UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0145

September Term, 2016

FRANCIS SPRIGGS

v.

STATE OF MARYLAND

Arthur,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: May 1, 2017

Appellant, Francis Spriggs, was tried and convicted by a jury in the Circuit Court for Prince George's County of three counts each of second-degree assault, use of a firearm in the commission of a crime of violence, reckless endangerment, and various weapons offenses. The court sentenced appellant to 95 years' imprisonment with all but 29 years suspended, plus five years' probation.[1] Appellant noted this timely appeal, and presents us with the following three questions:

I. Did the trial court err in refusing to instruct the jury on voluntary intoxication?

II. Did the trial court err in permitting Deputy Curtis to testify that a "chopper" is "normally referred to as an AK-47 assault rifle" when he was not properly qualified as an expert at trial?

III. Was the evidence insufficient to convict appellant of assault of Sgt. Davis, Cpl. Lockhart, and Deputy Burnett?

For the reasons that follow, we answer all three questions in the negative and affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of May 7, 2015, Sergeant Kirk Davis, Corporal Nadia Lockhart, and Deputy Karl Burnett, of the Prince George's County Sheriff's Office, went to a private

[1] Specifically, the circuit court sentenced appellant to: (1) three consecutive ten year terms, with seven years suspended from each term, for each conviction for second-degree assault; (2) three consecutive twenty year terms, with fifteen years suspended from each term, for each conviction for use of a firearm in the commission of a crime of violence; (3) a consecutive term of five years for possession of a short-barreled shotgun; (4) a concurrent term of fifteen years, with ten years suspended, for possession of a shotgun as a disqualified person; (5) a concurrent term of one year for possession of a regulated firearm as a disqualified person; and (6) a concurrent term of five years for possession of ammunition. The court merged reckless endangerment for sentencing purposes.

residence responding to a call for a domestic dispute. After they arrived and began speaking with the people involved in the domestic dispute, the officers heard a loud gunshot and immediately sought cover. All three police officers believed the gunshot came from a shotgun and that it must have been nearby because of how loud it was.

Sergeant Davis called for backup and, shortly thereafter, Deputy Adrian Curtis arrived at the scene and began investigating the source of the gunshot with a flashlight. In a yard adjacent to the residence where the first three officers responded to the domestic dispute call, Deputy Curtis encountered appellant who, upon being illuminated by Deputy Curtis' flashlight, immediately threw a shotgun to the ground. Deputy Curtis recovered a sawed-off shotgun with an obliterated serial number, a bag of ammunition, and one spent shell casing on the ground near the area where he saw appellant throw the shotgun. Upon questioning, appellant stated, "What y'all want[?] I wasn't doing anything," and that he was "just watching the officers." Deputy Curtis testified that while transporting appellant to the police station, appellant said "lots of things," including: "Y'all locking me up for no reason. You have to prove it." Deputy Curtis recalled that appellant also told him that "the next time he was going to use a chopper to make sure to pierce [the officers'] body armor."

Based on appellant's behavior and speech, Deputy Curtis and Corporal Lockhart both suspected that he was under the influence of drugs. Deputy Curtis said appellant was staggering, slightly slurring his words, had glassy eyes, and an "odor coming off his body."

Appellant told Deputy Curtis that he had "smoked three dippers,"[2] and declined Deputy Curtis' offer of medical attention. Although Corporal Lockhart did not personally speak with appellant, she observed the conversation between appellant and Deputy Curtis and said that appellant "was doing a lot of talking." She could not recall anything in particular that appellant said, but testified that "[h]e was all over the place[;] [h]e was calm one second, the next minute he was irate and cursing."

On December 9, 2015, a jury convicted appellant of three counts each of second-degree assault, use of a firearm in the commission of a crime of violence, reckless endangerment, and various weapons offenses. This timely appeal followed. Additional facts will be addressed as they become relevant.

