Circuit Court for Anne Arundel County
Case No. C-02-CR-000822

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 726

September Term, 2016

DERRAN PATRICK CLAGGETT

v.

STATE OF MARYLAND

Eyler, Deborah S.
Kehoe,
Shaw Geter,
JJ.

Opinion by Kehoe, J.

Filed: September 28, 2017

Derran Patrick Claggett was convicted of second-degree assault following an altercation with Latiese Riley, which arose out of appellant's efforts to seek visitation with their infant child. In his appeal from that conviction, appellant presents the following issues:

> 1. Did the trial court err in refusing to give a defense of property jury instruction despite it being generated by the evidence?
>
> 2. Did the trial court abuse its discretion by denying defense counsel's motion for a mistrial when the prosecutor alluded to Mr. Claggett's right to remain silent on two occasions during closing argument?

We will affirm the judgment of the trial court.

Background

Appellant does not argue that the evidence presented at trial was legally insufficient, so we will summarize the evidence in the light most favorable to the State in order to place appellant's contentions in context. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

During the summer of 2015, appellant had a daughter with Ms. Riley. For a time, they co-parented the child without the benefit of a custody agreement. On August 28, 2015, appellant visited Ms. Riley's residence in order to visit the child, who wasn't feeling well that day. Ms. Riley testified that she was expecting appellant to come over and visit with the child, but, when appellant arrived around 8 p.m., he put the child into her car seat and prepared to leave the house with her. Ms. Riley objected, because the child was not feeling well, and Ms. Riley was not comfortable with appellant's taking

her. Appellant became agitated and, notwithstanding her concerns, took the child out to his car and secured the car seat.

Ms. Riley continued to object, and appellant came back up to where she was on the porch and the two argued over whether appellant should take the child. Ms. Riley started down the steps toward appellant's car to retrieve the child. Though she felt appellant "try to push [her] down the rest of the steps," she did not fall. Appellant ran toward the car to block her path. Ms. Riley testified that, at this point, appellant began punching her in the head and the face. A struggle ensued, as Ms. Riley attempted to enter the car through several different doors to retrieve the child while being hit and otherwise physically rebuffed by appellant. Ms. Riley's grandmother appeared briefly to try to assist her, before going back to the house to call the police.

Appellant then changed tactics, getting into the driver's seat and driving the car, with Ms. Riley in it. Seeing she was undeterred, appellant tried several times to drag Ms. Riley from the vehicle and physically subdue her. Ms. Riley continued to get back in the car, with the goal of getting the child out. At one point, Ms. Riley was dragged alongside the vehicle as appellant attempted to drive off. Ms. Riley testified that during the latter part of the incident, the child was screaming and her car seat had come undone. Ms. Riley testified that she let go of the car once appellant swerved toward other cars in the parking lot, which caused her to strike one of the cars. At that point, appellant left the area with the child.

Additional facts needed to understand the issues involved in this appeal are discussed within the corresponding analysis sections below.

ANALYSIS

I. The Defense of Property Instruction

At trial, appellant requested a defense of property jury instruction, arguing that Ms. Riley's entry into his car during the altercation entitled him to use force to remove her from the vehicle. During a discussion of what jury instructions should be issued, the following exchange occurred between appellant's trial counsel and the court:

> [DEFENSE]: All right, real quickly. It — the way the instruction is, it is not that you actually have committed the acts. It is that a reasonable person would believe that you are about to commit the act and that is what is important because again look at the logic. I see someone getting into my car okay. They may be decided to get into my car because they just want to go to sleep. But I don't have to wait to find out what the intent to do — the reasonable assumption is they are getting into my car to deprive me of my ability to use it if when and where I want to use it.
>
> THE COURT: Right. And you are generating that when you are telling me that version or that example. Nothing has been generated in my mind from the defense to even kind of get over that threshold issue.
>
> [DEFENSE]: Oh no, she was very clear. She didn't want the car to leave. She was very clear that —
>
> THE COURT: No, no she wanted — she was very clear that she wanted her baby out of that car.
>
> [DEFENSE]: But she had to keep the car from leaving in order to do that. She could — and as a matter of fact, when it began to leave, she tried to do everything she could and I believe she said she was trying to get him to stop. That is what she said. She was trying to get him to stop by hanging on the car, she thought he would stop.

> Well, that is interfering with his right to drive that car away. And that was her intent. She said that.

The court refused to give the instruction.

