UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0064

September Term, 2015

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JOHN ERVIN MACK, JR.

v.

STATE OF MARYLAND

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Woodward,
Friedman,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

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Opinion by Sharer, J.

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Filed: April 15, 2016

Following a jury trial in the Circuit Court for Harford County, John Ervin Mack, Jr., appellant, was convicted of possession of a firearm by a disqualified person, in violation of Md. Code (2011 Repl. Vol.), Public Safety Article, § 5-133(c).[1] He was sentenced to a 15 year term of incarceration, all but five years suspended, and five years of supervised probation.[2] Appellant was acquitted of first-degree assault and use of a firearm in the commission of a crime of violence.

Appellant presents one question for our review:

> Did the trial court err by refusing to instruct the jury that it could consider the defense of duress with respect to the charge of possession of a firearm by a person with a felony conviction?

We shall affirm the judgment of the circuit court.

## FACTS and PROCEEDINGS

Because the question before us deals with the sufficiency of the evidence to generate a requested jury instruction, we provide a recitation of the circumstances underlying the charges against appellant.

In September 2012, appellant leased an apartment with his then girlfriend, Christina Antonelli. At about the same time, Antonelli was also involved in an "on/off relationship"

[1] Md. Code, (2011 Repl. Vol.), Public Safety Article ("PS"), § 5-133(c) provides that a person who has been convicted of certain crimes may not possess a regulated firearm. The parties stipulated that appellant had been convicted of a disqualifying crime.

[2]The offense carries a mandatory minimum sentence of five years, no part of which may be suspended. PS § 5-133(c)(2).

with Kasiem Davis. On November 11, 2012, Davis and Antonelli drove to appellant's apartment to retrieve Antonelli's personal belongings. Appellant was in the parking lot when they arrived. Davis "jumped out of the car," approached appellant, and they "started having a few words." When Davis displayed a gun, the two "began tussling," during which appellant was injured. As a neighbor called 911, Davis "took off running" into the woods. The police searched for Davis but did not find him. Appellant did not press charges.

Appellant testified that after that incident, he became "fearful" of Davis. His application for a protective order against Davis was denied, but he was granted a protective order against Antonelli, "figuring that would keep [her] away," and "then [Davis] would have no reason," to come back to his house. Appellant was not advised that he could apply for a peace order against Davis.[3]

Soon, Davis began sending threatening text messages to appellant on a daily basis. Davis texted that appellant was "a police," and a "rat," and added, "you know what we do to rats." Davis also sent messages indicating that he knew where appellant worked, or that he was at appellant's apartment. According to appellant, the texts were "tormenting" him.

[3] Peace orders and protective orders are similar in that they are both civil orders, issued by a judge, ordering one person to refrain from committing certain acts against others. The relationship between the parties determines which type of order can be requested. Protective orders generally apply to relatives and people in domestic or sexual relationships. *See* Md. Code, Family Law Article (2012 Repl. Vol), §§ 4-501 *et. seq.* Peace orders apply to other persons. *See* Md. Code, Courts and Judicial Proceedings Article (2013 Repl. Vol.), §§ 3-1501 *et. seq*.

He did not respond to the texts, and did not copy or preserve them. He answered "yes" when asked by the prosecutor if he had reported the threatening text messages "to the State Police or the Sheriff's Office or anybody else," but it was not made clear exactly to whom he had made the report.

Because of Davis' text messages, appellant advised security guards at his place of employment that there was an individual who was threatening to kill him. He also installed a security camera at his apartment, and put "pieces of paper on the door to see if [it] ha[d] been opened." He did not want to go back to his home at night because he was worried that Davis would "ambush []" him, so he "kind of [hung] out" at the home of his friend, Angela Fary. Appellant would "creep back" to his house at bedtime, lock the door and then prop a two-by-four piece of wood against the door so he could "sleep a little better."

Appellant explained his reaction to Davis' actions as follows:

> It was serious. It wasn't no game type thing. It was a serious thing, a serious threat. You know, you got to keep your guard up. Everywhere you go, you're working, this man knows where you work, knows where you live. I don't know nothing about him. I don't know his address. I don't know anything. I don't know if he's a killer; I don't know if he's a church goer. I don't know anything. All I know is he is texting me and threatening me on a daily basis and threatening to do harm to me.

