Circuit Court for Somerset County
Case No. C-19-CR-18-000033

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2702

September Term, 2018

BRADFORD TILGHMAN

v.

STATE OF MARYLAND

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

JJ.

Opinion by Raker, J.

Filed: October 22, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant Bradford Tilghman was convicted in the Circuit Court for Somerset County of second-degree assault, fourth-degree burglary (dwelling), fourth-degree burglary (permit tool use), malicious destruction of property of value less than $1,000, reckless endangerment, and carrying a dangerous weapon with the intent to injure. Appellant presents the following questions for our review:

> "1. Did the trial court err in refusing to instruct the jury on self-defense and commit plain error in failing to instruct on defense of others?
>
> 2. Did the trial court err in imposing separate sentences for burglary and malicious destruction?
>
> 3. Did the trial court commit plain error in permitting improper prosecutorial closing argument?"

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for the Circuit Court for Somerset County on charges of first-degree assault, second-degree assault, home invasion, third-degree burglary, fourth-degree burglary (dwelling), fourth-degree burglary (permit tool use), malicious destruction of property of value less than $1,000, reckless endangerment, and carrying a dangerous weapon openly with the intent to injure another person (shovel and hammer). The jury convicted appellant of second-degree assault, fourth-degree burglary (dwelling), fourth-degree burglary (permit tool use), malicious destruction of property, reckless endangerment, and carrying a dangerous weapon with the intent to injure (shovel). The court imposed a total term of incarceration of thirteen years: ten years for second-

degree assault, three years concurrent for fourth-degree burglary (dwelling), sixty days concurrent for malicious destruction of property, and three years consecutive for carrying a dangerous weapon with the intent to injure (shovel). For sentencing purposes, the court merged reckless endangerment into second-degree assault and fourth-degree burglary (permit tool use) into fourth-degree burglary (dwelling).

Appellant and Dale White resided in the same apartment building—appellant in Apartment 3 on the first floor and Mr. White in Apartment 6 on the second floor. Around midnight on October 5, 2017, an altercation occurred between appellant and Mr. White. At trial, they presented conflicting versions of the incident.

Appellant testified to the following events. On the evening of October 5, appellant was in his apartment when he heard his wife's voice coming from upstairs. He went upstairs and saw that Mr. White's apartment door was open with a shovel nearby. As he approached Mr. White's door, he heard someone say "no." Then, something came out of the darkness inside the apartment and hit him in the face. Mr. White appeared at the door holding a hammer and said to appellant, "I'm sick of you, I'm tired of you." Appellant then grabbed the shovel, and Mr. White slammed the door. As Mr. White closed the door, appellant heard his wife scream "stop" from inside Mr. White's apartment and believed that Mr. White was going to attack her. Appellant pushed the door open with his elbow and saw Mr. White standing at the door. Mr. White swung the hammer at appellant. Appellant tripped as he tried to deflect the blow from the hammer, and Mr. White fell on top of him. As appellant and Mr. White struggled, appellant's wife and her cousin ran out

of Mr. White's apartment and went downstairs. Appellant and Mr. White struggled until police arrived. Appellant was hospitalized with a serious injury to his eye socket.

Mr. White testified to the following events. Around midnight on October 5, Mr. White was in his apartment when he heard someone approaching his door. He looked through the peephole and saw someone hitting the door with a shovel. Mr. White could not identify the person because of his impaired sight and called police. While waiting for police to arrive, the person kicked the door open, and Mr. White recognized appellant. Mr. White tried to close the door, but appellant repeatedly hit it until it broke and came inside. Appellant lunged at Mr. White with the shovel, and Mr. White reached for a hammer in a corner of his apartment. Mr. White hit appellant's shovel with the hammer, and appellant grabbed the hammer from him. Mr. White then knocked appellant onto the floor and punched him until police arrived. Mr. White sustained injuries to his knuckles.

At trial, the court rejected appellant's request to instruct the jury on self-defense,[1] explaining as follows:

> "[APPELLANT]: I would like the self-defense instruction.
>
> [THE STATE]: Your Honor, I don't believe that's been generated.
>
> THE COURT: I don't believe it has either.
>
> ***
>
> [APPELLANT]: It comes from the Defendant's own mouth, it generates it.

[1] Appellant appeared pro se.

