UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2521

September Term, 2013

JAMES JONES

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Sonner, Andrew L.
(Retired, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 24, 2015

On September 24, 2010, a jury in the Circuit Court for Baltimore City acquitted James Jones, appellant, on charges of attempted first and second degree murder, but it convicted appellant of attempted voluntary manslaughter, first and second degree assault, reckless endangerment, use of a handgun in the commission of a felony or crime of violence, wearing or carrying a handgun on the person, possession of a regulated firearm as a prohibited person, and discharging a weapon within Baltimore City limits. The court sentenced appellant to 10 years for his attempted voluntary manslaughter conviction, 10 years, concurrent, for his use of a handgun in a crime of violence conviction, and 5 years, consecutive, for his conviction for illegal possession of a firearm. Appellant's remaining convictions were merged for sentencing purposes.

On appeal,[1] appellant presents the following two questions for our review:

1. Did the trial court err in failing to instruct the jury that the defenses of perfect and imperfect self defense apply to first degree assault?

2. Did the trial court err in prohibiting the defense from impeaching the victim with his prior conviction for assault with a knife?

For the reasons set forth below, we answer the first question yes and hold that the trial court erred in failing to instruct the jury that imperfect self-defense may be a mitigating defense to first degree assault based on serious physical injury. Accordingly, we shall

[1] On January 24, 2014, the circuit court determined that counsel's failure to note an appeal warranted post-conviction relief, and it granted appellant the right to file a belated appeal.

reverse that conviction. With respect to the other convictions, however, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 2:45 a.m. on June 19, 2009, in Baltimore City, appellant shot Andre "Dre" Brooks six times. The shooting was witnessed by Kayla Jennings and Lashanda "Nicole" Dixon, who was Mr. Brooks' current girlfriend and appellant's past girlfriend. The State's theory was that appellant shot Mr. Brooks in anger; appellant claimed that he did it in self-defense.

At trial, Mr. Brooks, Ms. Dixon, and Ms. Jennings gave their accounts of the altercation. Mr. Brooks testified that, early in the morning on June 19, 2009, he and a friend were sitting outside on the steps of 522 East North Avenue. Feeling "buzzed" by alcohol, Mr. Brooks went two houses down the street to Ms. Dixon's building, 526 East North Avenue, to get a cigarette. Ms. Dixon was sitting on the steps, but Mr. Brooks did not see Ms. Jennings. Entering the vestibule of that building, Mr. Brooks had "words" with appellant, whom he had never met in person, but whom he had talked to on the phone. According to Mr. Brooks, the only reason he could offer for the ensuing physical altercation was that he brushed against appellant in the small vestibule.

Mr. Brooks and appellant "got to tussling" for about twenty seconds, "trying to grab each other." Mr. Brooks testified that he threw appellant down the steps, then followed after him. At that point, appellant reached behind his back, which indicated to Mr. Brooks that

appellant was pulling out a gun. Mr. Brooks was not able to get away from appellant, who was "in the middle of the steps." He described what happened as follows:

> I went down the steps behind him, but before I could get to him I saw him pulling out a weapon, well the gun. And once I seen him doing that I went – tried to go the other way and tried to jump off the steps. Before I could even hit the ground a bullet had hit me and then I hit the ground.

When Mr. Brooks "got [his] senses back together," he was on the sidewalk. He "looked up and the defendant was standing over top of [him] pretty much and continued to shoot." Holding the gun with both hands, appellant shot Mr. Brooks five more times. The first four gunshots hit Mr. Brooks in his right thigh, the fifth went into his arm, and the sixth grazed his buttocks. At that point, the two men looked at each other, and appellant walked away.

Mr. Brooks testified that he could not recall who started the fight, he was not armed with a knife, and he did not see, touch, or comment about appellant's gun. In the hospital inventory of Mr. Brooks' belongings, however, a knife was catalogued. Mr. Brooks stated that he was unaware that he had it, and he did not use it.

Ms. Dixon and Ms. Jennings gave slightly different accounts of the shooting. Both agreed that the altercation between Mr. Brooks and appellant stemmed from the men's relationship with Ms. Dixon, that it began after Mr. Brooks ran up the stairs and tried to take appellant's gun, that appellant fired the first shot at the top of the stairs, and that appellant then came down the stairs and emptied the gun into Mr. Brooks as he laid on the sidewalk.

