UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2168

September Term, 2014

DEVONTA DESEAN GAINES

v.

STATE OF MARYLAND

Graeff,
Berger,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: September 22, 2015

Appellant, Devonta Desean Gaines, was tried and convicted by a jury in the Circuit Court for Baltimore County (King, J.) of disturbing the public peace. Appellant had been originally charged with second-degree assault and failure to obey a lawful order of a police officer. The trial judge granted appellant's motion for judgment of acquittal on the charge of failing to obey the lawful order of a police officer and the charge of second-degree assault resulted in an acquittal. Appellant was sentenced to 60 days imprisonment, suspended, and the court imposed 18 months of supervised probation. Appellant appeals from his conviction and sentence and presents the following issue, which we quote:

> Was the evidence insufficient to convict [appellant] of disorderly conduct?

For the reasons that follow, we shall affirm.

FACTS AND LEGAL PROCEEDINGS

On the afternoon of January 1, 2014, Jaslyn Morgan was home, sleeping inside her apartment, when she heard a lot of "commotion" coming from another nearby apartment. She also heard people "running up and down the stairs and banging on doors." Morgan explained that her apartment building was a three story building, with four apartments on each level and the "commotion" was coming from appellant's third floor apartment. This lasted approximately a half hour to an hour and involved appellant and another woman, later identified at trial as Kelly Alexander. Morgan looked out her window and saw appellant and Alexander "going back and forth, in and out the apartment building." Morgan opened her door, because of the "continuous" and "constant banging" on the door to the apartment above hers and saw Alexander kicking on appellant's apartment door. Morgan also heard

Alexander yelling that she wanted "her stuff," and her cell phone. Eventually, appellant opened the door to his apartment and gave Alexander her belongings.

Shortly thereafter, Morgan went outside the building to her car. At that time, she looked back, near the front door to the apartment building, and saw appellant "grabbing her arm, like slinging her by the arm, just tossing her and like pushing her against the wall, and he pulled her hair." According to Morgan, during this altercation, "both of them was saying stop . . ."

Morgan returned to her apartment and called the police. While she waited for the police to arrive, approximately 15 to 20 minutes later, Morgan continued to hear appellant and Alexander "going up and down the stairs and in and out the apartment." After the police arrived, Morgan saw appellant with an officer. Appellant continued yelling as he was being escorted out of the apartment building, and while he was outside with the police.

Officer Alexander Pann, of the Baltimore County Police Department, testified that he arrived on the scene at around 2:39 p.m. Officer Pann first met with Morgan, who told him that she heard "yelling and screaming" coming from an upstairs apartment. Officer Pann went up to the third floor of the building and also heard "yelling and screaming" coming from Apartment G. Noting that the apartment door was open, Officer Pann specifically heard appellant state "quote, shut the fuck up, end quote."

Officer Pann then announced his presence, identifying himself as a police officer. He then entered the apartment and saw appellant with his arms around Alexander's neck.

When appellant saw Officer Pann, he released Alexander and she then ran to the front door. Officer Pann spoke to Alexander, who appeared "afraid and nervous," and was "shaking." After speaking with appellant, as well as other occupants inside the apartment, Pann handcuffed appellant and placed him under arrest.

As he was taking appellant out to his patrol car, appellant was "screaming" various statements such as "why are you locking me up? Can't you cut me a break?" and "I didn't hit her." This occurred outside the apartment building in the presence of other people. Officer Pann explained that appellant was "upset," and that he refused to get into the back seat of the police car. Pann testified that he "had to place him in the car forcibly."

After the State concluded its case-in-chief, appellant argued that the State may have proven that he disturbed the public peace by making an unreasonably loud noise, as prohibited by Section 10-201 (c)(5) of the Criminal Law Article, but that it did not prove the offense that was actually charged in this case, *i.e.*, disturbing the public peace by willfully acting in a disorderly manner, as prohibited by Section 10-201 (c)(2). *See* Md. Code (2002, 2012 Repl. Vol.), § 10-201 of the Criminal Law ("Crim. Law") Article. The court denied the motion, finding, "Not only the words used by the Defendant, but the volume employed by the Defendant and his actions both before the police officer arrived and as the Defendant was being escorted out to the car," amounted to a violation of Crim. Law Section 10-201 (c)(2).