In his brief, appellant argues that the trial court abused its discretion in denying his request for a defense of property instruction. According to appellant, Ms. Riley's presence in his car entitled him to use force to remove her.

The State counters that a defense of property instruction was not generated in this case because there was no evidence to substantiate that appellant actually believed his property was endangered. Ms. Riley's testimony revealed that her only intention was to remove the child from the car—not to interfere with appellant's right to use the vehicle.

A. The Standard of Review

The trial court is responsible for instructing the jury "as to the applicable law and extent to which the instructions are binding." Md. Rule 4-325(c). "We review the trial court's decision not to grant a jury instruction under an abuse of discretion standard." *Johnson v. State*, 223 Md. App. 128, 138 (2015). When evaluating whether the trial court abused its discretion, we consider "'(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.'" *Malaska v. State*, 216 Md. App. 492, 517 (2014), *cert denied*, 135 S.Ct. 1162 (2015) (quoting *Bazzle v. State,* 426 Md. 541, 549 (2012)).

B. The Trial Court Did Not Abuse its Discretion by Refusing to Give a Defense of Property Instruction

Appellant's contention that his request for a defense of property instruction should have been granted hinges on the second factor of the abuse of discretion analysis, namely whether it was applicable to the facts of this case. The requirement is that some evidence must be presented on the matter:

> *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.

Arthur v. State, 420 Md. 512, 526 (2011) (emphasis in the original). Even though this is a seemingly low bar, every element of the defense must be supported by some evidence in order for the instruction to be appropriate. *Marquardt v. State*, 164 Md. App. 95, 131 (2005).

Maryland Pattern Jury Instruction 5:02.1 on defense of property using nondeadly force reads:

> You have heard evidence that the defendant acted in defense of [his] [her] property. Defense of property is a defense and you are required to find the defendant not guilty if all of the following three factors are present:
>
> (1) the defendant actually believed that (name of person) was unlawfully interfering [was just about to unlawfully interfere] with [his] [her] property;
>
> (2) the defendant's belief was reasonable; and
>
> (3) the defendant used no more force than was reasonably necessary to defend against the victim's interference with the property.

> In order to convict the defendant, the State must show that the defense of property does not apply in this case by proving, beyond a reasonable doubt, that at least one of the three factors previously stated was absent.

Appellant was not entitled to this instruction, as he failed to satisfy the first criterion, showing that he actually believed Ms. Riley was interfering with his car.

A criminal defendant can provide evidence of the beliefs relevant to his defense through his own testimony. *See State v. Martin,* 329 Md. 351, 361 (1993) ("Ordinarily, the source of the evidence of the defendant's state of mind will be testimony by the defendant."); *Sims v. State*, 319 Md. 540, 552-53 (1990) (noting that to generate a manslaughter instruction based on hot-blooded response, "the blood must indeed be hot, and under some circumstances only the hot-blooded killer can attest to that.") However, appellant did not to testify, so there was no such evidence regarding his state of mind or actual beliefs at the time of the altercation.

Appellant notes that although he did not testify, his subjective belief may be inferred from the circumstantial evidence introduced by the State's witnesses, and he argues that his repeated efforts to keep her from getting into the car give rise to the inference that he acted to defend his property. However, the testimony given by Ms. Riley reflects her desperate struggle to reach the child and his efforts to keep her from that objective. As Ms. Riley stated when testifying about the struggle over the infant, "The only thing I wanted to do was get her out of the car." Appellant notes that while describing her efforts to free the infant's car seat after it became stuck inside the vehicle, Ms. Riley said of appellant, "At this time now he's really upset because I'm in his car." However, this

statement was made within the context of the struggle for the child, and therefore we find it indicative of appellant's demeanor concerning the altercation rather than directed toward Ms. Riley's entry into the vehicle. The dispute between appellant and Ms. Riley concerned their child, not his automobile.

We conclude that appellant failed to generate "some evidence" to show an actual belief that Ms. Riley was interfering with his vehicle, and therefore the trial court did not abuse its discretion in denying appellant's request for the defense of property instruction.

II. The Motion for a Mistrial

Appellant also challenges the court's denial of his motion for a mistrial after the State made what appellant believes were impermissible references to his decision not to testify.

