Circuit Court for Wicomico County
Case No. C-22-CR-22-000585

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1959

September Term, 2023

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DAVONTE LAMONT PURNELL

v.

STATE OF MARYLAND

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Berger,
Nazarian,
Ripken,

JJ.

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Opinion by Ripken, J.

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Filed: December 9, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In October of 2023, a jury in the Circuit Court for Wicomico County found Davonte Lamont Purnell ("Appellant") guilty of the following offenses: first-degree assault; firearm use in the commission of a felony or crime of violence; illegal possession of a regulated firearm by a prohibited person; second-degree assault; and reckless endangerment. The circuit court imposed an aggregate sentence of twenty years.[1] Appellant noted this timely appeal, and presents the following issue for our review:[2]

> Whether the evidence was sufficient to convict Appellant of first- and second-degree assault.

For the reasons to follow, we shall affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

The following facts were elicited at trial. On September 10, 2022, Appellant accompanied his fiancée, Shakeena Parham ("Parham") and her four children, to watch Parham's son's football game. James Jones ("the victim"), who is a father figure to

[1] The court sentenced Appellant to twenty-five years, all but ten suspended for count one; twenty years, all but ten suspended for count two; and fifteen years, all but five suspended for count three. The sentences for counts one and two were to run concurrently, and the sentence for count three was to run consecutive to counts one and two.

[2] Rephrased from:

> Whether there was sufficient evidence to convict Defendant-Appellant Davonte Purnell of both first- and second-degree assault—and, by extension, use of a firearm in the commission of a crime of violence—despite testimony by James Jones that he neither feared nor believed that Purnell placed him in imminent physical harm.

Parham,[3] also arrived to watch. Once the game ended, Parham drove Appellant, and two of her children to her home, leaving her two other children at the football field. The two remaining children approached the victim, informed him that Parham had left them, and inquired if he would drive them home. The victim then drove the two children home.

When the victim arrived at Parham's residence, her eldest son, "A."[4] was standing outside in front of Parham's home. The victim testified that A. "was flagging his hand as if he was shooing something out of his face[,]" and that A. stated to the victim, "go ahead, man, go ahead, nobody don't want you here." Parham's two younger children exited the victim's vehicle and went inside. Perplexed as to A.'s statements and actions, the victim attempted to get out of the car to talk to A., when A. punched the victim in the face. At that point, Parham came out of her home because "she knew it was a ruckus." The victim again attempted to get out of his vehicle, but Parham approached his car and prevented him from exiting.

Shortly after that, Appellant came out of Parham's apartment. The victim testified that he thought Appellant came outside because Appellant "witnessed that [there] was a disturbance going on." The victim stated that upon exiting the apartment, Appellant went to Parham's vehicle, which was parked in front of her apartment door, opened the driver's door, reached under the seat, and took out a handgun. Per the victim, Appellant then began

[3] While the victim is not Parham's biological or adoptive father, he is Parham's great uncle, was married to Parham's great aunt, and raised Parham from a very young age. The victim calls Parham his daughter.

[4] To preserve the anonymity of the minor child, we refer to the child by the randomly selected letter "A."

"walking towards [the victim's] Toyota [] with the gun pointed towards" him. The victim testified that the gun was a black .9 mm handgun, and that he easily recognized guns from his twenty-plus years of military experience. The victim stated that Appellant was standing approximately twelve to forty-five feet[5] away from his car and was still pointing the gun at him when Parham pleaded, "Daddy, please just go." The victim testified that at this point, he "was upset" because Appellant had just pointed a gun at him. In response to Parham's pleading, the victim drove away, "looked up and [] smiled, [and stated to Appellant], 'you'll get your chance.'" The victim testified that he became increasingly nervous about the possibility of a gun going off in Parham's apartment with his grandchildren present, and that this prompted him to call the Fruitland Police Department ("FPD") and report the incident. After the 911 call, the victim went in person and made a more detailed sworn statement to FPD which was recorded via a body-worn camera.

