Circuit Court for Prince George's County
Case No. CT170803X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2589

September Term, 2019

TYRONE FREDERICK GENERAL, SR.

v.

STATE OF MARYLAND

Fader, C.J.,
Wells,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: April 6, 2021

Appellant Tyrone Frederick General was convicted by a jury in the Circuit Court for Prince George's County of first-degree assault and second-degree assault of Ian Reid, reckless endangerment of his infant step-grandson, Kairo Reid, use of a handgun in the commission of a felony,[1] and carrying a handgun. Appellant presents the following questions for our review:

> "1. Did the trial judge err by instructing the jury that it could convict appellant of use of a handgun in the commission of a felony based on the underlying misdemeanor of second-degree assault against Ian Reid or first-degree assault against Kairo Reid—a charge that was not submitted to the jury?
>
> 2. Did the trial judge impose an illegal sentence based on the jury's finding that appellant was guilty of "use of a handgun," where the jury did not announce a verdict on the charge of use of a handgun in the commission of a felony and thus did not reach a verdict on an element of that crime?
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> 3. Did the trial judge err by not instructing the jury concerning the defense of necessity?
>
> 4. Did the trial judge commit plain error by failing to instruct the jury that appellant was not prohibited from carrying a handgun on land that he owns or where he lives?
>
> 5. Did defense counsel provide ineffective assistance by failing to move for judgment of acquittal as to the charge of carrying a handgun on the ground that appellant was not barred from doing so on property that he owns or where he lives?
>
> 6. Did defense counsel render ineffective assistance by failing to request a jury instruction that appellant was not prohibited from carrying a handgun on land that he owns or where he resides?"

[1] Appellant was indicted for the offense of use of a handgun in the commission of a felony. The jury announced a verdict for "use of a handgun," rather than use of a handgun in the commission of a felony, and the clerk hearkened the verdict to "use of a handgun."

We shall hold that the trial court erred in instructing the jury that second-degree assault is a predicate offense for use of a handgun in the commission of a felony. Accordingly, we shall reverse the judgment of conviction for that handgun offense. We shall affirm the judgments of convictions of first-degree and second-degree assault of Ian Reid, carrying a handgun, and reckless endangerment of Kairo Reid.

I.

Appellant was indicted by the Grand Jury for Prince George's County on charges of attempted first-degree and second-degree murder, first-degree and second-degree assault, reckless endangerment, use of a handgun in the commission of a felony, and carrying a handgun. The jury convicted him of first-degree assault and second-degree assault of Ian Reid, reckless endangerment of Kairo Reid, "use of a handgun," and carrying a handgun. The jury acquitted appellant of attempted murder of Ian Reid. The assault charge related to Kairo Reid was not submitted to the jury. For first-degree assault, the court imposed a term of incarceration of ten years, all but five suspended; for reckless endangerment, a term of incarceration for one year, to be served concurrently; and for use of a handgun in the commission of a felony, a term of incarceration of five years without the benefit of parole, to be served concurrently.[2]

The event arose out of a custody visitation dispute between Ian Reid and Valencia

[2] For sentencing purposes, the court merged second-degree assault into first-degree assault, and carrying a handgun into use of a handgun in the commission of a felony.

Perry. We glean the following facts from the trial testimony. Appellant is married to Valerie Perry, and has been for more than thirty years. The couple are the stepfather and the mother of Valencia Perry. Kairo is the child of Ian Reid and Valencia Perry; appellant and Valerie are the step-grandfather and grandmother of Valencia's children.[3] Appellant and Mr. Reid have known each other since 1999 or 2000. On May 5, 2017, Mr. Reid drove to appellant's house to pick up his minor children, who were at appellant's house with their mother, Valencia, and with appellant and Valerie. There was no formal child custody agreement at the time. On May 4, the preceding day, Mr. Reid had threatened Valencia, the mother of his children, because she would not drop child custody proceedings pending in court. He also told her that day that he wanted her dead, part of a pattern of similar statements.[4] On May 4, Valerie Perry, who frequently babysat her grandchildren and who informally mediated custody and visitation issues between Mr. Reid and Valencia, asked Mr. Reid not to come over on May 5 to pick up the children, and told him that the appropriate day for him to pick up the children would be May 7. Mr. Reid agreed.

