UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2484

September Term, 2015

DAVID THORNTON

v.

STATE OF MARYLAND

Berger,
Friedman,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: October 28, 2016

A jury in the Circuit Court for Baltimore City convicted David Thornton, appellant, of second-degree murder and carrying a dangerous weapon openly with the intent to injure following the stabbing death of 17-year-old Jawan Henry on March 8, 2014.[1] The circuit court sentenced Thornton to thirty years in prison for second-degree murder and a consecutive three year period of imprisonment for the weapons conviction. Thornton raises three issues on appeal:

1. Did the lower court err by refusing to instruct the jury on self-defense, defense of others, the imperfect forms of those defenses, and manslaughter?

2. Did the lower court err in ruling that the State could impeach Mr. Thornton with his prior conviction for murder?

3. Did the lower court abuse its discretion in removing Juror Number 12 in the middle of trial, over Mr. Thornton's objection?

For the reasons stated below, we answer the first question in the affirmative, vacate Thornton's convictions, and remand for a new trial. Thornton's remaining issues are, therefore, moot.

BACKGROUND

In the spring of 2014, Henry lived in the 2600 block of Mura Street in Baltimore with his sister Delphine Williams, her husband Dwayne Wilson Sr. ("Wilson"), their five

[1] We note that appellant's name is spelled "Thorton" in the case caption and throughout the transcripts. Appellant has informed us, however, that his name is actually "Thornton." We will, accordingly, adopt the proper spelling of his name.

children, and Henry's father.[2] Deborah Wheeler, another of Henry's sisters, lived in the 2700 block of the same street. Prior to the time of the events in this case, Williams, her husband, and their children lived in the 2700 block of Mura Street with Donice Chapman, Wheeler and Williams's "god-sister."[3] In March 2014, Chapman and Thornton were dating, and Chapman stated that Williams and Wilson criticized her for this and argued with Thornton at times.

Sometime during the afternoon of March 8, 2014, one of Williams's sons called Chapman and asked her for $10 that she owed to him and Henry. The boys had done housework for Chapman, and she promised them money in exchange. Chapman said she did not have the money. She testified that she felt "harassed" because Henry had called multiple times that day asking for the money. Thornton, who was sitting next to Chapman and could overhear most of her conversation with the child, grabbed her phone and dialed the number that had just called. When Henry answered the phone, Thornton told him that they had his money and to stop calling. At trial, Williams testified that Thornton threatened to kill Henry in this conversation, but Thornton and Chapman denied this assertion. Thornton admitted, however, that his conversation with Henry was "back and forth" and "heated."

[2] We note that Dwayne Wilson Sr.'s first name is alternatively spelled "Duane" and "Dwayne" in the record. We will observe the latter spelling.

[3] Wheeler explained that her mother was Chapman's godmother.

Later that evening, at approximately 9:00 p.m., Chapman and Thornton returned to her home with Chapman's daughter, Chapman's friend Tiara Thorton ("Tiara"), and Tiara's daughter.[4] Joanne Jeter, Thornton's mother, was waiting there for them, and Thornton's cousin and his girlfriend arrived shortly thereafter. Jeter stated that she started walking down the street with Tiara to Williams's house to give Henry the money. Thornton, however, did not "feel right" about Jeter taking the money, so he caught up to her. Thornton testified that he helped his mother to turn around and go back to Chapman's house, while Chapman and Tiara took the money to Williams's house.[5] What followed is subject to conflicting versions of events.

Wheeler testified that she was getting her hair done at Williams's house, and she sent Henry next door to retrieve her phone's charger. He returned, quickly, saying that Thornton had chased him through an alley, brandishing a knife. Then, Wheeler and Williams heard a knock on the door. Henry, Dwayne Wilson Jr. ("Dwayne"), and Dwayne's friend Tony answered the door and left the house. By the time Wheeler and Williams got to the front door, they could see Henry, Dwayne, and Tony, in the middle of the street, approaching Thornton, who was coming toward them swinging a knife. Wheeler and Williams started arguing with Chapman, who was standing beside the door.

Meanwhile, Wilson had come downstairs, attracted by the "commotion." When he got to the door where his wife was standing, he saw Thornton approaching the three boys

[4] Tiara is not related to Thornton.

[5] Jeter testified that she is in poor health with several chronic conditions, including asthma, high blood pressure, COPD, "sciatic nerve," and arthritis.

and wielding a knife. Wilson described the knife as silver and large enough to be easily seen from "five or six car lengths away." Wilson advanced into the street to confront Thornton and started arguing with him, standing a short distance away with Henry, Dwayne, and Tony standing behind Wilson.

Then, Thornton swung the knife at Henry, who attempted to avoid the contact by jumping onto the roof of a parked car. Wheeler testified that she saw Thornton stab Henry in the stomach, and Henry attempted to kick Thornton. Henry retreated to Williams's house. Dwayne moved to confront Thornton, but Wilson restrained his son.

