UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0846

September Term, 2014

MARCO D. SAWYER

v.

STATE OF MARYLAND

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

JJ.

Opinion by Friedman, J.

Filed: March 8, 2016

Following a trial in the Circuit Court for Charles County, a jury convicted appellant, Marco Sawyer, of involuntary manslaughter, second-degree assault, and affray. The trial court sentenced appellant to a prison term of 10 years, suspending all but one year, after which he filed a timely notice of appeal.[1]

Appellant asks us to consider whether the evidence was insufficient to support his convictions for involuntary manslaughter and affray. For the reasons that follow, we shall affirm the judgments of the trial court.

FACTS AND LEGAL PROCEEDINGS

On July 7, 2012, Haley Hancock invited approximately 15 to 20 friends to a party at her house on Mason Springs Road, Indian Head, Charles County, but, as a result of word of mouth communication, more than 50 people—and by some estimates, more than 100—attended the party, most remaining outside in the yard. As the guests drank alcohol, they became rowdy, and several fights broke out among the partygoers, with gunshots fired and rocks thrown. One such fight involved 18-year-old Jerry Gilchrist, appellant, and Kyrell Lewis.[2]

During that fight, Erica Capuano observed appellant, whom she knew casually, hit Gilchrist in the face, causing Gilchrist to fall to the ground flat on his back, unconscious and looking "lifeless." "Almost immediately" thereafter, Capuano knelt beside Gilchrist

[1] The court merged the assault and affray convictions into the manslaughter conviction for sentencing purposes.

[2] Lewis was charged as a co-defendant in relation to Gilchrist's death. His case was severed from appellant's case and had not yet been adjudicated at the time of appellant's trial.

and attempted to help him; she heard him gasping for air before all sound ceased and he was still. Then, she said, someone else came over and smacked Gilchrist in the face, while another person kicked him in the side until his friends dragged him toward a car parked in the driveway.[3] Later that evening, she again observed appellant, hitting another man outside the home's garage, causing that man to fall.[4]

Gilchrist's friend, Jasmine Thomas, testified that she saw Gilchrist fighting with a man with a "kissy marks" tattoo on his neck—later identified as Kyrell Lewis—and getting the best of Lewis, when appellant came upon the pair and took a swing at Gilchrist's face at the same time as Lewis did, causing Gilchrist's head to snap back and him to fall to the ground.[5] In an attempt to help Gilchrist, Thomas dragged him away from the scene and to his car. Feeling no heartbeat and believing Gilchrist not to be breathing while in the car on the way to the hospital, Thomas "blew in his mouth." From the time he fell to the ground, Thomas said, Gilchrist did not open his eyes or make a sound.

[3] Capuano also saw Lewis in the crowd of people fighting. When defense counsel asked whether she had told the investigating police officer that Lewis, in addition to appellant, had hit Gilchrist, Capuano said she did not recall making that statement. The officer testified, however, that Capuano had told him that she also had seen Lewis hit Gilchrist.

[4] Capuano admitted that she did not like appellant because he had sent her text messages while he had a girlfriend, and when Capuano threatened to show the text messages to appellant's girlfriend, he said he "would blow [her] brains to the back of [her] head." She further admitted that she had not, upon the arrival of the police at Hancock's house on the night in question, or, indeed until September 5, 2012, advised the officers that she had seen appellant punch Gilchrist.

[5] Thomas identified appellant as one of the assailants from a pre-trial photo array presented to her by the police on July 9, 2012. She also made an in-court identification of him as one of the men she had seen punch Gilchrist.

When Gilchrist presented at the Civista Medical Center emergency room, he was not breathing and unresponsive. He was pronounced dead at 3:20 a.m.

Having received information from the police that Gilchrist had been hit twice on his face, immediately lost consciousness and fell, and ruling out bone, soft tissue and heart injuries, the medical examiner opined, to a reasonable degree of medical certainty, that the cause of his death was head and neck injuries, more specifically hyper-extension of the neck that concussed the brain stem and stopped the functioning of the brain. The manner of death was ruled a homicide.