The defendant then presented evidence, first calling James Wallace, who was inside appellant's apartment on the day in question, along with appellant, Lamar Chambers and Alexander. During the course of an argument between appellant and Alexander regarding a cell phone, Alexander took appellant's phone and threw it out off the third floor balcony.

Appellant then left the apartment to retrieve his phone, but Alexander went out before him, retrieved the phone and would not give it back to appellant. Appellant then returned to the apartment and locked Alexander outside. This caused Alexander to scream and start banging on the apartment door with her hands and feet. Wallace opened the door and Alexander came inside and continued arguing with appellant. She also started assaulting the appellant by kicking and hitting him and appellant responded by trying to push Alexander back outside his apartment.

Wallace was present when the police arrived and attempted to break up the fight between appellant and Alexander. Wallace saw the police arrest appellant, but denied that appellant was yelling during this incident.

Lamar Chambers testified that he was also present at the time that appellant and Alexander were fighting. Chambers confirmed that Alexander was locked out of the apartment and that she was banging and kicking on the door to get back in. Chambers also witnessed appellant being arrested and confirmed that appellant was upset and was yelling.

Appellant testified that he and Kelly Alexander began arguing when appellant received a phone call from another female, and Alexander "started wilding." Appellant

explained this meant "[s]he started acting crazy,"and threw his cellphone out of the window over the balcony. Appellant left his apartment on the third floor to go retrieve the phone, but Alexander, who was making a "commotion and stuff" running down the stairs, reached the front door of the building before appellant and would not let him out.

Appellant then returned to his apartment, closed the door, and locked Alexander out. Alexander returned and started "banging and kicking" on the door and "almost knocked my door off the hinges." After Wallace let her back inside, Alexander "started wilding again," and "started swinging" at appellant. Appellant told her, approximately 15 times, that she needed to "chill" and to "get out my house." Eventually, appellant had to pick Alexander up by "grabbing her," and "bear hugging her," in order to escort her out of the apartment. Appellant managed to get her outside and closed the door again.

At some point, the police arrived. After speaking to appellant and Alexander, the police placed appellant under arrest. Appellant kept asking the police why he was being arrested. He agreed that he was loud, but denied that he was yelling.

At the end of all the evidence, appellant renewed his motion for judgment of acquittal on the grounds previously raised. Appellant also asserted that he was simply contesting his arrest in a loud voice and that he was exercising his rights under the First Amendment to the United States Constitution. Appellant also argued, in response to the State's contention that it was appellant's willful actions that formed the basis for the disorderly conduct charge, that the State needed to show that he acted with specific intent. Further, appellant argued that,

with respect to Morgan's testimony that she heard running up and down the hallway, that the evidence of his involvement in that act was only circumstantial. The court ultimately denied the motion, finding that "the facts are sufficient to at least submit it to a jury for their determination."

STANDARD OF REVIEW

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)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). 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)); *see also Wallace v. State*, 219 Md. App. 234, 248 (2014) (observing that the appellate court "need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we

would have drawn different inferences from the evidence") (quoting *State v. Mayers*, 417 Md. 449, 466 (2010)). 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).

LEGAL ANALYSIS

Appellant maintains that the evidence was insufficient to convict him of disorderly conduct on several grounds, including that, although he may have been guilty, at most, of making loud noises, his conviction of the offense specifically charged in this case cannot stand because that offense requires proof that he acted in a disorderly manner. Further, to the extent that the statute covered his actions, appellant asserts that, although there were two possible instances that could have supported the charges, the jury did not delineate which instance formed the basis for its verdict. Finally, appellant contends that the charge was content-based and that his speech was constitutionally protected. The State disagrees with all of appellant's arguments and responds that the evidence was sufficient to sustain appellant's conviction. We agree.