Chapman, on the other hand, testified that Wheeler and Williams answered the door, and they started arguing about Thornton. As the women argued, Henry, Dwayne, Wilson, and Tony left the house and ran toward Thornton, who was helping his mother walk back to Chapman's house. Chapman testified that the men were "angry" and "talking about fighting." Chapman also noted that the men were all tall and each weighed over 190 pounds. Indeed, Jeter testified that after Chapman and Tiara knocked on the door, she and Thornton were surrounded by people that had emerged from the house. Thornton stated that he could see Wilson, Dwayne, and Tony in front of him, and they wanted to fight. Jeter said that she attempted to stand between Thornton and the men in an effort to defuse the situation.

Suddenly, Thornton saw Henry running up the sidewalk, leap onto a parked car, and then jump toward him and Jeter. Chapman and Jeter corroborated this account; indeed, Jeter testified that Henry leapt at her and would have landed on her had Thornton not

shoved her out of the way. Thornton testified that he was holding his pocketknife, which he habitually carried, and he thought that brandishing the knife would calm the situation.

Thornton stated that Henry swung at him and landed a couple of punches before Thornton punched back. Jeter testified that when she regained her balance, she saw her son put his hands up toward Henry before Henry went back to Williams's house. In an interview with police conducted shortly after the incident – portions of which were played for the jury – Chapman stated that she saw Henry and Thornton swinging at each other. Thornton testified that he did not know that he stabbed Henry.

When Henry returned to Williams's house, Wheeler observed the wound and testified that it looked bad. Williams called 911, and paramedics arrived to take Henry to the hospital, where he was later pronounced dead. An autopsy confirmed the stab wound as the cause of death.

The State charged Thornton with first-degree murder and openly carrying a dangerous weapon with the intent to injure. A jury convicted Thornton of second-degree murder and the weapons charge. Following sentencing, Thornton noted this timely appeal.

DISCUSSION

Jury Instructions

Prior to instructing the jury, Thornton's counsel requested an instruction on voluntary manslaughter, and the following colloquy ensued:

> [APPELLANT'S COUNSEL]: Your Honor, at this point I will be asking for an instruction of perfect self-defense and perfect defense of others. Based on the testimony provided not only by my client but by his mother and by some of the State's

witnesses. The case law that I provided Your Honor and the State, says that the defendant has to produce some evidence –

THE COURT: Yes, got that. This is my point with you, I got all of that. That's not where I am in your case. Where I am in this case is that the defendant – identification as the Court sees it is still at issue. Okay? Because Mr. Thor[n]ton, and I reviewed his testimony this morning. I got the tape fro[m] the Court Reporter's Office and I was listening to it this morning and prior to my taking the bench. What he testified to was, of course Tiara gives him the money, he gives it to his mother, his mother is taking it down to the house. At some point in time, he goes out there, he's walking, he's talking with his mother, he doesn't see Mr. Henry when he first comes out there but at some point in time, he and his mother, I assume at this point the money is now handed over to Ms. Chapman, and he and his mother are about to go back up to the house and then they here [sic] these footsteps behind them and they turn and that's when the crowd is there. He didn't see Mr. Henry at that time.

But then he sees some movement out of the corner of his eye and he realizes that's Mr. Henry, he's moving at full speed. He says he pushes his mother to the side, he doesn't know what's going to go on but he knew something would be adverse to his safety. That wasn't his exact words, I'm summarizing. He pushes his mother to the side and says watch out. Mr. Henry jumps on the car, boom, boom. He says it all happens so fast. Then at some point he comes off the car, he says I swung and I pushed him. He turned around and went back down the street and then little Dwayne [Dwayne] charged off and big Dwayne [Wilson] grabbed him. And then he and his mother, and the crowd walks back down the street, then he and his mother walk back down toward Ms. Chapman's house. That was his testimony. He didn't say anything about stabbing anybody.

[APPELLANT'S COUNSEL]: Well, Your Honor –

THE COURT: Let me finish. And then he says – and to go a little step further when he's talking about Mr. Henry coming off the car, he says he came off the car swinging. Next thing he knew, they were banging. That's his testimony.

* * *

[APPELLANT'S COUNSEL]: Well, Your Honor, I would like to draw the Court's attention to *Roach*, *Roach vs. State*, 358 Md. 418 [(2000)]. Now, saying a defendant's actually saying I stabbed, I shot, is immaterial. What's important here is that one, the defendant has a subjective belief, a reasonable subjective belief that either, and I'm just going to argue self-defense at this point; that either he – that he, in this particular case, was in apparent immediate danger of serious bodily harm or death.

