

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0404

September Term, 2015

MICHAEL AVON JOHNSON

v.

STATE OF MARYLAND

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

JJ.

Opinion by Friedman, J.

Filed: July 1, 2016

*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.

Following a trial in the Circuit Court for Prince George’s County, a jury convicted appellant, Michael Avon Johnson, of two counts of possession of a regulated firearm after conviction of a disqualifying offense and two counts of wearing, carrying, and transporting a firearm. The trial court sentenced Johnson to a total of 30 years in prison, suspending all but 14 years, after which he timely noted this appeal.¹

Johnson presents three questions for our consideration, which we have consolidated and rephrased, as follows:

1. Did the trial court err in denying Johnson the opportunity to present evidence of self-defense/necessity and in refusing to instruct the jury on that defense?
2. Did the trial court commit plain error in allowing improper closing argument by the prosecutor?

For the reasons that follow, we shall affirm the judgments of the trial court.

FACTS AND LEGAL PROCEEDINGS

The charges against Johnson arose from the shooting death of Devine Wood on October 26, 2014.

After a friend of Wood’s reported him missing, Prince George’s County Police Department Detective Michael Ebaugh oversaw a search for him. Aware that Wood had last been seen at a house occupied by Johnson on Cedarville Road, Detective Ebaugh began his investigation there. A search of a nearby field yielded the discovery of Wood’s body

¹ The court sentenced appellant to consecutive prison terms of 15 years, suspending all but seven years, on the possession by a disqualified person charges. On each wear/carry/transport charge, the court imposed a three year sentence, to run concurrently with one of the possession charges.

in the back seat of a car. A search warrant executed at the Cedarville Road house on October 28, 2014, led to the recovery of a package of .38 caliber cartridges.

Detective Ebaugh conducted a recorded interview with Johnson on October 29, 2014, during which Johnson, who admitted that Wood had been in the Cedarville Road house on October 26, 2014, initially stated that an unknown person named Steve had shot Wood. After Detective Ebaugh expressed his disbelief in that story, Johnson admitted to shooting Wood with a .38 revolver he had pulled out of the couch on which he had been sitting. The shooting, he said, was in response to Wood brandishing his own .32 caliber handgun at Johnson and the pair's ensuing struggle over the guns.²

After the shooting, Johnson continued, he placed Wood's body in Wood's car and moved the car to a nearby field, where he abandoned it. He then took both Wood's .32 caliber and his own .38 caliber handgun, which he admitted to possessing, to a friend's house and gave the .38 to his brother Charles to hide; Charles hid it in the woods. Johnson hid Wood's .32 under a log in another wooded area. Then, he returned to the Cedarville Road house where he cut out a bloodstained portion of the carpeting and burned it. He instructed the people who had been present in the house during the shooting to tell the police that a non-existent person named Steve had shot Wood.

² As discussed in more detail below, despite killing Wood, appellant was not charged with any crimes related to the homicide, as the State acknowledged that he likely had acted in self-defense.

Johnson told Detective Ebaugh where the two guns had been hidden, and the police evidence technicians recovered them.³ Johnson’s .38 retained one fired cartridge and four unfired cartridges in its cylinder.

The parties stipulated that Johnson had been convicted previously of distribution of cocaine, a crime that would disqualify him from possessing a regulated firearm.

DISCUSSION

I.

Prior to trial, the State filed a written motion *in limine* to preclude testimony about the attempted robbery, proffering that Wood had entered the Cedarville Road residence, a suspected “drug house,” on October 26, 2014, displayed the .32 caliber gun, and announced a robbery, which prompted Johnson to grab his own .38 caliber gun from the couch and fire it at Wood after the pair struggled over the two guns. Contending that self-defense is not a viable defense to possession of a regulated firearm after conviction of a disqualifying crime, the State argued that any evidence regarding the attempted robbery by, or the shooting of, Wood would be irrelevant and confusing to the jury and would likely “play improperly on emotion or sympathy.”

During the hearing on the State’s motion, the prosecutor argued that although the State recognized that Johnson had acted in self-defense during the shooting—precluding charges related to Wood’s homicide—the facts of the shooting were “irrelevant to whether

³ According to the State’s expert firearm and tool mark examiner, Wood’s .32, a rare 1919 Belgian-designed revolver, would have been operable with the “right ammunition” but was not operable with the newer .32 Smith and Wesson cartridges recovered with it.

or not the defendant possessed the gun[s],” as “[t]here is no justification to the unlawful possession of weapons when one is a disqualified person.”

Defense counsel disagreed, stating that the jury had “every right to know how the police got there,” with that reason being a homicide. In her view, she could not properly defend Johnson unless the jurors were made fully aware that there had been a homicide ruled as self-defense. In every unlawful gun possession case, she concluded, “you always know the circumstances surrounding how [the defendant] got the gun.”