DISCUSSION

I. Voluntary Intoxication Instruction

A. Parties' Contentions

Appellant contends that the trial court erred in refusing to instruct the jury on voluntary intoxication as a defense to the second-degree assault charges. Noting that second-degree assault is a specific intent crime, appellant argues that the evidence introduced at trial "establishes that appellant's intoxication rendered him incapable of forming the requisite *mens rea* which is a necessary element of all specific intent crimes."

[2] A "dipper" is a marijuana or tobacco cigarette that has been dipped in liquid form PCP. Signs and Symptoms of PCP Abuse, NARCONON.ORG, http://www.narconon.org/drug-abuse/pcp-signs-symptoms.html (last updated Sept. 5, 2015).

Appellant asserts that his conduct – staggering, slurred speech, erratic behavior – was "some evidence" that he had "lost control of his mental faculties to an extent that rendered him incapable of forming the requisite intent." *Bazzle v. State*, 426 Md. 541, 555 (2012) (quoting *Lewis v. State*, 79 Md. App. 1, 13, 555 A.2d 509, 514 (1989)).

The State responds that appellant's evidence was insufficient for a jury reasonably to conclude that he was unable to form the requisite intent as it established merely that appellant was under the influence of narcotics. *See Lewis*, 79 Md. App. at 12-13. The State asserts that the evidence does not "fill[] out the picture" of any effect the narcotics had on appellant. "The mere fact of intoxication[,]" the State argues, "does not, standing alone, justify giving the instruction[.]"

B. Standard of Review

In *Albertson v. State*, 212 Md. App. 531 (2013), we reiterated that "'[w]e review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard.'" *Id*. at 551-52 (quoting *Arthur v. State*, 420 Md. 512, 525 (2011)). In determining whether a trial court has abused its discretion, we consider "(1) whether the requested instruction was a correct statement of law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Id*. at 552 (quoting *Bazzle*, 426 Md. at 549). Here, it is undisputed that the only question is whether the instruction was applicable under the facts of the case.

"The threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge. The task of this Court on review is to determine whether the criminal defendant produced that minimum threshold of evidence

necessary to establish a prima facie case[.]" *Bazzle*, 426 Md. at 550. Moreover, "[i]n determining whether competent evidence was produced to generate the giving of the requested instruction, an appellate court views the evidence in the light most favorable to the defendant." *Wood v. State*, 209 Md. App. 246, 303 (2012).

C. Analysis

After the parties rested their respective cases at trial, appellant requested that the jury be instructed on voluntary intoxication as an affirmative defense to the second-degree assault charges.[3] Voluntary intoxication may be a defense to criminality "when a

[3] Appellant requested Maryland Criminal Pattern Jury Instruction ("MPJI-Cr.") 3:31.1, Specific Intent/Voluntary Intoxication. That instruction is now at MPJI-Cr. 5:08, Voluntary Intoxication – Specific Intent. The instruction provides:

> You have heard evidence that the defendant acted while intoxicated by [drugs] [alcohol]. Generally, voluntary intoxication is not a defense and does not excuse or justify criminal conduct. However, when charged with an offense requiring a specific intent, the defendant cannot be guilty if [he] [she] was so intoxicated, at the time of the act, that [he] [she] was unable to form the necessary intent.
>
> A specific intent is a state of mind in which the defendant intends that [his] [her] act will cause a specific result. In this case, the defendant is charged with the offense of (offense requiring a specific intent), which requires the State to prove that the defendant acted with the specific intent to (specific intent). [Voluntary intoxication is not a defense to (list offenses not requiring a specific intent).]
>
> In order to convict the defendant, the State must prove, beyond a reasonable doubt, that the degree of the intoxication did not prevent the defendant from acting with that specific intent. A
>
> (Continued…)

defendant, charged with a crime requiring specific intent, is so [intoxicated] that he is unable to formulate that [specific intent]. *State v. Gover*, 267 Md. 602, 606 (1973). The burden of production is on the defendant to generate the issue of voluntary intoxication, and the evidence of that intoxication must be viewed most favorably to the defendant for the purpose of entitling him to a voluntary intoxication jury instruction. *State v. Evans*, 278 Md. 197, 207-08 (1976). Once the defense has been generated, the court is obligated to give the instruction. *Sutton v. State*, 139 Md. App. 412 (2001).

