UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2624

September Term, 2013

DAVON MICHAEL CARTER

v.

STATE OF MARYLAND

Berger,
Nazarian,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: August 25, 2015

A jury in the Circuit Court for Anne Arundel County convicted Davon Michael Carter, Appellant, of first-degree assault, second-degree assault, and reckless endangerment. Appellant was acquitted of attempted first and second-degree murder, as well as two counts of carrying a weapon openly with intent to injure. For the first-degree assault, Appellant was sentenced to twenty-five years, with all but ten years suspended, plus five years of supervised probation; the remaining convictions were merged for sentencing purposes.

Appellant presents the following questions for our review:

1. Did the trial court err in refusing to instruct the jury on imperfect self-defense?

2. Did the trial court prejudicially restrict defense cross-examination of [prosecution witnesses] Walter Humple and Dominique Green?

Because we conclude that there was insufficient evidence to warrant an imperfect self-defense instruction and that the trial court did not err in restricting cross-examination, we shall affirm Appellant's convictions.

FACTS AND LEGAL PROCEEDINGS

The State's prosecution theory was that Appellant, suspecting that Walter Humple stole money from him, beat Humple within "an inch of his life" and left him to die, tied up in a bathtub with the water running. Appellant's defense was that Humple, a "liar," "heroin addict," and "violent man," escalated their verbal disagreement into a physical altercation, that Appellant acted in self-defense, and that someone else thereafter inflicted the serious injuries suffered by Humple.

Walter Humple testified that on the evening of February 24, 2013, his friend Dominique Green, along with his wife, had been staying at Humple's apartment for about a week. Appellant, a friend of Green's, had stayed over the night before. Suffering from heroin withdrawal symptoms, and off his bipolar medication that controlled his mood swings, Humple "was at a complete bottom in [his] life."

That evening, he was asleep in the living room when Appellant and Green woke him. Appellant accused him of stealing money. Humple denied taking any money and suggested it had been Green or his wife. According to Humple, after a heated argument of twenty to thirty minutes, Appellant said, "You're going to die over $100," then swung at him. Humple and Appellant wrestled to the ground.

Humple initially restrained Appellant, telling him, "I'm not trying to fight you," but Appellant "slipped out of [his] grip" and subdued Humple. Appellant tied his hands and ankles with belts, while an unknown "large [b]lack man" tied a belt around his neck.

As Humple lay on the ground, Appellant repeatedly dropped a heavy homemade axe on him. In addition, Appellant punched and kicked Humple, then stomped on his face, causing what was later diagnosed as a potentially life-threatening "brain bleed" or subdural hematoma. Before Appellant and his accomplice left, they dragged Humple to the bathroom, placed him in the bathtub, covered him with a comforter, and left the cold water running.

According to Humple, his friend Dominique Green stood by "watching all this," as Humple was bound and beaten. Humple testified: "I saw Dominique Green standing in

the doorway and I kept telling him, 'Help me, help me.'" Humple lost consciousness for a period of time, with Green being "the last thing [he] saw." Humple believed that while he was being dumped in the bathroom, Green was "in the kitchen just standing there watching."

After the assailants left, Humple eventually got out of the bathtub, Green cut the belts, and Humple got the rest off himself. After calling his mother, Humple called 911 to report that "[p]eople came in my house and beat me up really bad." Humple's 911 call was played for the jury. Although he initially stated he did not know his assailants and could not describe them, he then told the 911 operator, "This guy, I guess, I don't know, it was my friend's friend or whoever had spent the night and he thinks I stole his money[.]" Humple told the emergency medical technician that Appellant caused his injuries and later identified Appellant in a photo array.