When Mr. Reid arrived on May 5, appellant was sitting in a car in his driveway, smoking a cigarette. Mr. Reid possessed a gun in his car at the time; appellant also knew

[3] We shall use the first names of each Ms. Perry so as to distinguish them. In addition, although testimony indicates that appellant and his family use the terms "father" and "grandfather" rather than "stepfather" or "step-grandfather," and that appellant refers to Valencia as his daughter and to Mr. Reid as his son-in-law, we use the traditional, formal terminology in the interest of clarity.

[4] Valerie Perry testified that Mr. Reid repeatedly told her too that he wanted her daughter dead. In addition, on April 30, Mr. Reid came to appellant's house and engaged in threatening behavior towards a male friend of Valencia. Mr. Reid testified that he was merely entangled in "baby mama drama."

that Mr. Reid commonly engaged in concealed carry. Mr. Reid said that he was there to pick up his kids, and appellant went inside the house to get the children. Appellant returned and said that Valerie and Valencia would not allow Mr. Reid to take the children that day. Shortly thereafter, Mr. Reid entered the house, allowed to do so by appellant's wife, Valerie, apparently at the behest of appellant himself, who told her, "I feel confident about Ian [Reid]. He can come in. Let him see his kids."

Inside the house, Valerie handed the baby, Kairo, to Mr. Reid, who told the other two children to get ready to leave, and he carried Kairo outside while Valerie and Valencia were arguing with one another—according to Mr. Reid. According to appellant and his wife, however, an altercation broke out between Mr. Reid and Valencia over Kairo, the baby boy, while they were inside the house. Valencia then called 911. Mr. Reid took the baby and tried to exit through a side door, pushing Valerie down a flight of steps, causing her to scream for appellant to help her. Appellant came inside before Mr. Reid hit him and knocked him across the kitchen. Mr. Reid then exited with the baby.

According to Mr. Reid, Valencia followed him outside and tried to grab Kairo from his hands. Mr. Reid raised the baby up high, beyond her reach. Appellant then came outside and walked down the exterior stairs while holding a gun that he had retrieved from upstairs in his house. Mr. Reid continued to hold Kairo above his head and beyond the reach of the baby's mother. According to Mr. Reid, appellant pointed the gun at Mr. Reid's head and shot him in the left side of his neck.

Appellant testified, however, that he found Mr. Reid outdoors choking his

stepdaughter Valencia with one hand while holding the baby in the other. Appellant held the gun and tried to talk to Mr. Reid, prompting Mr. Reid to spin around and grab at the gun, which then discharged. He testified that he knew Mr. Reid carried guns and that Mr. Reid had made threats in the days before the incident. He related that Mr. Reid had threatened one of Valencia's friends and that he had remarked that he wanted Valencia dead. Appellant recounted that while he was outside the house smoking, he heard Valerie scream many times, causing him to run inside the house, where he saw Mr. Reid and Valencia tussling. After Mr. Reid swung at him, and because he believed that Mr. Reid had a gun, he retreated to his bedroom where he retrieved an antique, .22 caliber revolver.

Immediately after the shooting, appellant applied pressure to the neck wound so that Mr. Reid would not bleed out. When police arrived, they took over for appellant.[5] Subsequently, Mr. Reid was taken to Prince George's Hospital and was treated for his injuries.

At the trial, before closing arguments, the judge orally instructed the jury, as follows.

> "The defendant is charged with attempted first-degree murder against Ian McKinley Reid, attempted second-degree murder against Ian McKinley Reid, assault first degree against Ian McKinley Reid, assault second degree against Ian McKinley Reid, and assault first degree against Kairo Patrick McKinley Reid, assault second degree against Kairo Patrick McKinley Reid, reckless endangerment against Kairo Patrick McKinley Reid, handgun use felony and wear and carry, transport a handgun upon their person.
>
> "You must not consider each charge—you must consider each

[5] The police body-camera footage shows commendable and extraordinary first-aid efforts both by the police officers and by appellant.