The disorderly conduct statute makes it unlawful for a person to engage in various specific acts and conduct. *See* Md. Code (2002, 2012 Repl. Vol.), § 10-201 of the Criminal Law Article ("Crim. Law"). Generally stated, this statute prohibits, *inter alia*: wilful

obstruction of a person's free passage in a public place (Crim. Law § 10-201(c)(1)); willfully acting in a disorderly manner that disturbs the public peace (Crim. Law § 10-201(c)(2)); wilful failure to obey a reasonable and lawful order (Crim. Law § 10-201(c)(3)); wilful disturbance of the peace by a person who enters the land or premises of another (Crim. Law § 10-201(c)(4)); and, willfully making an unreasonably loud noise in certain private and publicly designated areas. (Crim. Law § 10-201(c)(5)). As appellant recognizes throughout his brief, Crim. Law Section 10-201 is the present recodification of a number of statutes under former Article 27, including Sections 121, 122, and 123. Thus, in considering the law of disorderly conduct, the Court of Appeals reminds us as follows:

> [I]n *Wanzer v. State*, 202 Md. 601, 97 A.2d 914 (1953), this Court interpreted what constitutes a breach of the peace, noting that it signifies disorderly, dangerous conduct, "an affray, actual violence, or conduct tending to or provocative of violence by others." *Id.* at 609. In *Drews v. State*, 224 Md. 186, 167 A.2d 341 (1961), we noted that, while disorderly conduct offenses are presently codified in Section 10-201 of the Criminal Law Article, "[t]he gist of the crime of disorderly conduct . . . as it was in the cases of common law predecessor crimes, is the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite, a number of people gathered in the same area." *Id.* at 192, 167 A.2d at 343-44. *See Sharpe v. State*, 231 Md. 401, 404, 190 A.2d 628, 630 (1963).

Spry v. State, 396 Md. 682, 691 (2007) (Footnote omitted); *accord In re Lavar D.*, 189 Md. App. 526, 592 (2009), *cert. denied sub nom. In re. Ronald B.*, 414 Md. 331 (2010); *See generally, In re Nawrocki*, 15 Md. App. 252, 256-61 (interpreting former sections 121, 122, and 123 of Article 27 to apply only when "other persons [are] within hearing of the disturbing noises" and that the statutes do not apply "to speech, although vulgar or offensive,

that is protected by the First and Fourteenth Amendments"), *cert. denied*, 266 Md. 741 (1972).

In this case, appellant was specifically charged with a violation of Crim. Law § 10-201(c)(2). That subsection provides that "[a] person may not willfully act in a disorderly manner that disturbs the public peace." When interpreting statutes, courts must determine and implement the legislature's intent. *Haile v. State*, 431 Md. 448, 466 (2013). We do this "by looking, first, to the plain language of the statute, 'on the tacit theory that the Legislature is presumed to have meant what it said and said what it meant.'" *Id.* (citations omitted). "We do not, however, 'add or delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute,' nor do we 'construe a statute with forced or subtle interpretations that limit or extend its application.'" *Id.* at 467 (citation omitted). When the text of the statute is not ambiguous, "there is no 'need to resort to the various, and sometimes inconsistent, external rules of construction.'" *Id.* (citation omitted).

Our reading of this subsection, in conformity with the authorities set forth above, leads us to conclude that the required elements necessary to prove a violation are: (1) conduct, through words and/or actions; (2) that offends, disturbs, incites, or tends to incite; (3) other persons gathered nearby that may have heard or witnessed the disturbing noises. Further, by its plain language, the State must prove that the person charged under this subsection acted willfully. This implies that the conduct "be committed intentionally, rather

than through inadvertence." *See generally, Deibler v. State*, 365 Md. 185, 195 (2001) (interpreting the wiretap laws and discussing the variety of definitions recognized, both at the State and Federal levels, when proof of willfulness is required); *Cf. Dziekonski v. State*, 127 Md. App. 191, 201 (1999) (interpreting former Section 123, which omitted an intent element, as requiring proof that "[t]he effect of the actor's conduct need only be that the peace was disturbed"). Pertinent to appellant's *mens rea*, this Court has stated that, "[i]n determining the intent of the defendant, the trier of fact is permitted to infer the requisite intent from the surrounding circumstances." *Breakfield v State*, 195 Md. App. 377, 393 (2010).[1]

The circumstances in this case establish the following. On the afternoon of January 1, 2014, Jaslyn Morgan was at home, sleeping inside her apartment, when she heard a lot of "commotion" coming from appellant's third floor apartment. This commotion lasted between a half hour to an hour and involved appellant and a woman, Kelly Alexander. During that time, Morgan also saw appellant and Alexander going in and out of the building, as well as running up and down the stairs and "banging on doors."

