UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2627

September Term, 2014

ANTONIO McCOY

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: April 8, 2016

At the conclusion of a jury trial in the Circuit Court for Baltimore City, Antonio McCoy, appellant, was convicted of second-degree assault. He was sentenced to incarceration for a term of five years, with all but ninety days suspended. This timely appeal followed.

QUESTIONS PRESENTED

McCoy presents the following two questions for our consideration:

I. Did the circuit court err in refusing to instruct the jury on self-defense?

II. Did the circuit court err in preventing McCoy from "drawing the sting" out of a defense witness's prior conviction for theft?

For the reasons that follow, we shall affirm.

FACTUAL BACKGROUND

On April 2, 2014, Edward Wilsey, a contractor, was working to repair a boiler in a building owned by Frank DeSimone and located at 1721 Bank Street in Baltimore City. The building was situated on the southwest corner at the intersection of Bank and Register Streets. At the end of the work day, Wilsey packed up his tools, exited the building from a side door onto Register Street, and made several trips to his truck, which was parked on Bank Street on the side opposite the front of the building. During one trip to his truck, Wilsey observed a man — whom he identified as McCoy — "buttoning his pants up after urinating all over the sidewalk" outside the building. Wilsey decided to document the incident "because we have a contractor working in that building and we're responsible for what happens at the job site." He took out his cell phone camera and followed McCoy as he walked from Register Street onto Bank Street. Wilsey asked McCoy what he was doing

urinating on the sidewalk, but McCoy did not respond. Wilsey continued to follow McCoy and was "framing" his shot when McCoy turned around. As Wilsey took a photograph, McCoy ran toward him, hit him in the jaw, and knocked him to the ground. Wilsey described the photograph as showing McCoy "with his fist up ready to . . . throw a right hook." The photograph was admitted in evidence.

McCoy disappeared behind an SUV, but Wilsey got up, followed him, and attempted to take a second photograph. McCoy knocked him down a second time. McCoy then ran around the SUV and Wilsey did not see him again. At that point, DeSimone approached, and Wilsey asked him to call the police, which he did.

DeSimone testified that he saw Wilsey follow McCoy up the street with his camera in his hand and heard Wilsey tell McCoy to stop so he could take a picture. According to DeSimone, McCoy did not engage with Wilsey and kept walking away. DeSimone lost sight of McCoy and Wilsey for fifteen to twenty seconds, but as he turned a street corner, he saw McCoy hit Wilsey in the face.

Tameeka Gilmore, a friend of McCoy, testified for the defense. She said she was giving McCoy a ride to a cookout in Patterson Park when he asked her to stop on Bank Street so he could stop by a friend's house. When McCoy got out of her Honda Accord, she remained in her car, double parked, about ten feet away from the corner of Bank and Register Streets. After a few minutes, Gilmore looked through the windows of her vehicle and saw McCoy talking or arguing with an "older, white male" who was holding a cell phone and appeared "tipsy, like he was drinking a little bit." As McCoy walked away, the man rushed

up behind him and said, "'not in my neighborhood.'" McCoy put up his hands "as if, you know, he was defending hi[m]self." Gilmore testified that the older man backed up, tripped on a curb, and fell to the ground. Gilmore did not see McCoy strike the man. McCoy then entered Gilmore's vehicle, and the two drove away.

DISCUSSION

I.

McCoy contends that the circuit court erred in refusing to instruct the jury on self-defense. At trial, McCoy requested the court to instruct the jury using Maryland Criminal Pattern Jury Instruction ("MPJI-CR") 5:07, which provides, in relevant part:

> You have heard evidence that the defendant acted in self-defense. Self-defense is a complete defense and you are required to find the defendant not guilty **if all of the following four factors are present**:
>
> (1) the defendant was not the aggressor;
>
> (2) the defendant actually believed that he was in immediate and imminent danger of bodily harm;
>
> (3) the defendant's belief was reasonable; and
>
> (4) the defendant used no more force than was reasonably necessary to defend himself in light of the threatened or actual harm.
>
> In order to convict the defendant, the State must prove that self-defense does not apply in this case. This means that you are required to find the defendant not guilty, unless the State has persuaded you, beyond a reasonable doubt, that at least one of the four factors of complete self-defense was absent.

MPJI-Cr 5:07 (2d ed., 2013 Supp.) (emphasis added).

The trial court refused to instruct on self-defense, and explained:

> [B]ased on my recollection of the testimony and the first State's witness testified that he was walking after the Defendant and not chasing him in an aggressive manner for the purpose of getting a photo of the Defendant and I don't find the defense witness credible because at the end of all of her testimony, she indicated that she was able to clearly see what was going on through the tint of the truck and that it was daylight and she had the ability to see what was going on through the tint of the truck. So I'll deny your request.