> charge separately and return a separate verdict for each charge with the following exception: Do not consider the charge of use of a handgun in the commission of a felony until you have reached a verdict on the charge of attempted first-degree murder against Ian McKinley Reid or attempted second-degree murder against Ian McKinley Reid or assault first degree against Ian McKinley Reid *or assault second degree against Ian McKinley Reid or assault first degree against Kairo McKinley Reid*. [Emphasis added.]
>
> "Only if your verdict on that charge is guilty should you consider that whether the defendant is guilty or not guilty of the use of a handgun in the commission of a felony. If, however, your verdict on that charge is not guilty, you must find the defendant not guilty of use of a handgun in the commission of a felony."

During the bench conference that followed, the prosecutor told the judge that the instruction was wrong. The judge included second-degree assault erroneously, a misdemeanor, as an offense that could support a conviction for use of a handgun in the commission of a felony. On the record, the prosecutor observed that after the judge made the error, she looked over at defense counsel. Before the judge had read the instructions, defense counsel had asked her to remove language directing jurors not to consider the charge of use of a handgun in the commission of a felony until reaching a verdict on the charge of second-degree assault against Ian Reid. In response to the prosecutor, the judge indicated that she would correct the instruction by correcting the written instructions that would be sent back to the jury deliberation room with the jury. The court agreed to delete second-degree assault from the list of felonies that could support a conviction for use of a handgun in the commission of a felony, and agreed to delete the charges of assault related to Kairo Reid from the instruction because the parties had agreed not to submit those charges to the jury.

When the jury returned its verdict on August 22, 2019, the verdict on the use of a handgun in the commission of a felony charge was announced as follows:

> DEPUTY CLERK: As to Question Six, do you find the defendant guilty or not guilty as to the *charges of use of a handgun*, on May 5, 2017?
>
> FOREPERSON: Guilty.

When polling the jury, the deputy clerk said, "you found the defendant guilty as to the charge of *use of a handgun* on May 5, 2017." The jurors responded in the affirmative. When hearkening the jury to its verdict, the clerk said, "you found the defendant guilty as to the charge of use of a handgun on May 5, 2017." Each juror agreed. The verdict was not announced as "use of a handgun in the commission of a felony."

The court imposed sentence as noted above, and this timely appeal followed.

II.

Appellant presents six questions in this appeal. He argues first that the trial judge erred by instructing the jury that it could convict appellant of use of a handgun in the commission of a felony based upon second-degree assault on Ian Reid or first-degree assault on Kairo Reid, a charge that was not submitted to the jury. Second-degree assault is a misdemeanor, not a felony, and cannot be the predicate offense for use of a handgun in the commission of a felony. *See* Md. Code Ann., Crim. Law § 3-203(b) (West 2015) [6] (assault in the second degree is a misdemeanor); § 4-204. Appellant acknowledges that

[6] Unless otherwise noted, all subsequent statutory references herein shall be to the Criminal Law Article of the Annotated Code of Maryland.

the trial judge corrected the errors on the written instructions that she sent back to the jury room, but observes that the court never corrected the oral instructions that she had read to the jury moments earlier. The final instruction that the court read to the jury before closing arguments was indisputably wrong, appellant urges, and was never corrected orally. This error, according to appellant, requires reversal.

Second, appellant argues that the trial judge imposed an illegal sentence based on the jury's finding that appellant was guilty of "use of a handgun," where the jury did not announce a verdict on the charge of use of a handgun *in the commission of a felony*, a required element of the offense. Appellant relies on Rule 4-327, which provides that the verdict of a jury shall be unanimous and shall be returned in open court. He interprets that Rule to mandate that the jury orally announce its verdict. Moreover, he concludes, no such offense of "use of a handgun" exists in Maryland.

Third, appellant argues that the trial judge erred in refusing to instruct the jury concerning the defense of necessity with respect to the charge of carrying a handgun. He argues that he produced *some* evidence in support of the necessity instruction, thereby satisfying the legal standard. Appellant argues that he was entitled to the instruction because he generated evidence of: (1) his reasonable belief that he was in present, imminent, and impending peril of death or serious bodily injury; (2) absence of intentional or reckless choice to be in the situation; (3) absence of reasonable alternative to possessing the handgun; (4) handgun availability without preconceived design; and (5) relinquishment of the gun as soon as the apparent necessity ended.

