UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1662

September Term, 2016

DAVONTE PERRY

v.

STATE OF MARYLAND

Beachley,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: June 23, 2017

A jury in the Circuit Court for Harford County found appellant, Davonte Perry, guilty of home invasion, conspiracy to commit home invasion, conspiracy to commit robbery with a deadly or dangerous weapon, attempted robbery with a deadly or dangerous weapon, three counts of first-degree assault, and four counts of use of a firearm in the commission of felony or crime of violence. The court sentenced appellant to an aggregate sentence of 180 years imprisonment, with all but 30 years suspended.[1] Appellant timely noted this appeal and presents the following questions for our consideration:

1. Is the evidence [in]sufficient to sustain appellant's conviction for the intent-to-frighten variety of assault of an eleven-month-old infant?

2. Did the trial court commit plain error by allowing the State to play an un-redacted recording of the victim making photographic identifications in which the victim made highly prejudicial statements about appellant including that he is "involved in gang activities," was "always known for gettin' in trouble," and was a "bad guy[] everyone heard about"; alternatively, was defense counsel ineffective for failing to request a redaction of the recording, object to these comments, and/or request a mistrial once the portion of the recording containing these statements was played?

For the reasons that follow, we answer the first question in the affirmative and reverse one of appellant's convictions for first-degree assault. We answer the second question in the negative, and affirm the judgments of the circuit court in all other respects.

[1] Specifically, Appellant was sentenced as follows: home invasion: twenty years with all but ten years suspended; conspiracy to commit home invasion: twenty-five years consecutive, all suspended; attempted armed robbery: twenty years consecutive, all suspended; conspiracy to commit armed robbery: merged; for each of the four use of a firearm counts: twenty years consecutive, all but five years suspended; and for each of the first-degree assault counts: twenty-five years consecutive, all suspended. The court also ordered that appellant will be placed on five years of supervised probation upon his release.

BACKGROUND

On January 9, 2015, Appellant, along with two confederates, forced their way into Christina Davenport's home at gunpoint and demanded money. At the time of the invasion, Davenport had been tending to her eleven-month-old daughter and was awaiting the arrival of her boyfriend, Antoine Gibson, and her friend, Tinisi Quincy Thongsy. Once inside the home, one of the intruders pointed a firearm at the infant and made a loud clicking noise with it. Thongsy eventually arrived at the home and interrupted the crime.

Because Appellant contests the sufficiency of the evidence regarding his conviction for the first-degree assault of the infant, we shall recite, at some length, portions of Davenport's trial testimony on direct examination by the State relevant to the circumstances of the event.

> Q. Directing you back to January 9th specifically of 2015 in the late afternoon sometime before four o'clock, can you tell us where you were?
>
> A. Home.
>
> Q. Can you tell us what you were doing?
>
> A. Nothing. In the house watching T.V. with my daughter.
>
> Q. Were you expecting any visitors?
>
> A. Yes.
>
> Q. Who were you expecting?
>
> A. Antoine [Gibson] and Quincy [Thongsy].
>
> Q. And who?
>
> A. And Quincy.
>
> Q. What is Quincy's relationship to you and Antoine and Quincy's relationship to your daughter?

A. He is a childhood friend. Knew him since we were little kids. He used to live down the street from Antoine and he is like my daughter's godfather.

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Q. At about four o'clock, tell us what happened.

A. I received a knock on my door and I opened the door and it was Anthony. They call him Shoota. He was outside and he was asking for Francis.

Q. Now, had you known Shoota prior to this occasion or Anthony?

A. Yes.

Q. And how did you know who he was?

A. I didn't personally know him, but I knew who he was. He went to my high school.

Q. Edgewood?

A. Yes. And I would see him around.

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Q. And what did you tell Anthony or Shoota about Francis at that time?

A. That there was no Francis at my house and that I didn't know a Francis.

Q. And then what did you do?

A. After that I felt weird because he kept asking for Francis. So, I attempted to hold my door.

Q. And then what happened?

A. That's when him and Trip, who is sitting right here, both started to push my door in.

Q. Now, you just said that he was sitting right here. Who are you referring to?

A. Him.

***

Q. Your Honor, let the record reflect that the witness has identified the Defendant Davonte Perry.

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Q. When you say they pushed their way in, who did the pushing of the door?

A. Shoota and Trip.

Q. And then what happened?

A. And then a third individual came from I don't know where and started running and stuck his arm through my door with the gun.

Q. Did you try to close the door?

A. Yes, but I couldn't. I mean, there was three guys against me.

Q. Did they enter into your residence?

A. Yes.

Q. Once inside, where did the three men go?

A. All three of them were standing right in front of my door yelling and screaming, telling me to shut up and get on the ground.

