UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0019

September Term, 2016

FAYETTA COLLICK

v.

STATE OF MARYLAND

Krauser, C.J.,
Wright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: October 25, 2016

A jury in the Circuit Court for Wicomico County convicted Fayetta Collick, appellant, of second-degree assault following a domestic dispute on September 15, 2015, with her then 15-year-old daughter. The circuit court sentenced appellant to a prison term of one year, with all but 179 days suspended, to be followed by 18 months of probation. Appellant raises two issues on appeal:[1]

> 1. Was it plain error for the court to instruct the jury on an assault charge using language from child abuse instructions?
>
> 2. Was the evidence presented at trial sufficient to sustain a conviction?

For the reasons stated below, we decline to address the first question, as appellant waived this issue, and we answer the second question in the affirmative. We, accordingly, affirm the judgments of the circuit court.

FACTS

On the evening of September 15, 2015, appellant was preparing dinner for her and her three children at their home in Salisbury. Appellant testified that she had been arguing with the children about cleaning up after themselves – especially with the daughter, whom we shall refer to as "S.N." – and this had become routine. S.N. gave her mother "nasty looks" and "this attitude," so appellant took the children's cell phones away from them.

[1] Initially, appellant raised an additional question as to the jury instruction for assault. Since the filing of appellant's brief, a corrected transcript has been filed, and appellant withdrew this claim of error.

Shortly afterward, when the family was sitting down to dinner, appellant began looking for the Kool-Aid so she could make some for the children. Appellant suspected that S.N. knew where the Kool-Aid was, but S.N. refused to tell her, even when appellant asked. S.N. rolled her eyes and made noises which appellant described as disrespectful. Appellant testified that she felt that she did not "deserve that," and, since S.N. was playing with her food, appellant told her that she could give the food to the cat and leave the table.

When S.N. got up and gave appellant her plate, she was in a "snapping mood-way," according to appellant. S.N. testified that when she went into the living room, appellant followed her and hit her twice in the head with a closed fist. S.N.'s brother corroborated this account and said that the fight lasted two or three minutes. Appellant conceded that she struck her daughter, but she maintained that she used an open hand.

S.N. left the house and went to a neighbor's residence to call police. Appellant later sent her sons to find S.N., but they stayed at the same house with S.N. Maryland State Police Trooper First Class Benjamin Pollmeier responded to the call and spoke with the children at the neighbor's house. TFC Pollmeier observed that S.N. had "two red marks" on her forehead where appellant struck her. When he returned the children to appellant's house, he asked her about the argument, and she became "hostile." TFC Pollmeier decided to detain appellant.

The State charged appellant with second-degree assault and second-degree child abuse. Prior to trial, the State *nol prossed* the child abuse charge. Subsequently, the jury

convicted appellant of the remaining charge, and the circuit court sentenced appellant as indicated above.

DISCUSSION

Jury Instructions

On appeal, appellant contends that the circuit court erred in its reading of the jury instruction pertaining to second-degree assault because it contained language derived in part from the child abuse pattern jury instruction.[2] Specifically, she argues that she was not charged with child abuse, and the parties had an agreement not to use the child abuse

[2] The circuit court provided the following instruction as to assault:

> The defendant is charged with the crime of second degree assault. Second degree assault is causing offensive physical contact to another person.
>
> In order to convict the defendant of assault, the State must prove: one, that the defendant caused physical harm to [S.N.]; two, that the contact was the result of an intentional or reckless act of the defendant and was not accidental; and three, that the contact was not consented to by [S.N.] and was not legally justified.
>
> A parent may use reasonable physical force to discipline a child. However, a parent may not use physical force simply to inflict pain upon the child. In addition, a parent may not use physical force that is inhumane or cruel.
>
> In determining whether the physical force used by a parent was reasonable, you should look at all of the surrounding circumstances including such factors as: the age; physical and mental condition of the child; the behavior that led to the use of physical force; the extent and duration of the physical contact with the child; and the impact or injury to the child, if any, resulting from the use of force.

pattern jury instruction.[3] Appellant concedes that she failed to object to the jury instructions at trial, but she contends that the court's instruction as given constitutes plain error.

The State urges us to find this error waived for our review. The State points out that appellant not only failed to object to the circuit court's instructions at trial but also specifically requested the instruction she now finds objectionable. Regardless of which party requested the challenged instruction, the State contends, any error was not plain.