The circuit court declined to give the instruction. In doing so, the court reasoned that pursuant to *Bazzle* the instruction was not warranted because, although there was evidence that showed that appellant was under the influence of narcotics, there was no evidence that he was unable to form the requisite specific intent. The court said:

> Well, my recollection of that testimony from Deputy Curtis is that the deputy asked the defendant if he was under the influence. He said he had smoked three dippers. The deputy opined that the defendant acted like he was under the influence, staggering, slurred speech, glassy eyes and an odor on his body and he declined medical attention. That was the extent of that testimony.
>
> Corporal Lockhart said that when the defendant was in custody, she walked over to talk to Deputy Curtis, the defendant was doing a lot of talking. He was calm and irate. He seemed like he was on some type of narcotic substance, although he could stand on his own. Those I find are

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> person can be [drinking alcoholic beverages] [taking drugs] and can even be intoxicated, but still have the necessary mental faculties to act with a specific intent.

> insufficient to generate the instruction on intoxication to negate specific intent.
>
> Ba[zzle] and other cases stand for the proposition that it needs to be not just under the influence of some intoxicant, but so far under the influence or so far intoxicated that they can't make decisions to form the specific intent and there's no evidence that shows that, just that he was apparently under the influence of some kind of intoxicant with the obvious signs thereof. So I'm going to decline to give the instruction.

In *Bazzle*, *supra*, Bazzle was convicted of attempted second-degree murder, attempted armed carjacking, and first-degree assault, all of which require a specific intent. *Id*. at 545, 548. On appeal, Bazzle challenged the trial court's decision to deny his request for a voluntary intoxication jury instruction. *Id*. at 547–48. He argued that four pieces of evidence satisfied the "some evidence" threshold required to generate the instruction: (1) a blood alcohol content level nearly twice the legal limit; (2) his loss of memory of the night of the crime; (3) a witness's testimony that Bazzle was "almost about to pass out;" and (4) his odd behavior during the attack. *Id*. at 552.

The Court of Appeals rejected Bazzle's arguments, noting that evidence of drunkenness was insufficient to generate the voluntary intoxication instruction. The Court stated that: "[T]he single fact that one has consumed what some may consider to be an inordinate amount of alcohol, standing alone, with no evidence as to the [effect] of that alcohol on the defendant, would not permit a jury reasonably to conclude that he had lost control of his mental faculties to such an extent as to render him unable to form the intent[.]" *Id*. at 553 (quoting *Lewis v. State*, 79 Md. App. 1, 12–13 (1989)).

In the instant case, just like in *Bazzle*, the evidence is insufficient to allow a jury to rationally conclude that appellant was so severely impaired that he could not form the intent necessary to constitute his crimes. *Id*. at 555. The evidence in the instant case showed only that appellant was likely intoxicated. Appellant admitted as much when he told the police officers that he had "smoked three dippers." Moreover, the officers noticed that he was behaving erratically, staggering, and had slightly slurred speech.[4] Appellant has shown that he exhibited behavior associated with being intoxicated. Nevertheless, as in *Bazzle*, appellant has not shown that his behavior "which [was] undoubtedly 'some evidence' that he was [intoxicated], [was] also 'some evidence' that he was unable to form a specific intent. Essentially, all [appellant] has shown is that he was [intoxicated] and exhibited the typical characteristics of being [intoxicated]." *Id*. at 556.

Therefore, we hold that the trial court did not err in refusing to instruct the jury on voluntary intoxication.

II. Police Officer's Testimony

A. Parties' Contentions

Appellant contends that the trial court erred in permitting Deputy Curtis to give an "expert" opinion that a "chopper" is "normally referred to as an AK-47 assault rifle." During the State's direct examination, Deputy Curtis testified that appellant told him that

[4] The police officers' opinion that appellant was intoxicated was admitted over appellant's objection at trial, which seems to be in tension with his present position that he was too intoxicated to commit a crime.