[1] We also note that the statute defines a "public place" as a place to which the public or a portion thereof has the right to resort for "dwelling," and includes, *inter alia*, public buildings, parking lots, streets and sidewalks, as well as the "common areas of a building containing four or more separate dwelling units, including a corridor, elevator, lobby, and stairwell . . ." *See* Crim. Law § 10-201(a)(3).

While the disturbance was occurring, Morgan opened the door to her apartment and went outside the building to her car. At that time, Morgan looked back toward the front door to the apartment building and saw appellant grab Alexander, while slinging and tossing her by the arm. She also witnessed appellant push Alexander against the wall, pull her hair, and heard both of them say "stop." Apparently having witnessed enough, Morgan returned to her apartment and called the police. The commotion did not cease. Over the next 15 to 20 minutes, as Morgan waited for the police to arrive, appellant and the woman continued going up and down the stairs and in and out of the apartment.

Officer Alexander Pann arrived on the scene at around 2:39 p.m. and, after speaking to Morgan, he went to appellant's apartment. There, Officer Pann heard "yelling and screaming," and specifically heard appellant state, according to Officer Pann, "quote, shut the fuck up, end quote." Pann went into the open apartment and saw appellant with his arms around Alexander's neck.

After speaking with appellant, Alexander and the other occupants inside appellant's apartment, appellant was arrested. As he was being escorted to the police vehicle, appellant continued to yell and scream things such as "why are you locking me up? Can't you cut me a break?" and "I didn't hit her." According to Officer Pann, this occurred outside the building while other people were present. In fact, the primary complainant, Jaslyn Morgan, specifically testified that appellant continued to yell after the police arrived on the scene and

took him outside the building. Finally, appellant resisted Officer Pann's efforts to place him inside the back of the police vehicle.

We are persuaded that this evidence was sufficient to sustain appellant's conviction pursuant to Crim. Law Section 10-201(c)(2). Appellant's conduct, through both his words and his actions, disturbed Morgan, a person who witnessed appellant's conduct, hearing him yell and scream, while she was present nearby inside her own apartment in the same apartment building. Notably, that conduct was disruptive and disturbing enough to warrant Morgan's decision to report it to the police. *See, e.g., Briggs v. State*, 90 Md. App. 60, 69 (1992) (observing that patrons at a carnival were "noticeably affected" by the defendant's conduct because they complained to firemen and asked them to do something about the situation). Given that appellant's conduct persisted before and after the police were called, there is also a rational inference that appellant's conduct was intentional and not merely inadvertent. The jury could conclude that, under the circumstances presented, appellant willfully acted in a disorderly manner that disturbed the public peace.

Notwithstanding this conclusion, however, one of appellant's primary arguments is that the State only produced evidence that he made loud noises and that this was insufficient to prove a violation of Md. Code Anno., Crim. Law Section 10-201(c)(2). Instead, appellant contends the State should have charged him with violating Md. Code Anno., Crim. Law, Section 10-201(c)(5), prohibiting a person from willfully disturbing the public peace by making an "unreasonably loud noise." We disagree. As the State points out, the prosecutor

retains discretion in deciding what charges to file against a defendant. *See Evans v. State*, 396 Md. 256, 298 (2006) ("State's Attorneys retain broad discretion . . . in determining which cases to prosecute, which offenses to charge, and how to prosecute the cases they bring"); *State v. Lee*, 178 Md. App. 478, 485 (2008) ("In Maryland, State's Attorneys have broad discretion in deciding which charges to prosecute against defendants"). In this case, the State charged appellant with violating subsection 10-201(c)(2) and we have already concluded that the evidence was sufficient to meet the requirements of that crime.[2]

We also conclude that any attempt by appellant to distinguish between his acts before the police arrived and afterwards, such that the jury was required to delineate the underlying incident that informed their verdict, was never raised in the trial court and is not properly preserved for appellate review. *Robinson v. State*, 209 Md. App. 174, 202 (2012) ("Because [appellant's] arguments were not raised below, they are not preserved for appellate review."), *cert. denied*, 431 Md. 221 (2013).