Maryland Rule 4-325(e) provides, in pertinent part: "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." Although the rule provides this Court with the discretion to review jury instructions for plain error when a party fails to object, *see id.*, "'[t]he plain error hurdle, high in all events, nowhere looms larger than in the context of alleged instructional errors.'" *Malaska v. State*, 216 Md. App. 492, 525 (2014) (quoting *Peterson v. State*, 196 Md. App. 563, 589 (2010)), *cert. denied*, 135 S. Ct. 1162 (2015). We generally do not exercise this discretion unless the error is "'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Steward v.*

[3] It is apparent from the context of the discussion appellant cites in support of this argument that appellant's counsel agreed with the circuit court's decision not to instruct the jury on the dismissal of the child abuse charge because the jury had never heard about it. Appellant had included the pattern jury instruction for dismissal of other charges in her requested jury instructions.

State, 218 Md. App. 550, 566 (2014) (quoting *Brown v. State*, 169 Md. App. 442, 457 (2006)), *cert. denied*, 441 Md. 63 (2014).

In this case, not only did appellant fail to object to the circuit court's jury instructions, but appellant responded in the affirmative when the court asked if it had covered the instructions "fairly." Additionally, in closing arguments, appellant's counsel reread the portion of the jury instructions to which appellant now objects, interspersed with comments about the evidence and argument that the force appellant used was justified as an act of disciplining S.N. We, accordingly, decline to exercise our discretion to review the jury instructions. *See Unger v. State*, 427 Md. 383, 390 (2012) ("The 'failure to object to a jury instruction ordinarily constitutes a waiver of any later claim that the instruction was erroneous[.]'" (Quoting *Walker v. State*, 343 Md. 629, 645 (1996))); *Smith v. State*, 218 Md. App. 689, 701-02 (2014).

Sufficiency of the Evidence

Appellant also contends that the evidence was insufficient to sustain her conviction for second-degree assault. Specifically, she argues that parents are justified in using reasonable physical force to discipline their children, and she exerted reasonable force to discipline S.N. in this case. She maintains that her actions were a justifiable response to S.N.'s continued disrespect and disobedience. Furthermore, she asserts that there is no law in Maryland that prohibits using a closed fist in physically disciplining children.

The State responds that appellant's conviction was based on sufficient evidence. Preliminarily, the State contends that a portion of appellant's argument is not preserved;

the State notes that appellant's argument as to the lack of a law prohibiting the use of a closed fist in disciplining children is raised for the first time on appeal. Turning to the preserved arguments, the State maintains that the jury had sufficient evidence to conclude that appellant committed a non-justified assault against S.N.

In reviewing the sufficiency of the evidence sustaining a conviction, we "'ask[] 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.'" *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)). Our "'concern is not whether the verdict is in accord with what appears to be the weight of the evidence, but rather is only with whether the verdicts were supported with sufficient evidence[.]'" *Hall v. State*, 225 Md. App. 72, 80 (2015) (quoting *Kyler v. State*, 218 Md. App. 196, 214, *cert. denied*, 441 Md. 62 (2014)). This Court has noted that "[t]his standard gives 'full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Peters v. State*, 224 Md. App. 306, 354 (2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)), *cert. denied*, 445 Md. 127 (2015). We, accordingly, "'give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference.'" *DeGrange v. State*, 221 Md. App. 415, 420 (2015) (quoting *Donati v. State*, 215 Md. App. 686, 718 (2014)).

Notably, Md. Rule 4-324(a) mandates that in moving for a judgment of acquittal, a "defendant shall state with particularity all reasons why the motion should be granted."

The Court of Appeals has recognized that "[t]his means that a defendant must 'argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient.'" *Arthur v. State*, 420 Md. 512, 522 (2011) (quoting *Starr v. State*, 405 Md. 293, 303 (2008)). As such, "'[t]he issue of sufficiency of evidence is not preserved when appellant's motion for judgment of acquittal is on a ground different than that set forth on appeal.'" *Poole v. State*, 207 Md. App. 614, 632-33 (2012) (quoting *Anthony v. State*, 117 Md. App. 119, 126 (1997)).

In this case, appellant made a motion for a judgment of acquittal at the proper times, as required by Md. Rule 4-324(a). Appellant, however, made no argument concerning the lack of a law prohibiting parents from disciplining their children with a closed fist. Accordingly, this argument is raised for the first time on appeal, and we, therefore, agree with the State that this argument is not preserved.

