UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2239

September Term, 2013

JENNY SUZANNE SIMMS JONES

v.

STATE OF MARYLAND

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

JJ.

Opinion by Thieme, J.

Filed: January 26, 2015

After a jury trial in the Circuit Court for Wicomico County, Jenny Suzanne Simms Jones, appellant, was convicted of two counts of theft of property having a value of less than $1,000 and one count of theft of property having a value of more than $1,000 and less than $10,000. She was sentenced to incarceration for a term of 5 years for one count of theft of property having a value of less than $1,000 and a consecutive term of 5 years for theft of property having a value of more than $1,000 and less than $10,000. The remaining charge was merged for sentencing purposes. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents the following questions for our consideration:

I. Did the trial court err by refusing to instruct the jury on the defense of mistake of fact?

II. Did the trial court err in instructing the jury on the defense of honest belief?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

Leslie Marshall owns a parcel of property in Powellville, Wicomico County, that includes an old chicken house. He used the chicken house to store equipment that he obtained from a marine company. On four occasions, someone stole items from Marshall's chicken house. On July 15, 2013, Marshall noticed that some items were missing from the chicken house. He called the Maryland State Police and a trooper responded to the property. Approximately two days later, Marshall noticed that additional items were missing, including a Cutlass bearing worth about $2,700. Marshall provided

measurements and drawings of the bearing to the Salisbury Scrap Metal company in the hope that it would be seen if someone tried to sell it for scrap. He also set up a camera in the hope of catching the person who was stealing items from the chicken house. Additional items were taken from the chicken house on July 22 and 23, 2013.

Detective Tom Funk, a Wicomico County Sheriff's Deputy assigned to the Wicomico County Bureau of Investigation, was assigned to investigate the burglaries and thefts on Marshall's property. He reviewed the reports filed by other troopers regarding some of the thefts and met with Marshall. On July 23, 2013, he met with Marshall at the Salisbury Scrap Metal Company. Subsequently, he viewed video footage taken from the chicken house on July 23rd and identified a juvenile and two other individuals as suspects, including appellant's nephew, Ralph Jones, Jr., and appellant's husband, David Jones.

Thereafter, Detective Funk showed Marshall photographs of some items that were at the scrap yard. Marshall identified some of them as belonging to him and the scrap yard returned those items to him. On July 23, 2013, Marshall viewed video footage of certain individuals taking items from the chicken house. He identified one of the individuals as "David's brother." Detective Funk investigated the number of times appellant had scrapped items and learned that "there was an extensive amount of scrapping done relevant to a normal person scrapping. It was much more than what a normal individual would for property they find about their house, things of that nature."

Justin Stroll, an employee at Salisbury Scrap Metal, testified that on January 15, 2013, appellant sold 161 pounds of brass items to his company for $338. As part of that transaction, a copy was made of appellant's driver's license and she signed a ticket before receiving the money. On July 17, 2013, appellant sold 343 pounds of irony brass to the scrap company for $446.

Appellant testified on her own behalf. On July 15, 2013, she was in bed, not feeling well because she was "coming off . . . a high dose of methadone," when her husband, David Jones, and his friend, Timothy Watson, asked her to go to the "scrap place" with them. They told appellant that Watson was working to tear down a chicken house and that he was able to keep some scrap metal that had been in it. According to appellant, her husband and Watson had experience scrapping metal and "lots of times, they tore down . . . trailers." Appellant had helped them tear down trailers on a number of occasions and then scrapped the metal.

On July 15th, appellant went with her husband and Watson to the Salisbury Scrap Metal company and sold some metal items. Again, on July 17th, she went to the scrap company with her husband, Watson and a man named Casey Prevette, all of whom rode in Watson's truck. After one trip to the scrap yard, appellant received a slushy drink and after another trip she received a cigarette. At trial she claimed that she did not learn that the items that were scrapped were stolen until the police surrounded her husband on about July 23 or 24, 2013.

On cross-examination, appellant acknowledged that she had 3 prior theft convictions, although none of them involved scrap metal. She also acknowledged that David Jones had prior theft convictions and that Watson had been involved in a theft from a Wal-Mart and had some drug convictions.

We shall include additional facts in our discussion of the issues presented.