On September 23, 2022, FPD executed a search warrant of Parham's residence, during which they found and seized a gun, ammunition, and a Medicaid ID for Appellant. In November of 2022, a grand jury indicted Appellant on seventeen counts to include first-degree assault, second-degree assault, and firearm use in a felony or a crime of violence.[6]

[5] There was a discrepancy in the evidence presented to the jury regarding the distance. At trial, the victim testified that the Appellant was standing twelve to fourteen feet away from his vehicle while pointing the gun, while the in the interview with the Fruitland Police Department the victim stated the distance was thirty to forty-five feet.

[6] Counts one through seven were severed from counts eight through seventeen. The first seven counts were: (1) first-degree assault; (2) firearm use in a felony or crime of violence; (3–4) firearm possession by a prohibited person; (5) second-degree assault; (6) reckless endangerment; and (7) illegal possession of a regulated firearm. After the conclusion of the trial, the state entered a *nolle prosequi* on the remaining counts, eight through seventeen.

In October of 2023, a two-day trial was held before a jury. Following the State's presentation of its case in chief, counsel for the Appellant moved for a judgment of acquittal on the grounds that the state failed to prove that the victim was in fear, as he contended is a requirement under the intent-to-frighten variety of assault. The circuit court denied Appellant's motion. Counsel for Appellant then presented Appellant's defense, at the end of which, he made a renewed motion for judgment of acquittal, which the circuit court likewise denied. The circuit court then sent the case to the jury. The jury found Appellant guilty on all remaining counts.[7]

In November of 2023, Appellant was sentenced. During the sentencing hearing, the State posited, and counsel for the Appellant agreed, that the second-degree assault and reckless endangerment charges—counts five and six—should merge with count one, first-degree assault. The court merged the counts. Under the remaining counts, Appellant received an aggregate sentence of twenty years of incarceration. *See supra* note 1.

## DISCUSSION

### A. Party Contentions

Appellant contends that there was insufficient evidence to sustain his convictions for first- and second-degree assault. Appellant bases this contention on the theory that, because the victim never stated that he was scared, the victim did not perceive Appellant's brandishing of a handgun as intent to use the gun, and thus did not perceive the actions by

[7] Prior to trial, Appellant jointly stipulated with the State, that he was prohibited from possessing a regulated firearm at the time he committed these offenses under Maryland Code (2003, 2022 Repl. Vol.), § 5-133(b–c) of the Public Safety Article. Directly before closing arguments, the State entered a *nolle prosequi* on counts four and seven.

the Appellant as an impending battery. Appellant alleges that the circuit court erroneously ruled that a jury could find the victim's testimony satisfied the elements of the intent-to-frighten variety of assault. Consequently, Appellant asserts that without the two assault convictions, there is insufficient evidence to support Appellant's conviction for use of a firearm in the commission of a felony or crime of violence.

The State contends that there was sufficient evidence to sustain Appellant's two assault convictions. The State asserts that under Maryland law, the intent-to-frighten variety of assault does not require the victim to be afraid; thus, because there was sufficient evidence demonstrating that the victim had a reasonable apprehension of the impending battery, Appellant's assault convictions should be affirmed. Further, the State asserts that even were we to determine that the intent-to-frighten variety of assault does require actual fear on the part of the victim, the victim here was experiencing fear when Appellant pointed the gun at him, prior to realizing that Appellant's pointing of the gun was only a threat. Finally, the State agrees with Appellant that if neither of the assault convictions are affirmed, there is insufficient evidence to support Appellant's conviction for count three, as this count relies on the validity of either the assault convictions.[8]

**B. Standard of Review**

"When reviewing the sufficiency of the evidence to support a conviction, we view the evidence in the light most favorable to the State and assess whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

[8] Because we are affirming Appellant's convictions for first- and second-degree assault we need not address this issue.

*State v. Krikstan*, 483 Md. 43, 63 (2023) (internal quotation marks omitted); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This is because "[w]eighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the [factfinder]." *State v. Smith*, 374 Md. 527, 533–34 (2003) (quoting *State v. Stanley*, 351 Md. 733, 750 (1998)). "Our role is not to review the record in a manner that would constitute a figurative retrial of the case." *Krikstan*, 483 Md. at 63. This standard "applies to all criminal cases, including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts." *Smith*, 374 Md. at 534.

