UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2477

September Term, 2014

NAMAR RICE

v.

STATE OF MARYLAND

Woodward,
Friedman,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: October 30, 2015

Namar Rice, appellant, was convicted by a jury sitting in the Circuit Court for Prince George's County of second-degree assault and wearing and carrying a handgun.[1] He was acquitted of first-degree assault and use of a handgun in a crime of violence. The court sentenced him to ten years' imprisonment with all but five years suspended and three years of supervised probation for second-degree assault. He was sentenced to three years, all suspended, for the handgun offense to be served concurrent with the assault offense. He filed a timely appeal and presents the following question for our review, which we rephrased:[2]

Did the trial court abuse its discretion in instructing the jury on the attempted battery theory of second-degree assault?

Finding no error, we shall affirm the judgment of the circuit court.

BACKGROUND

On or about August of 2013, appellant operated "Inkaholics," a tattoo shop in the Marlow Heights Shopping Center. Appellant sub-leased a portion of the shop to other tattoo artists, including Shaheed James. A group of tattoo artists who called themselves, "NSP" or "No Skin Policy" also rented space from appellant. Over time, the business relationship

[1]Namar Rice was tried jointly with Joshua Rowe. The appeal before us pertains only to the convictions of Mr. Rice.

[2]Appellant phrased the question as:

> Did the court err in instructing the jury on both the intent-to-frighten and attempted battery modalities of second-degree assault when the evidence supported only the intent-to-frighten modality?

among appellant, James, and NSP deteriorated. Appellant was ultimately forced to close the business and move out. James and NSP were also told to vacate the premises.

On August 22, 2013, while moving out of the building, an argument erupted at Inkaholics among appellant, James, members of NSP, and four to five of appellants' relatives and associates. The disagreement spilled over into the parking lot where two NSP members continued the argument with appellant who was seated in a U-Haul truck. During this time, appellant's associates returned to the premises in a Marquis vehicle. The driver of the Marquis retrieved a gun from the trunk of the vehicle and began shooting in the direction of the NSP group. Appellant told police that while he was still seated in the U-Haul, he fired a shot out of the window into the air to protect his brother and friends who had arrived in the Marquis. James left the scene in a Chrysler vehicle driven by a friend's mother. The Chrysler sustained multiple bullet holes. Police recovered eight 25-caliber handgun cartridge casings from the shopping center parking lot in the vicinity of James and the Chrysler vehicle.

DISCUSSION

Appellant contends that it was error for the court to instruct the jury on the "attempted battery" theory of second-degree assault when the evidence warranted an instruction on the "intent to frighten" theory only. During a break in testimony and before the court instructed the jury, the following colloquy took place regarding jury instructions on the second-degree assault charge:

THE COURT: All right. After we do those witnesses, obviously it will be time for jury instructions. And one thing that I believe we need to address is – well, two things, actually. First and foremost, with respect to second degree assault, this morning when I was preparing the instructions, I spoke to [the prosecutor] and confirmed what I believe was that she wanted two theories of second degree assault.

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The intent to frighten theory and the attempted battery theory. Counsel, do either of you want to be heard on that?

[DEFENSE COUNSEL]:Yes, Your Honor, I would on behalf of Mr. Rice. Your Honor, I can certainly understand based on the evidence that has been presented thus far, [prosecutor's] request for intent to frighten as it pertains to Mr. Rice. However, with regard to the attempted battery, Your Honor, I don't feel that there has been any evidence presented that my client attempted to batter or harm Mr. James in any way. In fact, the evidence that has been presented is that my client fired a shot in the air.

And if we look back to the testimony of Mr. James himself, which I was actually reviewing before the [c]ourt took the bench, there is no testimony that Mr. James ever saw my client with a gun or even approached or was near the U-Haul. And therefore, Your Honor, I can understand the State's position with regard to A ["intent to frighten"], I do not feel that B ["attempted battery"] is appropriate based on the evidence thus far.

THE COURT: [Prosecutor]?

[PROSECUTOR]: Your Honor, we also have the codefendants in that matter. I don't know how you would do it.

THE COURT: So you agree that the attempt to frighten theory would be the only theory applicable to Mr. Rice?

[PROSECUTOR]: I'm not agreeing with that, actually. We would argue otherwise.

THE COURT: Okay. So give me a theory as to the attempted battery regarding Mr. Rice.

[PROSECUTOR]: It's the State's understanding, based on looking at the evidence, like I said yesterday when we argued the motion for the judgment of acquittal, that based on the proximity of Mr. James, he indicated that he was right there at the vehicle in State's 1 - -

THE COURT: I see what you are saying.

[PROSECUTOR]: And all of that. And he said supposedly, let's see what they are going to do now. Car comes in, shots are fired. The casings are all together. The casings are not by the U-Haul as much as he wants to argue that. He didn't see him there - - well, that's his story. I mean, he can stick with his story. That's not the State's story.

[DEFENSE COUNSEL]: It's the State's evidence that presented his story, Your Honor.