Even though appellant knew he was not permitted by law to possess a gun due to a prior criminal conviction, he obtained a gun from Fary in early December 2012, for

protection. Appellant denied carrying the gun with him when he was away from his apartment, explaining that he only felt the need to protect himself when at home.

On December 12, 2012, one month and one day after the initial altercation with Davis, appellant received a phone call from Antonelli, who was crying. She explained that Davis was "stalking her," and requested a ride from the mall. Appellant picked her up and took her to his apartment.

Once there, Antonelli began to receive text messages from Davis, stating: "Bitch, I know where you at. I'm going to kill the both of you all. You're a lying whore. I'm going to kill you all." Appellant suggested that Antonelli turn her phone off, and told her not to worry about it, because Davis didn't know which apartment he lived in.

Some time later that day, Antonelli announced, "he's here." They heard "a beating on [ ] a neighbor's door," and "somebody yelling something." Davis then started banging on the door to appellant's apartment, and said, "I know that bitch is in there. Tell that lying bitch to come out," and threatened, "If you don't open this door up, I am going to kill you and her." Appellant responded, "she's not here," and told Davis to "chill out," but Davis insisted that he had seen Antonelli in the window, and proceeded to kick the door partially open.

Appellant told Antonelli to go into the attic and call 911. He then retrieved the gun from the closet and stood to the side of the door, warning Davis to "get out of here," because

the police were coming. Davis responded, "No, F you all. I'm going to kill you all. Give you to the count of three. If you don't open this door up, I'm going to come in, I'm kicking the door down." Davis then counted to three and kicked the door completely open. Appellant saw that he had a gun. As Davis stepped through the door into the apartment, appellant closed his eyes and started shooting. When appellant opened his eyes, Davis was gone. Davis survived gunshot wounds to his chest, shoulder, back and neck.

After the shooting, appellant went outside and tossed the gun into the yard, explaining, "I knew I wasn't supposed to have one, and, I mean, you don't want – after a shooting, you don't want to be standing there in the front with a gun in your hand when the troopers arrive." When the police arrived, he ran toward them and told them that he shot a person who had broken into his home. He showed the police where he had disposed of the gun.

**The Requested Duress Instruction**

The case was submitted to the jury on three charges: first-degree assault, use of a firearm in the commission of a crime of violence, and unlawful possession of a firearm after a felony conviction.

Appellant requested that the jury be instructed on several defenses to the charges, including duress, *i.e.*, that his crimes were necessitated by the circumstances.[4] The court denied the requested duress instruction only as it related to the firearm possession count. In the court's view, the defense of duress is applicable only when the defendant "is under a present threat [at] the time of the commission of the crime charged," and that:

[4] The pattern jury instruction on duress reads as follows:

> You have heard evidence that the defendant acted under the influence of an overpowering force. This is called duress. You are required to find the defendant not guilty if all of the following four factors are present:
>
> > (1) the defendant actually believed that the duress placed [him] [her] in immediate and impending danger of death or serious bodily harm;
> >
> > (2) the defendant's belief was reasonable;
> >
> > (3) the defendant had no reasonable opportunity for escape; and
> >
> > (4) the defendant committed the crime because of the duress.
>
> The defense of duress is not established by proof that the defendant had been threatened with violence at an earlier time. [He] [she] must have been under a present threat at the time of the commission of the crime charged.
>
> In order to convict the defendant, the State must prove that the defendant did not act under duress. This means that you are required to find the defendant not guilty unless the State has persuaded you, beyond a reasonable doubt, that at least one of the four factors of duress was absent.

Maryland Criminal Pattern Jury Instruction 5:03.

> . . . [appellant's] own testimony was that from the November incident, after which he obtained a . . . Protective Order against Ms. Antonelli, he had heard nothing from Mr. Davis, that he only heard from Mr. Davis when he showed up at the house that day. So there are no text messages that were intervening during that time, by [appellant's] own testimony. . . .
>
> So there is nothing to indicate that at that point there was an ongoing threat.
>
> And also, the only testimony as to being threatened with violence at an earlier time is that testimony of that prior November incident. So duress does not apply to that particular crime . . .

The court also stated that the defense of duress did not apply generally to the possession of a firearm after a felony conviction, reasoning that "otherwise, anyone who has a [dis]qualifying conviction could negate the commission of that crime by saying, 'I was under duress.' It's meant to be a strict liability offense."

