UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0818

September Term, 2014

MICHAEL FISHER

v.

STATE OF MARYLAND

Meredith,
Berger,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: July 28, 2015

In this timely appeal, Michael Fisher, appellant, challenges the sufficiency of the evidence to support his conviction of first degree assault by a jury in the Circuit Court for Carroll County.

QUESTIONS PRESENTED

Appellant raises a single issue for our review: "Is the evidence insufficient to sustain the conviction for first degree assault?" Because we answer "no" to the question presented, we shall affirm the judgments of the Circuit Court for Carroll County.

FACTS AND PROCEDURAL HISTORY

Appellant challenges only the sufficiency of the evidence to convict him of *first degree* assault; he does not contend that he did not commit any assault. Viewing the evidence in the light most favorable to the prevailing party — here, the State — there is sufficient support for a conviction for first degree assault of Brian Lawson, as we set forth below.

On the night of August 24, 2013, appellant's two brothers hosted a party at their family's home. At some point during the party, one of the guests in attendance was involved in a fight, which occurred near a fire pit that was located at the bottom of a hill on the Fishers' property. Following that fight, a number of partygoers decided to leave the party. Vehicles were parked on the Fishers' driveway, which was located up the hill from the fire pit. As departing guests walked to their vehicles, another fight broke out on the Fishers' driveway.

Brian Lawson, the victim, tried breaking up the fight on the driveway. Lawson ran toward the fight on the driveway while yelling at appellant to stop attacking one of the individuals attempting to leave the party. At that point, appellant struck Lawson with such great force that Lawson fell backward and "knocked his head on the gravel" driveway. The blow instantly knocked Lawson unconscious. He was bleeding badly, and had a "pool of blood" under his head. Some of the witnesses felt that Lawson's injuries were significant enough to warrant calling 9-1-1. One of the witnesses did so, and informed the operator that Lawson was unconscious.

Lawson recalled that he "ran up to the driveway," where the second fight broke out, and tried to break up the fight. At that point, appellant pulled Lawson off of the pile, grabbed him by the throat, punched him once in the face, and "knocked [him] out cold." Lawson had no memory from that point until he was at home on his couch over three hours later.

After being knocked unconscious by appellant, Lawson was taken to the hospital. He received four stitches on the inside of his mouth, one stitch on the outside of his mouth, ten staples on the back of his head, and five additional stitches on the back of his head. Trooper Reid, of the Maryland State Police, visited the hospital after receiving a call from Lawson's father who was at the side of Brian while he lay unconscious in the hospital. Trooper Reid testified that Brian Lawson was "unresponsive" when the trooper saw Lawson at the hospital. Brian Lawson had no recollection of being in the hospital or Trooper Reid's visit

there. Following the assault, and through the time of trial, Lawson felt like he was "a little bit off of [his] balance," and he had "a hard time concentrating."

At trial, the State did not present expert medical testimony. The State offered photographs of Lawson's injuries, which were entered into evidence and shown to the jury, in addition to the testimony about the facts summarized above.

Appellant denied hitting Lawson at all, and testified that he was inside the Fishers' home, asleep, for the duration of the party.

At the close of the State's case, appellant moved for a judgment of acquittal on the first degree assault charge, arguing, in part, that there was insufficient evidence to support a finding of intent to cause serious physical injury. The trial court reserved on that motion. Appellant renewed his motion for judgment of acquittal at the close of evidence. The trial court denied that motion.

Following the close of evidence, the court instructed the jury that, in order to convict appellant of first degree assault, the State must have proved, first, all the elements of second degree assault, and, second, that appellant intended to cause serious physical injury to Lawson in the commission of that assault. Regarding serious physical injury, the court instructed: "Serious physical injury means injury that[:] one[,] creates a substantial risk of death[,] or[;] two[,] causes serious and permanent or serious and protracted loss or impairment or function of any bodily member or organ."

The jury convicted appellant of first degree assault and reckless endangerment. The trial judge sentenced appellant to seven years' incarceration, suspended, to be followed by five years' probation for the first degree assault. The reckless endangerment conviction was merged with the first degree assault conviction for sentencing purposes. Appellant's first degree assault sentence is to run consecutively with a sentence that appellant does not contest for a conviction for second degree assault upon another victim. This appeal followed.