* * *

THE COURT: He testified all that. The point is, is that you don't – you're not defending yourself – well, you don't get an affirmative defense unless you've done something and that's the point.

[APPELLANT'S COUNSEL]: Well, Your Honor, I would like to propose to the Court that in *Roach*, the defendant in that case gave four accounts. The first account that he gave was that he denied knowledge of who shot the victim. The second account that he gave was that he wrote an apology letter to the family. The third account was that he said there was a fight over the gun, the gun just so happened to be in the street and it belonged to someone else. He later recanted and said the gun belonged to me. The fourth account did not address the detail surrounding the shooting but described the person he shot and the gun that was used.

And the Court in this case, the Court of Appeals said it was remanded, the lower court and the Court of Special Appeals and said you know what? Mr. Roach is entitled to an affirmative defense in this particular case.

THE COURT: Why?

* * *

[APPELLANT'S COUNSEL]: Well, the case said they used one of them and said that he wrote an apology.

THE COURT: Exactly. That's an admission of guilt.

Thornton's counsel then referred the court to a case concerning a request for an instruction as to voluntary intoxication. The court questioned the applicability of that case, to which Thornton's counsel responded:

> [APPELLANT'S COUNSEL]: I'm distinguishing, yes, I am, I'm distinguishing this case from the case before Your Honor, Mr. Thor[n]ton. In Mr. Thor[n]ton's case, he took the stand and he said I had a knife. He involves himself in the incident. I had a knife, I was fearful for my life, I was fearful that the mob surrounding me would not only injure me but possibly injure my mom –
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> THE COURT: Okay. So let me stop you right there. What he said was, he pulled the knife because you asked him on redirect, when did you pull the knife. He said I pulled the knife and showed it to them, hoping that they or thinking that they would go away. That's what he said. He's talking about the mob of people. Okay?
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> [APPELLANT'S COUNSEL]: Yes, Your Honor.
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> THE COURT: Because at that point, when he sees the mob of people, he hasn't even seen Mr. Henry yet. Okay? So he pulls the knife he says and he shows it to them. Similar to the case you just talked about, *Martin,* he said several times on cross, I didn't even know he was stabbed. I didn't know until the next day. He said I didn't know until March 9th that he was even stabbed because he left the house on March 8th when him and his mother went back up to Ms. Chapman's house, I don't guess Ms. Chapman was still outside because the mother kept testifying about how she couldn't leave Ms. Chapman's house open and so forth and so forth. Mother testified she didn't even know, you know, that he left the house but he left the house. And then on the 9th is when he's having conversations with the two of them, his mother and Ms. Chapman I mean. And he says I didn't even know what – that's what he was telling the State on cross, that he didn't even know he was stabbed. He didn't know anything about it. Almost as if, and it's for the jury to conclude, but you put in testimony that there were 10 other

people out there with knives, almost to suggest that … almost to suggest that perhaps one of the other 10 people stabbed him. That's for the jury to decide.

[APPELLANT'S COUNSEL]: Or –

THE COURT: I'm not saying that's what he was saying or what you were doing, I don't know what your defense was doing at that point.

* * *

THE COURT: But that's what you said. So I don't have anything in his testimony and that's why I took the time to go over it again this morning, because I was pretty clear on Friday about what I heard but I'm human, I can make mistakes. So I wanted to make sure. So I at 8:00 this morning, I had that tape and I was listening to it. So I don't have anything, as far as I'm concerned, counsel, where identification is still not an issue.

[APPELLANT'S COUNSEL]: But, Your Honor, I don't believe –

THE COURT: And the case that you're citing really are [sic] not on point for what you're citing or what you're trying to tell me.

[APPELLANT'S COUNSEL]: Well, Your Honor, I do believe they're on point because they are shown to distinguish –

THE COURT: Well, *Roach*, well, wait a minute, *Roach*'s defendant makes four different statements. The Court says the Court erred because you don't apologize for something that you didn't do. They took that as statement of guilt. That's what they need. The other three letters maybe didn't do it for them, or statements didn't do it for them. But they took that one because it's, you know, it's up to the jury. But he has to admit some type of guilt.

[APPELLANT'S COUNSEL]: That's not – well, Your Honor, in all of the cases that I've read, none of the Court's –

THE COURT: They're not going to come right out and use the –

[APPELLANT'S COUNSEL]: – did not say –

THE COURT: Listen, [appellant's counsel], they're not going to come out and say the defendant, it's a given.

[APPELLANT'S COUNSEL]: It's inferred.

THE COURT: Exactly. So they don't have to say the defendant must say that I shot the person, that I stabbed the person, it's what he testifies to. So the law – the Court of Special Appeals does not need to go over those specific words, but you don't have that in this case.

[APPELLANT'S COUNSEL]: Well, and Your Honor, please indulge me because I feel very strongly about this position –

THE COURT: I know you do.

