Circuit Court for Baltimore City
Case Nos.: 117212012, 117212013

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2467

September Term, 2018

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JIVON BROWN

v.

STATE OF MARYLAND

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Nazarian,
Wells,
Raker, Irma, S.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Wells, J.

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Filed: January 30, 2020

A jury sitting in the Circuit Court for Baltimore City found appellant, Jivon Brown, guilty of voluntary manslaughter, use of a handgun in a crime of violence, unlawful possession of a firearm, and reckless endangerment.[1] The court imposed consecutive sentences of ten years' imprisonment for voluntary manslaughter, twenty years' imprisonment for the handgun offense, five years' imprisonment for unlawful possession of a firearm, and five years' imprisonment for reckless endangerment, totaling forty years' imprisonment. Appellant noted a timely appeal and presents us with the following questions which we have re-phrased:

1. Was appellant entitled to have the jury instructed on the defense of necessity?

2. Was the evidence legally sufficient to support reckless endangerment?

Finding no error, we shall affirm.

## BACKGROUND

The shooting death of the victim, Darryl Owens, was precipitated by the events that unfolded on July 5, 2017 when Marie Stringfellow, the mother of C.B.,[2] went to appellant's home to get C.B. from visitation with her father, appellant. Stringfellow and appellant

[1] Appellant was charged in two cases, (Nos. 117212012 and 117212013), for crimes stemming from the same conduct against two separate victims. In case No. 117212012 the jury acquitted appellant of first and second-degree murder as to victim Daryl Owens. In case No. 117212013, as to victim Marie Stringfellow, the jury acquitted appellant of attempted first and second-degree murder, and first-degree assault. When the foreperson is asked for the verdict on first-degree assault, the transcript reflects that the foreperson said "guilty." However, when the jury is hearkened the clerk says the verdict was not guilty. The verdict sheet in the record indicates not guilty as well.

[2] Because C.B. is a minor, we refer to her by her initials out of concern for her privacy.

were engaged in an on-going custody dispute. Because of this, Stringfellow was accompanied by two of her cousins, Kelsey and Kierra Lewis, Kierra's then-boyfriend, Darryl Owens, and Marie Stringfellow's brother, Delvon Stringfellow. A number of people were in appellant's residence, including appellant, C.B., appellant's girlfriend Kendra Jones, appellant's brother Daytwan Maddox, and several children.

While the evidence adduced at trial offered a conflicting account of exactly what transpired, it is enough to say that a fight broke out after Marie Stringfellow and her group arrived at appellant's residence. At some point during the fight, Kierra Lewis picked up C.B. and walked out of appellant's residence with Daryl Owens. Moments later, after appellant retrieved a purple and white pistol from his bedroom, appellant shot Daryl Owens four or five times killing him in front of appellant's residence. Appellant did not deny shooting Daryl Owens, rather, he claimed he did so in self-defense and defense of others. He told the police that Daryl Owens brandished a pistol during the fight and he was in fear of his life and the lives of the others present at the scene.[3] No firearms were admitted into evidence.

Additional facts will be introduced as needed in the following discussion.

## DISCUSSION

### I.

[3] It is worth noting that the trial judge instructed the jury on both perfect and imperfect self-defense. Given that the jury acquitted appellant of first and second-degree murder, and found him guilty of voluntary manslaughter, the jury apparently believed the State had proved imperfect self-defense.

Appellant contends that the trial court erred when it declined to instruct the jury on the common law defense of necessity, which, if the jury accepted it, would have prevented guilty findings on the firearm related offenses.

The Court of Appeals has adopted the following standard of appellate review when reviewing a trial court's decision to give, or not give, a requested jury instruction:

> 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.' *Dickey v. State*, 404 Md. 187, 197–98 (2008); see also Md. Rule 4–325(c). We review a trial court's decision whether to grant a jury instruction under an abuse of discretion standard. *See, e.g., Thompson v. State*, 393 Md. 291, 311 (2006).