Fourth, as to carrying a handgun, recognizing that there was no request to instruct the jury as he argues in this appeal, appellant argues that the trial judge committed plain error by failing to instruct the jury that appellant was not prohibited from carrying a handgun on land that he owns or where he lives. Appellant relies upon Crim. Law § 4-203(b)(6), which exempts from criminal sanction the "wearing, carrying, or transporting of a handgun by a person on real estate that the person owns or leases or where the person resides[.]" Appellant asserts that the evidence strongly supports the conclusion that the altercation occurred in his driveway, on his own property.

Fifth, appellant asks us to entertain ineffective assistance of counsel in this direct appeal, because defense counsel provided ineffective assistance by failing to move for judgment of acquittal on the charge of carrying a handgun in light of the statutory exception. That statutory exception expressly allows, and does not criminalize, carrying a handgun on property that he owns or where he lives.

Sixth, appellant argues that defense counsel rendered ineffective assistance by failing to request a jury instruction that appellant was not prohibited from carrying a handgun on land that he owns or where he lives. Appellant states that it is undisputed that the altercation occurred on his property and that the statute does not proscribe him from carrying a handgun on his property. Because the defense conceded that appellant carried a handgun, appellant argues that counsel's representation was deficient in failing to request the jury instruction, because if the jury had been so instructed, "it almost certainly would have resulted in appellant's acquittal of carrying a handgun based on undisputed evidence

that the incident occurred on his own property." Appellant further argues that the instruction likely would have placed the evidence as to the remaining charges in an entirely different light; and that a possible reason the jury rejected appellant's claims of self-defense and defense of others was the mistaken belief that he was prohibited from carrying a handgun on his own land. The jury, wrongly believing that appellant was barred from carrying a handgun, might have inferred from this conduct that he was the initial aggressor or that he unreasonably used deadly force—which he argues would have negated self-defense—or that his purpose in confronting Ian Reid was not to aid appellant's imperiled stepdaughter, which he argues would have negated the defense-of-others defense.

The State asks us to affirm on all counts. As to the use of a handgun in the commission of a felony, the State's threshold argument is that the issue is not preserved for our review. The trial court corrected the written jury instructions which were sent back to the jury room, and defense counsel told the judge at the bench: "Or no [sic] first and second-degree assault, *that's fine as long as the verdict form indicates that."* The State emphasizes that appellant's counsel never asked the trial court to read to the jury the correct version of the instruction, thereby waiving the issue for our review. On the merits, the State maintains that appellant is simply wrong when he argues that the trial court never corrected the "use of a handgun" instructions because the court did correct the written instructions.

As to appellant's argument that his sentence was illegal because the jury returned a verdict for "use of a handgun" rather than "use of a handgun in the commission of a felony,"

the State argues non-preservation. Appellant did not object to the jury's announcement of the verdict or the hearkening of the verdict. Additionally, he did not object to the form of question six on the verdict sheet, which asked the jury to determine whether appellant was guilty or not guilty of "*use of a handgun.*" The State cites *Colvin v. State*, 450 Md. 718 (2016), for the proposition that procedural challenges to a verdict are subject to standard preservation requirements, and extrapolates that appellant's silence when the verdict was received and hearkened amounts to waiver.

Turning to the refusal of the trial court to instruct on the defense of necessity for carrying a handgun, the State responds that the trial court declined correctly to instruct the jury on the defense of necessity. In the State's view, the instruction was not generated by the evidence. The State argues that the evidence did not warrant the instruction because the five elements of the necessity defense, as set out in *State v. Crawford*, 308 Md. 683, 698–99 (1987), were not generated, particularly element three, a reasonable alternative, and element four, possession of the handgun without preconceived design. .

The State also urges this Court to reject appellant's argument that the trial court erred in not instructing the jury regarding the charge of violating Crim. Law § 4-203, which prohibits the wear, carry or transport of a handgun. The State opposes appellant's specific contention that the trial court should have told the jury that the statute does not prohibit a person from carrying a handgun on property owned by that person. *See* Crim. Law § 4-203(b)(6). Defense counsel never asked for this instruction, and the State maintains that we should decline to engage in plain error review. The State argues that appellant was

required by Rule 4-325(e) to request the jury instruction at trial, and that appellant was obliged to object to the instructions that did not mention the real-estate ownership/residence exception. In addition, the State maintains that the trial court did not commit plain error by omitting an instruction on the statutory real-estate exception because Rule 4-325(c) only *requires* that the trial court instruct the jury at the request of a party.