[APPELLANT'S COUNSEL]: – because he took, my client took the stand –

THE COURT: Uh-huh.

[APPELLANT'S COUNSEL]: – and he testified about his involvement, that he was there. In these other cases, the defendant is like oh, I wasn't there, either I was too intoxicated to either provide some evidence of my subjective mind at the time or they actually straight out denied ever being there –

THE COURT: Well, what do you think –

[APPELLANT'S COUNSEL]: He was there.

THE COURT: Listen, what do you think, I don't know – I didn't even know he was stabbed is? What do you think that is? What do you think that means?

[APPELLANT'S COUNSEL]: Well, what that means is it happened so fast that he swung. He said I punched him and I

swung. He also testified that he had a knife. He said I punched him and I swung –

THE COURT: So what, he had a knife, he didn't say he stabbed him. He said his knife didn't even have any blood on it.

[APPELLANT'S COUNSEL]: But isn't that consistent with the testimony that the officer –

THE COURT: Testimony of what?

[APPELLANT'S COUNSEL]: Well, because there was no blood trail from –

THE COURT: That doesn't mean – a blood trail is a different thing than the instrument having blood on it, the blood goes in the body.

[APPELLANT'S COUNSEL]: I understand but it is consistent.

THE COURT: Okay, [appellant's counsel], listen. I hear what you're saying and you just don't have the first part. **You did present some evidence perhaps,** except for I would disagree with you on defense of others. That you don't have either, even with some evidence, you don't have it. But the first thing you don't have for any kind of affirmative defense is that identification is not an issue. The way he testified, I don't know if that was you all strategy or what you thought it was, and you sat right there and you listened to what he was testifying to. You never asked him directly, did you stab or when you stabbed Mr. Henry, were you in fear of your life, dah, dah, dah, dah, dah, dah, dah. You never connected those two. You asked were you afraid, were you in fear of your life. Separate question. You never made those connections. Okay?

Now, for defense of other, you got the same thing because *Lee* [*v. State,* 193 Md. App. 45 (2010)] makes it clear that the person who the other person believes they're defending has to be under attack at the time that that person interferes. In this case, number one, Ms. Jeter testified that, first of all, she doesn't even know who Jawan Henry is –

> [APPELLANT'S COUNSEL]: She doesn't –
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> THE COURT: Let me finish. She testified she was never under attack. And there's no evidence that she was under attack because Mr. Thor[n]ton testified that at the time he saw Mr. Henry coming towards [sic] the car and jumping on the car, he already pushed his mother out of the way and said watch out. And then that's when Mr. Henry got off the car, he doesn't remember how he got off there, all he knows is he got off of there. And what did he say? I swung and I pushed him and he ran down the street. Mr. Henry was never physically attacking his mother. And in order to get defense of others, that's what you need. *Lee* makes that clear. And that was one of the cases that you gave me.
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> [APPELLANT'S COUNSEL]: Well –
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> THE COURT: *Lee* makes that clear.
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> [APPELLANT'S COUNSEL]: And, also *Lee*, just to distinguish, in the case of *Lee*, there was a parking lot and the Court said you cannot defend people who are milling around in a parking lot. In this particular case, Ms. Jeter testified that if she hadn't been pushed aside, that Mr. Henry would have fell [sic] on her.
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> THE COURT: You missed the whole point of *Lee*. The Court said that the people in the parking lot were never under any threat, they were not under a threat and they were not being attacked. That's what they said. It had nothing – that other was just an aside.

(Emphasis added). The court then reiterated what it saw as the missing pieces of appellant's asserted defenses:

> THE COURT: – and they're not – they're nowhere, you don't even – you don't have the first part and I guess that's the part that frustrates the Court is that if I am saying that I – in other words, I'm saying to someone, I did something that caused a person's death but I have a defense as to why I did it, that's why these things are called affirmative defenses. Okay? He's not saying that he did anything. That was his testimony. All he

> said he did, I swung, I pushed him, and he turned and ran back down the street. That was his testimony. He didn't even say – he may – I mean, he's swinging and I don't know a swing because he says they were banging, and to me that means punching or hitting or some type of hitting.
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> [APPELLANT'S COUNSEL]: **But that's up for the trier of fact**, we don't – we can't –
>
> THE COURT: Okay.
>
> [APPELLANT'S COUNSEL]: – Your Honor, can't infer what he meant, that's for the trier of fact.
>
> THE COURT: Okay.
>
> [APPELLANT'S COUNSEL]: And in this particular case, he said that he –
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> THE COURT: Well, I can infer that I swung, I pushed him, and he ran back down the street. I think that is clear to any objective person that he didn't stab anybody.
>
> [APPELLANT'S COUNSEL]: Well, when he swung, he did testify that he had a knife.
>
> THE COURT: Okay. Thank you, counsel.