Ms. Jennings told police that the encounter between Mr. Brooks and appellant was "like a set up." Ms. Dixon denied that, but she admitted that appellant had called her that evening and told her that he was coming to her place. Ms. Dixon went downstairs to sit on the front steps and was joined by Ms. Jennings. Both women knew about appellant's impending arrival, but they did not tell Mr. Brooks, who was sitting on the neighbor's steps.

A car pulled up and dropped off appellant. According to Ms. Jennings and Ms. Dixon, appellant walked up the steps where the two women were sitting, displayed a gun in his hand, then said to Ms. Dixon: "Let's go in the house." Appellant put the gun back in "his dip" and continued to the doorway, where he turned and again told Ms. Dixon: "Come on in the house." Ms. Dixon did not do so.

Both Ms. Dixon and Ms. Jennings testified that, at that point, Mr. Brooks ran up the stairs and grabbed appellant. Ms. Jennings recalled that Mr. Brooks said: "Oh, bitch, you got a gun?" Appellant replied: "Oh, who the fuck is you?" The two began "tussling" on the steps, with Mr. Brooks trying to get the gun away from appellant.

While the two men were still fighting in the doorway of the building, Ms. Dixon and Ms. Jennings both heard one shot. They testified that appellant fired the first shot inside the building, that it struck Mr. Brooks in the right forearm, and that appellant pushed Mr. Brooks down the steps, where he fell on the sidewalk in front of the building. While Mr. Brooks was down on the sidewalk, appellant shot him five times "below the waist."

Ms. Dixon testified that she was standing next to Mr. Brooks as he was lying on the sidewalk and appellant shot him from a short distance. According to Ms. Jennings, however, when the first shot was fired, Ms. Dixon ran into the house, and Ms. Jennings ran behind the building. Although Ms. Jennings was running when the second shot was fired, she peeked around the corner and saw appellant fire some of the remaining shots. Ms. Jennings estimated that appellant fired at Mr. Brooks from approximately fifteen feet away.

We shall add facts in our discussion of the issues raised by appellant.

DISCUSSION

I.

Self-Defense Instructions

Appellant contends that "the trial court erred in failing to instruct the jury that the defenses of perfect and imperfect self defense apply to first degree assault." He does not specifically argue why the court erred in failing to give an instruction on perfect self-defense, but he asserts that, pursuant to *Christian v. State*, 405 Md. 306 (2008), the defense of imperfect self-defense can be applied to the crime of first degree assault based on serious physical injury and mitigate that offense to second degree assault.

The State similarly does not address the failure to give a perfect self-defense instruction. With regard to the court's failure to give an instruction regarding imperfect self-defense, it argues that this does not warrant a reversal because "*Christian* is factually

inapposite, and, in any event, the circuit court merged [appellant's] first degree assault conviction into his conviction for attempted voluntary manslaughter."

A.

Assault

Maryland Code (2009) § 3-203 of the Criminal Law Article ("CL") prohibits a person from committing an assault. An assault encompasses the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings. CL § 3-201. The type of assault here was a battery. Battery is defined as "the unlawful application of force against another, either directly or indirectly." *Marquardt v. State*, 164 Md. App. 95, 129, *cert. denied*, 390 Md. 91 (2005). It includes "'kissing another without consent, touching or tapping another, jostling another out of the way, throwing water upon another, rudely seizing a person's clothes, cutting off a person's hair, throwing food at another, or participating in an unlawful fight.'" *Id.* (quoting *State v. Duckett*, 306 Md. 503, 510-11 (1986)). *Accord Lamb v. State*, 93 Md. App. 422, 433 (1992) (A battery involves an "actual physical injury or offensive touching."), *cert. denied*, 329 Md. 110 (1993). First degree assault may be committed in either of two ways: (1) "intentionally caus[ing] or attempt[ing] to cause serious physical injury to another," or (2) "commit[ing] an assault with a firearm." CL § 3-202(a)(1)-(2).

