Circuit Court for Baltimore City
Case No. 117121009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 886

September Term, 2018

SHAMIRA HARRIS

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: July 9, 2019

Appellant Shamira Harris was convicted in the Circuit Court for Baltimore City of second degree assault. The case arose from allegations that appellant and co-defendant Tyrone Fenner abused appellant's son, T.R. Appellant timely appealed, presenting the following rephrased questions for our review:

> 1. Did the trial court commit plain error by failing to instruct the jury that reasonable parental discipline is a justification for second degree assault?
>
> 2. Did the absence of an objection to the trial court's failure to instruct the jury that reasonable parental discipline is a justification for second degree assault deny appellant her constitutional right to effective assistance of counsel?

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for the Circuit Court for Baltimore City in 2017 on charges of child abuse, second degree assault, carrying a dangerous weapon (a belt) openly with the intent to injure, conspiracy to commit child abuse, and conspiracy to commit second degree assault. The jury convicted her of second degree assault, and the court sentenced her to a term of incarceration of ten years.

We state the following facts as set forth at trial. On March 19, 2017, appellant and Fenner[1] returned to their home in Baltimore City to find that T.R. and his six-year-old sister S.F. were outside the home. T.R. testified that Fenner "told [appellant] to get the belt.

[1] Fenner is the father of appellant's daughter, S.F.

That's when I got a beating first." Fenner hit him with a closed fist, appellant hit him with a belt, and Fenner hit him again with a clothes hanger. The beating left bruises and "red patches."

The following day, T.R. and S.F. approached Officer James Kostoplis at a bus stop near T.R.'s home. T.R. told the police officer that they did not want to return home "because my mom, she beat us. That's why we don't want to go home." T.R. stated also that Fenner beats S.F. with a coat hanger and with pencils. Officer Kostoplis recorded T.R.'s statements on his body camera. He noticed bruising on T.R.'s left arm, and he took the children to a hospital. A doctor in the pediatric emergency room observed T.R. that afternoon and noted that he still had bruises and "red patches" on his face, shoulder, chest, and arms.

Dana Lewis, a state social worker, interviewed T.R. and S.F. at the hospital. He noticed marks and bruises on T.R.'s face, neck, and arms. Appellant and Fenner arrived at the hospital sometime after Mr. Lewis. They told Mr. Lewis that they did not abuse T.R., stating that he was in an "altercation" with other boys at school.

At trial, appellant's entire defense was that T.R. fabricated the abuse to avoid reporting his bullies at school. Appellant did not introduce evidence that she hit T.R. in the course of reasonable parental discipline, arguing instead that his injuries came from an altercation at school, football games, or a skin condition. Officer Kostoplis, testifying for the State, said that appellant told him "I said that's why I don't want [T.R.] out there. You know like . . . [T.R.] just think I'm being mean when it could have been them. I made them

go in the house yesterday. He just didn't, he don't listen." She also said "she was hard on [T.R.]" and apologized to T.R. A friend of appellant testified that she supervised T.R. in the afternoon and evening on March 19 and saw no signs of physical abuse.

Appellant did not request a jury instruction relating to parental discipline as a defense to the charges of child abuse and assault. Nonetheless, the court instructed the jury that a parent's "reasonable physical force to discipline a child" was not child abuse, but it did not instruct the jury that reasonable physical force to discipline a child was a defense to second degree assault. Appellant did not object to the instructions. As stated above, the jury convicted appellant of second degree assault, and the court imposed sentence. This appeal followed.

II.

Appellant acknowledges that she did not object to the jury instructions and that the issue is not preserved for our review. She asks that we address the instructions as plain error or, in the alternative, that we find that her trial attorney rendered ineffective assistance of counsel when counsel failed to object to the instructions.