*Cost v. State*, 417 Md. 360, 368–69 (2010).

The second of the foregoing three threshold conditions, *i.e.*, that the instruction is applicable to the facts of the case, is a question of law which is reviewed *de novo*. *Bazzle v. State*, 426 Md. 541, 550 (2012). "A requested jury instruction is applicable if the evidence is sufficient to permit a jury to find its factual predicate." *Id.* The evidence is sufficient to permit a jury to find a requested instruction's factual predicate, if "'some evidence' has been adduced to support each element of the defense[.]" *McMillan v. State*, 428 Md. 333, 335 (2012), *see Dykes v. State*, 319 Md. 206, 216-17 (1990).

As the Court of Appeals explained in *Dyke*s, 319 Md. at 216–17:

> 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." The source of the evidence is immaterial; it may emanate solely from the defendant. It is of no matter that the self-defense claim is overwhelmed by evidence to the contrary. If there is any evidence relied on by the defendant which, if believed, would support

> his claim ... the defendant has met his burden. Then the baton is passed to the State. It must shoulder the burden of proving beyond a reasonable doubt to the satisfaction of the jury [the specific facts stated in the instruction].

*See also Bazzle*, 426 Md. at 551.

In *State v. Crawford*, 308 Md. 683, 698-99 (1987), the Court of Appeals held that the common law necessity defense can be a defense to unlawful possession of a handgun under the predecessor statute to section 4-203(a) of the Criminal Law Article,[4] Maryland Code, Art. 27, § 36B(b). After reviewing both the legislative history of section 36(B) and cases from other jurisdictions, the Court determined that such a defense has five elements:

> (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;

[4] Section 4-203(a) provides as follows:

> (a)(1) Except as provided in subsection (b) of this section, a person may not:
>
> (i) wear, carry, or transport a handgun, whether concealed or open, on or about the person;
>
> (ii) wear, carry, or knowingly transport a handgun, whether concealed or open, in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State;
>
> (iii) violate item (i) or (ii) of this paragraph while on public school property in the State;
>
> (iv) violate item (i) or (ii) of this paragraph with the deliberate purpose of injuring or killing another person; or
>
> (v) violate item (i) or (ii) of this paragraph with a handgun loaded with ammunition.
>
> (2) There is a rebuttable presumption that a person who transports a handgun under paragraph (1)(ii) of this subsection transports the handgun knowingly.

(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.

*Crawford*, 308 Md. at 699.

To be entitled to a jury instruction of necessity, appellant needed to adduce *some* evidence of each of the foregoing five elements. Because we conclude that appellant did not adduce *any* evidence of element number four, we hold that the trial court did not err in declining to instruct the jury as requested.

Pursuant to element number four, appellant needed to produce some evidence that the firearm he used to kill Darryl Owens was made available to him "without preconceived design," to be entitled to an instruction on the necessity defense. *Id*. The only evidence at trial about how appellant came into possession of a firearm came from appellant himself. In his recorded interview with the police, he admitted that he possessed the purple and white .380 caliber handgun he used to shoot Darryl Owens. Appellant said that he saw Darryl Owens brandish a firearm, and in response, he went to his bedroom and got the pistol.

In *Crawford*, *supra*, Crawford was entitled to the necessity instruction after Crawford testified that he was attacked by armed gunmen, one of whom he was able to

disarm. *Id*. at 699-700. As pertinent to the fourth element of the necessity defense, the Court of Appeals explained that:

> Crawford's possession of the handgun was merely fortuitous. The handgun was originally possessed by Crawford's assailant and only became available to him after he disarmed the assailant. Thus, Crawford had no preconceived design to gain possession of the handgun before being attacked.

*Id*. at 700.

Appellant may not claim that it "was merely fortuitous" that he came into physical possession of a pistol that he retrieved from his own bedroom and took to the fight. These circumstances are the opposite of the situation in *Crawford* where the access to the firearm was "merely fortuitous." *Id*. Simply put, appellant was intentionally armed and ready to use the pistol. Therefore, the trial court did not err in declining appellant's request to have the jury instructed on the defense of necessity.