DISCUSSION

At trial, defense counsel requested two specific jury instructions. The first was Maryland's Criminal Pattern Jury Instruction 5:06 on mistake of fact, and the second was an instruction on honest belief that was based on §7-110(c)(2) of the Criminal Law Article.[1] The prosecutor objected to both of the requested instructions, but argued that the pattern jury instruction was "more appropriate." The trial judge declined to give the pattern jury instruction, stating that counsel could save that for closing argument. Instead, he instructed the jury on honest belief as follows:

> THE COURT: One last thing I would say to you, it is a defense to the crime of theft if the Defendant acted in the honest belief that she had the right to

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[1] Section 7-110(c)(2) of the Criminal Law Article provides:

> (c) *Allowed defenses*. – It is a defense to the crime of theft that:
>
> * * *
>
> (2) the defendant acted in the honest belief that the defendant had the right to obtain or exert control over the property as the defendant did[.]

obtain or exert control over the property as the Defendant did. Any exceptions or additions?

[PROSECUTOR]: Not from the State, Your Honor.

[DEFENSE COUNSEL]: Your Honor, I would just object to the mistake of fact.

THE COURT: I'm not giving the mistake of fact. The Court's belief is that it is covered by the honest belief instruction, that's why I did not give it. You may go to the jury.

[DEFENSE COUNSEL]: I just would like my objection noted for the record.

THE COURT: You have. You have taken your exception.

I.

Appellant first contends that the trial judge erred in failing to give Criminal Pattern Jury Instruction 5:06 on mistake of fact because it was applicable under the facts of the case. That pattern jury instruction provides:

> You have heard evidence that the defendant's actions were based on a mistake of fact. Mistake of fact is a defense. You are required to find the defendant not guilty if:
>
> (1) the defendant actually believed (alleged mistake);
> (2) the defendant's belief and actions were reasonable under the circumstances; and
> (3) the defendant did not intend to commit the crime of (crime) and the defendant's conduct would not have amounted to the crime of (crime) if the mistaken belief had been correct, meaning that, if the true facts were what the defendant thought them to be, the [defendant's conduct would not have been criminal][defendant would have the defense of (defense)].
>
> In order to convict the defendant, the State must prove beyond a reasonable doubt that at least one of the three factors was absent.

Maryland State Bar Ass'n, Inc., *Maryland Criminal Pattern Jury Instructions* 5:06 (2012)("MPJI-Cr").

In support of her contention, appellant points to her testimony that she believed her husband and his friend had been given the material that she was asked to sell at Salisbury Scrap Metal. Appellant maintains that MPJI-Cr 5:06 was not fairly covered elsewhere in the instructions that were given to the jury because no other instruction conveyed to the jury "the important principle that the State needed to disprove the defense of mistake of fact in order to convict" her.

We review a trial court's decision to give or not to give a requested jury instruction for an abuse of discretion. *Stabb v. State*, 423 Md. 454, 465 (2011). In cases such as this, where the trial court refused to give a requested instruction, "[t]he burden is on the complaining party to show both prejudice and error." *Tharp v. State*, 129 Md. App. 319, 329 (1999), *aff'd on other grounds*, 362 Md. 77 (2000). Jury instructions are governed, in part, by Md. Rule 4-325, which provides, in relevant part:

> (c) **How given**. The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. . . . The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

In determining whether a trial court abused its discretion in declining to give a particular instruction, we consider the following factors: "(1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given.

Stabb, 423 Md. at 465 (citation omitted). The question before us is whether the mistake of fact instruction that the trial court refused to give was covered by any other instruction. The Court of Appeals has held that "so long as the law is fairly covered by the jury instructions, reviewing courts should not disturb them." *Farley v. Allstate*, 355 Md. 34, 46 (1999)(citing *Jacobson v. Julian*, 246 Md. 549, 561 (1967)).

The defense of mistake of fact has been explained by the Court of Appeals as follows:

> Mistake or ignorance of fact exists when the actor does not know what the actual facts are or believes them to be other than as they are. In essence, a mistake of fact is a defense when it negates the existence of the mental state essential to the crime charged. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW §5.1 (2d ed. 1986).

General v. State, 367 Md. 475, 484 (2002). In a footnote, the Court stated that "[a] mistake of fact has been described not as a true defense, but instead, like alibi, as a means of showing that the prosecution has not proven beyond a reasonable doubt the essential elements of the crime." *Id.* at 484 n.6. The Court went on to emphasize that once the issue of mistake of fact has been generated, the State must prove beyond a reasonable doubt that the act was committed without any mistake of fact and that the burden never shifts to the defendant. *Id.* at 485-86.

In the case at hand, the trial judge refused to instruct the jury on mistake of fact because he believed that it was contained within the instruction that was given on "honest belief," which provided that "[i]t is a defense to the crime of theft if the Defendant acted

in the honest belief that she had the right to obtain or exert control over the property as the Defendant did." Appellant asserts that the honest belief instruction failed to convey to the jury that the State needed to disprove the defense of mistake of fact in order to convict her and, therefore, the mistake of fact instruction was not fairly covered by the instructions given to the jury. We disagree.