Dominique Green, also called by the prosecution, gave a different account of the altercation. Although he confirmed that Humple and Appellant argued over Appellant's missing money, Green recounted that Humple threw the first blow and contradicted Humple's claim that there was one continuous assault throughout which Green was present. According to Green, "Walter [Humple] swung on [Appellant] first and then that's when they wrestled each other to the ground." Green claimed that he left the apartment after that skirmish concluded, because he "didn't want no part[] of it." By that time, however, Humple and Appellant were done fighting and "were just talking about the dispute . . . but nothing violent was going on [.]" When he returned thirty minutes later, Appellant was

gone, and Humple was badly beaten and loosely bound with belts. Humple told Green that the person who hurt him was "some big guy" he did not know.

Appellant did not testify at trial, but the jury learned that when police first questioned Appellant about the assault on Humple, Appellant stated, "I didn't hit him like that."

In closing, defense counsel argued that there was reasonable doubt based on the lack of other witnesses or physical evidence to corroborate Humple's claim that it was Appellant who beat and bound him. The defense also pointed to significant discrepancies in Humple's account of the incident, positing that Humple was the aggressor in his skirmish with Appellant, that the serious injuries suffered by Humple were inflicted by someone else, and that Green lied about being absent while they occurred.

The jury acquitted Appellant on charges of attempted first and second degree murder and carrying the homemade axe and belts as weapons, but convicted him of first- and second-degree assault, as well as reckless endangerment**.**

DISCUSSION

I. Imperfect Self-Defense Instruction

Appellant contends that "the trial court erred in refusing to instruct the jury on imperfect self-defense" thereby preventing his opportunity to mitigate the charge of attempted murder to attempted voluntary manslaughter.[1] The State counters that (a) any

[1] In his brief Appellant argues that had the jury been properly instructed then it may have found defendant not guilty or guilty of attempted manslaughter because the jurors may have believed he acted in imperfect self-defense. Had they done so, Appellant urges, then the maximum sentence he could have received for attempted (continued…)

error in failing to give the pattern instruction was harmless because Appellant was acquitted of attempted first and second degree murder, and (b) the instruction was not warranted because Appellant did not produce "any evidence of any of the elements" of imperfect self-defense. After reviewing the applicable law and the evidentiary record, we agree with the State that there was insufficient evidence to generate an imperfect self-defense instruction, albeit for reasons different than those articulated by the trial court.

Standards Governing Jury Instructions on Imperfect Self-Defense

Md. Rule 4-325(c) provides that "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law." A criminal defendant "is entitled to have the jury instructed on any theory of the defense that is fairly supported by the evidence." *General v. State*, 367 Md. 475, 485 (2002). In evaluating whether there is sufficient evidence to generate a requested instruction, "we view the record in the light most favorable to the accused." *Id.* at 487.

When the accused asserts an affirmative defense such as self-defense, it is his burden to produce "'some evidence' to support each element of the defense's legal theory before the requested instruction is warranted." *Marquardt v. State*, 164 Md. App. 95, 131 (2005). *See Arthur v. State*, 420 Md. 512, 525 (2011). "Whether the evidence is sufficient to generate the desired instruction is a question of law for the judge." *Roach v. State*, 358

(…continued)
manslaughter would have been 10 years rather than the 25 years that was ultimately imposed for his conviction of first-degree assault. We note that because the jury acquitted Appellant of murder, his argument is speculative at best. Regardless, Appellant failed to present sufficient evidence to generate the self-defense instruction.

Md. 418, 428 (2000). On appeal, this Court is limited to determining "whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired." *Id.*

Subsection (C) of the pattern instruction for attempted homicide, M.P.J.I.-Cr. § 4:17.14, explains how imperfect self-defense mitigates an attempted murder to attempted voluntary manslaughter, as follows:

> ATTEMPTED VOLUNTARY MANSLAUGHTER (IMPERFECT SELF-DEFENSE)
>
> Attempted voluntary manslaughter is a substantial step, beyond mere preparation, toward the intentional taking of a life, which would be attempted murder, but is not attempted murder because the defendant acted in partial self-defense. Partial self-defense does not result in a verdict of not guilty, but rather reduces the level of guilt from attempted murder to attempted manslaughter.
>
> You have heard evidence that the defendant attempted to kill (name) in self-defense. You must decide whether this is a complete defense, a partial defense, or no defense in this case. . . .
>
> Self -defense is a complete defense, and you are required to find the defendant not guilty, if all of the following four factors are present:
>
> (1) [the defendant was not the aggressor] [although the defendant was the initial aggressor, [he] [she] did not raise the fight to the deadly force level];
>
> (2) the defendant actually believed that [he] [she] was in immediate and imminent danger of death or serious bodily harm;
>
> (3) the defendant's belief was reasonable; and
>
> (4) the defendant used no more force than was reasonably necessary to defend [himself] [herself] in light of the threatened or actual force. [This limit

> on the defendant's use of deadly force requires the defendant to make a reasonable effort to retreat. . . .
>
> 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] [she] was in immediate and imminent danger of death or serious 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 guilty of attempted voluntary manslaughter rather than attempted murder.] [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.] . . .**

(Emphasis added.)

To generate an imperfect self-defense instruction, therefore, the accused bears the burden of producing evidence sufficient to raise a jury question as to whether (1) the victim was the initial aggressor; (2) the accused subjectively believed that he was in immediate danger of death or serious bodily harm; and (3) the accused used no more force than he believed necessary to defend himself in light of the threatened harm. *State v. Faulkner*, 301 Md. 482, 485-86 (1984). In establishing the last element, the accused should present some evidence that he retreated or attempted to avoid the danger, if he could have done so safely. *See Gainer v. State*, 40 Md. App. 382, 387 (1978).

The Evidentiary Record

Appellant's defense was that although he had an initial physical skirmish with the victim, he did not inflict the serious injuries suffered by Humple. Defense counsel maintained that Humple was "a liar" and a violent person, whose uncertainties and

inconsistencies about the events that evening created reasonable doubt as to who was the aggressor and who inflicted his injuries. There was conflicting evidence about the altercation. As detailed above, although Walter Humple testified that Appellant hit him first, prosecution witness Dominique Green contradicted that account, testifying that it was Humple who swung first, triggering the combat. Although Humple claimed that the assault began and escalated while Green stood by watching, Green testified that Humple was not visibly hurt during what amounted to an initial "wrestling match" and that he left before Humple was bound and beaten.

During defense counsel's cross-examination of Green, the subject of Appellant's self-defense came up in the course of defense counsel attempting to elicit testimony regarding Green's opinion as to whether Humple "is . . . a violent person[.]" In a bench conference, the trial court questioned whether Appellant could assert self-defense:

> THE COURT: [Y]ou can't in general get in, you know, the guy's a violent person. You have to establish, for instance, that the victim was the first – was the aggressor, et cetera, et cetera. And unfortunately your witness [sic] has just said when he left things had settled down. It seems to me your self-defense thing is gone.
>
> [PROSECUTOR]: Right.
>
> [DEFENSE COUNSEL]: Yeah, but the – he said that Walter threw the first punch.
>
> [PROSECUTOR]: But, it's over.
>
> [DEFENSE COUNSEL]: So he's the initial aggressor.
>
> THE COURT: But it's over and he's gone –

[DEFENSE COUNSEL]: Right. And I'm denying anything beyond that. I'm talking about this initial confrontation. My client acted in self-defense there.

THE COURT: And he's – nobody – he hasn't been charged on that initial confrontation, has he?

[DEFENSE COUNSEL]: Of course he has. . . .

That's what's (inaudible) --

[PROSECUTOR]: And their statements are not that different. I mean, they're basically on the ground rolling around. I mean, I think the heart of the case is Walter was not injured when Dominique says he left.

[DEFENSE COUNSEL]: Your Honor, . . . I'm allowed to bring in specific acts to demonstrate the basis of the witness's opinion that the victim in this case is violent. . . .

[PROSECUTOR]: But he doesn't know what happened after that and he already said –

THE COURT: You know, I think you're –

[PROSECUTOR}: – the victim started it.