Turning to appellant's preserved argument, she concedes that she struck S.N. Appellant contends, however, that her action was justified because of her parental right to discipline her child. Essentially, appellant admits that she assaulted S.N., but she asserts a legal justification for so doing.[4]

[4] We note that to establish the completed battery-type of second-degree assault, the State must establish that "'the perpetrator intended to cause harmful or offensive contact against a person without that person's consent and without legal justification.'" *Hickman v. State*, 193 Md. App. 238, 257 (2010) (emphasis omitted) (quoting *Elias v. State*, 339 Md. 169, 183-84 (1995)). *See also* Maryland Code (2002, 2012 Repl. Vol., 2015 Suppl.), Criminal Law Article, § 3-203.

Indeed, the Court of Appeals has recognized a parent's legal justification for physically disciplining a child:

> "Long before the advent of contemporary child abuse legislation, it was a well-recognized precept of Anglo-American jurisprudence that the parent of a minor child or one standing *in loco parentis* was justified in using a reasonable amount of force upon a child for the purpose of safeguarding or promoting the child's welfare . . . . So long as the chastisement was moderate and reasonable, in light of the age, condition and disposition of the child, and other surrounding circumstances, the parent or custodian would not incur criminal liability for assault and battery or a similar offense."

Fisher v. State, 367 Md. 218, 271 (2001) (quoting *Bowers v. State*, 283 Md. 115, 126 (1978)). The Court continued:

> "On the other hand, where corporal punishment was inflicted with a malicious desire to cause pain or where it amounted to cruel and outrageous treatment of the child, the chastisement was deemed unreasonable, thus defeating the parental privilege and subjecting the parent to penal sanctions in those circumstances where criminal liability would have existed absent the parent-child relationship."

Id. (quoting *Bowers*, 283 Md. at 126).

Certainly appellant, as the parent of S.N., possesses the right to discipline S.N. This parental privilege, however, does not give appellant the right to inflict physical punishment with malice or to do so for the purpose of instilling pain. In determining whether a parent acted to punish a child or acted with malice, we "look[] to the objective facts of the intended conduct and not to the subjectively perceived result." *Id.* at 272.

Appellant principally relies on *Deloso v. State*, 37 Md. App. 101 (1977). We are not persuaded that appellant's case is similar to *Deloso*. In that case, on two separate occasions, a father physically disciplined his five-year-old daughter for misbehaving. *Id.*

at 103-04. The father was convicted of two counts of child abuse, but on appeal, this Court reversed the convictions, determining that the State relied almost entirely on inadmissible hearsay evidence to sustain the father's convictions. *Id.* at 104-07.

In considering whether a new trial should be ordered, we determined that the State would not be able to produce additional probative evidence of guilt. *Id.* at 110-11. We then reviewed the evidence adduced at trial, in the light most favorable to the State, and concluded that "it is apparent that the degree of force administered by [the father] . . . was not so unreasonable in disciplining this child as to constitute 'cruel or inhumane' treatment . . . nor was the statutory alternative of malice on the father's part in any way indicated." *Id.* at 112 (internal citations omitted). We noted that there was evidence that the child often misbehaved – even remarking that the foster parents who then had custody of the child spanked her on occasion – that the child repeatedly told the parents she would "tell her teacher" for supposed slights, and that the child often ran away from home. *Id.* at 113-14. We concluded that the punishment – a slap on the shoulder on one occasion and three spanks on the daughter's posterior with a belt with no buckle on the other occasion – was reasonable given the child's age and her degree of misconduct. *Id.* at 113-15. Ultimately, we reasoned, "the question of child abuse should never have been, nor be, submitted to a jury." *Id.* at 115.

In this case, by contrast, there was testimony that appellant punched S.N. at least twice in the head with a closed fist. Appellant argued that this was in response to S.N.'s disrespectful treatment of her. Unlike in *Deloso*, we cannot say, as a matter of law, that appellant acted without malice or solely for the purpose of disciplining S.N. Spanking a

child may be for the purpose of discipline, but punching a child in the head is not a similar act.

Viewing the evidence in the light most favorable to the State, we are not persuaded that appellant acted within her parental privilege in striking S.N. Appellant argues that physical punishment was the next step after a milder form of discipline – taking the phones – failed to correct the behavior. Punching a child in the head, however, is not a reasonable response to a child acting disrespectfully, refusing to help locate Kool-Aid, or even rejecting a prepared meal.

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