"the next time he was going to use a chopper to make sure to pierce [the officers'] body armor." Thereafter, the following transpired:

> [Prosecutor]: And when [appellant] said that he the next time was going to use a chopper to pierce the vest, do you know what a chopper is?
>
> [Deputy Curtis]: I do.
>
> [Prosecutor]: What is that?
>
> [Defense Counsel]: Objection.
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> THE COURT: Overruled.
>
> [Defense Counsel]: Can we approach?
>
> THE COURT: Okay.
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> ***
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> [Defense Counsel]: Your Honor, it's a similar objection to what I made earlier in that this witness has not been – notice was not given that this was an expert witness going into an explanation of what different things mean and/or requires expert testimony. This is not something that is within a lay person's opinion; therefore, him explaining what this is is inadmissible because he's not an expert.
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> THE COURT: Overruled.
>
> [Prosecutor]: Deputy Curtis, you can answer the question. You stated you know what a chopper is? Can you tell us what it is?
>
> [Deputy Curtis]: It's normally referred to as an AK-47 assault rifle.

Appellant contends that the State impermissibly adduced Deputy Curtis' expert opinion that a "chopper" is an AK-47 assault rifle without having complied with the

relevant Maryland Rules[5] and case law. Appellant argues that Deputy Curtis' expert opinion was wrongly admitted as a lay opinion in contravention of *Ragland v. State*, 385 Md. 706, 725 (2005) (holding that Md. Rules 5-701 and 5-702 prohibit the admission as lay opinion of testimony based upon specialized knowledge, skill, experience, training or education).

The State argues that Deputy Curtis did not interpret a specialized term of art, which would require an expert, but merely translated a common street slang term. Because the interpretation did not require any specialized training, the State contends, Deputy Curtis' opinion was lay opinion. Alternatively, the State argues that any error in admitting the deputy's testimony was harmless.

[5] Md. Rule 5-701 provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Md. Rule 5-702 provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

B. Standard of Review

The decision to admit lay opinion testimony lies within the sound discretion of the trial court. *Thomas v. State*, 183 Md. App. 152, 174 (2008) (citing *Robinson v. State*, 348 Md. 104, 118-19 (1997)). Therefore, we review a trial court's decision to admit testimony under Maryland Rule 5-701 under an abuse of discretion standard. *Id*.

C. Analysis

We need not engage in a lengthy discussion about the admissibility, *vel non,* of Deputy Curtis' opinion that a "chopper" is an AK-47 because any error in its admission was harmless. *See Fields v. State*, 395 Md. 758, 759 (2006) (declining to address the admissibility of a nickname of the defendant as hearsay because any error in its admission was harmless).

In context, what sort of weapon appellant intended to use "the next time" to "pierce [the police officers'] body armor" was irrelevant and had no impact on the outcome of this case. Therefore, the admission of Deputy Curtis' opinion that a "chopper" is an AK-47 assault rifle was harmless. *See Dorsey v. State*, 276 Md. 638, 659 (1976) (error will be harmless when reviewing court, upon independent review, is able to declare a belief beyond a reasonable doubt that there is no reasonable possibility that the error contributed to the verdict).

III. Sufficiency of the Evidence

A. Parties' Contentions

Lastly, appellant contends that the evidence was legally insufficient to support the second-degree assault charges. Initially, appellant notes that the jury was instructed on two different theories of assault: attempted battery and intent-to-frighten. Appellant argues that the State failed to present evidence from which the jury could reasonably draw an inference that appellant tried to shoot the officers by firing the shotgun in their direction (attempted battery) or that he fired the gun with the intent to place the officers in fear of immediate physical harm (intent-to-frighten). At the close of the evidence, appellant moved for judgment of acquittal arguing, *inter alia*:

> [B]ut there actually needs to be some kind of evidence that somebody was actually trying to shoot [the police officers] and this isn't there. At most, you would have [appellant] being located in a yard with a shotgun and that there's a shell near the shotgun as well, but there's zero evidence of him trying to actually shoot the officers other than them hearing the noise, and I think there needs to be more than just hearing a noise for that attempt to happen.