THE COURT: – unless – it seems to me your self-defense thing is gone.

[DEFENSE COUNSEL]: Well, I don't agree at all.

THE COURT: How is it still –

[DEFENSE COUNSEL]: Because I have in that Mr. Humple triggered the event, that he was the initial aggressor.

THE COURT: Who says that?

[DEFENSE COUNSEL]: This gentleman said.

(Bench Conference concluded)

The trial court then proceeded to question Green about whether the initial altercation "was over" before Humple suffered any serious injury:

> THE COURT: Sir, you just said when you – what did – when you left, describe what was going on between Fox, the defendant, and . . . . Mr. Humple[?] . . . . What was going on when you left?
>
> [MR. GREEN]: Between the two of them?
>
> THE COURT: Between the two of them.
>
> [MR. GREEN]: They were talking about the money that had been taken.
>
> THE COURT: All right. Exactly – well, you mentioned there was a fight of some kind where –
>
> [MR. GREEN]: There was wrestling on the ground.
>
> **THE COURT: Okay. And then when you left was the wrestling over? Was it –**
>
> **[MR. GREEN]: Yes. It was over.**
>
> **THE COURT: And before you left how long had it been over?**
>
> **[MR. GREEN]: It was just, like, it just – it was just over when I was leaving.**
>
> **THE COURT: Okay. And everything – all right. When you left did you talk to either of the guys to say, you know, I'm going or have a nice day or the Ravens are playing next week? What –**
>
> **[MR. GREEN]: I'm honestly not too sure. I don't want to say I did, but I'm not sure what I said, so I'm not really sure.**
>
> **THE COURT: Okay. For how long had the fight between them been over?**
>
> **[MR. GREEN]: Like, I guess, just maybe two minutes.**

THE COURT: Okay. And as you went out the door were you able to observe how they were doing with each other?

[MR. GREEN]: No. I just left.

THE COURT: Okay. Where were they when you left the room?

[MR. GREEN]: In the living room.

THE COURT: Together?

[MR. GREEN]: Yeah.

THE COURT: All right. Not fighting.

[MR. GREEN]: No.

(Emphasis added.)

At that point, the trial court called a bench conference to reject Appellant's claim of self-defense, prompting defense counsel to cite Green's testimony that Humple was the aggressor and to reassert Appellant's position that someone else inflicted Humple's serious injuries.

THE COURT: That's it. Self-defense is gone.

[DEFENSE COUNSEL]: I don't think so, Your Honor. Again, the testimony is, is that the victim threw the first punch.

THE COURT: Uh-huh.

[DEFENSE COUNSEL]: I mean, there may be more than one – this is sort of a serious offense but in terms of –

THE COURT: That's true, there might be, but –

[DEFENSE COUNSEL]: And the State's –

THE COURT: – when he left –

[DEFENSE COUNSEL]: – the charging document in this case doesn't say, you know, the latter incident is the charge versus the former incident and there's a 1st degree assault charge here. So the – admittedly my theory is that Mr. Carter had nothing to do with this latter series of events, whatever they were in truth and in fact and that Mr. Humple is a[n] incredible witness. That said, I've already conceded to you there is initial physical altercation, so the issue there . . . . is, number one, who was the initial aggressor and now this witness has testified, A, that he was the initial aggressor and, B, that he's a violent person. . . .

THE COURT: Okay. Okay, let me just ask him one more question.

(Bench Conference concluded)

(All Counsel and the Defendant return to the trial tables where the following ensues:)

THE COURT: When you left what was the condition of Mr. Humple? What did he look like? Did he appear to have injuries?

[MR. GREEN]: No. I didn't – them bruises that I just saw in the pictures was not there.

THE COURT: I'm sorry?

[MR. GREEN]: Them bruises that I just – the pictures, I didn't see none of those bruises on him.