**C. Analysis**

"Our case law embraces three types of common law assault: (1) [intent-to-frighten], (2) attempted battery, and (3) battery." *State v. Frazier*, 469 Md. 627, 644 (2020) (internal quotation marks and citations omitted). Only the intent-to-frighten variety of assault is relevant here. This type of assault has three elements: first, "that the defendant commit an act with the intent to place another in fear of immediate physical harm[;]" second, that "the defendant had the apparent ability, at that time, to bring about the physical harm[;]" and third, that "[t]he victim must be aware of the impending battery." *Hammond v. State*, 257 Md. App. 99, 126 (2023). After proving the elements of second-degree assault, to prove first-degree assault, "the State must prove also that [A]ppellant either used a firearm to commit an assault, or that [Appellant] intended to cause serious physical injury in the

commission of the assault."[9] *Snyder v. State*, 210 Md. App. 370, 380 (2013), *cert. denied* 432 Md. 470 (2013); *see* Maryland Code (2002, 2021 Repl. Vol.), Crim. Law § 3-202 (first-degree assault); Crim. Law. § 3-203 (second-degree assault).

Because Appellant only challenges the third element required in intent-to-frighten assault, we narrow our focus to an explication on such topic. Appellant alleges that under *Hammond*, the State failed to prove the victim's reasonable awareness of imminent bodily harm because the victim was not subjectively frightened. We disagree with this contention. An instructive case is *Lamb v. State*. 93 Md. App. 422 (1992). In *Lamb*, we explained that "it is not necessary that the victim be actually frightened or placed in fear of an imminent battery . . . [t]he critical state of mind on the part of the victim is to be placed 'in reasonable apprehension' of an impending battery." *Id.* at 437–38. That a defendant

> knows the gun [they point] is unloaded or defective or is no gun at all is of no consequence . . . *All that is required in terms of perception is an apparent present ability from the viewpoint of the threatened victim.* If, on the other hand, the would-be victim of the threat is unaware of the threatening conduct, there can be no assault of this variety. If the would-be victim perceives the threatening conduct but knows, for instance, that the gun is defective, there is no apprehension of an imminent battery and, therefore, no assault of the threatening variety.

*Id.* at 443 (internal citations omitted) (emphasis added). Here, the State need only show that a rational jury could conclude, that the victim perceived, or was aware, that Appellant had the apparent ability to commit an impending battery.

[9] In challenging his first-degree assault conviction, Appellant contends that there was insufficient evidence of second-degree assault; he does not dispute the presence of the handgun as the aggravating factor.

Viewing the evidence in the light most favorable to the State, as required under *Krikstan*, it is apparent that a rational jury could have found the element of the victim's awareness of the impending physical harm was proven beyond a reasonable doubt based on the evidence presented. There are two consequential pieces of evidence, each of which was available to the jury for consideration in reaching a verdict: the victim's trial testimony and audio recordings of the victim's calls with FPD.[10]

At trial, the victim testified that after leaving Parham's house, he was upset because Appellant had just pointed a gun at him. The victim also testified that although he did not see Appellant load the gun, he assumed it was loaded. Additionally, the victim was asked about his thoughts regarding Appellant's actions:

> [PROSECUTOR]: When you initially had the gun pointed at you, what did you think?
>
> [THE VICTIM]: Pretty much the statement that I said. That little shit head pointed a gun at me, and he didn't shoot it.
>
> [PROSECUTOR]: Why did you assume that it was loaded?
>
> [THE VICTIM]: It—it didn't even occur to me whether it was loaded or not. He pointed a gun at me and he did not shoot. And I mean, I'm—you know, I'm from the [Vietnam] era, you know. One of us is going to get hurt. And if I got out of the car, that was the attitude that I had.

Regarding the victim's initial 911 call, the victim told an FPD dispatcher, "I left and the situation got real rough. I mean literally, a young man went into a car and got a gun after

[10] There are two relevant 911 calls to FPD. The victim made an initial 911 call regarding the incident. The responding officer told the victim that FPD would have another non-emergency FPD officer call back shortly, which is the second call.

me." When FPD called the victim back, the victim and an FPD officer had the following colloquy:

> [THE VICTIM]: He didn't come to my car with it, but he got out of his car and he started talking trash to me with the gun pointed over towards me.
>
> [FPD OFFICER]: Okay so he did point the gun at you?
>
> [THE VICTIM]: Yes.