The Maryland appellate courts have explained the difference between perfect self-defense and imperfect self-defense. "'Perfect self-defense requires not only that the killer

subjectively believed that his actions were necessary for his safety but, objectively, that a reasonable man would so consider them.'" *Christian*, 405 Md. at 324 (quoting *State v. Faulkner*, 301 Md. 482, 500 (1984)).[2] Perfect self-defense is a complete defense resulting in acquittal. *State v. Latham*, 182 Md. App. 597, 619 (2008), *cert. denied*, 407 Md. 277 (2009). Imperfect self-defense, however,

> "requires no more than a subjective honest belief on the part of the killer that his actions were necessary for his safety, even though, on an objective appraisal by a reasonable man, they would not be found to be so. If established, the killer remains culpable and his actions are excused only to the extent that mitigation is invoked."

Christian, 405 Md. at 324 (quoting *Faulkner*, 301 Md. at 500).

[2] The elements of self-defense are well-settled in Maryland:

> "(1) The accused must have had reasonable grounds to believe himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant;
> (2) The accused must have in fact believed himself in this danger;
> (3) The accused claiming the right of self-defense must not have been the aggressor or provoked the conflict; and
> (4) The force used must not have been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded."

Christian v. State, 405 Md. 306, 324 n.14 (2008) (quoting *State v. Faulkner*, 301 Md. 482, 485-86 (1984)).

B.

Proceedings Below

The trial court instructed the jury regarding perfect and imperfect self-defense in the context of the murder charges. In that regard, the court instructed the jury as follows:

> You have heard evidence in this case that the defendant attempted to kill the victim in self-defense. You must decide whether this is a complete defense, a partial defense or no defense.
>
> . . . If the defendant did not act in complete self-defense but did act in partial self-defense, the verdict should be guilty of attempted voluntary manslaughter and not guilty of attempted murder.
>
> ***
>
> Even if you find that the defendant did not act in complete self-defense, the defendant may still have acted in partial self-defense. If the defendant actually believed that he was in immediate and imminent danger of death or seriously bodily harm, even though a reasonable person would not have so believed, the defendant's actual, though unreasonable belief, is a partial self-defense and the verdict should be attempt voluntary manslaughter rather than attempted murder. Or if the defendant used greater force than a reasonable person would have used, but the defendant actually believed that the force used was necessary, the defendant's actual, though unreasonable belief, is a partial self-defense and the verdict should be guilty of attempted voluntary manslaughter rather than attempted murder.

When the court went on, however, to instruct on the charges of first and second degree assault, the court did not discuss self-defense.

C.

Analysis

Pursuant to Md. Rule 4-325(c), "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law." "When requested to do so by a party, the trial court is required to give an instruction that correctly states the applicable law if it has not been fairly covered in the instructions actually given." *Allen v. State*, 157 Md. App. 177, 184 (2004). Nevertheless, "[t]he court need not grant a requested instruction if the matter is fairly covered by instructions actually given." *Id*.

As indicated, although appellant asserts in his argument heading that the court erred in failing to instruct on perfect self-defense, he submits no further argument in that regard. There may be reason for that, such as the jury's verdict rejecting the defense in the murder context. Nevertheless, given the lack of argument, we decline to consider it. *Diallo v. State*, 413 Md. 678, 692-93 (2010) ("'[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal.'") (quoting *Klauenberg v. State*, 355 Md. 528, 552 (1999)).

With respect to the court's refusal to instruct on imperfect self-defense, appellant relies on *Christian*, 405 Md. at 332, where the Court of Appeals held that imperfect self-defense may apply to a charge of first degree assault based on the "serious physical injury" modality, reducing the offense to second degree assault. In *Christian*, the Court expanded the defense of imperfect self-defense beyond its traditional application to murder and

attempted murder charges on the theory that this modality of first degree assault is a "shadow form of homicide." *Id.* at 332-33. Overruling precedent limiting imperfect self-defense to homicide cases, the Court of Appeals held that "mitigation defenses should be available for charges of first degree assault" based on the intent to inflict serious physical injury. *Id.* at 333. The Court reasoned that, if the intent to commit serious physical injury that supports first degree assault "may be imputed to underlie a murder conviction," then the same mitigation defense that would be available on the murder charge also "should be available for charges of first degree assault." *Id.*

The State argues that "*Christian* is factually inapposite," stating that, in *Christian*, "the [c]ourt did not address the giving of a perfect or imperfect self[-]defense instruction where, as here, the first degree assault does not serve as a predicate crime for a charge of felony murder or is not the flagship crime." It asserts that, because "the court instructed the jury in this case on both perfect and imperfect self-defense as it related to the attempted murder charges," the court was not required to repeat the same imperfect self-defense instruction on the first degree assault charge.