Appellant's final two issues relate to an ineffective assistance of counsel claim, *i.e.*, whether appellant received ineffective assistance of counsel because trial counsel failed to request a jury instruction based upon the real-estate ownership/residence statutory exception, or failed to argue that exception as a basis for judgment of acquittal. The State argues that counsel's failure to move for judgment of acquittal on the statutory exception ground or counsel's failure to request a jury instruction on the same is best and properly left to post-conviction proceedings, and not addressed on direct appeal on this scant record. The State suggests that the record is inadequate because appellant never raised that exception as a defense. The State disputes appellant's claim that it is indisputable that the statutory exception applies in this case and, because no record was developed on the issue, the State maintains that it is possible that appellant crossed his property line in the course of the altercation, making the exception inapplicable. Furthermore, according to the State, trial counsel may have had a reason for intentionally not raising the issue at trial.

III.

We address first appellant's centerpiece claim: that the trial court erred in

instructing the jury on the crime of use of a handgun in the commission of a felony. There is no dispute that the oral instructions to the jury were erroneous. Second-degree assault is not a felony, and thus, as a matter of law, cannot be a predicate offense for the charged crime of use of a handgun in the commission of a felony.[7] *See* Crim. Law § 3-203(b) (assault in the second degree is a misdemeanor); § 4-204(b). Further, first-degree assault against Kairo Reid was not submitted to the jury and was therefore an erroneous predicate. There is also no dispute that the trial court did not tell the jury that the verbal instructions were legally wrong, *albeit* no one asked the court to do so. The fact remains that the jurors were never alerted to the need to disregard the erroneous instruction and to rely solely on the written instructions. A defendant has a right to complete and accurate jury instructions on the law and the trial court's failure to provide accurate jury instructions deprives the accused of the right to a jury trial. *See Robertson v. State*, 112 Md. App. 366, 385–86 (1996) ("[a]ccurate jury instructions are also essential for safeguarding a defendant's right to a fair trial").

The State argues that this issue is not preserved for our review because appellant did not ask the court to re-read the jury instructions aloud and he did not ask for any additional relief which the court refused to give. Appellant argues that the issue is preserved because the court recognized appellant's objection to inclusion of second-degree

[7] Because the Grand Jury indicted for "use of a handgun in the commission of a felony" rather than "use of a handgun in the commission of a felony or crime of violence," the State requested that the trial judge diverge from the pattern jury instruction by eliminating "or crime of violence" from that instruction. The judge honored the request.

assault as a potential underlying offense. We need not decide whether the issue was technically preserved because we have the discretion to review unpreserved claims as plain error if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See* Rule 8-131(a). A trial court commits plain error when: (1) there is error; (2) the error is plain; and (3) the error affects substantial rights of the defendant. *See Newton v. State*, 455 Md. 341, 364 (2016).

Here, there was undisputed error. Although plain error is a rare phenomenon, this error is plain and clear on its face. The error affected substantial rights and the integrity of the proceeding. Because here there was "plain error," and the error is clear, we will exercise our discretion and reverse appellant's conviction for use of a handgun in the commission of a felony because allowing the conviction to stand results in a miscarriage of justice.

Maryland Rule 4-325 addresses jury instructions. Rule 4-325(c) relates to "How given," stating, in pertinent part, as follows:

> "The 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 may give its instructions orally or, with the consent of the parties, in writing instead of orally. . . . "

Here, the trial judge instructed the jury both orally, stating the law incorrectly, and with written instructions correcting the oral error. Appellant was prejudiced by the incorrect oral instructions explaining the law and we will recognize the plain error. According to the oral instructions, the jury could consider second-degree assault, a misdemeanor, as a predicate offense for the crime of use of a handgun in the commission of a *felony*.

Likewise, according to the instructions, the jury could consider as a predicate the first-degree assault of Kairo Reid, an offense that the court did not submit to the jury.