(Emphasis added).

After confirming with the State that Thornton never explicitly testified to stabbing Henry, further discussion ensued as to the applicability of the requested instructions:

> [APPELLANT'S COUNSEL]: Thank you, Your Honor. So if we're going to go with State's line of reasoning, are we to allow mom to be seriously injured before there is an affirmative defense of others? No. There has to be a threat of imminent bodily harm, serious bodily harm or injury. Testimony was that Ms. Jeter is frail, she has COPD, could not run. He was there to protect. He testified that Mr. Thor[n]ton was there to protect himself and to protect his mom. They were surrounded by a mob. This was not a fair fight. This was not a fair fight. There

was testimony that they were turning. There was testimony that they were in the middle of the street, that they were not at the door. So they were not the aggressor. So if the State's argument is –

THE COURT: You know, counsel, if Mr. Henry had been on top of his mother, had knocked her to the ground, landed on top of her, and she was – I would consider that as some type of attack. That is not the testimony in this case.

[APPELLANT'S COUNSEL]: And that's true, Your Honor, but the Court doesn't –

THE COURT: And that's what you need for a defense of others.

[APPELLANT'S COUNSEL]: You don't, and I will argue –

THE COURT: Okay. Well, I disagree.

[APPELLANT' COUNSEL]: I understand. And I would argue that you don't need the actual attack if someone is defending. In this particular case, Mr. Henry was on the car, this was testimony, and as Ms. Jeter argued or testified to and as Mr. Thor[n]ton testified to, he was attacking them, he was out for the purpose of –

THE COURT: Well, let me ask you something, listen to this. The person has to be the target of the threat and then actually have been attacked for you to get a defense of others, like you know, the old Good Samaritan. Okay. Mr. Henry, first of all, I don't know if he knows his mother, the mother didn't seem to know him. If there was going to be any dispute between anybody out there that night, it was going to be between Mr. Henry and Mr. Thor[n]ton. Now, had, you know, and him trying to attack Mr. Thor[n]ton and mom got in the way and he's, you know, on top of her, attacking her, and then he turns to assist his mother and this, then you got defense of others. You don't have that here.

[APPELLANT'S COUNSEL]: Well, Your Honor, what Ms. Jeter testified to was that they were going to go through her to get to him. She –

THE COURT: Well, that's a subjective feeling that she might have felt. They – they didn't get stabbed. They – the only person that got stabbed here is Mr. Henry.

[APPELLANT'S COUNSEL]: Well, the Court looks at the defendant's belief, so if we're talking, if Ms. Jeter is saying that she –

THE COURT: Counsel, I told you before, all you need to do is put on some evidence of self-defense. You don't have defense of others, I'm not going to even go through that again with you.

[APPELLANT'S COUNSEL]: Well, he –

THE COURT: Listen to me.

[APPELLANT'S COUNSEL]: Okay.

THE COURT: I'm not even going to go through that again. All you need to do was put on some evidence of self-defense.

[APPELLANT'S COUNSEL]: And there was.

THE COURT: The problem is, is that if I am defending myself, if I say I killed somebody or I did something to somebody, but we got a death here, we've got a cause of death here and a manner of death. The cause of death was a stabbing. Okay? Right? You agree with that?

[APPELLANT'S COUNSEL]: I do.

THE COURT: All right. Very good. Now, and I'm saying that I caused that but I caused it because I felt my own life was in danger, then you've got self-defense. You may have perfect or imperfect, depending on what the jury believes, if the relief [sic] was reasonable. You don't even have him saying that he did anything. His testimony, as I said on Friday, was no different than any other defendant that may take the stand and deny the charges. You already put in evidence that other people had knives out there, you know, the jury may believe that when the boy jumped, he got accidentally stabbed by one of the other knives, I don't know where [sic] they're going to believe. But I don't feel that identification is not an issue in this case

> because Mr. Thor[n]ton didn't take the stand and testify that he stabbed Mr. Henry and that's the Court's ruling.

In instructing the jury, the circuit court did not provide instructions on self-defense, defense of others, or voluntary manslaughter. On appeal, Thornton contends that the circuit court erred in refusing to instruct the jury as to the perfect and imperfect forms of self-defense and defense of others, as well as voluntary manslaughter. Thornton maintains that he presented "some evidence" of self-defense and defense of others necessary to generate the instruction, and that is all that is required. Responding to the court's stated rationale for refusing the instructions -- that Thornton never admitted to stabbing Henry -- Thornton argues that such an admission is not necessary, and, regardless, other witnesses testified that Thornton stabbed Henry. Moreover, Thornton contends that he did present some evidence that his mother was under attack, which was sufficient to generate the defense of others instruction.