At the close of the State's case-in-chief, appellant moved for judgment of acquittal, arguing, with regard to the charge of affray, that the fight occurred near a garage at a secluded private residence and not in a public place, which is one of the required elements of the crime. As to the involuntary manslaughter charge, appellant averred that the State had not proved that he killed Gilchrist because the medical examiner had presented evidence from which a reasonable trier of fact could conclude that the cause of death was two punches to the face at the same time, and appellant had only contributed one punch. As such, his single act could not have killed Gilchrist. The court denied the motion. Appellant did not present any evidence, and the court denied his renewed motion for judgment of acquittal, based on the same arguments he made at the end of the State's case, at the close of all the evidence.

DISCUSSION

Appellant argues that the evidence adduced by the State was insufficient to sustain the convictions of involuntary manslaughter and affray.[6] As he did during his argument on his motions for judgment of acquittal at trial, he claims, first, that a reasonable jury could not have found him guilty of involuntary manslaughter because nothing in the evidence adduced by the State supported a finding that but for his single punch to Gilchrist's face, Gilchrist would not have died. Because Lewis also may have punched Gilchrist at or near the same time, that man may have caused Gilchrist's death. Second, appellant avers, the evidence did not establish an affray because the fight occurred on private property, far removed from a public place, and proof that the fight occurred in a public place is a required element of the crime.

We recently set forth the applicable standard for reviewing challenges to the sufficiency of the evidence:

> In reviewing the sufficiency of the evidence, an appellate court determines 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. … The test is 'not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder[.]' …
>
> The appellate court thus must defer to the factfinder's opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.] … We defer to any possible reasonable inference the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence[.] … Circumstantial evidence, moreover, is entirely sufficient

[6] Appellant does not challenge the sufficiency of the evidence to sustain the conviction of second-degree assault.

> to support a conviction, provided that the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused.

Benton v. State, 224 Md. App. 612, 629-30 (2015) (internal citations omitted).

1. Involuntary Manslaughter

Involuntary manslaughter is "a common law felony defined as an unintentional killing done without malice (1) in doing some unlawful act not amounting to a felony, or (2) in negligently doing some act lawful in itself, or (3) by the negligent omission to perform a legal duty." *Johnson v. State*, 223 Md. App. 128, 138 (citing *State v. Gibson*, 4 Md. App. 236, 242 (1968)), *cert. denied*, 445 Md. 6 (2015). As to the first class of involuntary manslaughter, the unlawful act must be *malum in se,* and not merely *malum prohibitum*.[7] *Id.* at 139.

In the instant case, the involuntary manslaughter is the "unlawful act" type, and, as the court instructed the jury, that unlawful act is an affray and/or the battery form of second-degree assault.[8] The question before the jury was whether appellant's single punch to

[7] *Malum in se* is "'[a] wrong in itself; an act or case involving illegality from the very nature of the transaction upon principles of natural, moral, and public law. … An act is said to be *malum in se* when it is inherently evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state.'" *Warfield v. State*, 315 Md. 474, 496 n. 8 (1989) (quoting *Black's Law Dictionary* at 865 (5th ed. 1979)). *Malum prohibitum* is "[a] wrong prohibited; a thing which is wrong *because* prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law; an act involving an illegality resulting from positive law." *Id*. (Emphasis in original).

[8] The court instructed the jury that, to convict appellant of involuntary manslaughter, "the State must prove that the defendant and/or another participating in the crime with the defendant committed a second-degree assault, an affray, or both, that the defendant and/or another participating in the crime with the defendant killed Jerry Gilchrist, (continued…)

Gilchrist's face caused or contributed to his death so as to support a conviction of involuntary manslaughter. To resolve that question, the jury heard the testimony of Erica Capuano and Jasmine Thomas, who did not know each other but agreed that a fight involving Gilchrist, Kyrell Lewis, and appellant broke out at the party.

