Circuit Court for Montgomery County
Criminal No. 135674

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2353

September Term, 2019

ZAIN IMDAD

v.

STATE OF MARYLAND

Friedman,
Shaw Geter,
Wright, Alexander Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: July 7, 2021

On March 31, 2019, Zain Imdad, appellant, was served with a protective order that prohibited him from contacting his wife, Krupa Patel, or entering her residence or place of employment. On April 15, 2019, appellant entered the house where Ms. Patel lived with her parents, her brother, her sister, and her sister's husband. Events took place inside the house that led to charges of attempted first-degree murder, home invasion, violation of the protective order, and several assault charges.[1]

Following a jury trial in the Circuit Court for Montgomery County, appellant was convicted of third-degree burglary, three counts of second-degree assault, and violation of a protective order.[2] Appellant challenges the burglary conviction, presenting the following question for our review:

> Did the trial court err by refusing to instruct the jury on the lesser-included offense of fourth-degree burglary?

We perceive no abuse of discretion in the denial of appellant's request to submit the charge of fourth-degree burglary to the jury.[3] Accordingly, we shall affirm.

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[1] The State *nol prossed* the attempted murder charge prior to trial.

[2] The court sentenced appellant to ten years of incarceration for the burglary conviction, with all but three years suspended, and five years of supervised probation upon release. For the assault convictions, appellant was sentenced to three consecutive ten-year terms, all suspended.

[3] The State asserts that appellant failed to preserve the issue for appeal because the record does not demonstrate that defense counsel objected to the omission of an instruction on fourth-degree burglary after the court finished instructing the jury. Because the transcript of defense counsel's exceptions to the jury instructions is replete with indications that defense counsel's remarks were "unintelligible," we shall assume that the objection was preserved.

DISCUSSION

"We review a trial court's decision to give or refuse a jury instruction under the abuse of discretion standard." *Nicholson v. State*, 239 Md. App. 228, 239 (2018) (citing *Stabb v. State*, 423 Md. 454, 465 (2011) (additional citation omitted). In evaluating whether an abuse of discretion occurred, we look to three factors: "whether the requested instruction was a correct statement of the law; whether it was applicable under the facts of the case; and whether it was fairly covered in the instructions actually given." *Id.* (quoting *Gunning v. State*, 347 Md. 332, 348 (1997)). The issue before us concerns the second factor.

"The inquiry in assessing whether a defendant is entitled to a lesser included offense jury instruction is a two-step process." *State v. Bowers*, 349 Md. 710, 721 (1998). "The threshold determination is whether one offense qualifies as a lesser included offense of a greater offense." *Id.* at 721–22. The parties do not dispute that fourth-degree burglary (breaking and entering the dwelling of another) is a lesser included offense of third-degree burglary (breaking and entering the dwelling of another with intent to commit a crime).[4] *See Bass v. State*, 206 Md. App. 1, 7–8 (2012).

> [DEFENSE COUNSEL]: I just make an exception to the Court with regard to the (unintelligible) instruction, as well as the (unintelligible) instruction. And I take another exception to the Court with regard to the instruction regarding the violation of the protective order that we have for (unintelligible) violation being (unintelligible). And I just (unintelligible) what he said prior to the instructions (unintelligible).

[4] *See* Md. Code (2002, 2012 Repl. Vol., 2018 Supp.), Criminal Law Article, §§ 6-204 and 6-205.

"Once the threshold determination is made, the court must turn to the facts of the particular case." *Bowers*, 349 Md. at 722. "In assessing whether a defendant is entitled to have the jury instructed on a lesser included offense, the court must assess 'whether there exists, in light of the evidence presented at trial, a rational basis upon which the jury could have concluded that the defendant was guilty of the lesser offense, but not guilty of the greater offense.'" *Id.* (quoting *Ball v. State*, 347 Md. 156, 191 (1997) (additional citations omitted). "If a rational jury could not reach this conclusion, then the judge need not submit the lesser offense to the jury." *Ball*, 347 Md. at 191.