The State first responds that Thornton's claim as to defense of others is not preserved. If this argument is preserved, the State argues that the instruction was not generated because Jeter was not under attack when Thornton stabbed Henry. As to self-defense, the State agrees with Thornton that it was not necessary for Thornton to testify that he stabbed Henry in order to generate the instruction. The State maintains, however, that it was not generated by the evidence because Thornton failed to demonstrate an inability to retreat.

First, we reject the State's contention as to preservation. Rule 4-325(e) provides: "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." (Emphasis added). Promptly after instructing the jury in this case, Thornton objected as follows:

> [APPELLANT'S COUNSEL]: And the reason was (inaudible) I believe that the defendant has generated enough evidence that the jury should be instructed as to manslaughter. (Inaudible).
>
> THE COURT: Okay. And as the Court **stated earlier**, the Court **does not disagree that he generated some evidence**; however, he did not resolve the issue of identification because he did not say that he caused the death of Jawan Henry.
>
> [APPELLANT'S COUNSEL]: And, Your Honor, I believe I also have to do that as to – make my argument I'm objecting because instructions (inaudible) self-defense was not given to the jury. The instructions for imperfect and perfect self-defense (inaudible). For those reasons, we are objecting.

(Emphasis added). The State contends that Thornton did not raise defense of others in this objection.

Assuming *arguendo* that the inaudible portions of the above-quoted exchange did not reference defense of others, we would, nevertheless, hold that Thornton has preserved this issue for our review. Prior to instructing the jury, the court and Thornton's counsel had an extended discussion about Thornton's request for jury instructions as to self-defense and defense of others. At various points in this colloquy, the court informed Thornton's counsel that Thornton had failed to generate evidence of defense of others. Accordingly, the court ruled on Thornton's request. *See* Rule 8-131(a) (noting that an issue will not be preserved for appellate review, "unless it plainly appears by the record to have been raised in **or decided by** the trial court") (emphasis added).

Moreover, in responding to Thornton's post-instruction objection, the court referenced the earlier discussion. Although Rule 4-325(e) requires objections to be made after the court instructs the jury, "'under certain well-defined circumstances, when the objection is clearly made before instructions are given, and restating the objection after the instruction would obviously be a futile or useless act, we will excuse the absence of literal compliance with the requirements of the Rule.'" *Corbin v. State*, 94 Md. App. 21, 27 n.2 (1992) (quoting *Sims v. State*, 319 Md. 540, 549 (1990)). We are satisfied that under these circumstances, Thornton has preserved the issue as to the court's refusal to give a defense of others instruction.[6] We further note that immediately prior to instructing the jury, the court admonished Thornton's counsel not to argue self-defense or defense of others in closing argument, yet the State attacked Thornton's self-defense and defense of others claims in its rebuttal closing argument.

Turning to the merits, "'[a] trial court must give a requested jury instruction where (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.'" *Dashiell v. State*, 214 Md. App. 684, 694 n.3 (2013) (quoting *Carroll v. State*, 428 Md. 679, 689 (2012)). The State does not contend that Thornton's requested instructions were incorrect statements of law or that the given jury instructions

[6] On September 29, 2016, this Court granted an unopposed motion to correct the record and permitted the appellee to file a supplemental memorandum. We have considered the supplemental memorandum filed by the appellee and reject the argument advanced by the State. Accordingly, we are satisfied that under the circumstances of this case, Thornton has preserved this issue for our review.

covered Thornton's requested instructions. Rather, the parties dispute whether the evidence generated Thornton's requested instructions. We review a court's decision to refuse to give a requested instruction for an abuse of discretion. *Malaska v. State*, 216 Md. App. 492, 517 (2014) (citing *Gimble v. State*, 198 Md. App. 610, 627 (2011)), *cert. denied*, 135 S. Ct. 1162 (2015).

"An instruction is 'applicable under the facts of the case' when a defendant can point to 'some evidence that supports the requested instruction.'" *Id.* (quoting *Bazzle v. State*, 426 Md. 541, 551 (2012)). "'Some evidence is not strictured by the test of a specific standard. It calls for no more than what it says – some, as that word is understood in common everyday usage.'" *Id.* (quoting *Bazzle*, 426 Md. at 551). Moreover, "'[t]he source of the evidence is immaterial; it may emanate solely from the defendant. It is of no matter that the self-defense claim is overwhelmed by evidence to the contrary. If there is **any** evidence relied on by the defendant which, if believed, would support his claim that he acted in self-defense, the defendant has met his burden.'" *Corbin*, 94 Md. App. at 26 (emphasis added) (quoting *Dykes v. State*, 319 Md. 206, 217 (1990)). Notably, in reviewing whether Thornton generated some evidence sufficient to generate the instruction, we "view[] the evidence in the light most favorable to the defendant." *Wood v. State*, 209 Md. App. 246, 303 (2012) (citing *Bazzle*, 426 Md. at 551). If a defendant is able to generate some evidence, then the burden shifts to the State to prove to the fact finder beyond a reasonable doubt that the defendant failed to meet the requirements of the instruction. *See id.* (citing *Dykes*, 319 Md. at 217).

