Circuit Court for Baltimore City
Case No. 117135014

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2896

September Term, 2018

MAURICE WILKERSON

v.

STATE OF MARYLAND

Kehoe,
Berger,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: February 10, 2020

Appellant Maurice Wilkerson was convicted in the Circuit Court for Baltimore City of first-degree assault, use of a firearm in a crime of violence, reckless endangerment, possession of a firearm by a prohibited person, wear, carry, and transport of a handgun, and unlawful discharge of a firearm within the city limits. He presents one issue for our review:

> "Did the trial court err in failing to instruct the jury that perfect and imperfect self-defense applied to Appellant's assault charges when the instruction was properly given for the attempted homicide charges based on the same act?"

We hold that appellant has not preserved the issue for our review and affirm.

I.

Appellant was indicted by the Grand Jury for Baltimore City on charges of attempted first-degree murder, attempted second-degree murder, first-degree assault, second-degree assault, use of a firearm in a crime of violence, reckless endangerment, possession of a firearm by a prohibited person, wear, carry, and transport of a handgun, and unlawful discharge of a firearm within the city limits. The jury convicted him of first-degree assault, use of a firearm in a crime of violence, reckless endangerment, possession of a firearm by a prohibited person, wear, carry, and transport of a handgun, and unlawful discharge of a firearm within the city limits. The court sentenced appellant to a term of incarceration of fifteen years for first-degree assault, consecutive twenty years (the first five without possibility of parole) for use of a firearm in a crime of violence, concurrent

five years (without possibility of parole) for possession of a firearm by a prohibited person, and concurrent one year for unlawful discharge of a firearm within the city limits.[1]

On April 8, 2017, an exchange of gunfire occurred in a group of people, wounding three individuals including Tion Jackson. Appellant was charged with several counts arising out of his alleged shooting of Mr. Jackson.

At trial, the State played for the jury video surveillance clips of the shooting taken from a residence nearby and alleged that they showed the following facts. On the morning of the incident, a car with Mr. Jackson in the passenger seat pulled up to a crowd, at which point the friendly demeanor of the crowd changed. Mr. Jackson exited the car, which remained running and in reverse. An individual in the crowd shot at Mr. Jackson. Mr. Jackson's driver then jumped out of the running car, shot in the direction of the shooter in the crowd, put wounded Mr. Jackson in the car, and drove away. The State alleged that the individual who shot at Mr. Jackson in the crowd was appellant.

Defense counsel attempted to generate perfect and imperfect self-defense instructions relying solely on the State's witness—the primary detective in the case—who did not witness the shooting. After viewing the video surveillance, the detective wrote in his statement of probable cause for charging Mr. Jackson with conspiracy to murder appellant that the individual who exited the passenger side of the car (Mr. Jackson) pulled his shirt up and reached for what appeared to be a handgun and that the individual in the

[1] For sentencing purposes, the court merged the reckless endangerment count with the first-degree assault count and the count of wear, carry, and transport of a handgun with the count of possession of a firearm by a prohibited person.

crowd (appellant) fired shots in response. Defense counsel argued that this statement and the detective's testimony about it during cross-examination provided "some evidence" sufficient to raise the issue for the jury that appellant fired at Mr. Jackson in self-defense after seeing him reach for his gun. The State argued that the detective's statement of probable cause was not in evidence. The State further argued that the detective's interpretation of the events in the surveillance videos did not establish that appellant saw Mr. Jackson reaching for his gun and that he feared for his life.

Defense counsel subsequently requested the Maryland Criminal Pattern Jury Instructions (MPJI-Cr.) 4:17.2, which incorporates perfect and imperfect self-defense into the instruction for completed homicide. After hearing arguments from defense counsel and the State, the court found that the evidence generated self-defense as follows:

> "All right. This is something we've been discussing back in chambers and researching as well and I have reviewed the law on. And while at first I thought that self-defense would not be applicable, I have subsequently changed my mind on that. The testimony of the detective . . . He wrote that he sees the victim pulling up his shirt and pulling out what looked like a gun and then the shooting took place.
>
> I believe that we do have enough evidence—well, it's a minimum amount perhaps, but it is evidence and it did come from the witness stand and it did come from the testimony. And we do tell the jury that they can draw all reasonable inferences. I think that it's there. I think that in this case based on the video, based on that testimony.
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> I believe that self-defense is applicable and I'll give the instruction. The defendant was not the aggressor. The defendant actually believed— . . . circumstantial evidence,

> inferences— . . . he or she was in immediate or imminent harm."