> THE COURT: No, it doesn't, it doesn't work that way. You really could have used counsel. Just coming from your mouth doesn't mean it was . . . based on self-defense. [W]hen you go to somebody's apartment and create the havoc that was created, it's pretty difficult to generate a self-defense argument, so I'm going to deny your request for a self-defense argument."

Appellant later objected to the jury instruction on self-defense as follows:

> "[APPELLANT]: I object to the self-defense [inaudible].
>
> ***
>
> THE COURT: All right. We'll note [appellant]'s exception for the record, so that it will be available to you on appeal."

Appellant did not call his wife or her cousin to testify. Mr. White testified that there was no one else in his apartment. One of the responding officers testified that he did not see anyone else inside the apartment or anyone coming down the stairs of the building when he arrived. In closing arguments, the State argued as follows:

> "And why would the Defendant assume that [his wife] was at the house? He heard a no. He maybe heard it, never saw her. And here's the interesting thing, where are [his wife] and [her cousin]? If they were really upstairs, where are they? Why didn't they call the police when they ran past him, according to him, why didn't [they] run home?
>
> ***
>
> Ladies and gentlemen, . . . you can go back and deliberate about what makes sense, what doesn't make sense, what was presented, what wasn't."

As to appellant's failure to call police, the State argued as follows:

> "You know who called the police? Mr. White told you he called the police. Mr. White told you as [appellant] was trying to get in his house he called the police. Not [appellant], he

> didn't call the police when he thought he heard no from his wife, didn't call the police when he thought he heard stop from his wife, didn't call the police when he was supposedly hit in the head with that hammer."

The jury convicted appellant, and this timely appeal followed.

II.

Appellant first argues that the court erred by denying his request to instruct the jury on self-defense. Appellant contends that the jury instruction on self-defense was fairly supported by "some evidence" viewed in the light most favorable to appellant. Appellant testified that he was hit in the face before entering Mr. White's apartment and that he defended himself without escalating to deadly force. Therefore, appellant concludes that a theory of either perfect or imperfect self-defense was generated.

Additionally, appellant argues that the court committed plain error by failing to instruct the jury on defense of others. The error was patent, appellant contends, because the theory of defense of others was clearly generated; by testifying that he heard his wife scream, he argues that the jury could have concluded that he acted in the reasonable belief that his wife was in danger. Appellant argues that the error was prejudicial because (1) defense of others would have been a complete defense to second-degree assault, and (2) the jury could have acquitted him of fourth-degree burglary had the jury believed that he entered Mr. White's apartment to protect his wife.

Appellant next argues that the court erred in imposing separate sentences for the convictions of fourth-degree burglary and malicious destruction of property. Appellant

argues that breaking through the door was purely incidental to the burglary and was done to effect entry. Therefore, in appellant's view, the sentence for malicious destruction should merge into the sentence for fourth-degree burglary.

Lastly, appellant argues that the court committed plain error by permitting the State to make improper closing arguments. Appellant contends that plain error review applies to closing arguments that have a tendency to deprive a defendant of a fair trial. Appellant argues that two errors were made: (1) that the State's comment "where are [his wife] and [her cousin]? If they were really upstairs, where are they?" was an improper missing witness inference that shifted the burden of calling witnesses to appellant; and (2) that the State's comment that appellant did not call the police amounted to the State using his pre-arrest silence against him.

The State first argues that the court properly declined to instruct the jury on self-defense. The State contends that appellant failed to establish that he was not the first aggressor, which is an element of self-defense. According to the State, after appellant was allegedly hit in the face as he approached the door for the first time, Mr. White slammed the door and ended the fight. Appellant then broke into Mr. White's apartment and attacked him. At that point, in the State's view, appellant became the aggressor because he reinitiated the altercation. The State also argues that plain error review is not available for the court's failure to instruct on defense of others because appellant failed to request that instruction. In any event, the State argues, appellant was not entitled to an instruction on defense of others because it was unreasonable for appellant to believe that his wife was in danger.

The State next argues that the court's decision to impose a sentence for malicious destruction is moot because appellant has served the sentence—appellant was credited for 365 days served prior to his sentence of sixty days for malicious destruction. Moreover, the State relies on *Rothe v. State*, 242 Md. App. 272, 286 (2019), in which this Court declined to review a merger issue when appellant raised no objection below and appellant's counsel affirmatively agreed at trial that merger was not proper.