To establish a claim for perfect self-defense, a defendant must show some evidence that:

> "(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 not have been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded."

Dashiell, 214 Md. App. at 696 (quoting *State v. Faulkner*, 301 Md. 482, 485-86 (1984)). Perfect self-defense is a complete defense and results in an acquittal. *Dykes*, 319 Md. at 210-11 (citing *Faulkner*, 301 Md. at 485).

By contrast, imperfect self-defense "'mitigates murder to voluntary manslaughter.'" *Id.* at 212 (quoting *Faulkner*, 301 Md. at 486). The Court of Appeals explained the difference between perfect and imperfect self-defense as follows:

> "Perfect self-defense requires not only that the killer subjectively believed that his actions were necessary for his safety but, objectively, that a reasonable man would so consider them. Imperfect self-defense, however, requires no more than a subjective honest belief on the part of the killer that his actions were necessary for his safety, even though on an objective appraisal by a reasonable man, they would not be found to be so."

Id. at 213 (quoting *Faulkner*, 301 Md. at 500). The Court noted, additionally, that if a defendant generates some evidence for perfect self-defense, then imperfect self-defense is

likely generated as well. *See id.* at 214 ("'It is hard to imagine a situation where a defendant would be able to produce sufficient evidence to generate a jury issue as to perfect self-defense but not as to imperfect self-defense.'" (quoting *Faulkner*, 301 Md. at 502)).

As to whether Thornton presented some evidence sufficient to generate an instruction for self-defense, perfect or imperfect, in this case, we note that the circuit court recognized that Thornton had, indeed, generated some evidence on this issue. The court declined, however, to give the requested instructions, ruling that Thornton did not admit to stabbing Henry. We agree with the parties that this is not fatal to Thornton's claim. Although Thornton, himself, did not conclusively admit to stabbing Henry, at least one other witness -- Wheeler -- testified that Thornton stabbed Henry.

Furthermore, we agree with the circuit court that Thornton had presented some evidence that, if believed, would establish Thornton's claim to self-defense. Thornton testified that on a darkened street, he and his mother were confronted by four larger men that wanted to fight. He stated that he was afraid for the health and safety of himself and his mother. There was testimony from Thornton, Chapman, and Jeter that Thornton was not the aggressor in the situation. Finally, notwithstanding that Henry was actually stabbed and that Thornton brandished a knife, Thornton stated that he swung at Henry with a fist, not his knife, which would not have been an escalation of force, permitting Thornton to claim self-defense. *But see Lambert v. State*, 70 Md. App. 83, 94-98 (1987) (recognizing that reasonability of force used is for trier of fact, but holding that meeting non-deadly force with deadly force precluded giving of perfect self-defense instruction and imperfect self-defense may be applicable).

We note that the State is correct that before a defendant may claim the affirmative defense of self-defense, he or she must ordinarily establish that he or she could not safely retreat or that there was an exception to this duty. *See Sydnor v. State*, 365 Md. 205, 216-17 (2001); *Lambert*, 70 Md. App. at 92. Nevertheless, this Court has described the duty to retreat as an "interpretive gloss on the first or fourth requirement" of self-defense. *Wilson v. State*, 195 Md. App. 647, 658 (2010), *vacated on other grounds by* 422 Md. 533 (2011). These are issues for the jury to resolve. *See Hall v. State*, 22 Md. App. 240, 248 (1974) (citing *Guerriero v. State*, 213 Md. 545, 549 (1957)).

Accordingly, we are persuaded that the court abused its discretion in refusing to give Thornton's requested instructions for perfect and imperfect self-defense. Furthermore, had the court instructed the jury as to imperfect self-defense, the court would have needed to instruct on voluntary manslaughter, as that is the offense Thornton would have been convicted of had the jury accepted Thornton's claim of imperfect self-defense.[7] *See Dykes*, 319 Md. at 212 (citing *Faulkner*, 301 Md. at 486).

Perfect defense of others is, also, a perfect defense. *Lee*, 193 Md. App. at 58 (citing JUDGE CHARLES E. MOYLAN JR., CRIMINAL HOMICIDE LAW 194 (2002)). In order to establish the defense, a defendant must show:

[7] Moreover, voluntary manslaughter is a lesser-included offense of murder. *See Bowers v. State*, 227 Md. App. 310, 319-20 (2016). If a defendant requests a jury instruction on a lesser-included offense, the court may be required to give such an instruction. *See Bass v. State*, 206 Md. App. 1, 9 (2012) (citing *State v. Bowers*, 349 Md. 710, 721-22 (1998) (noting that if a defendant requests an instruction on a lesser-included offense, the trial court must give the instruction where 1) the offense is a lesser-included offense of the charged crime; and 2) the evidence provides a rational basis to conclude that the defendant committed the lesser-included offense).