After the trial judge's law clerk pointed out that MPJI-Cr. 4:17.2 was an instruction for *completed* homicide charges and suggested that perhaps defense counsel meant to request MPJI-Cr. 4:17:14, which incorporates perfect and imperfect self-defense instruction for *attempted* homicide charges.

Defense counsel then requested a self-defense instruction for assault by pointing out that imperfect self-defense mitigates first-degree assault as follows:

> "[A]lso within those same lesser includes is the assault one and assault two and if you believe imperfect self-defense then you would have to acquit on assault first degree as well. . . . [I]mperfect self-defense does mitigate . . . assault one down to assault two."

The State objected, claiming that imperfect self-defense would mitigate only the "intent-to-commit-serious-bodily-harm" modality of first-degree assault and not the "assault-with-a-firearm" modality. After a discussion about which assault modality imperfect self-defense mitigates, defense counsel acquiesced to the trial court's decision to give MJPI-Cr. 4:17.14 and no other self-defense instruction, stating as follows:

> "I mean we can leave it and then if it's a conviction we can see what [the] Court of Appeals . . . does with it, but I think the case law is clear about it. I've never seen one where it says it only mitigates it depending on what version of assault one. I've never seen that before. So I don't have the quick answer to that. *I just think we're going to confuse the heck out of the jury at this point.*"

The court ended the discussion on jury instructions as follows:

> "Well, I'm going to leave it in. I think—unless during the rest of the break I can find something to convince me otherwise or you guys could find something to convince me otherwise. I'm going to leave that in."

The court gave the jury MJPI-Cr. 4:17.14, the instruction on attempted homicide charges that incorporates perfect and imperfect self-defense. The court did not give a standalone instruction on self-defense and did not link self-defense to the assault charges. After the jury instructions were given, the court asked, "Any objections, exceptions, requests for further instructions?" Defense counsel raised only a concern with the instruction for reckless endangerment, and the court addressed it. The trial court then asked, "Anything else?" to which defense counsel responded, "Nothing else, Your Honor."

The court imposed sentence, and this appeal followed.

II.

Before this Court, appellant argues that the trial court erred in not instructing the jury on self-defense in relation to his assault charges, which were based on the same act as that for his attempted homicide charges. As for defense counsel's explicit mention only of an imperfect self-defense instruction for the assault charges, appellant argues that it was apparent from the context that he was requesting both imperfect and perfect self-defense instructions. Appellant maintains that he substantially complied with the rule for preserving appellate claims by requesting self-defense instructions for the assault charges repeatedly prior to the court's giving the jury instructions. If not preserved, appellant asks for plain error review. Appellant argues that the court's error impacted the fairness and

integrity of appellant's trial because the jury, which acquitted him of all attempted homicide charges, could also have acquitted him of assault or mitigated the first-degree assault charge had they received a self-defense instruction in relation to the assault charges.

The State argues that the jury instruction issue is not preserved for our review. The State contends that after the court decided to give an instruction incorporating self-defense for attempted homicide charges, appellant requested only the imperfect self-defense instruction for assault charges and ultimately agreed to the court's decision to give no self-defense instruction for assault charges. The State further argues that after the court instructed the jury, appellant did not raise any objection to the assault instructions or to the absence of additional self-defense instructions. Even if appellant's claim is preserved, argues the State, it fails because the evidence did not generate any self-defense instruction—there was no evidence that appellant subjectively believed he was in imminent danger of bodily harm. In the State's view, the self-defense instruction that appellant received for attempted homicide charges was "gratuitous" and should not be extended to assault charges.

III.

