UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0621

SEPTEMBER TERM, 2016

MATTHEW W. BREDLOW

v.

STATE OF MARYLAND

Meredith,
Reed,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: May 8, 2017

In the afternoon hours of November 18, 2014, James Riley was in the parking lot of a Wendy's Restaurant located in the Joppatown Plaza Shopping Center in Harford County, Maryland. That afternoon, as Mr. Riley was standing in back of his motor vehicle, a green Mercury, operated by appellant, Matthew Bredlow, struck Mr. Riley and injured him severely. After Mr. Riley was struck, Mr. Bredlow's vehicle then struck the left rear portion of Mr. Riley's vehicle and left the scene of the collision. Mr. Bredlow was quickly apprehended and later charged, in the Circuit Court for Harford County, with, *inter alia*, attempted second-degree murder, first-degree assault, second-degree assault, malicious destruction of property worth more than $1,000 and failure to remain at the scene of an accident resulting in bodily injury or death. A jury convicted Mr. Bredlow of all the above charges and, after sentencing, Mr. Bredlow filed a timely appeal in which he raises two questions, phrased as follows:

> 1) Did the trial court abuse its discretion when it denied Mr. Bredlow's requested jury instruction on self-defense where that instruction was fairly generated by Bredlow's testimony that he struck and injured Mr. Riley as he (Bredlow) attempted to escape Riley's advancing assault with a tire iron?
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> 2) Did the trial court err when it denied Mr. Bredlow's motion for judgment of acquittal as to attempted second-degree murder when there was insufficient evidence for a jury to conclude beyond a reasonable doubt that Mr. Bredlow intended to kill Mr. Riley, as opposed to grievously injur[e] him?

We shall hold that the first question was not preserved for appellate review. In regard to question number two, we shall hold that the evidence produced by the State was sufficient to convict appellant of attempted second-degree murder.

I.

EVIDENCE PRESENTED BY THE STATE

A. Testimony of James Riley.

On November 18, 2014, at approximately 3:00 p.m., Mr. Riley was driving his automobile, at approximately 45 miles per hour in the right, northbound lane of Route 40, when he noticed a green Mercury immediately to his left. The driver of the Mercury was Matthew Bredlow, whom Mr. Riley had never seen before. Bredlow waved his fingers aggressively at Mr. Riley and the two exchanged "nasty words." Bredlow then "swerved" his vehicle at Mr. Riley's car and then spit at him. Mr. Riley attempted to "get away from" Bredlow's vehicle by "hitting [his] brakes," but Mr. Bredlow countered by also slowing down in order to keep abreast of the vehicle driven by Mr. Riley.

To avoid further contact with Bredlow, Mr. Riley took an abrupt right turn and pulled into the Joppatown Plaza Shopping Center and parked his vehicle near a Wendy's Restaurant, got out and walked back to the trunk area of his car. He intended to remove his work boots and put on some other shoes (that were in the trunk) before going into Wendy's. At that point, he noticed a vehicle coming into the parking lot at a high rate of speed and recognized that vehicle to be the green Mercury that he had encountered on Route 40. The Mercury continued "[a]ccelerating at a very high rate of speed," in a straight line towards Mr. Riley. As the car driven by Mr. Bredlow accelerated towards him, Mr. Riley made eye contact with Mr. Bredlow and then felt a "large impact on [his] face." Mr. Riley next remembered waking up on the ground. He was taken by ambulance to a local hospital where he was treated for a broken left leg, torn labrum in his shoulder, torn tendons

behind his knee, multiple bruises and cuts over his head and face and "[t]errible trauma to [his] head and face."

B. Testimony of Christopher Wimer.

On the afternoon of November 18, 2014, Christopher Wimer was taking his daughter to the Wendy's Restaurant located in the Joppatown Plaza Shopping Center. He was driving a pickup truck. As he turned from Joppa Farm Road into the Wendy's parking lot, he noticed Mr. Bredlow's vehicle behind him and heard Mr. Bredlow's car "aggressively accelerating." He next saw the Bredlow vehicle pass him on the left, then "cut right in front of [him] and head[ ] directly towards" Mr. Riley's car. Mr. Wimer described what he saw as follows:

> I saw the tail end of the [Bredlow] car headed to the gentleman standing near the left corner panel of his car. He was not aware the car was coming towards him. At the last second, he recognized the danger. He saw the car. He took a step, maybe two steps towards his vehicle to shield himself. And I was in a direct line, from a visual perspective, I was in a direct line to the back of the car. It was heading straight away from me. And as he was moving towards this gentleman, the gentleman stepped, as I said, and the car veered to the right very quickly and hit the car at the left rear corner panel.