We agree with appellant that the court erred in failing to instruct the jury regarding imperfect self-defense as it related to mitigating first degree assault to second degree assault. The instruction given on imperfect self-defense was tied directly to the homicide offenses, and it was not sufficient to inform the jurors that imperfect self-defense was applicable to mitigate first degree assault to second degree assault.

Moreover, we cannot say that the error was harmless. The jury's verdict, which acquitted appellant of the murder charge and convicted him of voluntary manslaughter, shows that the jury was persuaded that appellant acted in imperfect self-defense. Because the jury convicted appellant of first degree assault without specifying whether that conviction was based on the use of a weapon modality or on the serious physical injury modality, we cannot discern whether the guilty verdict on the first degree assault count is tainted by the omission of the requested imperfect self-defense instruction.

Nor are we persuaded by the State's contention that nothing need be done to remedy the error because the trial court merged appellant's first degree assault for sentencing purposes. Although appellant is not serving a sentence for first degree assault, the conviction itself stands. Accordingly, we shall reverse it.

II.

Cross-Examination

Appellant next contends that "the trial court erred in prohibiting the defense from impeaching the victim with his prior conviction for assault" in violation of Md. Rule 5-609. For the reasons explained below, we disagree.

A.

Impeachment Cross-Examination Regarding Witness' Prior Conviction

"The Confrontation Clause of the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the

right to confront the witnesses against him." *Martinez v. State*, 416 Md. 418, 428 (2010). The right to cross-examination, however, "may reasonably be limited" in a manner that does not deprive the accused of a fair trial. *Church v. State*, 408 Md. 650, 664 (2009). Thus, the constitutional right of confrontation is satisfied "when defense counsel has been 'permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences related to the reliability of the witness.'" *Martinez*, 416 Md. at 428 (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)).

Maryland Rule 5-609(a), which protects a criminal defendant's Confrontation Clause rights by permitting impeachment with prior convictions relevant to credibility, provides:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.

The Court of Appeals has recognized that, in most cases, a prior conviction for assault is not admissible for impeachment because it is irrelevant to the witness' credibility, given that "acts of violence . . . generally have little or no direct bearing on honesty or veracity." *Jones v. State*, 217 Md. App. 676, 708, *cert. denied*, 440 Md. 227 (2014). Nevertheless, evidence of a prior assault may be relevant when a defendant claims self-defense and credibly proffers his knowledge of such acts as reputation evidence, rather than propensity evidence. In *Williamson v. State*, 25 Md. App. 338, *cert. denied*, 275 Md. 758

(1975), for example, this Court acknowledged that, "[o]n the issue of whether or not the accused had reasonable grounds to believe himself in imminent danger, he may show his knowledge of specific instances of violence on the part of the [victim]," but "questions regarding specific acts" should be precluded. *Id.* at 344, 347.

B.

Proceedings Below

Before trial, the State moved *in limine* to preclude defense counsel from impeaching the victim, Mr. Brooks, with evidence of his two prior convictions for first and second degree assault, stating that "they are not crimes that go to the victim's ability to tell the truth." The court then asked defense counsel to explain why he should be able to impeach the witness with his prior assault:

> THE COURT: [addressing Defense counsel] is it your intention to use these convictions to impeach Mr. Brooks?
>
> [DEFENSE COUNSEL]: Yes, for impeachment but also with regard to even the second degree assault charge because . . . . my client is alleged to have engaged in assaultive behavior against him the jury has the right to know.
>
> THE COURT: We're talking about impeachment. We're not talking about propensity towards violence.
>
> [DEFENSE COUNSEL]: Well first of all, specifically impeachment, first degree assault felony, so absolutely. And with regard to the second degree assault [conviction] – well that doesn't have to do with impeachment. So we'll cross that bridge when we get there. But –
>
> THE COURT: All right.