Q. Now, initially when all three came in, were any of them wearing masks?

A. No. They had on those ski kind of masks, but they weren't up. They pulled them up after they got in.

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Q. Specifically what were they saying when they were inside?

A. Specifically?

Q. Yes.

A. To shut the fuck up.

Q. And who told you to shut the fuck up?

A. The first one that started talking was Shoota and after that all three of them were yelling. I was screaming initially and my daughter was crying.

Q. Where was she when this was occurring?

A. Right in the living room behind me crying in her bouncer.

Q. I'm sorry?

A. In her bouncer.

Q. Were any of these men armed?

A. Yes.

Q. How many of them?

A. All three.

Q. With what kind of weapon?

A. A black handgun like the police carry.

Q. Did you believe them to be real guns?

A. Yes.

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Q. When this was going on, did any of them make threats towards your daughter?

A. Yes.

Q. How did that occur?

A. They said shut up if I didn't want them to hurt my daughter.

Q. Can you remember the specific words they used?

A. I remember specific words that Trip said –

Q. What was that?

A. -- when he took me upstairs.

Q. What was that?

A. If I wanted my daughter to live.

Q. Was he doing anything while he was saying these words to you?

A. Downstairs or upstairs?

Q. Either place.

A. Upstairs. Well, he dragged me up the stairs. He's the one that took me upstairs.

Q. At any point did they point guns or make threats towards your daughter?

A. Yes.

Q. When did that occur?

A. Jabreel, he was the one pointing the gun at my daughter.

Q. I'm sorry?

A. Jabreel was the one pointing the gun at my daughter.

Q. What, if anything, was he doing when he was doing that?

A. I was screaming. He was pointing the gun at my daughter I guess to motivate me to stop screaming.

Q. Was he doing anything with the gun?

A. He kept clicking it to scare me.

Q. When you say clicking it, can you tell us what that means?

A. Like he was pulling the back of the gun and it was making like a loud clicking noise like all of the movies.

Q. Like if this is the gun, racking the slide or manipulating it? Is that what you mean?

A. Yes.

Q. And what kind of sound did that make?

A. It was like a loud metal kind of sound.

Q. Were they asking for anything? What was their reason for being there that they told you at least?

A. Asking me if I had money.

After Thongsy arrived at the home, the intruders left and Thongsy called 9-1-1. Thongsy could not identify any of the assailants to the police. On the day of the crime, Davenport identified a person she recognized from social media as "Shoota" to the police. Several days later, Davenport identified the other two assailants to the police. She later identified all three from a photographic array conducted by the police.

Additional facts will be addressed as they become relevant to the discussion.

DISCUSSION

I.

Appellant contends that the evidence was insufficient to sustain his conviction for the first-degree assault of the infant because the State failed to prove that the "infant was aware of an impending battery." The State contends that, because the child was crying, an inference could be drawn that the child was frightened by the strangers making loud noises and racking a gun near her face, and therefore the evidence was sufficient.

The standard of review for sufficiency of the evidence 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in the original). "Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder." *State v. Stanley*, 351 Md. 733, 750 (1998). "We do not re-weigh the evidence, but 'we do determine whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the

offenses charged beyond a reasonable doubt.'" *State v. Smith*, 374 Md. 527, 534 (2003) (quoting *White v. State*, 363 Md. 150, 162 (2001)).

Appellant was prosecuted for, *inter alia*, first-degree assault in violation of Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL), § 3-202, on Ms. Davenport's infant daughter. That charge was reflected in count twelve of the charging document.

"Assault is a protean crime." *Pair v. State*, 202 Md. App. 617 (2011). First-degree assault can be thought of as an aggravated form of second-degree assault. Second-degree assault can be carried out in three distinct ways: (1) by intentionally frightening the victim, (2) by actually battering the victim, and/or (3) by attempting to batter the victim. *Jones v. State*, 440 Md. 450, 455 (2014). There are two ways to aggravate a second-degree assault up to a first-degree assault: (1) by causing, or attempting to cause serious physical injury, and/or (2) by using a firearm. Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("C.L.") § 3–202, *see also Dickerson v. State*, 204 Md. App. 378, 383 (2012). The jury in the instant case was instructed on the "intent-to-frighten" theory of second-degree assault, and on the "using a firearm" theory of aggravation to first-degree assault, as follows:

> Assault is intentionally frightening another person with the threat of immediate offensive physical contact or physical harm. In order to convict the Defendant of assault, the State must prove, one, that the Defendant committed an act with the intent to pla[ce] Christina Davenport, Tinisi Quincy Thongsy, and [Ms. Davenport's infant daughter] in fear of immediate offensive physical contact or physical harm; two, that the Defendant had the apparent ability, at that time, to bring about offensive physical contact or physical harm; and, three, that Christina Davenport, Tinisi Quincy Thongsy, and [Ms. Davenport's infant daughter] reasonably feared immediate offensive physical contact or physical harm.
>
> The Defendant is also charged with the crime of first degree assault. In order to convict the Defendant of first degree assault, the State must prove all of

> the elements of second degree assault and also must prove that the Defendant used a firearm to commit assault.