According to Mr. Wimer's testimony, when Mr. Bredlow's car "veered to the right," this was "the same direction . . . [Mr. Riley] had stepped." Mr. Wimer next saw Mr. Riley's body on the hood of Mr. Bredlow's car, where it stayed for "approximately 50 feet" before the body rolled off and Bredlow's vehicle "veered to the left and accelerated" as it exited the parking lot.

C. Testimony of Frank Dufour.

On the afternoon that Mr. Bredlow's vehicle struck Mr. Riley, Frank Dufour, a contractor, was working inside the Wendy's Restaurant. He went outside to get a tool and was about ready to climb inside his van when he "heard tires squealing and . . . a smash." When Mr. Dufour looked up, he saw Mr. Riley's body "going across the hood of [Mr. Bredlow's]" vehicle. Mr. Dufour then observed Mr. Bredlow's vehicle make a "half a U-turn and speed off out of the parking lot."

D. Testimony of Ashley Clark.

Ashley Clark, on the afternoon of November 18, 2014, was sitting at a red light near the Wendy's parking lot, when she saw Mr. Bredlow's vehicle "go around a yellow truck and speed up towards and hit" Mr. Riley and his white Nissan. Before the impact, Ms. Clark saw Mr. Riley walk to his trunk then walk "over by his [car] door."

The impact of Mr. Bredlow's car with Mr. Riley's body caused Mr. Riley to "fly" up into the air. According to Ms. Clark, prior to the impact, Mr. Bredlow's vehicle "was accelerating," as it "sped around the truck towards the [victim's] car." In her words, she saw Mr. Bredlow's vehicle head "straight for the [victim's] car."

E. Testimony of Brian Rockstroh.

Brian Rockstroh was in the drive-thru lane of the Wendy's Restaurant when he "heard a large crash" that included "[b]reaking glass, squealing tires, [and a] racing engine." When Mr. Rockstroh looked in the direction of the noise, he saw Mr. Riley "on the hood of the car, trying to hold on." He testified that "the driver of the [striking] car was driving extremely fast, trying to shake the victim off of the hood." He added that the

Bredlow car was "swerving back and forth and the tires were squealing." After Mr. Riley fell off of the hood, the Bredlow car sped out of the parking lot with its "engine racing" and "tires squealing."[1]

II.

EVIDENCE PRESENTED BY THE DEFENSE

Appellant was the only witness to testify for the defense. The defense introduced no exhibits.

Mr. Bredlow testified that on the day in question he was proceeding northbound on Route 40 in the left lane. He noticed Mr. Riley shouting and gesturing aggressively towards him. When he made that observation, Mr. Riley's car was parallel to and directly to the right of his vehicle. Mr. Riley hollered at Mr. Bredlow and told him to "pull over." The encounter continued for at least one mile until Mr. Riley abruptly pulled his vehicle off Route 40 into the Wendy's parking lot. Because Mr. Bredlow wanted to report Mr. Riley's threatening behavior to the authorities, he went a little further north, then turned right on Joppa Farm Road and then into the Wendy's parking lot. His plan was to take a picture of Mr. Riley's vehicle and its license plate and give it to the police.

In the parking lot, Mr. Bredlow approached Mr. Riley's vehicle from behind. As he did so, he saw Mr. Riley run to the trunk of his car and pick up what appeared to Mr. Bredlow to be a tire iron. This frightened Mr. Bredlow and caused him to swerve to his

[1] In addition to the five witnesses whose testimony are summarized in Part I above, the State called additional witnesses. Those witnesses, however, did not testify as to any fact that is relevant to the issues here presented.

[Bredlow's] "left and hit the accelerator to try to get away" from Mr. Riley. But, according to Mr. Bredlow, in making this escape maneuver he "accidently sideswiped the rear corner of [Mr. Riley's] vehicle and bumped him." According to Mr. Bredlow, the collision with Mr. Riley and his vehicle was the result of a "horrible miscalculation" that resulted from Mr. Bredlow's "fear for [his] own life."