Although, as McCoy notes, the trial judge stated that it did not find Gilmore to be a credible witness, the judge later explained that she denied the request for a self-defense instruction "because the defense wasn't generated" by the evidence. McCoy did not lodge an objection after the trial judge instructed the jury, but we note that the trial judge granted McCoy a continuing objection to the court's refusal to give an instruction on self-defense.

McCoy maintains that the court erred in not applying the "some evidence" standard in determining whether the issue of self-defense had been generated, and erred in determining that the issue of self-defense was not generated by the evidence at trial. We disagree that there was "some evidence" of each of the four elements required for self-defense.

A trial 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." Maryland Rule 4-325(c). The court shall give a requested jury instruction if it is a correct statement of the law, is generated by the evidence, and is not fairly covered by the other instructions given. *Preston v. State*, 444 Md. 67, 81-82 (2015) (and cases cited therein). But, if a requested instruction "'has not been generated by the evidence, the trial court is not required to give it.'" *Coleman-Fuller v. State*, 192 Md. App. 577, 592-93 (2010) (quoting *General v. State*,

367 Md. 475, 485-87 (2002)). Furthermore, a court is not required to instruct on self-defense unless there is some evidence of all elements of the defense. *Cunningham v. State*, 58 Md. App. 249, 257 (1984). Whether there was sufficient evidence to generate a requested instruction is a question of law which we review *de novo*. *Bazzle v. State*, 426 Md. 541, 548-50 (2012).

In *Dykes v. State*, 319 Md. 206, 215-16 (1990), the Court of Appeals explained what is meant by "some evidence," stating:

> *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. It need not rise to the level of "beyond reasonable doubt" or "clear and convincing" or "preponderance." The 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**.

Dykes, 319 Md. at 216-17 (italics in original; bold emphasis added).

McCoy contends that the jury could have inferred from the evidence at trial that he "actually and reasonably believed himself in imminent danger of bodily harm," and that, although he "did hit Mr. Wilsey, the blow was not excessive, but just the amount of force necessary to stop Mr. Wilsey from continuing to come at him."

We disagree that there was any evidence from which a rational finder of fact could have found that McCoy in fact reasonably believed himself to be in "imminent or immediate danger of death or serious bodily harm" by Wilsey. There was no evidence from which the jury could have found that Wilsey hit McCoy or threatened to do so. Nor was there any

evidence to establish that McCoy actually believed he was in danger of death or serious bodily harm from the man with the cell phone. Even Gilmore's account would not support a conclusion that Wilsey's approach of McCoy constituted sufficient aggression to justify McCoy's punch to the face. The evidence presented at trial was not sufficient to generate a self-defense instruction.

II.

McCoy next contends that the trial court erred in refusing to allow defense counsel to question Gilmore about a prior conviction for theft in an attempt to "draw the sting" out of the conviction. At trial, the following occurred:

> [DEFENSE COUNSEL]: I do want to ask you one thing cause I know Madam State is going to ask you about. There, there's something on your criminal record –
>
> [GILMORE]: Mm-hmm.
>
> Q. – from like 2008.
>
> A. Mm-hmm.
>
> Q. Was that, did you get convicted of something?
>
> A. I did.
>
> Q. What was it?
>
> A. It was theft.
>
> Q. Shoplifting.
>
> A. Yes.
>
> [PROSECUTOR]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Well, what was the nature of that?

[PROSECUTOR]: May we approach?

THE COURT: Yep.

[DEFENSE COUNSEL]: I'll withdraw the question.

THE COURT: Move to strike.

[PROSECUTOR]: Move to strike.

THE COURT: The last question and the responses will be stricken from the record.

[DEFENSE COUNSEL]: Um, the thing that's on your record, did you go to court for it?

[GILMORE]: Yes.

[PROSECUTOR]: Objection.

THE COURT: Sustained. You have anything else regarding her record[?]

[DEFENSE COUNSEL]: Nothing else regarding her record.

McCoy is correct that Maryland law allows defense counsel to preemptively disclose evidence of a witness's prior convictions on direct examination. *See, e.g., Cure v. State*, 421 Md. 300, 313-321 (2011), and *Brown v. State*, 373 Md. 234, 237-38 (2003). The above-quoted portion of the transcript reveals, however, that defense counsel *did* elicit testimony that Gilmore had previously been convicted of theft, and *did* put that information before the

jury. If McCoy is complaining that the trial court did not permit him to elicit evidence concerning details about Gilmore's theft conviction, his complaint is without merit.

In Maryland, "only the name of the conviction, the date of the conviction, and the sentence imposed may be introduced to impeach a witness." *State v. Giddens*, 335 Md. 205, 222 (1994) (internal citations omitted). "A trial court should never conduct a mini-trial by examining the circumstances underlying the prior conviction." *Id.* As a result, the trial court did not err in limiting defense counsel's follow-up questions regarding additional details about Gilmore's prior theft conviction.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.