In response to defense counsel's argument that both appellant and Antonelli testified that threatening texts were ongoing, the court reiterated that the "the defense of duress is not established by the proof that the defendant had been threatened with violence at an earlier time." The jury was ultimately instructed that self-defense, defense of others, defense of habitation, and duress were defenses that may apply to the crime of first-degree assault only.

## STANDARD of REVIEW

"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." Maryland Rule 4-325(c). "We review a trial court's decision to give a particular jury instruction under an abuse of

discretion standard." *Appraicio v. State*, 431 Md. 42, 51 (2013) (citation omitted). The trial court's decision whether to give a jury instruction, especially a pattern jury instruction, "will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Atkins v. State*, 421 Md. 434, 447 (2011) (citation and internal quotation marks omitted).

In determining whether a trial court has abused its discretion, we consider "(1) whether the requested instruction is a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered elsewhere in the instructions actually given." *Bazzle v. State*, 426 Md. 541, 549 (2012) (citation and internal quotation marks omitted).

> 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*. at 550 (quoting *Dishman v. State*, 352 Md. 279, 292-93 (1998)).

The evidentiary threshold the defendant must surmount is low. "[A] defendant needs only to produce 'some evidence' that supports the requested instruction[.]" *Id*. at 551. "Some evidence" simply means "any evidence," as the Court of Appeals has explained:

> *Some evidence* is not strictured by the test of a specific standard. It calls for no more than what it says – "some," as that word is understood in common, everyday usage. It need not rise to the level of "beyond a reasonable doubt" or "clear and convincing" or "preponderance". . . . If there is any evidence relied on by the defendant which, if believed, would support his claim . . . the defendant has met his burden.

*Id.* at 551 (quoting *Dykes v. State*, 319 Md. 206, 216-17 (1990) (emphasis in *Dykes*)).

## DISCUSSION

Appellant asserts that the court's stated reasons for refusing to apply the duress defense to the handgun violations were incorrect for two reasons. Appellant posits, first, in his view, the evidence of earlier, continuing threats by Davis, even to the date of the shooting, was sufficient to support the requested instruction. Secondly, he argues that the court's ruling that the defense of duress does not apply to the crime of felon in possession of a firearm is incorrect, citing *State v. Crawford*, 308 Md. 683 (1987).

The State responds that appellant did not satisfy the criteria set forth in *Crawford* that would entitle him to the duress instruction. We conclude that, while, in some cases, the defense of duress may be applicable to a charge of possession of a handgun with a disqualifying conviction, this is not such a case.

### *Crawford v. State*

In considering the availability of the duress defense to appellant, we find *Crawford* to control our conclusion.

An assailant entered Crawford's apartment and began shooting at him. *Id*. at 686. After an unsuccessful attempt to contact the police, Crawford tried to move into a bedroom and lock the door behind him, but before he was able to do so, he was set upon by a second assailant who attempted to shoot at him. *Id.* at 686-87. As Crawford reached out to wrest the gun from that assailant, he fell out of a window and onto the ground below. *Id*. at 687. As he lay on the ground, he heard footsteps coming toward him and "realized the gun was there," and picked it up to defend himself. *Id.* During a sequence of events that followed, he was shot numerous times and ultimately lost consciousness. *Id*. at 688-90. He was later charged, *inter alia*, with assault, and with carrying a handgun in violation of former Art. 27 § 36B(b) (currently § 4-203 of the Criminal Law Article), which generally prohibits wearing, carrying, or transporting a handgun, whether concealed or open, on or about the person. *Id*. at 685.

In *Crawford*, the Court of Appeals held that necessity[5] may be a valid defense to the crime of unlawful possession of a handgun, *id*. at 696, when five elements are present:

> (1) the defendant must be in present, imminent, and impending peril of death or serious bodily injury, or reasonably believe himself or others to be in such

[5] "Necessity is similar to duress, except that the compulsion to act comes from the physical forces of nature (storms, privations) rather than from human beings." *McMillan v. State*, 428 Md. 333, 361 (2012) (citation and internal quotation marks omitted). The comment to Maryland Criminal Pattern Jury Instruction 5.03 explains that there is not a separate pattern jury instruction on necessity because of the interrelationship between necessity and duress.