Mr. Bredlow further testified that after the collision he drove his vehicle out of the parking lot and to his parent's house. After he arrived there, he told his parents what had occurred. Not long after his arrival, he was arrested.

III.

FAILURE TO GIVE A SELF-DEFENSE INSTRUCTION

At the end of the second day of trial, the defense rested and counsel for Mr. Bredlow made a motion for judgment of acquittal as to all charges except for the charge of leaving the scene of an accident involving personal injury. After that motion was denied, the following colloquy took place:

> THE COURT: All right. In terms of jury instructions, [defense counsel], I believe you gave a request for attempted involuntary manslaughter and attempted voluntary manslaughter.
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> [Defense Counsel]: Yes.
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> THE COURT: Has the State had an opportunity to see that?
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> [Prosecutor]: We have not received a copy of the defense jury instructions.
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> [Defense Counsel]: Your Honor, I apologize to the [Prosecutor]. She is correct. I did not. I can grab the criminal jury instructions and show[] her what I requested, if that will suit her. Again, she submitted her requests by number, basically, which I have no objection to.

> THE COURT: Well, before we get to that, are you requesting some type of self-defense instruction?
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> [Defense Counsel]: Yes, that he felt threatened by this person reaching into the trunk of his car who seemed to be getting a weapon, and that he tried to protect himself to get away.

The State argued that a self-defense instruction was not warranted because defendant testified that the collision of his vehicle with Mr. Riley's body was an accident, and not something that was done for self-protection. Defense counsel countered as follows:

> [H]e certainly had a right to take action to get away from what he perceived as a dangerous possible assault, certainly in light of the contact that he'd had with this person leading up to that. So it's certainly a matter of self-defense to avoid the person, evade the person, get away from the person. If you have to use some physical force to do that, that would be acceptable. Here we have the force as the power of the automobile that he was in.

The trial judge replied:

> I'm going to have to read a little more about this, [defense counsel], just because the conduct was not protective conduct to ward off an attack, it was to get away, and there's testimony that it was an accident. While I understand where you're going with the self-defense, I don't necessarily know if that fits within the legal framework. So I just need to read a little more to wrap my head around it.

The next morning, when trial proceedings were about to resume, the following colloquy occurred:

> THE COURT: Good morning, everyone. Would either side wish to present any additional arguments concerning the defense's request to include the charge of attempted voluntary manslaughter and the requisite self-defense and imperfect self-defense that is associated with the request? I did do some research yesterday and that charge does exist.
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> [Defense Counsel]: Your Honor, I made the request in good faith. As I was working my way through my closing argument last night, it occurred to me why that is not appropriate. So I'm withdrawing that request.

THE COURT: Okay. Thank you.

The trial judge next told counsel that she had prepared written jury instructions that she intended to give to the jurors. She then gave copies of those written instructions to counsel. After an interlude where other matters were discussed, the trial judge asked defense counsel whether he needed more time to read the written jury instructions. Defense counsel said that he did not and said that the written instructions were acceptable.

In the trial judge's oral instructions to the jury, she told the jury that it was not necessary to take notes because she would give them a copy of the written instructions. Those written instructions made no mention of self-defense. Likewise, when the judge orally instructed the jury, there was no mention of self-defense. At the conclusion of the oral instructions, the trial judge asked counsel if they would like to approach the bench. Both sides said that there was no need to do so and neither counsel voiced any objection to the court's instructions.

In this appeal, appellant contends that the trial judge abused her discretion "by denying his counsel's requested jury instruction on self-defense . . . ." Maryland Rule 4-325(e) reads as follows:

> No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

In his opening brief, Mr. Bredlow makes no mention of the preservation requirement set forth in Md. Rule 4-325(e). In his reply brief, appellant claims his counsel substantially complied with Md. Rule 4-325(e). He argues:

> The underlying rationale behind Rule 4-325(e) is that a "trial court cannot correct errors of which it is not informed." *McMillan v. State*, 181 Md. App. 298, 359 (2008), *rev'd on other grounds*, 428 Md. 333 (2012). "Only if a party takes exception to an error in the jury instruction does the court have the opportunity to correct it." *Id*. Indeed,
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> > [t]he reason for the rule requiring objection as a prerequisite to appellate review is a salutary one, being designed to afford the trial judge an opportunity to correct inadvertent omissions or inaccuracies in [her] instructions, where the alleged error is one that might have been readily corrected if it had been called to the trial judge's attention.
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> *Parker v. State*, 4 Md. App. 62, 67 (1968).
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> The Court of Appeals has "recognized that, on occasion, an objection in *substantial compliance* with [Rule 4-325(e)] will be considered adequately preserved." *Bowman v. State*, 337 Md. 65, 69 (1994) (emphasis added); *see Merritt v. Darden*, 227 Md. 589, 597-98(1962); *Gore v. State*, 309 Md. 203, 209 (1987). In *Bennett v. State*, the Court of Appeals found substantial compliance where the request was submitted to the court in writing; it was "clear that the trial court was fully aware of the particular instruction the defendant desired the court to give;" the defendant objected on the record to the court's refusal to read the instruction to the jury; "[a]nd while no further exceptions were made . . . after it had been read to the jury, there was . . . no reason to repeat in the court room what had already been said and recorded by the reporter." 230 Md. 562, 568-69 (1963); *see also Horton v. State*, 226 Md. App. 382, 414 (2016).

In the case *sub judice*, the colloquy between defense counsel and the trial judge that took place immediately before the instructions were given (see pages 7 and 8, *supra*), did not make it clear that appellant still wanted a self-defense instruction to be given as to any charge. Defense counsel's statement that he was "withdrawing that request," coupled with

defense counsel's statement that he had "no objections to the written instructions," indicated that appellant no longer wanted a self-defense instruction. The "substantial compliance" exception to Rule 4-325(e) is therefore inapplicable.

We hold that because appellant's trial counsel failed to object after the court instructed the jury, appellant's claim that the court erred in not propounding the self-defense instruction is not preserved for review. *See Alston v. State*, 414 Md. 92, 111 (2010) ("[c]ountless opinions of this Court have held that, when no timely objection to the jury instructions is made in the trial court, this Court ordinarily will not review a claim of error based on those instructions").

Appellant, in his reply brief, asks us, in the alternative, to forgive his trial counsel's failure to object based on the plain error doctrine. We decline to do so. "Plain error is error that is 'so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial.'" *Steward v. State*, 218 Md. App. 550, 565 (2014) (quoting *Diggs v. State*, 409 Md. 260, 286 (2009); *accord Claggett v. State*, 108 Md. App. 32, 40 (1996)). Appellant has not shown that he was denied an impartial trial.

Moreover, the plain error doctrine requires that there be error that is plain. *Hammersla v. State*, 184 Md. App. 295, 306 (2009). Even if appellant's trial counsel had promptly objected, the trial judge's failure to give the self-defense instruction would not have constituted error of any sort. To present a viable claim of self-defense, the evidence must be sufficient to allow a jury to find all of the following four elements, *viz*.:

> (1) The accused must have had reasonable grounds to believe himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant;

> (2) The accused must have in fact believed himself in this danger;
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> (3) The accused claiming the right of self-defense must not have been the aggressor or provoked the conflict; and
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> (4) The force used must have not been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded.

Dykes v. State, 319 Md. 206, 211 (1990) (citation and quotation marks omitted). It is quite doubtful, even taking the evidence as we must in the light most favorable to appellant, that any of these elements were shown, much less all four. In any event, there can be no doubt that two of those four elements were not shown. Assuming Mr. Riley held a tire iron in his hand when appellant saw him standing by the trunk of his vehicle, appellant could not have reasonably feared imminent or immediate death or serious bodily harm. After all, appellant was driving a speeding automobile and Mr. Riley was not advancing towards that automobile. Mr. Riley and his car were in a parking place while Mr. Bredlow was in the travel portion of the parking lot. Appellant could have simply driven straight forward in the travel portion of the roadway and missed Mr. Riley. Alternatively, he could have stopped his vehicle, made a "U-turn" and left. Moreover, the force used, even assuming that appellant's version of events was true, was far more than was reasonably necessary. In this regard, it must be remembered that appellant, while accelerating, struck Mr. Riley with a vehicle and then, when the victim was helpless and on the hood of his Mercury, sped off, causing the victim to be thrown to the ground.

IV.