Capuano stated that she saw appellant punch Gilchrist in the face, after which the victim fell to the ground, unconscious and appearing lifeless. When she rushed to his aid, he was gasping before all breath sounds ceased.[9] Thomas also observed appellant punch Gilchrist in the face, but she added that Lewis punched the victim simultaneously or nearly simultaneously, and the punches caused Gilchrist's head to jerk back and his body to fall to the ground. Thomas did not see Gilchrist open his eyes or regain consciousness after he was hit, and she said that he appeared not to be breathing during the ride to the hospital. In addition, the medical examiner opined that hyper-extension of Gilchrist's neck caused his death, which injury was consistent with the report she received from the police that Gilchrist had been punched in the face, causing his head to jerk back.[10]

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and that the act resulting in the death of Jerry Gilchrist occurred during the commission of a second-degree assault and/or affray."

[9] The medical examiner testified that gasping sounds in such a situation are evidence of impending death, not life.

[10] Contrary to appellant's assertion, the medical examiner did not testify that two punches were required to support her opinion as to Gilchrist's cause of death. She merely testified that, based on her autopsy, other testing, and the report she had received from the police that Gilchrist had been hit in the face two times, she came to a conclusion as to his cause of death, hyper-extension of his neck.

Although the eyewitnesses' testimony differed, it was up to the jury to determine, from all the evidence, whether the punch administered to Gilchrist by appellant caused, or contributed to, the victim's death. As both eyewitnesses observed Gilchrist fall to the ground immediately after appellant punched him, it was certainly permissible for the jury to infer that appellant either caused Gilchrist's death or contributed to it in concert with Lewis. It is not our task to determine whether there were other permissible inferences that the jury could have made. *Pinkney v. State*, 151 Md. App. 311, 338-39 (2003). Viewing the evidence in a light most favorable to the State, there is nothing that persuades us that the jury acted unreasonably or erred in its determination that appellant was guilty of the crime of involuntary manslaughter in the death of Gilchrist.

2. Affray

Appellant also argues that the evidence was insufficient to sustain his conviction for affray because the fight occurred in Haley Hancock's private yard and not in a public place, one of the elements of the crime. Again, we disagree.

Our courts generally define the common law crime of affray as two or more people fighting in a public place to the terror of the people. *Hickman v. State*, 193 Md. App. 238, 248 (2010). The fact of the fight's occurrence in a public place is a crucial element of the crime. *Dashiell v. State*, 214 Md. App. 684, 699 (2013). If, however, the fight occurs on private property, but sufficiently near a public road or neighboring houses, "then the 'public place' element of affray is satisfied." *Id*. at 700. Only "some evidence" that the fight occurred in a public place is required. *Id*. at 701.

Here, the undisputed testimony revealed that the fight that resulted in Gilchrist's death occurred in the yard of Haley Hancock's home, near the driveway outside her garage, which faced Mason Springs Road. Although Hancock agreed that there was a "good bit of distance" between her house and the road and between her house and those of her neighbors, the State introduced, and published to the jury, photographs of the house and driveway, which plainly showed the public road in view of the side yard and driveway of the house, where the fight occurred. Although no testimonial evidence established the specific distance between the location of the fight and the public road, again, it was up to the jury to determine, from the evidence, whether the fight occurred sufficiently near the public road so as to satisfy the "public place" element of affray. Moreover, the party attendance itself provided "some evidence" to support the public place element of the crime. The hostess, Haley Hancock, invited 15 or 20 friends to the party, but more than 50 and maybe as many as 100 appeared. From that testimony, the jury might well have believed that the yard was being used as a public place.

In our view, the State presented at least "some evidence" that the fight occurred in a public place, and we find no error with the jury's determination that the evidence was sufficient to convict appellant of the crime of affray.

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