The State counters that the evidence presented sufficed to establish the elements of second-degree assault, and for a jury to find that "at the very least, [appellant intended] to frighten the officers."

B. Standard of Review

The standard of review for appellate review of the legal sufficiency of the evidence is "whether any rational trier of fact could have found the essential elements of the crimes

beyond a reasonable doubt." *Perez v. State*, 201 Md. App. 276, 286 (2011). We view the evidence in the light most favorable to the prosecution and "give due regard to the fact finder's finding of facts, its resolution of conflicting evidence, and significantly, its opportunity to observe and assess the credibility of witnesses." *Id*.

C. Analysis

Section 3-203 of the Criminal Law Article, titled *Assault in the Second Degree*, criminalizes second-degree assault, of which there are three types: "(1) intent to frighten, (2) attempted battery, and (3) battery." *Jones v. State*, 440 Md. 450, 455 (2014) (citing *Snyder v. State*, 210 Md. App. 370, 382 (2013)). Appellants correctly note for us that in the instant case, the jury was instructed on attempted battery and intent-to-frighten second-degree assault.[6]

[6] The court instructed the jury on second-degree assault as follows:

> [A]ssault [of the intent to frighten] variety is intentionally frightening another person with the threat of immediate physical harm. In order to convict the defendant of second degree assault of this variety, the State must prove, first, that the defendant committed an act with the intent to place the victim in fear of immediate physical harm; second, the State must show that the defendant had the apparent ability at that time to bring about physical harm; and third, the State must show that the victim reasonably feared imminent physical harm – or immediate physical harm. I'm sorry.
>
> Another variety of second degree assault that may apply in this case is what we call sometimes attempted battery. So assault of this variety is an attempt to cause physical harm. In order to convict the defendant of assault of this variety, the State must
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> (Continued…)

A defendant commits second-degree assault of the attempted battery variety where: (1) the defendant actually tried to cause physical harm to the victim, (2) the defendant intended to bring about physical harm to the victim, and (3) the victim did not consent to the conduct. *Snyder*, 210 Md. App. at 385. "In order to prove the first element, that the defendant actually tried to cause physical harm to the victim, the State must prove that the defendant believed he had the apparent present ability to consummate a battery." *Id*. *See also Wieland v. State*, 101 Md. App. 1, 38 (1994) (holding that the attempted battery variety of assault involves a general intent).

On the other hand, a defendant commits intent-to-frighten second-degree assault where: (1) the defendant commits an act with the specific intent to place a victim in fear of immediate physical harm; (2) the defendant has the apparent ability, at the time, to bring about the physical harm; and (3) the victim is aware of the impending physical harm. *Jones*, 440 Md. at 455; *see also Wieland*, 101 Md. App. at 38 (holding that the intent-to-frighten variety of assault involves a specific intent).

We hold that the evidence was legally sufficient to support the second-degree assault convictions beyond a reasonable doubt. The jury was presented with evidence that the police officers heard a shotgun blast in their immediate vicinity, and that each officer took some defensive measure to protect themselves. Upon investigation shortly thereafter, they found appellant throwing what appeared to be a shotgun to the ground. Nearby, the

> prove, first, that the defendant actually tried to cause immediate physical harm to the victim and, second, that the defendant intended to bring about physical harm.

police recovered a sawed-off shotgun, a spent shell casing, and live ammunition. That evidence was more than sufficient for a jury to find that appellant fired the shotgun.

It was appellant himself who provided the critical link from firing a shotgun to committing a second-degree assault by either the intent-to-frighten or attempted battery modality when appellant told the investigating police officer that "the next time" appellant "was going to use a chopper to make sure to pierce [the officers'] body armor." That statement, coupled with his earlier statement that he was "just watching the officers," permitted a jury to believe either that appellant attempted to frighten or attempted to batter the police officers the "first" time when he fired the shotgun.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.