The trial court denied the State’s motion, “largely because I think there is no way that the jury can fully understand the facts and circumstances of this possession with that in mind.” Following the administrative judge’s denial of a continuance request by the State, to subpoena additional witnesses in light of the court’s denial of its motion, the prosecutor asked the court to reconsider its ruling, adding that the pattern jury instructions on defense of self, property, or others indicate they are to be used when an assaultive crime has been charged, and none had been charged in Johnson’s case. Because there is no self-defense aspect to the possessory crimes with which Johnson was charged, she continued, any testimony relating to self-defense or justification should be deemed inadmissible. The court declined to reconsider its ruling denying the State’s motion.

Notwithstanding the court’s pre-trial ruling on the State’s motion *in limine*, when defense counsel sought to cross-examine Detective Ebaugh with the single question, “The killing of Mr. Wood was ruled justified self-defense?” the court sustained the State’s objection. And, when defense counsel called Detective Ebaugh as a witness in Johnson’s case-in-chief and asked him whether, during the course of his investigation, he discovered

that “Mr. Wood was there for the purpose of an attempted robbery,” the court again sustained the State’s objection and granted its motion to strike the question.

At the close of all the evidence, during discussion regarding requested jury instructions, defense counsel asked for instructions regarding self-defense and necessity.⁴

⁴ The proposed instructions read:

Self-Defense

You have heard evidence that the defendant was justified in knowingly possessing a regulated firearm after being convicted of a disqualifying crime, because he was acting in self-defense. Self-defense is a complete defense and you are required to find the defendant not guilty if all of the following four factors are present:

1. The defendant was under a present, imminent, and impending threat as to induce a well-grounded apprehension of death or serious bodily injury;
2. The defendant had not reckless[ly] or negligently placed himself in a situation in which it was probable that he would be forced to choose criminal conduct;
3. The defendant had no reasonable legal alternative to violating the law; and
4. A direct causal relationship maybe reasonable [sic] anticipated between the action taken and the avoidance of the threatened harm.

In order to convict the defendant, the State must prove that self-defense does not apply in this case. This means that you are required to find the defendant not guilty, unless the State has persuaded you, beyond a reasonable doubt, that at least one of the four factors of complete defense was absent.

Necessity

The Defendant in this case has raised the Defense of Necessity. In order to show necessity, you must find the following elements. (continued...)

The State objected, arguing that the instructions apply only to assaultive crimes, and Johnson had not been charged with such a crime. The court advised it would not give the instructions, on the grounds that Johnson had not been charged with an assaultive crime and that there had been no evidence presented as to any hostility between Johnson and Wood to support the giving of the instructions.

On appeal, Johnson renews his contention that the trial court erred in sustaining the State’s objections to questions regarding Wood’s attempted robbery of Johnson and Johnson’s act of self-defense in shooting him, as the court’s decision led to the case being presented to the jury “in the absence of its true context” of Johnson’s legitimate self-defense. In addition, relying upon *State v. Crawford*, 308 Md. 683 (1987), Johnson claims error in the trial court’s decision to decline to instruct the jury on self-defense and necessity,

- 1) that the Defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury
- 2) that the Defendant must not have intentionally or recklessly placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct
- 3) that the Defendant must not have any reasonable, legal alternative to possessing the handgun
- 4) the handgun must be made available to the Defendant without preconceived design
- 5) the Defendant must give up possession of the handgun as soon as the necessity or apparent necessity ends

If you find that necessity applies in this case, you must find the Defendant not guilty of all counts.

as, contrary to the State’s assertion, self-defense or necessity may provide a proper defense to unlawful gun possession charges.⁵

We conclude that, although self-defense or necessity defenses may be applicable to charges of unlawful possession of a handgun in some cases, this is not such a case. Johnson did not elicit sufficient evidence to support such a defense, pursuant to the test set forth in *Crawford*. As such, we find no error in the trial court’s preclusion of defense counsel’s examination of Detective Ebaugh regarding the background of the attempted robbery and Johnson’s act of self-defense in shooting Wood or in the court’s related decision to decline to instruct the jury on self-defense or necessity.

To explain requires a detailed look at *Crawford*. In that case, the defendant testified that an assailant opened fire upon him while he was in his own apartment. 308 Md. at 686. Crawford attempted to call the police, but his phone service had been turned off for lack of payment. He then tried to alert his neighbors, to no avail. *Id.*

As he crawled toward his bedroom to hide, the assailant opened fire upon him again, joined by a second assailant. *Id.* at 686-87. Crawford hit one of the men with a stick, grabbed the gun, and, during the ensuing struggle, fell out a window onto the ground below. *Id.* at 687. Hearing footsteps coming toward him, and “realiz[ing] the gun was there,” he picked it up so as to defend himself and tried to crawl away. *Id.* When the assailants found

⁵ The State raises a preservation issue, averring that appellant presents issues not raised before the trial court. In our view, however, the State’s argument misconstrues the contentions in appellant’s brief. It is clear that appellant’s claims of error in the trial court’s failure to permit any evidence of, or jury instruction regarding, self-defense and necessity were indeed considered by the trial court.

him in the parking lot, they shot Crawford again. *Id.* at 688. By that time, the police had responded to the scene, and Crawford was arrested and charged with unlawful possession of a handgun. *Id.* at 685.