Appellant's plain error argument is as follows. The jury acquitted her of child abuse (for which there was a reasonable parental discipline instruction) but convicted her of assault (for which there was no such instruction). Based on the evidence, she reasons that the jury could only have found that she hit T.R. with a belt but did not do so in a way that overcame the parental discipline privilege. Because reasonable parental discipline is the

same standard for both child abuse and assault, she concludes that the jury would have acquitted her of assault if the court had instructed the jury that reasonable parental discipline was a defense that precluded a conviction for assault.

If the trial court did not commit plain error, appellant argues, we should find that trial counsel's failure to object to the jury instructions was ineffective assistance of counsel. Appellant asserts that her trial counsel requested a jury instruction on reasonable parental discipline "as incorporated in the pattern jury instruction for child abuse" but did not request the same instruction for the assault charge or object to the lack of a discipline instruction for assault. She recognizes that we seldom review claims of ineffective assistance on direct appeal but contends that counsel's failure to request the instruction and failure to object to the instructions constitute a sufficient record. She claims prejudice in that if counsel had requested the instruction and objected to its absence, the issue would have been preserved for direct appeal, creating a substantial possibility that this court would reverse her conviction on direct appeal.

The State argues that plain error review is inappropriate and that we should decline to review the ineffective assistance claim on direct appeal. The State emphasizes that plain error is a rare, discretionary form of review that is inappropriate here because appellant's defense was that the event did not occur, not that appellant acted reasonably in disciplining the child. The State notes that trial counsel disclaimed expressly at a pre-trial motions hearing any defense of discipline or corporal punishment. We should not exercise plain error review, the State argues, where the alleged error appears to reflect a tactical decision

at trial.

Addressing appellant's ineffective assistance of counsel claim, the State maintains that infective assistance of counsel claims are best left to post-conviction review. Addressing the merits of the claim, the State notes that review of counsel's performance is deferential and should not be based on the outcome of counsel's actions. The State points out that the record demonstrates appellant's consistent trial strategy of denying any use of force against T.R. and that appellant's failure to request a parental discipline instruction appears to be part of counsel's strategy.

III.

We address first appellant's plain error argument. Maryland Rule 4-325(e) provides as follows:

> "(e) Objection. 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."

Appellant recognizes that she did not object to the lack of a parental discipline instruction as to second degree assault and thus relies on plain error review. She asks this Court to hold that the trial court erred in not instructing the jury that reasonable parental

discipline is a justification to second degree assault. We hold that plain error review is not warranted. None of the prerequisites for plain error are satisfied here.

Plain error review is rare indeed, *Yates v. State*, 429 Md. 112, 131 (2012), and ordinarily is "reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Robinson v. State*, 410 Md. 91, 111 (2009). As a predicate to exercising our discretion to review based on plain error, the Court of Appeals has held that the following four conditions must be met:

> "(1) [T]here must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the . . . court proceedings; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings."

Newton v. State, 455 Md. 341, 364 (2017). We exercise our discretion to note plain error only when the error was "so material to the rights of the accused as to amount to the kind of prejudice [that] precluded an impartial trial." *Id*. at 364 (quoting *Diggs v. State*, 409 Md. 260, 286 (2009)). Although there are many cases where the appellate courts in Maryland have recognized plain error, there are far more declining to do so. *See, e.g., Trimble v. State*, 300 Md. 387, 399 (1984) (declining to find plain error where jury instructions omitted mental retardation as a reason the defendant could be found not guilty).

Here, the trial court did not err. Appellant did not request a parental discipline justification instruction. On its own initiative, the trial court instructed the jury as to

parental discipline for the child abuse charge. Additionally, and more importantly, the evidence did not generate the instruction. The defense was that appellant did not strike the child, not that the child was stricken in the exercise of reasonable parental discipline.

Rule 4-325(c) provides as follows:

> "The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given."

A trial judge should give a *requested* jury instruction if three criteria are satisfied: the instruction correctly states the law, it is generated by some evidence, and the content of the jury instruction is not covered fairly by another instruction. *Preston v. State*, 444 Md. 67, 81 (2015). Whether to give a requested jury instruction lies within the sound discretion of the trial judge unless the refusal amounts to a clear error of law. *Id.* at 82.