THE COURT: Did you observe any other bruises, other cuts, any other –

[MR. GREEN]: No.

THE COURT: I'm sorry?

[MR. GREEN]: No, I did not.

THE COURT: Were there straps on his hands or anything?

[MR. GREEN]: Straps?

THE COURT: You know, the restraints you later saw, wherever they were, hands, feet. I can't recall.

[MR. GREEN]: No.

THE COURT: Okay. Any questions, either side, on this foundation?

BENCH CONFERENCE

THE COURT: I'm sorry. I mean, you've got two events here, you know? . . .

[DEFENSE COUNSEL]: – but the State hasn't segregated them for purposes of their charging document.

THE COURT: Well, the State hasn't charged him under this first altercation, huh?

[DEFENSE COUNSEL]: I don't have any – I haven't put on – been put on notice of two distinct events. (Inaudible) talked about an altercation and so I'm defending the charge as to, you know, whatever appeared (inaudible).

THE COURT: Well, I can certainly instruct the jury that, you know, any altercation that occurred before the gentleman who's testifying now is not to be considered by them as part of (inaudible) assault, that it's –

[PROSECUTOR]: I –

[DEFENSE COUNSEL]: I'm not asking –

[PROSECUTOR]: – I wouldn't ask for that.

[DEFENSE COUNSEL]: – for that instruction.

[PROSECUTOR]: Yeah.

THE COURT: – the – anyway, I'll let that (inaudible). It seems to me that there is clearly a separate event that this guy is testifying to and that is the one where the victim and the defendant had an altercation. It was over when he left. He left and whatever happened after that he was not positioned to see or describe or tell us whether it was a product of self-defense or not. And

> that being said the . . . victim's propensity for violence vis a vis the assault in front of us is not an issue.
>
> [DEFENSE COUNSEL]: (Inaudible). Again, I understand the Court's ruling and I'll abide it. That said, the – for purposes of the record the case is not charged that way and this jury could certainly conclude that Mr. Carter was not a principal to any attempted murder or 1st degree assault but that there was an initial altercation which Mr. Humple testified. That the converse of this witness's testimony is the testimony of Mr. Humple and he says that Mr. Carter struck first. And then they went to the ground or that he restrained. But in the event Mr. Humple's testimony is that Mr. Carter was the initial aggressor as to this event. There's no segregation in the charging document of what happened at 6:00 o'clock versus what might have happened at . . . . 8:00 o'clock. The jury could certainly conclude . . . . that Mr. Carter had nothing to do with these latter events and therefore is not guilty of attempted murder . . . . and a first degree assault but that he's guilty of a second degree assault because of the initial confrontation. . . . .
>
> THE COURT: . . . .The State might not have charged it in this manner because . . . A, the State might not have been aware of this first altercation . . . . Or, B, the State . . . might just be charging the second altercation and based on the conversation it had with its victim it may be the victim for legitimate reasons chose not to discuss this first altercation or secondly –
>
> [PROSECUTOR]: Or it didn't happen.
>
> THE COURT: Or it didn't happen. And they . . . . had no knowledge of it and this guy's just made it up, or C, the events were two distinct things and the victim only brought to their attention the second one. And that would be consistent with the testimony that the second – or the event that was charged and that the victim testified to happened hours later.

(Emphasis added.)

After the trial court sustained the State's objection to cross-examining Green about specific instances of prior violent conduct, cross-examination resumed without further discussion of whether Appellant could assert self-defense.