Finally, the State argues that the issue of the State's improper closing arguments is not preserved because of appellant's failure to raise the objection at trial. Even if the issue was preserved, the State argues, there was no plain error. According to the State, the questions raised in closing arguments about the absence of appellant's wife and her cousin were not improper burden shifting because appellant identified them as potential exculpatory witnesses but failed to call them to the stand. In addition, the State contends that appellant's pre-arrest, non-custodial silence was used to impeach his theories of self-defense and defense of others, not as substantive evidence of guilt. Therefore, in the State's view, the argument did not violate the privilege against self-incrimination. The State concludes that the court did not err in permitting these closing arguments.

III.

Regarding the court's decision not to instruct the jury on self-defense and defense of others, we hold that the court did not abuse its discretion. We review the propriety of a jury instruction for abuse of discretion. *See Wietzke v. Chesapeake Conf. Ass'n*, 421 Md. 355, 371 (2011). A defendant who provides "sufficient" or "competent" evidence to

support a theory of defense—a determination we make viewing the evidence in the light most favorable to appellant—is entitled to a jury instruction on that theory. *General v. State*, 367 Md. 475, 485–87 (2002).

The Court of Appeals summarized the elements of perfect self-defense as follows:

> "(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;
>
> (3) The accused claiming the right of self defense must not have been the aggressor or provoked the conflict; and
>
> (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."

State v. Faulkner, 301 Md. 482, 485–86 (1984). Imperfect self-defense only requires "a *subjective honest belief* on the part of the [defendant] that his actions were necessary for his safety," even though a reasonable person would not have found them necessary. *Id.* at 500 (internal quotation omitted) (emphasis added). This Court also requires that the aggressor must "in good faith effectively withdraw[] from any further encounter with his victim." *Cunningham v. State*, 58 Md. App. 249, 255 (1984) (internal quotation omitted).

The evidence does not generate either perfect or imperfect self-defense. Despite the conflicting testimonies of appellant and Mr. White, they both agreed that Mr. White closed his door after the initial interaction between the two men. Accordingly, the fight ended once the door closed. Appellant provided no testimony regarding any attempt to defend himself after he was allegedly hit in the face and before Mr. White closed the door. Instead

of withdrawing, appellant elbowed Mr. White's door open and became the aggressor by initiating a second altercation. Consequently, the evidence presented does not generate a theory of self-defense, and the court did not abuse its discretion by refusing to instruct the jury on this theory.

Regarding defense of others, we agree with the State that appellant did not preserve the issue and that plain error review does not apply. Maryland Rule 4-325(e) governs the preservation of error in jury instructions and states 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. . . . 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."

Even if an objection is raised, it is not preserved if the basis of the objection at trial differs from the issue raised on appeal. *See State v. Smullen*, 380 Md. 233, 276 (2004).

Appellant never requested a jury instruction on defense of others, and the only objection at trial was based on the court's failure to instruct the jury on self-defense. Furthermore, the court's decision not to instruct the jury on defense of others is not a plain error that warrants our review in the absence of an objection, as 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," Md. Rule 4-325(c) (emphasis added). The Court of Appeals has held that not properly instructing the jury on a defense theory is not a plain error material to the rights of the accused. *See Tull v. State*, 230 Md. 152, 156 (1962). This

Court has also refused to take cognizance of plain error on its own initiative when an appellant fails to object to a jury instruction. *See, e.g.*, *Fischer v. State*, 117 Md. App. 443, 459 (1997). Because appellant in this case failed to object at trial and because the court's decision was not plain error, we decline to review the issue.

We address next the issue of merging sentences and agree with the State that the issue is moot. A sentencing issue is moot when a defendant has completed the sentence. *Barnes v. State*, 423 Md. 75, 86 (2011). Once a defendant has completed the sentence, there is no longer a sentence to correct, and a court can no longer provide relief. *Id.* The court imposed a sentence of sixty days for malicious destruction of property, and appellant was awarded 365 days of credit for time served prior to the sentencing date. Appellant has therefore completed his sentence for malicious destruction of property, and the issue is moot.

We turn next to the issue of the State's closing statement and hold that this issue is not preserved for our review. A party that fails to object to remarks made in closing arguments waives the issue on appeal. *Crew v. Dir. of Patuxent Inst.*, 245 Md. 174, 181 (1967). During the State's closing argument, appellant did not object to the comments on the whereabouts of his wife and her cousin or on his failure to call the police. Appellant has thus waived appellate review of this issue.

JUDGMENTS OF THE CIRCUIT COURT FOR SOMERSET COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.