There is no appreciable difference between the honest mistake instruction and the mistake of fact pattern jury instruction that the trial court declined to give. The crux of appellant's argument is that the instructions given failed to convey to the jury the principle that the State needed to disprove the defense of mistake of fact in order to convict her. This is incorrect, however, because the instructions given included other pattern jury instructions, including that the State bore the burden of proof beyond a reasonable doubt and that this burden remained with the State throughout the trial. Viewing the instructions as a whole, as we must, it is clear that the trial judge did not abuse his discretion in foregoing the mistake of fact instruction because the same concept was covered by the instructions that were given. *Tharp*, 129 Md. App. at 329 (and cases cited therein).

II.

Appellant next contends that the trial court erred in instructing the jury on the defense of honest belief because the instruction given was missing certain information

appellant had requested and was, therefore, "prejudicially misleading." At trial, appellant requested the following instruction on honest belief:

> The defendant's honest belief that she had the right to obtain or exert control over the property as she did is also an absolute defense to the charges in this case.
>
> If the defendant honestly believed that she had the right to obtain or exert control over the property as she did, even if she was mistaken in that belief, and even if others were injured by her conduct, there would be no crime.
>
> The burden of establishing lack of an honest belief rests upon the prosecution. A defendant is under no burden to prove her honest belief; the prosecution mus prove bad faith beyond a reasonable doubt.

The instruction given by the court included only the following sentence: "It is a defense to the crime of theft if the Defendant acted in the honest belief that she had the right to obtain or exert control over the property as the Defendant did." As appellant did not lodge any objection to the instruction that was given, she asks us to exercise our discretion to grant plain error review. We decline to do so.

Maryland Rule 8-131(a) provides that, "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." To be sure, "[i]n the case of plain error, 'that is error which vitally affects a defendant's right to a fair and impartial trial,'" we "retain the discretion to provide appellate review, although the error was unobjected to." *Conyers v. State*, 345 Md. 525, 563 (1997)(quoting *Rubin v. State*, 325 Md. 552, 587-88 (1992), in turn quoting *State v. Daughton*, 321 Md. 206, 210-11 (1990)). But, we do not depart from

the rule except where an unobjected-to error can be characterized as "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Conyers v. State*, 354 Md. 132, 171 (1999)(quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). As Judge Moylan wrote in *Garner v. State*, 183 Md. App. 122, 151-52 (2008):

> [T]he possibility of plain error is out there, and on a rare and extraordinary occasion we might even be willing to go there. One must remember, however, that a consideration of plain error is like a trip to Angkor Wat or Easter Island. It is not a casual stroll down the block to the drugstore or the 7-11. The exaggerated cry of alarm in this case evokes no echo of Angkor Wat or Easter Island.

In *Rubin*, the Court of Appeals explained:

> We have not "set forth any fixed formula for determining when discretion should be exercised." But, "we do expect that the appellate court would review the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention." The enumerated factors "are ordinarily inconsistent with circumstances justifying an appellate court's intervention" under plain error.

325 Md. at 588 (citations omitted).

In the instant case, appellant never informed the trial judge that the instruction on honest belief was inadequate. Moreover, although she asserts that the instruction failed to explain to the jury that the State must prove each element of the crime beyond a reasonable doubt and that the burden of proof never shifts to the defendant, the record establishes that this information was contained in other instructions that were given to the jury. The trial judge instructed the jury that appellant was "presumed to be innocent of all the charges" and that that "presumption remains with her throughout every stage of the

trial and is not overcome unless you are convinced beyond a reasonable doubt that she is guilt[y]."

The judge also instructed the jury that "[t]he State has the burden of proving the Defendant's guilt beyond a reasonable doubt and the burden remains on the State throughout the trial. The Defendant is not required to prove her innocence." Finally, with regard to possession of stolen property, the judge instructed the jury that possession meant "**knowingly** having the property belonging to somebody else within one's control or at one's disposal." The judge explained that if the jury found "the Defendant was in possession of the property shortly after it was stolen **and the Defendant's possession is not otherwise explained by the evidence**, you may but are not required to find the Defendant guilty of theft." Thus, even if appellant had objected to the honest belief instruction that was given, we would find no merit to her contention that the trial judge failed to explain to the jury that the State must prove each element of the crime beyond a reasonable doubt and that the burden of proof never shifts to the defendant because those principles were included in other instructions. As there was no error, much less plain error, we decline appellant's invitation to grant plain error review.

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