UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2128

September Term, 2014

KARL RAY SOLLBERGER

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: April 12, 2016

Following a trial in the Circuit Court for Anne Arundel County, a jury convicted Karl Ray Sollberger ("Sollberger") of theft of property with a value under $1,000.

Sollberger was sentenced to one year in prison, but the court suspended all but six months. He filed a timely notice of appeal and presents the following question for our consideration:

> Did the trial court err in allowing the prosecution to ask a "were they lying?" question of Mr. Sollberger?

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

I.

A. Evidence Presented by the State[1]

At about 12:30 p.m., on August 31, 2013, appellant entered a Home Depot store in Anne Arundel County pushing an empty shopping cart. He moved quickly through the store, placing items into the cart. Suspicious, a store security guard, George Coombs ("Coombs"), followed appellant without losing sight of him. Coombs saw appellant show

[1]Appellant has not challenged the sufficiency of the evidence to prove his guilt. Therefore, in Part I, we shall summarize only those portions of the evidence necessary to provide context for our discussion of the issue presented. *See Washington v. State*, 180 Md. App. 458, 461-62 n.2 (2008).

a receipt to a garden center employee.[2] He then watched Sollberger exit the store without paying.

Coombs stopped appellant and accompanied him to the store's security office, where, according to Coombs, appellant apologized for the theft and signed a "Voluntary Statement" admitting that he "knowingly took from Home Depot . . . merchandise without making payment and with the intention to deprive Home Depot of its right in the merchandise." Additionally, according to Coombs, in the presence of a witness, appellant wrote and signed a statement in which he said: "Look, I took the stuff to just finish a job to get my rent paid. I never do [sic] this stuff before." Both statements were admitted into evidence at trial.

After appellant signed the statements, Anne Arundel County Police Corporal Scott Pedersen arrived at the Home Depot. Corporal Pederson asked appellant some questions, and saw appellant sign a document in which he agreed not to enter the Home Depot for one year. Corporal Pedersen compared appellant's signature on the agreement to that on his

[2]The State explained in its closing argument that the store's security videotapes, which had been inadvertently erased prior to trial, showed someone other than appellant purchasing items from the Home Depot at 12:21 p.m. on August 31, 2013 and then leaving the store and handing the receipt to appellant. Appellant was seen on camera entering the store at 12:26 p.m. and loading the items listed on the receipt, along with additional items, into his cart and then attempting to leave the store without paying, although he presented a receipt to a cashier as proof of payment. The receipt appellant had in his possession was stamped 12:21 p.m.; and showed that, with tax, the cost of the items selected totaled $201.20. But, according to Coombs, the price, with tax, of the items in appellant's cart was $281.56.

driver's license. He did not recall appellant denying the commission of the theft. Appellant was arrested for shoplifting and removed from the store.

B. Evidence Presented by the Defense

Appellant testified that he had purchased items from the Home Depot store to complete a construction job and that a cashier in the store's garden department had reviewed his self-checkout receipt against the items in his cart and found everything to be in order. When Coombs approached him moments later, he tried to show Coombs his receipt and asked to see the security videotapes, which Coombs said proved that appellant stole items. Coombs refused to let him look at the videotape and told him he had to confess.

Appellant denied writing or signing either of the two written confessions. He testified that the signatures on the purported confessions were not his. He said the only document he had signed was an agreement that he refrain from entering the store for one year, although he conceded he had not read that document before signing it.

During cross-examination, the prosecutor tried to get appellant to admit that he was convicted, in 2003, of fraud. Appellant admitted that government records showed that he had been convicted of fraud, but insisted that, in actuality, it was his twin brother, Kurt, who had committed the crime and been convicted of it. When the prosecutor asked: "Nevertheless, you were convicted of this crime," appellant answered ambiguously: "For buying a tool, yes."

II.

DISCUSSION

Appellant contends that the trial court erred when it permitted the prosecutor to ask him, in effect, whether George Coombs was lying when he testified that Sollberger had signed two confessions in which he admitted the theft. Appellant asserts that the question, and the prosecutor's reference to the answer to that question during closing argument, was unfairly prejudicial and warrants reversal.

During cross-examination by the State, appellant denied writing or signing any confession notwithstanding Coombs' testimony to the contrary. The relevant colloquy was as follows:

> Q. You were in the courtroom when Mr. George Coombs was testifying?
>
> A. Yes, ma'am.
>
> Q. And you were in the courtroom when he said that the cart never left the room?
>
> A. The cart was never in the room. Just like he's---
>
> Q. *So . . . Mr. Sollberger, is it your testimony today that Mr. Coombs forged this document?*
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: I never signed anything but only one signature.

BY [PROSECUTOR]:

Q. [Prosecutor] And that one signature was?

A. Saying I wasn't allowed back in the Home Depot. And that was in front of an officer.

Q. So my original question was you claim that Mr. Coombs forged this document. And that is yes, you think he forged it.

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

BY [PROSECUTOR]:

Q. [Prosecutor] So Mr. Sollberger, you are claiming you never wrote this?

A. Yes, ma'am.

Q. That you never signed it.

A. Yes, ma'am.

Q. That you never signed a voluntary statement that was admitted into evidence earlier.

A. The only thing I signed was stating that I was banned from Home Depot for a year; I wasn't allowed back. I only signed one signature. I didn't exactly look at the piece of paper. All I know I signed one signature because the officer told me that was protocol and that's the way it goes.

(Emphasis added.)

Appellant argues that the question emphasized above asked him, in essence, whether Coombs was lying when he testified that appellant had confessed in writing to shoplifting.