STANDARD OF REVIEW

"It is the responsibility of the appellate court, in assessing the sufficiency of the evidence to sustain a criminal conviction, to determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Manion*, 442 Md. 419, 431 (2015) (emphasis in original) (quoting *Taylor v. State*, 346 Md. 452, 457 (1997)). Our purpose is not to "undertake a review of the record that would amount to, in essence, a retrial of the case." *State v. Albrecht*, 336 Md. 475, 478 (1994).

Our only concern is "'whether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *Manion, supra,* 442 Md. at 431 (quoting *Taylor, supra,* 346 Md. at 457). Because the finder of fact has "the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of

witnesses during their live testimony . . . . [w]e defer to the jury's inferences and determine whether they are supported by the evidence." *Smith v. State*, 415 Md. 174, 185 (2010).

We recognize that "'the finder of fact has the ability to choose among differing inferences that might possibly be made from a factual situation . . . .'" *Id.* at 183 (quoting *State v. Smith*, 374 Md. 527, 534 (2010)). As a result, "'[w]e do not second-guess the jury's determination where there are competing rational inferences available.'" *Id*. (quoting *Smith, supra*, 374 Md. at 534). "'The limited question before us, therefore, is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether *it possibly could have* persuaded any rational fact finder.'" *Olson v. State,* 208 Md. App. 309, 329 (2012) (emphasis in original) (quoting *Fraidin v. State*, 85 Md. App. 231, 241 (1991)).

DISCUSSION

Appellant contends that the evidence presented at trial was insufficient to convict him under Maryland Code, Criminal Law Article ("CL"), § 3-202(a)(1), which proscribes first degree assault. Section 3-202(a)(1) provides: "A person may not intentionally cause or attempt to cause serious physical injury to another." Therefore, to obtain a conviction under § 3-202(a)(1), the State "must prove that an individual had a specific intent to cause a serious physical injury." *Chilcoat v. State,* 155 Md. App. 394, 403 (citing *Dixon v. State,* 364 Md. 209, 239 (2001)).

Appellant argues that his single punch did not cause a serious physical injury. Serious physical injury is defined by CL § 3-201(d) in the following manner:

> (d) "Serious physical injury" means physical injury that:
> (1) creates a substantial risk of death; or
> (2) causes permanent or protracted serious:
> (i) disfigurement;
> (ii) loss of the function of any bodily member or organ;
> or
> (iii) impairment of the function of any bodily member or organ.

Appellant further contends that the State failed to prove that he intended to cause serious physical injury by punching Brian Lawson. Appellant insists that, in spite of the testimony given by multiple eyewitnesses and Lawson himself, no rational jury could infer that he intended to cause a serious injury when he hit Lawson. Appellant also argues that Lawson did not suffer sufficiently serious "protracted . . . impairment of the function of any bodily member or organ" to meet the statutory standard for serious injury under CL § 3-201(d)(2)(iii).

The State responds that the evidence about Lawson's injuries supported a rational jury finding that appellant's brutal attack upon Lawson created a substantial risk of death. Additionally, the State asserts that the jury could reasonably infer, from the description of the attack, that appellant intended to cause Lawson serious physical harm. Alternatively, the State contends that Lawson suffered protracted impairment meeting the standard of CL § 3-201(d)(2)(iii) because Lawson was unconscious for more than three hours between

being punched and Lawson's next memory, and Lawson continued to have difficulty with his balance and concentrating, even seven months after the assault.

We conclude that there was sufficient evidence for the jury to determine that appellant intentionally caused serious physical injury to Lawson by creating a substantial risk of death. "[A] jury may infer the necessary intent from an individual's conduct and the surrounding circumstances . . . ." *In re Lavar D.*, 189 Md. App. 526, 589-90 (2009) (citing *Chilcoat, supra,* 155 Md. App. at 403). The jury may also "infer that 'one intends the natural and probable consequences of his act.'" *Id*. at 590 (quoting *Ford v. State*, 330 Md. 682, 704 (1993)).

Appellant argues that no rational jury could find the requisite intent to convict him of first degree assault because there was no size or age disparity between appellant and Lawson; Lawson was not caught off guard by the punch; Lawson willingly involved himself in the skirmish that broke out at the party; and there was no evidence that appellant "attempted to escalate the assault or had to be restrained." These arguments all go to the weight of the evidence, and we do not second-guess a jury's decision to accord less weight to the points which might support a defendant's point of view.