> danger; (2) the defendant must not have intentionally or recklessly placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct; (3) the defendant must not have any reasonable, legal alternative to possessing the handgun; (4) the handgun must be made available to the defendant without preconceived design, and (5) the defendant must give up possession of the handgun as soon as the necessity or apparent necessity ends.

*Id*. at 698-99.[6]

Holding that the trial court erred in refusing to instruct the jury on the defense of necessity, the Court explained that the necessity defense "arises when an individual is faced with a choice of two evils, and one is the commission of an illegal act." *Id*. at 691. In that circumstance, "'the greater good for society will be accomplished by violating the literal language of the criminal law.'" *Id*. (quoting WAYNE R. LAFAVE, CRIMINAL LAW § 50 (1972)).

The Court held that the trial court erred in refusing to instruct the jury on necessity, finding that each of the five elements of the test had been satisfied. *Id.* at 699-700.

As we consider, and apply, the *Crawford* factors to the record before us, we conclude that several of the factors weigh in appellant's favor. He and Antonelli were clearly in

[6] Crawford was charged with violating Art. 27 § 36B(b) (currently § 4-203 of the Criminal Law Article), which generally prohibits a person from wearing, carrying, or transporting a handgun. The *Crawford* Court did not restrict its general holding that "necessity may be a defense to the charge of unlawful possession of a handgun," *State v. Crawford*, 308 Md. 683, 696 (1987) to the particular firearms statute at issue in that case. Therefore, we see no reason why *Crawford* should not apply equally to PS § 5-133(c), which makes it unlawful to possess a handgun after a disqualifying conviction.

present, imminent, and impending peril of serious bodily injury. He did not intentionally or recklessly place himself in that perilous situation – indeed, he was in his own home when Davis forced entry by breaking down the door. And, although he sought to dispose of the weapon after the shooting of Davis, he did advise police where he had thrown it into the yard.

Two other factors, however, do not weigh in his favor. He did have – for at least 30 days – the opportunity to avail himself of a reasonable legal alternative to possession of the weapon by reporting Davis' action to the police and receiving judicial assistance.

More to the point, appellant is not entitled to relief because there was no evidence to satisfy the fourth prong of the *Crawford* test – that the handgun be obtained without preconceived design, because he clearly obtained the gun with preconceived design. On that basis alone, he was not entitled, under *Crawford*, to rely upon the defense of duress. The *Crawford* court clearly imposed five elements to be satisfied to justify the duress instruction in a case involving unlawful possession of a handgun. The Court did not extend to similarly situated defendants a balancing or scoring option as to the five factors – they must all be met. *Crawford* does not offer a menu from which a defendant may select one or more of the elements of the duress defense.

In *Crawford,* the analysis of the evidence relevant to the "preconceived design" element led the Court to conclude that "Crawford's possession of the handgun was merely fortuitous. The handgun was originally possessed by Crawford's assailant and *only became*

*available to him after he disarmed the assailant. Thus*, *Crawford had no preconceived design to gain possession of the handgun before being attacked*." *Id.* at 700 (emphasis supplied).

Here, in contrast, appellant, knowing that he was not legally permitted to possess a gun, had obtained one from Fary two weeks prior to the shooting of Davis. The weapon did not come into his possession fortuitously, during a confrontation with an armed attacker, but was procured in advance and stored in his home, specifically for protection from Davis. Indeed, from the moment he took possession of the gun from Fary he had been in violation as a convicted felon.

Appellant cites *U.S. v. Perez*, 86 F.3d 735 (7th Cir. 1996) and *U.S. v. Gomez*, 92 F.3d 770 (9th Cir. 1996), in support of his argument that other jurisdictions have recognized that a justification defense may apply even when the defendant armed himself in advance, in anticipation of a reasonable threat. In view of *Crawford*, those cases are of no avail to appellant. Maryland law is clear that, to support a justification defense, such as duress, to the crime of unlawful possession of a handgun, one essential factor is that the handgun "*must* be made available to the defendant *without preconceived design." Crawford*, 308 Md. at 699 (emphasis supplied). We are aware of no exception to *Crawford* that permits the defense to be raised where, as here, the handgun was obtained well before the arrest for illegal possession, regardless of the circumstances.

Accordingly, the duress instruction was not available to appellant as to the charge of unlawful possession of a handgun. The trial court did not abuse its discretion in declining to give the instruction.

**JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**