**II.**

Appellant contends that the evidence was legally insufficient to support his conviction for the reckless endangerment of C.B. Appellant claims that the evidence showed that C.B. was with Kiera Lewis, who was standing in front of the appellant's residence, and not within the "arc of danger" created when appellant shot Daryl Owens, who was on the steps to the front door.

The State explains that the evidence at trial showed that Kiera Lewis carried four-year old C.B. out of appellant's residence and walked down the steps leading to the front yard with Darryl Owens on her left side. She then heard gunshots, looked over, and saw Darryl Owens on the ground.

In considering a challenge to the sufficiency of the evidence, we ask "'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.'" *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[W]e defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)), *cert. denied*, 448 Md. 726 (2016). We will not reverse a conviction on the evidence "'unless clearly erroneous.'" *Id.* (quoting *State v. Manion*, 442 Md. 419, 431 (2015)).

The offense of reckless endangerment in Maryland is found in section 3-204 of the Criminal Law Article which provides, in pertinent part:

> (a) Prohibited. – A person may not recklessly:
>
> (1) engage in conduct that creates a substantial risk of death or serious physical injury to another...
>
> * * *
>
> (b) Penalty – A person who violates this section is guilty of the misdemeanor of reckless endangerment and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding $5,000 or both.

Accordingly, the offense of reckless endangerment has the following elements:

> 1. [T]hat the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another;
>
> 2. [T]hat a reasonable person would not have engaged in that conduct; and

3. [T]hat the defendant acted recklessly.

*Perry v. State*, 229 Md. App. 687, 697 (2016) (quoting *Jones v. State*, 357 Md. 408, 427 (2000)) (citation omitted, alterations from original).

"The statute criminalizes reckless behavior that creates a substantial risk of death or serious bodily harm." *Jones*, 357 Md. at 428. Moreover, "to evaluate whether the behavior is reckless," a defendant's conduct is evaluated "from the standpoint of an ordinary, law-abiding citizen under similar circumstances." *Id*.

Appellant relies on *Albrecht v. State*, 105 Md. App. 45 (1995) in support of his argument that C.B. was not in the "arc of danger" when he shot and killed Darryl Owens. Appellant's reliance on *Albrecht* is misplaced. In *Perry v. State*, 229 Md. App. 687 (2016) we explained:

> In the context of the *Albrecht* case – the genesis of the "arc of danger" expression – the appellant was a police officer who was trained to carry and discharge a gun, and the exact line of fire was known and established. This Court was able to conduct a heightened and nuanced review of who at the scene was actually placed in substantial risk of death or serious bodily harm based on the arc of danger created by the officer's line of fire. When Officer Albrecht, a trained officer authorized to carry and use a weapon, purposefully aimed it at one precise target in broad daylight, the arc of danger was very narrow.

*Id*. at 705 (citation omitted). Further, we pointed out that, in Perry's case, as in this case, "the reckless behavior that created the substantial risk was not that of a police officer, trained to discharge a weapon leveled at a specific target, [rather,] Perry was a civilian who was not authorized to carry or discharge a weapon." Largely because of that distinction, the Court in *Perry* went on to find that "the highly nuanced 'arc of danger' analysis that was applied in *Albrecht* [was] inapplicable to the facts presented in [that] case." *Id*. at 706.

In this case, reviewing the evidence in the light most favorable to the State, Kiera Lewis held a minor child, C.B., while both were next to Darryl Owens when appellant shot Owens multiple times. There was no evidence adduced at trial to suggest that appellant was a police officer or was even trained in the use of firearms for us to consider undertaking *Albrecht*'s "arc of danger" analysis. We therefore hold the jury could have reasonably found that appellant's conduct put C.B. in "substantial risk of death or serious physical injury sufficient to find reckless endangerment." *Id*.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**