of the law, (2) is generated by the evidence, and (3) is not fairly covered by the other instructions given. *Preston v. State*, 444 Md. 67, 81-82 (2015) (and cases cited therein). A trial court's decision as to whether to give a jury instruction is reviewed for an abuse of discretion unless the refusal is a clear error of law. *Id.* at 82.

Appellant contends that the court improperly determined that his proposed "wanton trespass" instruction was not applicable because the instruction was a statement of tort law, applicable in civil cases. Specifically, appellant argues that his requested instruction was applicable in this case pursuant to *Maddran v. Mullendore*, 206 Md. 291, 300 (1955), in which the Court of Appeals adopted the rules of law set forth in 1 Restatement, Torts, §77 for "infliction of bodily contact by use of force not threatening death or serious bodily harm," §78 for "mistake of fact," and §82 "effect of excessive force," and applied those principles in an assault and battery case.

In *Maddran*, the plaintiff owned a portion of an alleyway that was subject to an easement owned by the defendant, but which the plaintiff disputed. *Id*. at 295-96. Determined to prevent defendant from accessing the alley, plaintiff sat in a chair on the alleyway, blocking defendant's access, and refused to move. *Id*. at 296. Defendant "pushed the chair and plaintiff out of the way," and proceeded down the alley with a delivery for his business. *Id*. In deciding that the defendant was not liable for assault and battery, the Court adopted the rule that "the intentional infliction upon another of harmful or offensive contact or other bodily harm by a means not intended to cause death or serious bodily harm is privileged, for the purpose of preventing or terminating another's intrusion upon the actor's possession of land or chattels." *Id*. at 300.

Appellant's proposed "wanton trespass" jury instruction was a correct statement of the law of 1 Restatement of Torts, § 77, and pursuant to *Maddran*, it was equally applicable in criminal law and civil law. In fact, as the State notes, the rule adopted by

the Court in *Maddran* is substantially similar to Maryland's pattern instruction, MPJI-Cr. 5:02.1 – DEFENSE OF PROPERTY – NONDEADLY FORCE, which provides:

> You have heard evidence that the defendant acted in defense of [his] [her] property. Defense of property is a defense and you are required to find the defendant not guilty if all of the following three factors are present:
>
> (1) the defendant actually believed that (name of person) was unlawfully interfering [was just about to unlawfully interfere] with [his] [her] property;
>
> (2) the defendant's belief was reasonable; and
>
> (3) the defendant used no more force than was reasonably necessary to defend against the victim's interference with the property. [A person may not use deadly force to defend [his] [her] property. Deadly force is that amount of force reasonably calculated to cause death or serious bodily harm.]
>
> In order to convict the defendant, the State must show that the defense of property does not apply in this case by proving, beyond a reasonable doubt, that at least one of the three factors previously stated was absent.

A court should give this instruction "if the defendant is charged with a nondeadly force assaultive crime and there is an issue of justification generated by evidence of defense of property." MPJI-Cr 5:02.1, Notes on Use.

In the widely accepted authority on Maryland criminal law, *Maryland Criminal Jury Instructions and Commentary*, David E. Aaronson explains the similarities between the civil rule for defense of property set forth in *Maddran* and the nondeadly force defense of property instruction set forth in MPJI-Cr. 5:02.1. He states:

> This jury instruction is based substantially on *Maddran [v. Mullendore]*.

* * *

> The Court in *Maddran v. Mullendore* stated that persons may remove the obstruction when it interferes with their rights only as long as they do not disturb the public peace or put innocent persons in peril.
>
> * * *
>
> While this ruling was made in the context of a civil case, the same rule has been applied to the criminal law:
>
> > 'One in lawful possession of real or personal property is privileged to use reasonable non-deadly force if this is necessary or is reasonably believed to be necessary to prevent or terminate an unprivileged intrusion upon his right of possession …'
> > R. Perkins, Criminal Law, ch. 10, §7 at 1156 (3d ed. 1982).
>
> Note that the use of force intended or likely to cause death or serious bodily injury is never authorized for the defense of property. The right to use non-deadly force to protect property and the right to use deadly force to protect one's habitation will overlap, for example, when a person uses force against an intruder in his home. Dressler, *Understanding Criminal Law* 261 (3d ed. 2001). Such a person has the right to protect his property under the doctrine of defense of property and the right to protect the privacy and safety of his home under the doctrine of defense of habitation. *Id*.
>
> Only the defense of habitation allows for the use of deadly force, and even that defense only allows for such a defense when the victim intended to commit a forcible felony. See § 8.03, Defense of Habitation – Right to Use Deadly Force, supra.