The trial court refused to instruct the jury as to the availability of the defense of necessity to the charge of unlawful possession of a handgun. *Id.* at 690-91. In reversing, the Court of Appeals explained that the necessity defense “arises when an individual is faced with a choice of two evils, and one is the commission of an illegal act.” *Id.* at 691. The Court was unwilling to accept the State’s contention that, in such circumstances, “the General Assembly intended that the individual should succumb to his attacker and possibly forfeit his life rather than take possession of a handgun and act in self-defense.” *Id.* at 696. The Court held that necessity is a valid defense to the crime of unlawful possession of a handgun when all of the following five elements are present:

(1) the defendant must be in present, imminent, and impending peril of death or serious bodily injury, or reasonably believe himself or others to be in such danger; (2) the defendant must not have intentionally or recklessly placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct; (3) the defendant must not have any reasonable, legal alternative to possessing the handgun; (4) the handgun must be made available to the defendant without preconceived design, and (5) the defendant must give up possession of the handgun as soon as the necessity or apparent necessity ends.

Id. at 698-99.

In the present case, however, Johnson did not satisfy the *Crawford* test. With respect to the fourth element, Johnson’s .38 caliber handgun was not “made available to him without preconceived design.” In *Crawford*, the defendant’s possession of the gun was “merely fortuitous,” as he grabbed it from his assailant during the scuffle. *Id.* at 700.

By contrast, Johnson conceded to Detective Ebaugh that the .38 caliber handgun was present in the Cedarville Road house before Wood arrived unexpectedly and attempted to rob him, that is, before he had any immediate need to protect himself. Moreover, when confronted with Wood’s gun, Johnson pulled the .38 from under the couch cushions on which he sat, indicating his knowledge that it was and had been there.

As to the fifth factor, Johnson did not give up possession of either his .38 caliber handgun or Wood’s .32 caliber handgun as soon as the necessity ended. Instead, he kept possession of both guns after Wood’s death, which ended any necessity or need to defend himself, and left the house to hide one gun and give the other to his brother to hide.

Accordingly, even if we were to agree that the *Crawford* test applies to negate culpability for the crimes charged in this matter, Johnson’s claim that he should not have been precluded from presenting evidence of self-defense or necessity would fail. And, because a trial court must only give a requested jury instruction when the instruction is generated by the evidence, *General v. State*, 367 Md. 475, 486-87 (2002), we similarly find no error in the trial court’s refusal to instruct the jury regarding self-defense or necessity.

II.

In a related argument, Johnson avers that the trial court committed plain error in permitting the prosecutor to “seize[] the opportunity in closing argument to misstate the law and mislead the jury” by stating that the only issue before the jury was whether Johnson possessed a gun, with no applicable defense.

In closing, the prosecutor told the jury:

Why the gun was brought to the house is not relevant. We didn't hear any testimony about that.

* * *

As I said earlier today, you are not here to decide whether or not that killing was good, bad or indifferent. It's a tragedy without any question, but the questions you have to answer are, did the defendant possess those two guns. And if he did, did he have a conviction that said he's not allowed to.

Then, during her rebuttal closing argument, the prosecutor commented:

When the judge instructed you about the elements that are necessary to find the defendant guilty, it did not say he is not allowed to have a gun unless he has a reason. Right? He just said he's not allowed to have a gun, period. End of sentence. End of instruction. ...

The question is, did he possess a gun, yes or no? The .32, the .38. If so, did he have a conviction that precluded him from the lawful possession of it regardless of circumstances, yes or no?

There are no exceptions. There is no defense. There is no unless. There is no but if. Either he possessed it or he didn't. And either he was precluded from that because of his conviction or he wasn't.

By asking for plain error review, Johnson appears to concede that his failure to object to the prosecutor's comments during trial renders the issue unpreserved for appellate consideration. *See* Maryland Rules 4-323(c) and 8-131(a); *Stone v. State*, 178 Md. App. 428, 450 (2008) (argument is not preserved for review because the defendant never lodged an objection to the closing argument in the court below).

Indeed, an appellate court has the discretion to consider an un-objected to error, but we reserve this discretion for “compelling, extraordinary, exceptional[,] or fundamental” error that deprives a defendant of a fair trial. *Stone*, 178 Md. App. at 451. On the other

hand, “non-error does not constitute plain error.” *Smith v. State*, 225 Md. App. 516, 529 (2015), *cert. denied*, (Apr. 25, 2016).

For the reasons set forth in section I, above, Johnson did not generate sufficient evidence of any justification to negate culpability for his crimes. As such, the prosecutor was entitled to argue, in closing, that the circumstances surrounding Wood’s death were not relevant to a determination of Johnson’s guilt of the crimes charged. Johnson’s claim of error is therefore without basis.

**JUDGMENTS OF THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
AFFIRMED; COSTS TO BE PAID BY
APPELLANT.**