> [DEFENSE COUNSEL]: But the first degree assault, yes.
>
> ***
>
> THE COURT: I'm going to grant the State's motion and not allow you to use either the assault in the first degree or the assault in the second degree conviction for impeach [sic] matters pursuant to Maryland Rule 5609 because it does not qualify. Now with regard to his propensity to violence and what the defendant knew or didn't know that may be a different issue. But the fact of a conviction will not be admissible. The fact of conduct may be admissible. But . . . we'll see how that unfolds. But you will not be allowed to ask Mr. Brooks whether he was convicted of assault in the first degree. Anything else?

Defense counsel then expressed his disagreement with the court, stating that he would "provide the Court a case that really speaks to the contrary." On the second day of trial, just before the State called Mr. Brooks as a witness, defense counsel asked the trial court to "revisit" the "issue on the first degree assault [Md. Rule] 5[-]609, which I think was an impeachable offense." The court asked counsel if he had the case regarding admissibility that he said he would provide. When counsel said: "No," the court said that it would not revisit the issue. The court stated that, if counsel gave it "a case that says, 'Assault in the first degree – is an impeachable crime,'" the court would "be happy to reconsider." At that point, however, the court stated that "it's . . . in this particular case, far too prejudice [sic] and not probative of truth telling. And therefore it will not allow you to use the assault in the first degree. If you find me a case that says . . . something to the contrary, I'll be happy to review it."

C.

Analysis

"A trial judge's refusal to allow a line of questioning on cross-examination amounts to exclusion of evidence." *Grandison v. State*, 341 Md. 175, 207 (1995), *cert. denied*, 519 U.S. 1027 (1996). If "evidence is inadmissible on its face . . . the proponent must . . . explain to the court how the evidence is admissible and why it should be received." *In re Adoption/Guardianship Nos. CAA92-10852 and CAA92-10853*, 103 Md. App. 1, 33 (1994).

Here, when the State moved to exclude Mr. Brooks' prior convictions, defense counsel argued that the evidence was admissible for impeachment. On appeal, he concedes, correctly, that assault is not an impeachable offense within the purview of Rule 5-609. *See Duckett*, 306 Md. at 512. He argues, however, that impeachment with a prior conviction for assault was permissible "to support his defense that [Mr.] Brooks and not [appellant] was the initial aggressor."

Advancing an alternate theory of admissibility for the first time in an appellate brief, long after the trial court might have been persuaded to change its ruling, is simply too late. In the absence of a timely proffer of the "self-defense/aggressor" rationale for treating a prior assault conviction as an impeachable offense, we will not reverse on this ground. *See In re: Kaleb K.*, 390 Md. 502, 512 (2006) (appellate court will review only "'the ruling actually asked and made'" in the trial court) (quoting *Wickman v. Bohle*, 173 Md. 694, 695

(1938)); *Ware v. State*, 360 Md. 650, 668 (2000) (argument not made to trial court is waived), *cert. denied*, 531 U.S. 1115 (2001).

Even if appellant's theory of admissibility had been timely proffered, we would not be persuaded that appellant would be entitled to a new trial. Although the trial court prohibited defense counsel from mentioning Mr. Brooks' *convictions*, it indicated that inquiry about Mr. Brooks' propensity toward violence and appellant's knowledge of that may be permissible, stating that "conduct may be admissible," but not the convictions.

Moreover, the jury's finding that appellant acted in imperfect self-defense indicates that appellant effectively impeached Mr. Brooks' credibility by cross-examining him about the evidence contradicting his claim that he was unarmed and his testimony that the altercation began when he brushed appellant in the vestibule. Thus, appellant's right of confrontation was satisfied "when defense counsel [was] 'permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences related to the reliability of the witness.'" *Martinez*, 416 Md. at 428 (quoting *Davis*, 415 U.S. at 318).

CONVICTION FOR FIRST DEGREE ASSAULT REVERSED. ALL OTHER CONVICTIONS AFFIRMED. COSTS TO BE PAID 50% BY APPELLANT, 50% BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.