2 David E. Aaronson, *Maryland Criminal Jury Instructions and Commentary* § 8.04, at 1761-62 (2017). As Professor Aaronson's analysis explains, it is unlawful for a property owner to use deadly force to defend his property; deadly force is only permitted in defense of one's habitation to defend against forced entry by an aggressor with felonious intent. In the present case, appellant's discharge of a firearm, a deadly weapon, constituted the use of deadly force. *See Myers v. State*, 237 Md. 632, 634 (1965) (finding that a gun that was fully loaded, but not fireable due to a defective firing pin, was a

deadly weapon). *See also Miller v. State*, 613 So. 2d 530, 531 (Fla. Dist. Ct. App. 1993) (finding no error in trial court's refusal to give jury instruction on justifiable use of nondeadly force where defendant's "[f]iring a firearm in the air, even as a warning shot, constituted as a matter of law the use of deadly force"); *Hosnedl v. State*, 126 So. 3d 400, 405 (Fla. Dist. Ct. App. 2013) (holding that because the discharge of a firearm constituted use of deadly force as matter of law, defendant was not entitled to jury instruction on justifiable use of non-deadly force).

"An instruction is applicable under the facts of the case when a defendant can point to some evidence that supports the requested instruction." *Malaska v. State*, 216 Md. App. 492, 517 (2014) (quoting *Bazzle v. State*, 426 Md. 541, 551 (2012)) (internal quotation marks omitted). "The threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge." *Bazzle*, 426 Md. at 550 (2012) (citation omitted). In the present case, the undisputed evidence was that appellant used deadly force by firing of a loaded shotgun. Accordingly, the court did not err, as a matter of law, in declining to give appellant's requested "wanton trespass" (nondeadly force) instruction.

Moreover, appellant's request for a jury instruction on justification was adequately covered by the pattern instruction given by the court on "DEFENSE OF HABITATION – DEADLY FORCE" taken from MPJI-Cr. 5:02, which provides:

> You have heard evidence that [appellant] acted in defense of his home. Defense of one's home is a defense and you are required to find [appellant] not guilty if all of the following five factors are present. (1) Mr. Bruce Howard entered or attempted to enter [appellant's] home or curtilage. Curtilage is defined as that area of the person's property that is in

> immediate proximity to the residence. (2) [Appellant] believed that Mr. Bruce Howard intended to commit a crime that would involve [an] imminent threat of death or serious bodily harm. (3) [Appellant] reasonably believed that Mr. Bruce Howard intended to commit such a crime. (4) [Appellant] believed that the force that he used against Mr. Bruce Howard was necessary to prevent imminent death or serious bodily harm, and (5) [Appellant] reasonably believed that such force was necessary.
>
> In order to convict [appellant] the State must show that the defense of one's home does not apply in this case by proving beyond a reasonable doubt that at least one of the five factors previously stated was absent.

The court also gave appellant's requested pattern jury instructions for defense of others, MPJI-Cr. 5:01, and self-defense, MPJI-Cr. 5:07. Appellant's claim that he was justified in firing at Mr. Howard because Mr. Howard had trespassed on his property was adequately covered by the instructions given by the court on defense of habitation – deadly force, defense of others, and self-defense. The trial court's refusal to give the wanton trespass instruction was not error.

II.

Motion for a New Trial

Appellant contends that the jury's verdicts were inconsistent because the defenses that he presented at trial applied equally to first-degree assault, for which he was acquitted, and reckless endangerment, for which he was convicted. Appellant made no objection to the jury verdicts at trial, but challenged the verdicts in a motion for new trial, filed one week after his trial had concluded. The State argues that appellant failed to preserve any claim that the verdicts were legally inconsistent, and even if preserved, his claim fails on the merits because the verdicts were not legally inconsistent. We agree with the State.

In order to preserve a challenge to an allegedly inconsistent jury verdict, a defendant "must object or make known any opposition to the allegedly inconsistent verdicts before the verdicts become final and the trial court discharges the jury." *Givens v. State*, 449 Md. 433, 438 (2016). This preservation requirement is an "iron clad" rule requiring strict adherence in legal inconsistency challenges. *Travis v. State*, 218 Md. App. 410, 452 (2014); *accord Givens*, 449 Md. at 472-73. The preservation requirement is important in this context because the jury "may render a legally inconsistent verdict to show lenity to the defendant." *Price v. State*, 405 Md. 10, 40 (2008) (Harrell, J., concurring) (citations omitted).