The erroneous oral instructions were never orally corrected for the jury and, highly significant to our analysis, the jury was never told to disregard the erroneous instructions. That a competing written instruction offered the correct legal standard does not cure the harm. In fact, the jury was never told that the written instructions varied in any way from the oral instructions. While a trial court could, under our Rule, satisfy its duty to instruct jurors in a criminal case by providing jurors with written instructions to use during deliberations, the Rule does not contemplate contemporaneous oral and written instructions which are different and where one contains an incorrect statement of the law. We hold that the trial court erred and we shall reverse the judgment of conviction for use of a handgun in the commission of a felony.

IV.

Our holding leaves for consideration the remaining convictions: first and second-degree assault of Ian Reid, reckless endangerment of Kairo Reid, and carrying a handgun. Appellant claims he raised the defense of necessity and that he was entitled to a jury instruction on that defense. He argues that the defense of necessity applies to carrying a handgun and that the error in not instructing on the defense spilled over to "the other charges" (which we interpret relates principally to the assaults). He reasons that the spill-over exists because without the necessity instruction the jury might infer that appellant had

no legally recognized need to carry a gun, or that he was the aggressor, or that he raised the altercation level to deadly force, thereby negating appellant's claim of self-defense or defense of others, *i.e.*, Valencia Perry.

Rule 4-325(c) provides that 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." To be entitled to an instruction, however, it must have been generated by the evidence. *General v. State*, 367 Md. 475, 485–87 (2002) (petitioner was unrelated to appellant in the instant case).

We review the question of whether there was sufficient evidence to generate a requested jury instruction *de novo*. *Howell v. State*, 465 Md. 548, 561 (2019). The test is whether there is "some evidence" in the record to support the requested instruction. *Dykes v. State*, 319 Md. 206, 216–17 (1990). In Maryland, a defendant in a criminal case is entitled to have the jury instructed on his or her theory of the case if there was some evidence to support that theory. *Id.* In evaluating appellant's evidence, the trial court must view it in the light most favorable to the defendant. *Bazzle v. State*, 426 Md. 542, 551 (2012).

What is the defense of necessity? The Court of Appeals examined the necessity defense thoroughly in *Sigma Reprod. Health Ctr. v. State*, 297 Md. 660 (1983), explaining that the necessity defense arises when a person "is faced with a choice of two evils, and one is the commission of an illegal act." *Id*. at 677. In a subsequent case, the Court elaborated, explaining "that the justification for the necessity defense is not that a person

faced with a choice of two evils lacks the *mens rea* for the crime in question, but that the law promotes the achievement of higher values at the expense of lower ones and that 'sometimes the greater good for society will be accomplished by violating the literal language of the criminal law.'" *State v. Crawford*, 308 Md. 683, 691 (1987) (quoting *Sigma Reprod. Health*, 297 Md. at 667 (quoting Wayne R. LaFave & Austin W. Scott, Jr., HANDBOOK ON CRIMINAL LAW § 50 (1972))). The defense of necessity is available to all crimes except the killing of an innocent person. *Frasher v. State*, 8 Md. App. 439, 447–48, *cert. denied*, 400 U.S. 959 (1970). The defense, if generated properly by the evidence, is applicable to the crime of wearing or carrying a handgun in violation of § 4-203.

The *Crawford* Court set out that necessity is a valid defense to the crime of unlawful possession of a handgun when five elements are present: (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; (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. The defense of necessity is not available if the threatened harm is property damage or future personal injury or if the compulsion to possess the handgun arose directly from the defendant's own misconduct. *Id*. at 697.

The common law defense of necessity is a defense that is applicable in rare situations. The Court of Appeals stated, "The case does not become one of necessity unless all other alternatives have been exhausted." *Sigma Reprod. Health*, 297 Md. at 679.

We hold that the trial court did not err in declining to instruct the jury as to the defense of necessity. The evidence did not generate the defense and did not satisfy the evidentiary foundation set out in *Crawford* to justify the jury instruction. Appellant escalated the confrontation by going upstairs in the house and retrieving a loaded handgun. Appellant had reasonable alternatives to retrieving and possessing the handgun. Appellant did not establish that he or another was in *imminent* danger of death or serious physical injury by the time he went upstairs for the gun. Appellant made the conscious decision to retrieve a gun from inside his house and to escalate the encounter into an armed conflict, a decision he made before he saw Mr. Reid choking Ms. Valencia Perry.