Maryland Rule 4-325 governs jury instructions. Rule 4-325(e) addresses objections and preservation of instruction issues for appeal, providing 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 has not preserved for our review any issue as to the jury instructions. First, defense counsel never submitted to the trial court a request for a legally correct applicable instruction. Initially, defense counsel requested a jury instruction for completed homicide, MPJI-Cr. 4:17.2, which was not applicable to the case at bar. Second, defense counsel acquiesced to the court's proposed instruction, MJPI-Cr. 4:17.14, stating as follows:

> "I mean we can leave it and then if it's a conviction we can see what [the] Court of Appeals . . . does with it, but I think the case law is clear about it. . . . So I don't have the quick answer to that. I just think we're going to confuse the heck out of the jury at this point."

The trial court made it clear to counsel that it would leave the instruction as is unless they could convince the court otherwise. Finally, and most significantly, after the court instructed the jury, the court asked, "Any objections, exceptions, requests for further instructions?" Appellant expressed no dissatisfaction with the self-defense instruction. Defense counsel objected only to the reckless endangerment instruction, and when the court asked, "Anything else?" defense counsel responded, "Nothing else, Your Honor."

Appellant argues that he "substantially complied" with Rule 4-325(e). Substantial compliance, as opposed to strict compliance, preserves an issue for appellate review. *Bennett v. State*, 230 Md. 562 (1963). *Bennett* set out several conditions necessary to

establish substantial compliance with Rule 4-325(e): "[1] there must be an objection to the instruction; [2] the objection must appear on the record; [3] the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record[;] and [4] the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless." *Gore v. State*, 309 Md. 203, 209 (1987) (citing *Bennett v. State*, 230 Md. at 568). The purpose underlying the Rule is to give the trial court an opportunity to correct the instruction if it deems correction necessary. *Bowman v. State*, 337 Md. 65, 69 (1994).

Appellant did not substantially comply with the requirements of Rule 4-325. Defense counsel first requested an inapplicable instruction and was then given two opportunities to object, correct, or except the instructions modified by the court. Defense counsel did not request a perfect self-defense instruction applicable to assault, and although he argued that imperfect self-defense mitigates first-degree assault, he expressed concerns about confusing the jury and ultimately agreed to the court's instruction.[2] Appellant only excepted to the reckless endangerment instruction. Based on the record before us, we

[2] During the discussion with the trial court as to the appropriate language of the instruction, defense counsel questioned whether imperfect self-defense could mitigate first-degree assault with a firearm to second-degree assault, or whether it was applicable only to the first-degree assault with intent to inflict serious physical injury. Because the facts of this case unquestionably show an assault with a firearm, a first-degree assault, it is not clear how imperfect self-defense is applicable or would have helped appellant.

A question for another day—the viability of *Christian v. State*, 405 Md. 306 (2008). *See State v. Jones*, 451 Md. 680 (2017); *Roary v. State*, 385 Md. 217 (2005), *overruled by State v. Jones*, 451 Md. 680 (2017).

cannot find that any post-instruction objection or suggestion to the court would have been futile or useless.

This is not a case for the court to exercise its discretion and find plain error. The norm for preservation is an objection below. *Morris v. Stat*e, 153 Md. App. 480, 507 (2003). As stated for this Court in *Morris* and often quoted, Judge Charles E. Moylan, Jr. wrote, "appellate invocation of the 'plain error doctrine' 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Id*. at 507.

Arguably, appellant intentionally relinquished or abandoned any objection to the instruction. He referred to jury confusion, commented that the instruction was acceptable and could be left later for the Court of Appeals to examine,[3] and made no objection after the instruction was given. The State argues that, on the merits, self-defense was not even generated and that appellant received the benefit of the gratuitous self-defense instruction with respect to attempted homicide. Any legal error here is not clear or obvious. The error did not affect the fairness or integrity of the judicial proceedings.

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

[3] Defense counsel cannot simultaneously assent to the court's instructions and maintain an appellate claim in the event of a conviction. *See, e.g.*, *Robinson v. State*, 410 Md. 91, 104 (2009) ("[I]f the failure to object is, or even might be, a matter of strategy, then overlooking the lack of objection simply encourages defense gamesmanship.").