We consider only whether a jury, in viewing the evidence in the light most favorable to the State, could rationally conclude that appellant intentionally caused or intended to cause serious physical injury. Appellant punched Lawson, without any warning, and hard enough to knock him unconscious while they were standing on a gravel driveway. Under

those circumstances, a rational jury could be convinced, beyond a reasonable doubt, that appellant's punch had the natural and probable consequence of significant head trauma. *See In re Lavar D., supra*, 189 Md. App. at 589-90.

Appellant's argument that, given the evidence at trial, no rational jury could conclude that his assault on Lawson created a substantial risk of death as prohibited by CL § 3-201(1), is also unavailing. Appellant rests his argument upon the contention that serious physical injury cannot be inferred from the testimony about him grabbing Lawson by the throat and punching him once. In determining whether an injury creates a substantial risk of death, however, "the focus is upon the injury[,]" not merely the act that led to the injury. *Chilcoat, supra,* 155 Md. App. at 402-03. Examples of head trauma leading to death are abundant in Maryland case law. *See, e.g., Dashiell v. State,* 214 Md. App. 684, 689 (2013) (decedent received several punches to the head and died that night as a result of those punches); *Hickman v. State,* 193 Md. App. 238, 241 (2010) (decedent was punched twice in the head, fell, hit his head on pavement, never regained consciousness, and died three days later from that injury); *Gray v. State,* 107 Md. App. 311, 330 (1995) *rev'd on other grounds*, 344 Md. 417 (1997), *vacated*, 523 U.S. 185 (1998) (medical examiner testified that trauma to the head, such as hitting one's head on a hard surface, can lead to death); *Ledbetter v. State,* 224 Md. 271, 272-73 (1961) (decedent died several hours after being struck in the head, falling, and hitting the back of his head on the street or curb); *Home*

Beneficial Life Ins. Co. v. Partain, 205 Md. 60, 64 (1954) (decedent fell, hit his head on a stone, and died a few hours later from that injury).

In *Chilcoat,* we quoted, and expressed agreement with, the analysis of the Supreme Court of Alaska, which made the following comments about serious physical injury:

> "Serious physical injury" may be proved, *inter alia,* by evidence establishing that the defendant inflicted physical injury by an "act performed under circumstances that create a substantial risk of death." The definition of serious physical injury focuses on the circumstances in which the defendant performed the act that caused physical injury. The fortuity of prompt medical treatment and recovery by the victim is not a primary consideration.

Chilcoat, supra, 155 Md. App. at 403 (quotations in original) (quoting *Konrad v. Alaska,* 763 P.2d 1369, 1376 (Alaska Ct. App. 1988)). *Accord New Jersey v. Turner*, 586 A.2d 850, 853 (N.J. Super. Ct. App. Div. 1991), *cert. denied*, 598 A.2d 892 (1991) (determination of whether the victim was subjected to a substantial risk of death requires the primary focus to be upon the nature and extent of the injury).

Upon viewing the evidence in the light most favorable to the State, a rational jury could determine, beyond a reasonable doubt, that appellant's punch, under the circumstances that existed on the night of August 24, 2013, created a substantial risk of death. Lawson suffered a blow to the head that was hard enough to render him instantly unconscious. He then fell backward, splitting his head on the driveway. That head injury required emergency medical treatment in a hospital. The wound required ten staples and five stitches in order to be closed. Given the witnesses' testimony at trial, coupled with the photographs of

Lawson's injuries, and the very real potential of death as a result of significant head trauma, a rational jury could infer that Lawson's injuries created a substantial risk of death if he did not receive medical treatment. *See Chilcoat, supra,* 155 Md. App. at 403. That Lawson received such treatment, and ultimately survived, is not a factor that mitigates the severity of his injuries. *See id.*

Although appellant makes much of the fact that he threw a single punch, that punch had devastating consequences. Because there were competing, rational inferences to be drawn from the photographs and testimony at trial, we refuse to second-guess the jury's determination to convict appellant of first degree assault under these circumstances. *See Smith, supra,* 415 Md. at 183. We hold that the evidence, viewed in the light most favorable to the State, was sufficient for a jury to convict appellant of first degree assault.

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