THE COURT: She does have - - she has been clinging onto it strong. She does have this physical evidence issue of the spacing of the shell casings.

And so based on that, her argument is that there was shooting just beyond shots in the air.

[DEFENSE COUNSEL]: Okay.

THE COURT: My thing is, look, from my perspective, I just need to know whether or not there has been some evidence generated that warrants that particular jury instruction or in this case, this particular theory of a jury instruction. There has been.

[DEFENSE COUNSEL]: Well, can I just make a record with regard to the shots fired?

THE COURT: Sure.

[DEFENSE COUNSEL]: Your Honor, the ballistic reports are in evidence, and there is no evidence that my client, unless the [c]ourt is going to allow an accomplice liability instruction, that my client shot anywhere but in the air, because the ballistic evidence shows that there was one casing left from the gun that my client tossed. The rest of the ballistic evidence shows that the casings that were found were fired from the

gun that was found in [co-defendant's] trunk. That would be my argument with regard to that issue.

THE COURT: Over the objection, I'm going to give the theory - - both theories as applicable to your client.

The court then gave the following instruction on second degree assault:

The first charge we are going to start with is second degree assault, and there are two different theories of second degree assault. Okay? The State is trying - - is using either one of those theories to try to prove the guilt of the Defendants.

The first theory is - - of second degree assault is intent to frighten. Assault is intentionally frightening another person with the threat of immediate physical harm. In order to convict the Defendant of assault, the State must prove:

Number one, that the Defendant committed an act with the intent to place Shaheed James in fear of immediate physical harm.

Number two, that the Defendant had the apparent ability at that time to bring about physical harm.

And number three, that Shaheed James reasonably feared immediate physical harm.

And number four, that the Defendant's actions were not legally justified.

The second theory of second degree assault is attempted battery. Assault is an attempt to cause physical harm. In order to convict the Defendant of assault, the State must prove:

Number one, that the Defendant actually tried to cause immediate physical harm to Shaheed James.

Number two, that the Defendant intended to bring about physical harm.

> And number three, that the Defendant's actions were not consented to by Shaheed James or not legally justified.

Following the jury instructions, the court inquired as to whether counsel were satisfied. All counsel affirmatively stated that they were satisfied with the instructions as given.

Maryland Rule 4-325(e) provides: "[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." The rule "plainly requires an objection after the instructions are given, even though a prior request for an instruction was made and refused." *Johnson v. State*, 310 Md. 681, 686 (1987). Defense counsel failed to comply with Rule 4-325(e) by failing to object following the jury instructions. Accordingly, we find appellant's contention that the court erred in giving the "attempted battery" theory of second-degree assault is not preserved for review.

Appellant nonetheless urges this Court to find substantial compliance with Rule 4-325(e) based on counsel's earlier objection. In some cases an inadequately preserved objection may be considered in "substantial compliance" with the rule. *Bowman v. State*, 337 Md. 65, 69 (1994). The requirements of the rule should be followed closely, however, and substantial compliance is reserved for rare exceptions. *Sims v. State*, 319 Md. 540, 549 (1990).

The threshold for substantial compliance with Rule 4-325(e) was not met in this case. Defense counsel did not make the court aware of an ongoing objection following the jury

instruction. "Unless the attorney preserves the point by proper objection after the charge, or has somehow made it crystal clear that there is an ongoing objection to the failure of the court to give the requested instruction, the objection may be lost." *Id*. Here, the trial court provided counsel with an opportunity to object to the instructions as given and defense counsel raised no objection. In fact, the defense stated that they were satisfied with the instructions as given.

Finally, appellant requests that we exercise our discretion to review the question pursuant to the plain error doctrine provided in Rule 4-325(e). This provision applies only where the circumstances are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial". *State v. Hutchinson*, 287 Md. 198, 203 (1980). We decline to invoke the plain error doctrine here as those circumstances are not before us.

Even if we were to review the issue, we would find no abuse of discretion in the court's giving of the instruction. The trial court found that "some" evidence existed to warrant the jury instruction for the "attempted battery" theory of second-degree assault. So long as the requesting party has produced "some evidence" implicating the instruction, the trial court properly exercised its discretion in propounding the instruction. *Bazzle v. State*, 426 Md. 541, 551 (2012)(citing *Dykes v. State*, 319 Md. 206, 216-17 (1990). The threshold of demonstrating "some evidence" is very low. *Id*. "Some evidence" 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 reasonable doubt' or 'clear and convincing' or 'preponderance.'" *Dykes*, 319 Md. at 216-17.

Applying the "some evidence" threshold to the facts, the court's instruction on the "attempted battery" theory of second-degree assault was not improper. Although appellant told police that he fired one shot "in the air" from the U-Haul to stop James from shooting at his brother, the appellant's version of the events was inconsistent with the evidence presented by the State. The State presented sufficient evidence from which reasonable jurors could infer that the appellant shot at James with the intent to injure him. Accordingly, the court did not abuse its discretion in giving the "attempted battery" instruction.

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