The logic of this principle is rooted in the notion that "[j]ustice is no more done when a defendant is wrongly acquitted of a crime than it is when the defendant is wrongly convicted of that crime." *Bowers*, 349 Md. at 723 (quoting *Burrell v. State*, 340 Md. 426, 434 (1995)). As the Court of Appeals observed, jurors "may not want to convict a defendant, plainly guilty of the more serious charge, when he appears sympathetic for some reason." *Id.* at 722. Hence, "the jury should be given the option of convicting on the lesser crime only when 'it constitutes a valid alternative to the charged offense,' thereby 'preserv[ing] the integrity of the jury's role as a fact-finding body.'" *Id.* at 723 (quoting Janis L. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 BROOK. L. REV. 191, 210 (1984)).

Based on our review of the record, we conclude that there was no rational basis for the jury to conclude that appellant was guilty of breaking and entering, but not guilty of the greater offense of breaking and entering with intent to commit a crime. The evidence at trial showed that appellant pointed a gun at residents of the home and threatened to kill

them if they called the police.[5] Police were called to the home surreptitiously, at which time appellant grabbed a knife and put Ms. Patel in a chokehold. Appellant was immediately arrested.

The backpack that appellant had with him contained five sets of handcuffs, duct tape, two knives, rope, and four bottles of liquid mixed with a "white powdery substance."[6] Also found in appellant's backpack was a typewritten note, which we reproduce verbatim:

FOR POLICE

> Please don't waste your time looking for me. I am not on the run and I am not going to run. I have taken a poison that will take 72-96 hours to kill me. My body will turn up in a few days in sugarloaf mountains. If I do not die in 3 days or so I will come and turn myself in. Please do not harass my family too much they have no idea what I have done and they were not involved in any way. I acted alone. I took my mom's car but I always use her car she did not know what I am up to. In this packet is a flash drive that explains what I did and why I did it.[7] Please give one copy to news channel if necessary.

Appellant did not testify at trial. The defense did not challenge the evidence found in the backpack but advanced the theory that appellant did not intend to hurt anyone but himself. Defense counsel focused the jury's attention on evidence that Ms. Patel's family would never accept her marriage to appellant because of their religious differences, that Ms. Patel had kept the marriage a secret from her family for months because she was afraid they would physically harm her if they found out, and that, when Ms. Patel finally disclosed

[5] It was later discovered that the gun was an unloaded BB gun.

[6] The police were unable to test the liquid substance.

[7] There was no evidence at trial regarding the contents of the flash drive.

the marriage to her sister, the day before the protective order was issued, her sister physically assaulted her.

In closing argument, defense counsel suggested that appellant entered the house only to ensure that Ms. Patel's family had not harmed her or coerced her into filing for a protective order against her will, and that he brought the BB gun only because he was going to "meet danger" and wanted to "pretend that he had protection[.]" The rope and the handcuffs, according to defense counsel, were "intended to be used in [a] desperate suicide attempt" that appellant planned to undertake if Ms. Patel told him that she wanted to end the marriage. Defense counsel posited that "somebody who tries to commit suicide, especially by way of a poison that's going to take a number of hours, if not days to act, will take measures to refrain [sic] himself from changing his mind, from moving, from being able to escape his fate."

In our view, whether the jury believed that Ms. Patel was being controlled by or was at risk of harm from her family is immaterial to the question of appellant's intent. The uncontested evidence that appellant entered her home, in clear violation of the protective order, with a BB gun, five sets of handcuffs, duct tape, rope, and a note to police, stating that he acted alone and would turn himself in if his suicide attempt failed, precludes a rational conclusion that appellant was guilty only of the lesser offense of fourth-degree burglary. Consequently, appellant was not entitled to an instruction on that offense and the court did not abuse its discretion in refusing to give it.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.