Under *Lamb*, the perception that a gun is loaded while being pointed at a person is enough to sustain a conviction for assault. 93 Md. App. at 443. In sum, because the victim saw Appellant point a gun directly at him, and because he reasonably assumed that the gun was loaded, whether he was subjectively afraid is of no import. A rational jury could conclude that from the victim's viewpoint, he was aware of the potential for an impending battery. *See Lamb*, 93 Md. App. at 437–38; *cf. Harrod v. State*, 65 Md. App. 128, 138 (1985) (holding that where there was no evidence that the appellant was aware of the alleged assault, there was insufficient evidence to find appellant guilty of the intent-to-frighten variety of assault). Moreover, the victim's extensive military background does not negate his reasonable apprehension of an impending battery; as the State notes, the possibility that the victim's fear dissipated when he later thought to diffuse the situation and thought that the Appellant would not shoot, does not diminish the victim's awareness of an impending battery. Therefore, viewing this evidence in the light most favorable to the State, the jury as a rational trier of fact had legally sufficient evidence to determine that the victim was aware there was an impending battery.

Appellant's argument, that the jury based its verdict on insufficient evidence, can be grouped into two categories. The first category is that there was insufficient evidence to demonstrate that the victim's fear of an impending battery was imminent or immediate as required under *Jones v. State*. 213 Md. App. 208, 217 (2013) (explaining that the intent-to-frighten variety of assault requires the victim to be in fear of *immediate* physical harm). The second category is that there was insufficient evidence to illustrate that the victim was in reasonable apprehension. Both of Appellant's contentions are misplaced, and each will be addressed in turn.

For the first category, Appellant contends that the victim's testimony—that he was concerned about the possibility that the gun would go off at a later time with his grandchildren in the home—is legally insufficient to support his assault convictions. The basis of Appellant's contention is twofold: (1) the victim testified that he developed these concerns *only after he left* Parham's home; and (2) the victim's concern was speculative and was grounded upon a non-imminent harm that could occur at an indefinite, future point in time. Appellant may be correct, that this testimony is not sufficient to serve as the basis for the assault convictions here, as it, taken alone, lacked the "immediateness" requirement of physical harm. However, this was not the only evidence available to the jury as a basis for its verdict. *See id.* at 220 (exemplifying the ways in which a juror could, based on the evidence available to it, infer one conclusion regarding the facts to find that an assault occurred even though that was not the only conclusion that could be gleaned from those same set of facts). A reasonable jury could have relied upon the victim's testimony that he was upset, that he saw a gun pointed at him through his car windshield, or that he

reasonably assumed the gun was loaded, all of which are sufficient to sustain the assault convictions.

As to the second category, Appellant asserts that there was insufficient evidence to demonstrate that the victim was in reasonable apprehension. In support of his contention, Appellant focuses on the victim's interview with FPD and the victim's trial testimony, wherein the victim stated he thought Appellant was not ready to shoot. As an example, Appellant notes that during the victim's interview with FPD, the victim stated: "[a]nd him flagging that gun means that he ain't ready to shoot." Appellant likewise notes that at trial, the victim testified, "I apologize for being crazy, but if you point a gun at me and don't use it, then you didn't intend to." This contention bears no weight.

It is true that that there were competing rational inferences from the victim's testimony. To be sure, the victim testified that he was upset but never testified that he was afraid, and that he assumed that the gun was loaded but also did not think that Appellant was prepared to use the gun. However, under the sufficiency of the evidence standard, our role is to give "due regard to the [factfinder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *Smith*, 374 Md. at 534 (quoting *Moye v. State*, 369 Md. 2, 12 (2002)). "Our deference to reasonable inferences drawn by the [factfinder] means we resolve conflicting possible inferences in the State's favor, because '[w]e do not second-guess the jury's determination where there are competing rational inferences available.'" *Krikstan*, 483 Md. at 64 (quoting *Smith v. State*, 415 Md. 174, 183 (2010)). Accordingly, because there was

sufficient evidence to support the jury's finding, we give due regard to the jury's findings of facts and their resolution of the conflicting evidence.

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