In *Lamb v. State*, 93 Md. App. 422 (1992), Judge Moylan makes clear that, under the "intent-to-frighten" form of assault, "it is not necessary that the victim be actually *frightened* or placed in *fear* of an imminent battery[.]" *Id*. at 437 (emphasis added). Rather, "[t]he critical state of mind on the part of the victim is to be placed in reasonable *apprehension* of an impending battery. This distinction preserves the rights of the intrepid crime victims[.]" *Id*. at 437–38 (emphasis added).

Lamb further explained:

> For an assault of the intentional frightening variety, … the assailant may be guilty even though he knows full well that he lacks any ability to follow through on his threat. That he knows the gun he points is unloaded or defective or is no gun at all is of no consequence. *Dixon v. State*, 302 Md. 447, 463–464, 488 A.2d 962 (1985). From his perspective, there is no apparent present ability but that will avail him naught. *Hayes v. State*, 211 Md. 111, 115, 126 A.2d 576 (1956). All that is required in terms of perception is an apparent present ability from the viewpoint of the threatened victim. *Hall v. State*, 69 Md. App. 37, 45, 516 A.2d 204 (1986). If, on the other hand, the would-be victim of the threat is unaware of the threatening conduct, there can be no assault of this variety. *Harrod v. State*, 65 Md. App. 128, 138, 499 A.2d 959 (1985). If the would-be victim perceives the threatening conduct but knows, for instance, that the gun is defective, there is no apprehension of an imminent battery and, therefore, no assault of the threatening variety.

Id. at 443.

Appellant relies on *Harrod v. State*, 65 Md. App. 128, 131-32, 138 (1985), in support of his sufficiency argument. In *Harrod*, this Court found the evidence insufficient to support the "intent-to-frighten" form of assault where the evidence showed that Harrod threw a hammer that struck the wall over an infant's crib while intending to throw the

hammer at another victim. We held that the State failed to prove that Harrod "placed [the infant] in reasonable apprehension of receiving an immediate battery." *Id*. at 138. Noting that "[b]y definition, the victim must be aware of the impending contact," we held that "[t]here is no evidence in the record before us that [the infant] was in fact aware of the occurrences in his home on the morning in question." *Id*.

The State attempts to distinguish *Harrod* on its facts by pointing out that the infant in the instant case was, in fact, crying, and that an inference could be drawn that the infant was crying because of the intruders making loud noises and racking a gun in the infant's face.

We do not find the State's argument persuasive. It is clear that, *inter alia*, in order to sustain a conviction of the intent-to-frighten form of assault, that the victim be, at the very least, aware of an impending battery. The evidence viewed in the light most favorable to the State in the instant case showed that the only threatened battery came from the threatened use of a firearm. In order for an infant to be aware of such a battery, by definition, the infant would have to be aware of what a firearm is, and what it can do. The situation is analogous to Judge Moylan's hypothetical in *Lamb*, *supra*, that "[i]f the would-be victim perceives the threatening conduct but knows, for instance, that the gun is defective, there is no apprehension of an imminent battery and, therefore, no assault of the threatening variety." *Lamb*, 93 Md. App. at 443. That hypothetical is equally true when altered to fit the facts of this case: "If the would-be victim perceives the threatening conduct but [does not know, for instance, what a firearm is, or what it can do], there is no apprehension of an imminent battery and, therefore, no assault of the threatening variety."

We believe it is common human experience that an infant lacks the capacity to understand what a firearm is, and what it can do, just as it is common human experience that an adult understands what a firearm is, and what it can do. As a result, the infant was not placed in reasonable apprehension of an imminent battery.

The fact that the infant was crying is of little moment. It would be expected that an infant would cry if strangers burst into his or her home and everyone started screaming. To be sure, the actions of appellant and his confederates were reprehensible and likely formed the basis for other crimes against the infant. Nevertheless, we believe that assault of the intent-to-frighten sort was not among them.

II.