At the close of evidence, defense counsel asked for the pattern instruction on imperfect self-defense to attempted homicide.[2] After reviewing other instructions, the trial court stated, "the only issue is 4.17.14" and noted that the "State wants me to read just (a) and (b)," covering attempted first and second degree murder and perfect self-defense, whereas defense counsel "wants me to read just (c)," covering imperfect self-defense and attempted voluntary manslaughter, "or (a), (b) and (c)." Defense counsel again asserted that there was sufficient evidence to warrant the imperfect self-defense instruction:

> [DEFENSE COUNSEL]: Well, (a) and (b) [relating to first- and second-degree murder] are generated now that the Court has denied my motion for judgment of acquittal.
>
> THE COURT: Uh-huh.
>
> **[DEFENSE COUNSEL]: And I submit that attempted voluntary manslaughter is generated on a theory of imperfect self-defense.**
>
> **[PROSECUTOR]: There's no evidence generated.**
>
> **THE COURT: Yeah. I don't see – what's the evidence of imperfect self-defense?**
>
> **[DEFENSE COUNSEL]: Well, the evidence from Mr. Green was that Mr. Humple was the initial aggressor so the issue then would be whether or not at a minimum –**
>
> **THE COURT: It was reasonable – his perception of the risk was reasonable or a duty to retreat?**

[2] Defense counsel did not seek an instruction that imperfect self-defense mitigates first degree assault to second degree assault, in accordance with *Christian v. State*, 408 Md. 306, 333 (2008). We note that the holding in *Christian* is not reflected in the text or "notes on use" of the pattern jury instruction for first degree assault. *See* M.P.J.I.-Cr. 4:01.1. The notes to the pattern instruction on second degree assault contain an annotation to *Christian*. *See* M.P.J.I.-Cr. 4:01.

> **[DEFENSE COUNSEL]: His perception wasn't unreasonable of the danger or he used more force than was necessary.**
>
> **THE COURT: Yeah. I agree with the State. I don't think that was generated due to the testimony of Mr. Green that when he left the two had discontinued their fight and they were sitting in the same room with apparently everything resolved.**

(Emphasis added.)

Appellant's Challenge

Appellant contends that Dominique "Green's testimony that Humple, whom he described as a violent person, 'swung on [Appellant] first' and Humple's own admission that when he and Appellant wrestled to the ground[,] he held and restrained Appellant was *some* evidence from which a reasonable juror could find that Humple was the initial aggressor and that Appellant believed, reasonably or unreasonably, that his life was in danger and that he had to react with the force that he did to defend himself." In Appellant's view, the trial court erred in refusing his request for an imperfect self-defense instruction for the reason that the court found two separate altercations and there was no evidence that Humple also was the aggressor in the second altercation during which he suffered his serious injuries. Appellant argues that "it was not for the court to determine that there were two independent incidents (rather than one continuous incident)," so that "[t]he court's reasoning was clearly factual in nature and as such, was within the exclusive province of the jury."

We agree that the trial court improperly resolved conflicts in the evidence when it concluded that there were two separate incidents and that Humple was not seriously injured until the second altercation. As the excerpted colloquy shows, the trial court credited Green's testimony that the initial "wrestling match," although started by Humple, was over and that "nothing violent was going on" when Green left Appellant with Humple in the apartment. The court also disregarded Humple's contradictory testimony that the physical altercation began and escalated without a break, as Green stood by watching. It was for the jury, not the trial court, to resolve this conflicting testimony. *See Dykes v. State*, 319 Md. 206, 224 (1990). Nevertheless, the trial court expressed its finding that there were two separate incidents only during bench conferences with counsel. Because the court never communicated its finding to the jury, the jury remained free to reach its own conclusion regarding the conflicting evidence.

Moreover, our task in this appeal is limited to reviewing the trial court's denial of the requested instruction, by reviewing the same evidence considered by the trial judge, and to determine whether the defendant satisfied his burden of producing sufficient evidence to make a *prima facie* showing on every element of imperfect self-defense. *See generally Roach,* 358 Md. at 428 (appellate court reviewing decision not to give a requested jury instruction performs the same task as the trial court, which is to determine "whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired"). Accordingly, we may affirm that ruling if we

conclude it was correct for a reason other than that given by the trial court. *See State v. Cates*, 417 Md. 678, 691-92 (2011). After conducting our own review of the evidentiary record, we conclude that Appellant did not satisfy his burden of production and, therefore, that the trial court did not err or abuse its discretion in denying Appellant's request for an imperfect self-defense instruction.