SUFFICIENCY OF THE EVIDENCE TO PROVE ATTEMPTED SECOND-DEGREE MURDER

Appellant contends that the State's evidence was insufficient to prove attempted second-degree murder because, purportedly, the State did not meet its burden of showing that he (Bredlow) intended to kill Mr. Riley. More specifically, according to appellant, there was insufficient evidence showing "that he intended to strike [Mr. Riley], and that when he did so that his intention was to kill [Mr. Riley]."

If the State's evidence was believed, appellant clearly intended to strike Mr. Riley. This was shown by the fact that appellant, while in the travel portion of the parking lot, veered his car to the right and drove directly toward Mr. Riley and the latter's parked car.

Appellant makes the following argument in support of his contention that the State failed to prove an intent to kill:

> The State's theory of attempted murder rested upon the unsupported inference that "Mr. Bredlow's action . . . manifest that he had an intent to kill" Mr. Riley. However, the State's argument did not overcome the equally plausible, if not stronger, inferences that Mr. Bredlow acted negligently or merely intended to grievously injure Mr. Riley. Therefore, the jury was forced to rely on mere speculation when it discerned Mr. Bredlow's intent.

Our answer to the first two sentences of the above argument is that the State was not required to overcome "the equally plausible, if not stronger, inference that Mr. Bredlow . . . merely intended to grievously injure Mr. Riley." This was shown by the language we used in *Ross v. State*, ___ Md. App. ___No. 2894, September Term, 2015, *slip op*. at 27-28 (filed March 3, 2017). In *Ross*, Judge Charles E. Moylan, Jr., speaking for this Court said:

The message of *Smith* [*v. State*, 415 Md. 174 (2010)] is clear. Even in a case resting solely on circumstantial evidence, and resting moreover on a single strand of circumstantial evidence, if two inferences reasonably could be drawn, one consistent with guilt and the other consistent with innocence, the choice of which of these inferences to draw is exclusively that of the fact-finding jury and not that of a court assessing the legal sufficiency of the evidence. The State is **NOT** required to negate the inference of innocence. It is enough that the jury must be persuaded to draw the inference of guilt. As the Court of Appeals stated, 415 Md. at 183, "the finder of fact has the 'ability' to choose among differing inferences that might possibly be made from a factual situation.' That is fundamentally the fact-finder's role, not that of an appellate court." Judge Harrell's opinion went on, 415 Md. at 183-84:

"We do not second-guess the jury's determination where there are competing rational inferences available. We give deference 'in that regard to the inferences that a fact-finder may draw.' . . . We need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence."

(Citations omitted).

In assessing the legal sufficiency of the evidence in a criminal case, the standard of review is simply the test of *Jackson v. Virginia*, unburdened by any vestigial barnacles from a bygone age. The test, the single test, is clear, quoting from *Jackson v. Virginia*, 443 U.S. at 318-19:

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . is 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."

415 Md. at 184 (emphasis supplied).

The Court of Appeals fully explained, 415 Md. at 185, moreover, why this has to be the single test and why the now discarded rule of *West* [*v. State*, 312 Md. 197 (1988)] simply makes no logical sense.

"Because the fact-finder possesses 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, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence. We defer to

> the jury's inferences and determine whether they are supported by the evidence.
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> "That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone."

(Emphasis supplied, citations omitted).

Taking the evidence in the light most favorable to the State, the jury could have rationally inferred that Mr. Bredlow intended to kill, not merely injure, Mr. Riley. Such an inference could be drawn because, immediately prior to the collision, Mr. Bredlow's car "aggressively" accelerated in order to pass Mr. Wimer's truck and then veered right and headed directly toward the victim at a high rate of speed; when Mr. Riley tried to get out of the way by moving behind his vehicle, Mr. Bredlow drove his vehicle in the same direction as Mr. Riley had moved. In other words, a rational juror could reasonably infer that a motorist who aims his vehicle directly at a pedestrian and then accelerates at a high rate of speed toward the pedestrian, intended to kill that pedestrian, not merely injure him. That inference is especially strong in a case like this where, after the pedestrian lay helpless on the hood of appellant's car, the motorist swerved his vehicle back and forth in an effort to dislodge the victim from the car. For the above reasons, we reject appellant's contention that the evidence was insufficient to show that he intended to kill Mr. Riley.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.