A defendant is entitled to a jury instruction where "there is *any evidence* relied on by the defendant which, if believed, would support his claim," and the issue is not fairly covered by the instructions as a whole. *McMillan v. State*, 428 Md. 333, 356 (2012). The Court of Appeals, in *Bazzle v. State*, 426 Md. 541, 550 (2012), stated that a "requested jury instruction is applicable if the evidence is sufficient to permit a jury to find its factual predicate." As to that determination—whether the evidence is sufficient to permit a jury to find its factual predicate—the Court of Appeals explained as follows:

> "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 that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired."

Id. (quoting *Dishman v. State*, 352 Md. 279, 292–93 (1998)).

Maryland recognizes a parental privilege in disciplining a child as a defense to the charges of assault and child abuse. *Anderson v. State*, 61 Md. App. 436, 444–45 (1985). Significantly, however, the privilege does not arise (or can be lost) where the assault is inflicted on the child with no purpose of imposing parental discipline. *Fischer v. State*, 367 Md. 218, 271 (2001). Judge Charles E. Moylan, Jr., writing for the Court of Special Appeals in *Anderson*, explained as follows:

> "The common law notion of privileged force as a defense to what would otherwise be assault and battery has two clear limitations. The first, so taken for granted that it tends to be neglected by the case law and legal literature, is that the force truly be used in the exercise of domestic authority by way of punishing or disciplining the child—for the betterment of the child or promotion of the child's welfare—and not be a gratuitous attack."

61 Md. App. at 444.

In the case at bar, appellant was not entitled to a jury instruction on the parental discipline privilege for two reasons. First, appellant did not request a parental discipline privilege instruction at all. In the absence of a request, the trial court chose to instruct the jury (in the context of the offense of child abuse) that "a parent or caretaker may use reasonable physical force to discipline a child." The court did not tell the jury that the parental discipline privilege applied to second degree assault. Although reasonable

parental disciple is a defense to assault, the trial court did not so instruct.

Second, and most significantly, the defense was not generated by the evidence. Appellant's defense was that she did not strike T.R. and that T.R. fabricated the abuse. The State offered evidence that appellant and Fenner beat T.R. with a closed fist, a belt, and a clothes hanger. Appellant and co-defendant Fenner offered evidence that they did not hit T.R. and that his injuries came from bullies at school, football games, or a skin condition. The force appellant applied in this case was not used in the exercise of parental authority to punish or discipline the child, *i.e.*, for the betterment of the child or promotion of the child's welfare. Appellant did not claim parental privilege, and the evidence did not support the privilege.[2] When the court instructed the jury that reasonable parental disciple is a defense to child abuse, appellant received more than she was entitled to, not less. We find no error.

We decline to review appellant's claim of ineffective assistance of counsel on direct appeal. We review on direct appeal a claim of ineffective assistance of counsel only "where the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim." *In re Parris W.*, 363 Md. 717, 726 (2001).

Appellant suggests that her counsel requested for the child abuse charge an instruction on reasonable parental discipline. She misreads the record. Perhaps she made

[2] Appellant did not rely on her statements to Officer Kostoplis (that she "was hard on" T.R. and that he didn't listen to her) as part of her defense. And even if the jury believed her vague statements, they did not necessarily support a defense that on the date in question she hit T.R. in a reasonable manner consistent with parental discipline. The statements were insufficient to generate a parental discipline instruction.

this request in chambers or off the record, but we find no such request. The record reflects that counsel pursued consistently a trial strategy of denying that appellant and Fenner hit T.R. in any way. Failing to request a parental discipline instruction for any charge was consistent with that strategy. Given the record and appellant's trial strategy, her claim of ineffective assistance of counsel is best left for post-conviction review.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.