"[I]f the defendant objects to the inconsistent verdicts, the jury, given a second chance, may choose to remedy the error in a manner not in the defendant's favor." *Travis*, 218 Md. App. at 453 (citation and emphasis omitted). The preservation requirement prevents defendants from enjoying a "windfall" where they could "accept the benefit of a jury's incongruous acquittal even while condemning the incongruous conviction" on appeal. *Id.* at 452. Moreover, a post-trial motion – here, a motion for new trial – "cannot be permitted to serve as a device by which a defendant may avoid the sanction for nonpreservation." *Ramirez v. State*, 178 Md. App. 257, 274 (2008) (quoting *Torres v. State*, 95 Md. App. 126, 134 (1993)). Because appellant failed to object to the jury verdicts at trial, his claim that the verdicts were inconsistent is unpreserved.

Even if appellant had preserved this claim, however, the inconsistency that he raises is at most, a factual inconsistency, not a legal inconsistency. Legally inconsistent verdicts are prohibited in criminal cases, but factually inconsistent verdicts are permitted.

McNeal v. State, 426 Md. 455, 458-59 (2012). "A legally inconsistent verdict is one where the jury acts contrary to the instructions of the trial judge with regard to the proper application of the law." *Id.* (citation omitted). Such a verdict occurs when "a defendant is convicted of one charge, but acquitted of another charge that is an essential element of the first charge[.]" *Id.* (citation and footnote omitted). "Factually inconsistent verdicts are those where the charges have common facts but distinct legal elements and a jury acquits a defendant of one charge, but convicts him or her on another charge." *Id.* (citation and footnote omitted).

Appellant argues that the verdicts were inconsistent because the jury misapplied the law by finding that the affirmative defenses that he presented at trial applied to the first-degree assault charge, but failing to apply those defenses to the reckless endangerment charge. In support of this argument, he relies on the jury's note to the court that stated:

> Jury is not making progress on the second charge, first degree assault. We are equally divided on the defense of others. The issue lies in whether or not the additional shots fired after the appearance of reverse lights constitute unreasonable force either in light of the threat and force to [aid] the person [whom he] was defending. Given that the jury has decided on the self defense and defense of habitation, we would like to know if any additional clarification or guidance is available on this specific factor for the second charge.

Appellant contends that, based on the jury's note, "[t]his is the rare case when we *do* know what the jury was thinking" because, he argues, "[t]he jury expressly detailed its unanimous conclusions, accepting the 'defense of others' as to the first two charges, but the verdict of guilty of 'reckless endangerment' directly contradicted those conclusions."

Appellant's argument necessarily assumes that the jury acquitted him of attempted second-degree murder and first-degree assault based on self-defense. We are unpersuaded that appellant's interpretation of the jury's message is correct, as the message could be susceptible to more than one interpretation. In fact, after reading the note, the court, the prosecutor, and defense counsel each interpreted the note, and the jury's request, differently. The court commented that "[w]e are all pretty smart folks in this room and we can't agree on what [the jury's request] is. So I'm not convinced the jury is being as clear as I guess it appears to be."

Although the jury could have found that appellant was justified in using force to defend himself, the jury could also have found that the State failed to prove, beyond a reasonable doubt, the elements of first-degree assault. First-degree assault requires an intent to inflict serious physical injury on another. *See* Maryland Code (2002, 2012 Repl. Vol, 2017 Supp.), Criminal Law Article ("C.L.") §3-202(a)(1). Reckless endangerment requires only that the actor engage in conduct that creates a substantial risk of death or serious physical injury to another. *See* C.L. §3-204. Because it was not necessary to prove that appellant intended to inflict serious physical injury (first-degree assault) in order to prove that he created a substantial risk of death or serious physical injury (reckless endangerment), these verdicts were not legally inconsistent.

The jury's decision could also be the result of juror lenity, as appellant was acquitted of the greater offense of first-degree assault and convicted of a lesser offense of reckless endangerment. Such lenity in this case would not be legal error because none of the crimes for which appellant was acquitted is a lesser included offense of reckless

endangerment, for which he was convicted. We recognize that juries "deserve deference with regard to inconsistent verdicts, which may be the 'product of lenity, mistake, or a compromise to reach unanimity…'" *McNeal*, 426 Md. at 470 (citations omitted). In this case, the verdicts are not legally inconsistent, and therefore, even if preserved, appellant's inconsistency challenge would not be a basis for relief.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.