[2] Appellant also asserts that he could not be convicted under subsection (c)(2) because he never received a warning that his speech was too loud. There is nothing in the plain language of the statute that requires such a warning. Moreover, appellant's reliance on *Eanes v. State*, 318 Md. 436, 463 (1990), to support this argument is misplaced because the part of *Eanes,* cited by appellant, was more concerned with proof of what constitutes a "loud and unseemly noise" as used in former Section 121, arguably the precursor to present subsection 10-201(c)(5).

Finally, we address appellant's contention that his speech was somehow constitutionally protected. The following general statement from the Court of Appeals is instructive:

> When a court reviews restrictions on speech in traditional public forums, "the appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content." [*Frisby v. Schultz*, 487 U.S. 474, 481 (1988)]. A content-based restriction is constitutionally hale only if it can be shown that the challenged "'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end....' " *Id.* (quoting [*Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)] [ellipsis in *Frisby*]. *See Sable Communications of Calif. v. FCC*, [492 U.S. 115, 127-28 (1989)] (content-based regulation of telephonic commercial communication); *Carey v. Brown*, 447 U.S. 455, 461, 100 S.Ct. 2286, 2290, 65 L.Ed.2d 263, 270 (1980) (content-based regulation of residential picketing). On the other hand, a state "'may ... enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *Frisby*, [487 U.S. at 481], (quoting *Perry*, 460 U.S. at 45, 103 S.Ct. at 955, 74 L.Ed.2d at 804). *See Ward v. Rock Against Racism*, [491 U.S. 781, 789-90 (1989)], (content-neutral regulation of sound volume); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221, 227 (1984) (content-neutral ban on overnight sleeping and camping in certain parks).

Eanes v. State, 318 Md. 436, 447-48, *cert. denied*, 496 U.S. 938 (1990); *see also Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances").

There is no indication in this record that appellant was arrested based on the content of his speech. Morgan referred to the fact that appellant was running, yelling and screaming, but she never testified that she heard anything other than appellant and the other woman say

"stop." Although Officer Pann heard appellant state "shut the fuck up," before he was arrested, as well as "why are you locking me up?," "Can't you cut me a break?," and "I didn't hit her," afterwards, it does not appear that these formed the basis for appellant's arrest. Instead, it is a fair inference that appellant's conduct, including his actions and the volume of his speech, were the content-neutral reasons for the arrest and subsequent conviction. *See Eanes*, 318 Md. at 453 (noting that the disorderly conduct statute affords "content-neutral protection to the captive auditor (on the facts before us, auditors in homes or in private offices) who cannot avoid continuing, unreasonably loud and disruptive communications emanating from the street").

Continuing his argument relying on cases interpreting content-based speech, Appellant asserts that, to the extent that his conviction was based on loud yelling, the State failed to prove that the speech was "actually disruptive to the 'captive' audience in the neighborhood." *Eanes*, 318 Md. at 464. More precisely, appellant contends that "[t]o hear what the parties were saying, Jaslyn Morgan had to open the door to her apartment. To see what was happening outside, she had to look out her window. She could have avoided hearing and seeing whatever was occurring if she had simply kept her door closed and her blinds drawn. She was not a captive audience; she was a busybody." The hypothesis that the putative victim, who had been asleep in her apartment, but was awakened by the commotion somehow bore responsibility for having been disturbed indeed strains credulity.

Again, appellant appears to rely on Crim. Law Section 10-201(c)(5), which concerns a defendant who makes an "unreasonably loud noise," an element not included in the charged offense under Crim. Law Section 10-201(c)(2). Moreover, even to the extent that we would read a "captive audience" as an element to this latter offense, we are persuaded that Ms. Morgan would qualify. Appellant's conduct occurred in the same apartment building where Morgan was also a resident and Morgan was actually sleeping inside her apartment when the commotion involving appellant began. That commotion continued while Morgan temporarily went to the parking lot to her car when appellant stood in the doorway to Morgan's apartment building and grabbed, tossed, pushed and pulled on Alexander. We hold that the evidence was sufficient to sustain appellant's conviction for willfully acting in a disorderly manner that disturbed the public peace.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.