A video was played for the jury of Davenport's identification of appellant during a photographic array conducted by the police. After Davenport made the identifications, the following portion of the video was played:

> KRAMER[2]: Okay. Is there anything that you think we should know ah in reference to this that may help in this case?
>
> DAVENPORT: I seen those, those guys walkin' around the neighborhood a few times. Ah I've seen them guys together walkin' around. The one other guy, Maul, he's always walkin' around askin' does somebody want to buy Percs? Ah other than that, I know that Trip and Shoota went to my school. They were always known for gettin' in trouble, but like I said I never had any personal interactions with them. I was honor roll, FCLA, all of that, and they were just the bad guys that everyone heard about.
>
> KRAMER: And where did you go to high school?
>
> DAVENPORT: Edgewood High School.

[2] Detective Donald Kramer of the Harford County Sheriff's Office.

KRAMER: And what year did you graduate?

DAVENPORT: I graduated in 2011.

KRAMER: Do you believe they were in the same grade as you? Or a different?

DAVENPORT: I don't think they were the same. I don't, they weren't in any of my classes.

KRAMER: Right.

DAVENPORT: Even if they were in the same grade, they wouldn't have been in my classes.

KRAMER: Right.

DAVENPORT: Besides from that, no, I just know that they're involved in gang activities. For sure, one of them I think is Trip, I think he's my friend on Facebook. I think he, I was lookin' at it and he, it said that he sent me a friend request last year on Facebook, but on Facebook if, if you know someone you just accept the friend request. And yeah I didn't realize until I went online looking just to see if I could find any details. And I realized that he was my friend on Facebook.

Appellant contends that the trial court committed plain error by allowing the State to play an un-redacted recording of the victim making photographic identifications in which the victim made highly prejudicial statements about appellant, including that he is "involved in gang activities," was "always known for gettin[g] in trouble," and was a "bad guy[] everyone heard about." In the alternative, appellant contends that his right to effective assistance of counsel was denied when trial counsel failed to request a redaction of the recording, object to the comments, and/or request a mistrial once the portion of the recording containing these statements was played. Appellant suggests that the failure to seek a redaction or otherwise object was not a strategic decision because there was "no conceivable benefit to failing to object."

Appellant contends that the comments were inadmissible and prejudicial because they highlighted appellant's criminal propensity. In addition, appellant complains that insult was added to injury when, upon request of the jury during deliberations, the video was re-played for the jury.

The State contends that the issue was not preserved for appellate review when appellant failed to object, or otherwise take any steps to shield the jury from the comments. Moreover, the State argues that plain error is an extraordinary remedy, and the circumstances of this case do not rise to that level. Finally, the State contends that appellant's ineffective assistance of counsel claim is properly litigated in a post-conviction proceeding and not on direct appeal. In conjunction with that argument, the State argues that trial counsel could have had a strategic reason for not objecting to the specific comments. In any event, the State argues that appellant was not prejudiced by the comments because they were insignificant in the context of the whole trial.

We agree that, by failing to object or take any other corrective measures, appellant failed to preserve the issue for appeal. In addition, we decline appellant's invitation to invoke plain error. "[P]lain error review is a 'rare, rare phenomenon,' undertaken only when the un-objected-to error is extraordinary." *Perry v. State*, 229 Md. App. 687, 710 (2016) (quoting *Pickett v. State*, 222 Md. App. 322, 342 (2015)). The Court of Appeals has

> "characterized instances when an appellate court should take cognizance of unobjected to error as compelling, extraordinary, exceptional or fundamental to assure the defendant of fair trial." We further made clear that we would intervene in those circumstances only when the error complained of was so

> material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial.

Trimble v. State, 300 Md. 387, 397 (1984) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)) (internal citation omitted). "[I]nvocation of the "plain error doctrine" 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003).

We also decline to address appellant's contention that his right to effective assistance of counsel was denied because "[g]enerally, absent any 'objective, uncontroverted, or conceded error,' the issue of defense counsel's effectiveness is raised most appropriately in a post-conviction proceeding." *Steward v. State*, 218 Md. App. 550, 570 (2014), (quoting *Haile v. State*, 431 Md. 448, 473 (2013)). This is so, because "ordinarily, the trial record does not illuminate the basis for the challenged acts or omissions of counsel." *In re Parris W.*, 363 Md. 717, 726 (2001).

CONSISTENT WITH THIS OPINION, CONVICTION AND SENTENCE FOR ONE COUNT OF FIRST-DEGREE ASSAULT VACATED. JUDGMENTS OF THE CIRCUIT COURT OTHERWISE AFFIRMED. COSTS TO BE EQUALLY DIVIDED BETWEEN APPELLANT AND APPELLEE.