Again, to generate an imperfect self-defense instruction, the accused bears the burden of producing evidence sufficient to raise a jury question as to whether (1) the victim was the initial aggressor; (2) the accused subjectively believed that he was in immediate danger of death or serious bodily harm; and (3) the accused used no more force than he believed necessary to defend himself in light of the threatened harm. *Faulkner*, 301 Md. at 485-86. Assuming the jury would credit Greene's testimony and conclude that Humple was the initial aggressor, we turn to the subjective belief element of imperfect self-defense, recognizing that "[o]rdinarily, the source of evidence of the defendant's state of mind will be testimony by the defendant." *State v. Martin*, 329 Md. 351, 361 (1993). But this element may be generated "if the record reflects, from whatever source, that . . . the defendant subjectively believed that he or she was in imminent danger of death or great bodily harm[.]" *Id.* at 363. *Cf. Roach*, 358 Md. at 432 (defendant's statement to police was "some evidence" supporting self-defense, even though it was inconsistent with his trial testimony).

Although defense counsel maintained that Appellant's only physical altercation with Humple was the initial wrestling skirmish, during which neither man was injured,

Appellant did not testify. Nor did he proffer evidence to contradict the evidence admitted during the State's case-in-chief, which consisted of testimony by Humple, Green, the responding police officer and medical technician, and Humple's treating physician, as well as the 911 call and photographs. Appellant's only admissible statement regarding his altercation with Humple was that he did not hit Humple "like that," referring to Humple's serious head wounds. Because that brief statement does not address Appellant's frame of mind, it cannot support an inference that Appellant subjectively believed himself to be in such danger.

Nor could such an inference be drawn from the testimony of Green or Humple. According to Walter Humple, Appellant bound him before kicking and beating him with the aid of an accomplice and Humple's own homemade ax. Humple's testimony, that Appellant incapacitated his victim and enlisted an assistant while Green stood by, supports an inference that Appellant did *not* believe himself to be in danger. Similarly, Dominque Green's testimony does not support an inference that Appellant thought Humple presented an immediate danger of death or serious bodily harm. Green recounted that the initial skirmish between Appellant and Humple ended without significant injury and that Humple was bound and beaten while Green was away from the apartment. If the jury credited all or part of that account, appellant had the same opportunity to leave (i.e., retreat); at the very least, Green did not witness the altercation during which Humple was bound and beaten, so that the jury could not infer from Green's testimony that Appellant believed he was in danger. From the evidence presented at trial, therefore, the jury could not

reasonably infer that Appellant believed himself to be in imminent danger of death or physical harm from Humple. Although that insufficiency, by itself, warranted the denial of Appellant's request for an imperfect self-defense instruction, Appellant also failed to generate "some evidence" that he used a reasonable level of force to defend himself against Humple.

Appellant offered no evidence to contradict the State's evidence that Appellant, in the belief that Humple had stolen money from him, inflicted life-threatening injuries while Humple lay bound and helpless on the floor. According to Humple, after he briefly put Appellant in a wrestling hold, Appellant quickly escaped, then bound Humple's hands and feet with belts and proceeded to assault him. According to Green, upon his return, Humple had been beaten and bound with belts. Police recovered belts at the scene. Humple indicated that it was Appellant who viciously attacked him, both to the 911 dispatcher and to the responding EMT. The trauma physician who treated Humple characterized his head and brain injuries as acute and life-threatening. There was no countervailing evidence from which a jury could have inferred that the Appellant was unable to retreat or that he used only the amount of force he believed necessary to defend himself against Humple.