Appellant asserts that the "were they lying" question was improper and the objection to the question should have been sustained. The error was compounded, appellant argues, by the "prosecutor's exploitation of this improper testimony" during her rebuttal closing argument, wherein she stated:

> He claims that Mr. Coombs forged the signature of that voluntary statement, that he must have made up that he voluntarily confessed, and also that Mr. Coombs must have written the statement himself and then signed it.
>
> Members of the jury, is this reasonable? It is not, because the Defendant has a stake in today's case. He is facing theft charges.

"In a criminal case tried before a jury, a fundamental principle is that the credibility of a witness and the weight to be accorded the witness' testimony are solely within the province of the jury." *Bohnert v. State*, 312 Md. 266, 277 (1988). In general, it is "error for the court to permit to go to the jury a statement, belief, or opinion of another person to the effect that a witness is telling the truth or lying." *Id*. Issues of witness credibility, and the weight to be given to a witness's testimony are for the jury to determine, and "it is impermissible, as a matter of law, for a witness to give an opinion on the credibility of another witness." *Hunter v. State*, 397 Md. 580, 589 (2007). *See also* 6 Lynn McLain, Maryland Evidence (3d ed. 2013) §701:6 ("The prosecution may not ask an accused whether he contends that the State's witnesses are lying."); Joseph F. Murphy, Jr., Maryland Evidence Handbook (4th ed. 2010) §1303 ("Because nobody is competent to read anyone else's mind, it is improper to ask a witness whether another witness was 'lying'").

The *Hunter* Court explained its reasons for reversing the petitioner's conviction as follows:

> [P]etitioner was asked five questions that put him in a position of characterizing the testimony of two other witnesses. He was asked five "were they lying" questions. These questions were impermissible as a matter of law because they encroached on the province of the jury by asking petitioner to judge the credibility of the detectives and weigh their testimony, i.e., he was asked: "And the detective was lying?" The questions also asked petitioner to stand in place of the jury by resolving contested facts. Moreover, the questions were overly argumentative. They created the risk that the jury might conclude that, in order to acquit petitioner, it would have to find that the police officers lied. The questions were further unfair because it is possible that neither the petitioner nor the police officers deliberately misrepresented the truth. These questions forced petitioner to choose between answering in a way that would allow the jury to draw the inference that he was lying or taking the risk of alienating the jury by accusing the police officers of lying. Therefore, the trial court erred in allowing the State to ask petitioner "were-they-lying" questions. When prosecutors ask "were-they-lying" questions, especially when they ask them of a defendant, they, almost always, will risk reversal.

Id. at 595-96.

In this matter, Coombs testified that appellant signed a Home Depot form confession and also gave a separate written statement in which he explained, in his own words, why he committed the theft. When appellant asserted, upon cross-examination, that he had not signed either of those documents, the prosecutor asked, "[I]s it your testimony today that Mr. Coombs forged this document?" The trial court overruled defense counsel's objection to the question but, significantly, appellant did not answer it. Instead, he simply reaffirmed his

prior testimony that he had not written or signed the confession. The second time the question was asked, the court sustained defense counsel's objection to it.

Although the prosecutor did not directly ask appellant if he contended that Coombs had lied in his testimony, we have cautioned that a variation of a "were they lying" question may be impermissible, and that a trial court errs when it does not sustain an objection to such a variation. *Horton v. State*, ___ Md. App. ___, 130 A.3d 1002, 1015 (2016). In our view, asking appellant whether Coombs forged the inculpatory documents was tantamount to a "were they lying" question. Because the prosecutor's question put appellant in the position of judging the credibility of Coombs, the question was improper, and the trial court erred in overruling defense counsel's objection to it. That conclusion, however, does not end our inquiry. Such an error is subject to harmless error review. *id*. at 1018, especially in a case like this where the witness did not answer the question and, as a consequence, never voiced an opinion, one way or the other, as to Coombs' credibility.

In *Hunter*, the Court of Appeals, in determining whether the prosecutor's "were-they-lying" questions were harmless beyond a reasonable doubt, explained that "[t]he possible prejudicial effect of the 'were-they-lying' questions is demonstrated by the number and the combination of the questions themselves, the repeated emphasis on them during the State's closing argument, and, most importantly, the jury's behavior during its deliberations." 397 Md. at 597. Here, on only one occasion was the prosecutor allowed to ask whether appellant

claimed that Coombs had forged the written confessions. The argument by the prosecution regarding a "forged" signature, to which appellant's counsel interposed no objection, simply advanced the State's theory as to what appellant evidently contended. That argument was not based on any answer appellant gave in response to the offending question.

In defense counsel's closing argument, he maintained that the two confessions were of suspicious origin because Coombs did not produce them until long after appellant's arrest and after appellant had gone to District Court four times in a nine-month period regarding this case. Defense counsel stressed in closing argument that it was not until June 17, 2014 (nine and one-half months after appellant's arrest), that the confessions were first shown to defense counsel. The disputed portion of the prosecution's argument constituted a proper rebuttal argument because, based on what appellant's counsel said in closing argument, it could be inferred legitimately that it was appellant's contention that Coombs manufactured the written confession long after appellant's arrest.

In addition, the prosecutor's argument was merely a small part of a larger attack on appellant's credibility, based, in part, on appellant's outright denial that he had been convicted of an impeachable crime that the State proved. And, unlike the situation in *Hunter*, where the jury presented four questions during its deliberations, one of which may have directly related to the "were-they-lying" questions, the jury in this matter raised no

questions at all during its short deliberation, much less one relating to appellant's confessions.

Under the circumstances of this case, given Coombs' eyewitness testimony; Corporal Pedersen's testimony that to his recollection appellant, at the time of his arrest, had not denied committing the crime; and the fact that appellant never answered the offending question, we are able to express a belief, beyond a reasonable doubt, that the single question at issue did not, in any way, contribute to the rendition of the guilty verdict.

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