> "(1) the defendant actually believed that the person defended was in immediate danger of death or serious bodily harm;
>
> (2) the defendant's belief was reasonable;
>
> (3) the defendant used no more force than was reasonably necessary to defend the person defended in light of the threatened or actual force; and
>
> (4) the defendant's purpose in using the force was to aid the person defended."

Id. (quoting Md. Crim. Pattern Jury Instructions ("MPJI") 4:17.3). Similarly to self-defense, there is also an imperfect form of defense of others. Indeed, a claim of defense of others may be imperfect where a defendant actually believed that force was necessary to defend another, but this belief was unreasonable, or where the force used was not reasonable. *Id.* at 59 (citing MOYLAN at 194). Furthermore, in order to demonstrate that the defense is warranted, a defendant must show "that the person being defended was coming under direct attack when the defendant came to his or her defense." *Id.* at 64.

In response to Thornton's request for the instruction of defense of others in this case, the court determined that it was not generated, citing *Lee* in support of its finding that Thornton did not generate some evidence on this issue. On appeal, the State contends that the court was correct to reject Thornton's requested instruction because the evidence demonstrated that Thornton believed that *he* was under attack, not Jeter.

Taking the evidence in the light most favorable to Thornton, we are persuaded that Thornton generated some evidence that he was acting in the defense of Jeter when he responded to Henry's attack. Jeter and Thornton testified that Henry was jumping at Jeter. In fact, Jeter stated explicitly that her son defended her by shoving her out of the way and

reacting to Henry. Furthermore, Thornton's purpose was to defend his mother, as he testified:

> He [Henry] turned like to come between two cars and then so that means him and my mother [Jeter] like this (indicating). I still don't know what he going to do but I'm thinking well it's about to ugly, real ugly right, so what I do is, I tell my mother watch out, I push her like this (indicating), you feel me? And as I'm pushing her, [Henry] runs up on the top of the car to the hood, it just happens so fast, he jumped up, hit me like twice, I swung once, pushed him, and then he turned around and went down the street.

We are persuaded that there was some evidence that Jeter was under attack, and this case is distinguishable from *Lee*. In that case, Lee admitted that he shot his assailant. 193 Md. App. at 50. Lee, a security guard at the bar where the shooting occurred, testified that a disorderly man was advancing toward another person in the parking lot, and the man had a knife. *Id.* at 50-52. Lee shot the man, killing him. *Id.* at 52. At trial, Lee argued that he was defending the people who were standing around in the parking lot behind him. *Id.* at 55-56. We rejected this argument, finding that the assailant was not attacking the patrons in the parking lot. *Id.* at 65. In this case, by contrast, Jeter testified that had Thornton not pushed her away, Henry would have landed on her. We are persuaded, therefore, that Jeter was under attack when Thornton acted to defend her.

The State is correct that Thornton testified as to his concern that Jeter would become involved if something happened to him, but this was in addition to his testimony that Jeter was under attack. Moreover, the Court of Appeals has found similar statements to Thornton's to be sufficient to generate some evidence of an affirmative defense. *See Wilson*, 422 Md. at 543 (holding that Wilson's remark of "'[k]ill or be killed'" was

sufficient to generate jury issue of self-defense, despite overwhelming evidence to the contrary).

Thornton had produced some evidence that he believed his mother was in danger of death or serious bodily harm, that he responded with an appropriate amount of force, and that his actions were to defend Jeter. Taking the evidence in the light most favorable to Thornton, accordingly, we are persuaded that the court abused its discretion in refusing to give instructions as to perfect and imperfect defense of others.[8]

We, therefore, vacate Thornton's convictions and remand for a new trial. *See Vielot v. State*, 225 Md. App. 492, 506 (2015) (citing *Cost v. State*, 417 Md. 360, 369 (2010)), *cert. denied*, 446 Md. 706 (2016). Thornton had generated some evidence sufficient for the jury to assess his claims of self-defense and defense of others.

In vacating Thornton's convictions on the basis of the jury instruction errors, Thornton's remaining issues are moot.[9]

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED AND REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

[8] Again, we note that the use of deadly force in response to non-deadly force may preclude an instruction for perfect defense of others, but the imperfect version may still be applicable. *See Lambert*, 70 Md. App. at 94-98.

[9] We note, too, that were we to address Thornton's claim as to impeachment using his prior conviction, this issue would not be preserved because Thornton testified as to his conviction on his direct examination. *See Cure v. State*, 195 Md. App. 557, 567-73 (2010), *aff'd*, 421 Md. 300 (2011).