V.

Appellant's final issues relate to trial counsel's failure to argue that he was statutorily entitled to carry the handgun on his own property, and failure to argue the same as a basis for his motion for judgment of acquittal. Because these issues were not raised below, he asks us to address his claim of ineffective assistance of counsel in this direct appeal based upon these omissions. He also asks us to address the failure to raise or instruct upon the statutory real-estate exception as plain error. We decline to do so.

Maryland Code criminalizes the wear, carry, or transport of a handgun on the person, Crim. Law § 4-203(a)(1)(i), but the statute expressly exempts from criminal sanction "the wearing, carrying, or transporting of a handgun on real estate that the person owns or leases or where the person resides." Crim. Law § 4-203(b)(6).

As noted *supra*, plain error is a rare, rare phenomenon, *Morris v. State*, 153 Md. App. 480, 507 (2003), and we have limited the instances in which an appellate court should take cognizance of an unpreserved error to those which are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *State v. Hutchinson*, 287 Md. 198, 203 (1980). We will not do so in this instance because appellant has not shown that the trial court committed plain error by failing to raise a statutory argument *sua sponte*. The error is not plain here because the record as to whether the entirety of the altercation occurred within appellant's property boundaries was not developed below. As appellant argues, it was never raised or argued at trial.

We reject appellant's view that the trial court was required in this case to provide a jury instruction on a defense or issue that was *never requested* by defense counsel or even mentioned factually as an issue for the trier of fact's attention. Appellant's fourth question presented was: "Did *the trial judge* commit plain error by failing to instruct the jury that appellant was not prohibited from carrying a handgun on land that he owns or where he lives?" (Emphasis added.) To that specific question, we answer in the negative.

We decline to address appellant's ineffective assistance of counsel claim in this direct appeal. The general approach is that claims of ineffective assistance of counsel are

addressed more appropriately in a post-conviction proceeding. *Martin v. State*, 218 Md. App. 1, 23–24 (2014). On direct appeal, the record is usually insufficient for an appellate court to reasonably assess trial counsel's decisions or reasons behind counsel's actions. *Harris v. State*, 295 Md. 329, 337–38 (1983). Here, the record is silent as to why trial counsel did not request the instruction related to the statutory real-estate exception to the prohibition against carrying a handgun; and the record is silent as to his failure to argue the same at the motion for judgment of acquittal. As one example of a deficient record, we note that the necessity defense is predicated upon a person committing an illegal act, while the statutory exception here is based upon a claim that the act of carrying a handgun was a legal and permissible act. Perhaps counsel wished to avoid arguing to the jury inconsistent positions. Who knows, without a sufficient record. Even more significant is the absence of any testimony regarding the property lines and testimony directed to the location issue. As noted, we will not address appellant's allegation of ineffective assistance of counsel in this direct appeal and leave open the option of pursuing the issue in post-conviction proceedings should he choose to do so.

VI.

In sum, we reverse the judgment of conviction for use of a handgun in the commission of a felony. We note that, at sentencing, the court merged the carry offense into the greater conviction of use of a handgun in the commission of a felony, the conviction we now reverse. We remand to enable the court to impose sentence for the

count of carrying a handgun. To provide the court maximum flexibility on remand to fashion a proper sentence in this case that takes into account all of the relevant facts and circumstances, we shall vacate all of the sentences. *See* Rule 8-604(d)(1); *Twigg v. State*, 447 Md. 1, 30 (2016).

JUDGMENT OF CONVICTION IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR USE OF A HANDGUN IN THE COMMISSION OF A FELONY REVERSED. ALL OTHER JUDGMENTS OF CONVICTIONS AFFIRMED. SENTENCES ON ALL REMAINING CONVICTIONS VACATED AND CASE REMANDED TO THAT COURT FOR RESENTENCING, AND FOR NEW TRIAL ON USE OF A HANDGUN IN THE COMMISSION OF A FELONY. COSTS TO BE DIVIDED EVENLY BETWEEN THE PARTIES, ONE HALF PAID BY APPELLANT AND ONE HALF BY PRINCE GEORGE'S COUNTY.