Thus, Appellant failed to present sufficient evidence to establish these essential elements of imperfect self-defense. Although the trial court improperly resolved conflicts in the evidence in concluding that there were two separate incidents, that error did not influence the jury. Because our task is to review the denial of Appellant's request for a jury instruction, and there was insufficient evidence to support that instruction, we

conclude that the trial court did not abuse its discretion in failing to propound it.[3]

II. Restriction of Impeachment Cross-Examination

The trial court limited impeachment cross-examination regarding instances of Walter Humple's prior violent conduct, restricting defense counsel to inquiring about Humple's prior conviction for second degree assault and to eliciting Dominique Green's testimony that he considered Humple to be violent. Appellant contends that the court erred in preventing him from inquiring about three instances of violent conduct, thereby undermining his efforts to show that Humple was the initial aggressor and that Appellant acted in self-defense. Specifically, Appellant argues that the trial court should have permitted defense counsel to inquire about separate incidents in which Humple allegedly chased his mother, then struck her on the head with a hammer; he grabbed his girlfriend by the hair and repeatedly struck her; and he threw a kitten against a wall.[4] We agree with the State that such anecdotal evidence of the victim's prior acts of violence was irrelevant and inadmissible.

"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). We review such a ruling to determine whether the excluded evidence was "'plainly admissible under

[3] Having concluded the trial court did not err in denying the requested instruction, we do not address the State's alternative harmless error argument.

[4] According to Appellant, "Humple had entered a guilty plea to a charge of second degree assault with respect to the incident involving his mother. As to the incident involving his girlfriend, the State had charged Humple but the case was pending trial."

a specific rule of principle of law'" or whether the trial court abused its discretion. *See Decker v. State*, 408 Md. 631, 649 (2009) (quoting *Merzbacher v. State*, 346 Md. 391, 405) (1997).

Generally, a person's prior act is inadmissible "to show action in conformity therewith" on a particular occasion. *See* Md. Rule 5-404(b)(1). An exception to this rule permits the accused to "offer evidence of an alleged crime victim's pertinent trait of character" when that trait is relevant to a contested issue at trial. *See* Md. Rule 5-404(a)(2)(B). The manner in which such a character trait may be proven is generally limited to "testimony as to reputation or . . . testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." Md. Rule 5-405(a).

Nevertheless, the Court of Appeals has held that when self-defense is a contested question, the accused may recount prior violent acts by the victim, to prove that the accused "had reason to perceive a deadly motive and purpose in the overt acts of the victim." *Thomas v. State*, 301 Md. 294, 307 (1984). "To use character evidence in this way, the defendant must first prove: (1) his knowledge of the victim's prior acts of violence; and (2) an overt act demonstrating the victim's deadly intent toward the defendant." *Id.* *See also Williamson v. State*, 25 Md. App. 338, 344, 347 (1975) ("On 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.). Alternatively, the accused may proffer

evidence of the victim's violent acts to "corroborate evidence that the victim was the initial aggressor." *Thomas*, 301 Md. at 307.

We are not persuaded that the trial court erred in precluding defense counsel from eliciting evidence regarding these three instances of violence. As discussed in Part I, imperfect self-defense was not a contested issue because the evidence did not generate a jury question on the elements of subjective belief of danger, use of limited force, and retreat. Nor was there any evidence that Appellant was aware of the three instances of violent conduct by Humple. *See id.* Accordingly, anecdotal evidence regarding Humple's prior violent acts was correctly excluded as both irrelevant and inadmissible.

Nevertheless, the trial court exercised its discretion to admit other evidence of Humple's violent character, as support for Appellant's alternative defense that someone else bound and beat Humple. The jury learned from Humple that at the time he was assaulted, he was an active drug user with a violent past; that he was not taking his medication for bipolar disorder; and that when without such medication, he experiences "a lot of mood swings" and "anger issues." Thereafter, defense counsel was permitted to elicit on cross-examination that Humple had a 2009 conviction for second-degree assault and that Green considered Humple to be a violent person. Because that was adequate protection of Appellant's right to present evidence of Humple's violent character, the trial

court did not err or abuse its discretion in excluding cross-examination about Humple's specific acts of violence.

CONVICTIONS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.