To provide proper context for the prosecutor's closing argument remarks, we first turn to comments made by defense counsel in his opening statement, explaining what happened the night of the brawl (emphasis added):

> [Ms. Riley] comes running out of the house. And she is yelling and screaming.
>
> . . .
>
> She was not saving this child. She, if anything, was putting the child in danger, to grab onto a car and open the doors, what she is going to tell you, and reach in and try to pull out a car seat while the car is moving, a child in a car seat if you would try and pull that car—the child out of a moving car, you know, you could really injure the child. That makes no sense.
>
> *The person that was irresponsible, the person that was causing the confrontation that night* was a person who for just some reason felt that her power of veto was being eroded by my client, and she *losing all self-control, ran after, according to her, a moving car, opened the door to grab the child and pull the child out.*

> Now, I will submit to you that the police did a great investigation in this case. They took pictures of [Ms. Riley]. You will see what—she had cuts on her, there is no doubt about it. *The police took pictures of my client two days later and he had cuts on him*. I mean, there is no doubt that in fact there was a confrontation. But *this is a confrontation that was started by Ms. Riley*.

This theory—that Ms. Riley was to blame for the brawl, because she was the person who lost control, injuring appellant first and then putting their child in danger—was the central theme of the defense's opening argument.

As part of the State's case, two witnesses—Ms. Riley and her grandmother—testified that appellant repeatedly assaulted Ms. Riley, pushing her down the steps, punching and kicking her in the head, pulling her out of his car, putting her in a chokehold, dragging her across the ground. But neither witness said that Ms. Riley hit, scratched, struck, or assaulted appellant. In fact, Ms. Riley, during cross examination by defense counsel, affirmatively denied striking appellant in any way.

Appellant's father was a witness for the defense. He testified that he saw his son twice on the night of the altercation—once at about 8 p.m., around the time Ms. Riley approximated appellant came to her house, and then later around 9 or 10 p.m. He also testified that appellant was bruised on both of those occasions, although appellant only had the infant with him the second time around. The father's testimony, however, did not clarify whether appellant's first visit—with a bruised face—came before or after appellant's altercation with Ms. Riley.

It was during closing arguments that the prosecutor made what defense counsel asserted were references to the defendant's decision not to take the stand. Defense

counsel objected and moved for a mistrial both times the references were made, and both times the judge, after a bench conference, denied the motions. In each incident, the prosecutor resumed her closing argument without any instruction from the judge to her or to the jury.

The first instance appellant points to went as follows (emphasis added):

> [STATE]: . . . So think about what that means. The Defendant's father told you . . . there were some injuries on the Defendant the first time so, you know, any sort of contention or argument that he was injured as a result of this is not substantiated at all. *And you never heard how any injuries occurred. All you heard is—*
>
> [DEFENSE]: Objection. Objection. May we move to the Bench, please?
>
> THE COURT: Sure.
>
> (Whereupon, a Bench Conference followed.)
>
> [DEFENSE]: Your Honor, we move for a mistrial. This is real dangerous territory. She has just commented that my client did not testify and it is very dangerous. She did not say that -- she said there is no explanation for the injuries. He is the one that has to do the explanation for the injuries.
>
> THE COURT: Okay.
>
> [DEFENSE]: And he did not take the stand and his case is right on point. You cannot say—you can say that the State's case is uncontroverted. You cannot even say it is uncontradicted when the Defendant would be the one called upon to contradict or to at least respond to that. Now she is contradicting where the injuries came from.
>
> THE COURT: Okay. I am going to deny the request for a mistrial. It is a fair commentary in the testimony of the father, Mr. Claggett and his father.
>
> [STATE]: Thank you.

[DEFENSE]: But the problem is how would he know about a hearsay comment? She could have cross—examined him on that and she did not.

THE COURT: I made my ruling. Thank you.

[STATE]: Thank you.

The bench conference was concluded. The court did not issue any curative instruction. The prosecutor resumed her closing argument, and the second challenged remarks were made shortly thereafter:

[STATE]: But look at this sharp incision. Does that look like a scratch mark by a human or does that look more like maybe something that could occur in the cement trucking business like we know the Defendant works because his dad told us that which is interesting but, regardless, *the more important thing is that these were over 48 hours later and we do not know how or when they occurred.*

[DEFENSE]: Objection. May we please approach?

THE COURT: Sure.

(Whereupon, a Bench Conference followed.)

[DEFENSE]: She continues the same line and is calling upon him to explain these injuries. I mean this absolutely grounds for a mistrial, Your Honor. She does not have to speak to that. She asked no questions of the father where they came from and she is repeatedly commenting that my client has not explained how he got hurt. He is the best person to explain it.

THE COURT: I disagree with you. I am going to overrule the objection based on that.

[STATE]: Thank you.

THE COURT: I should say I am denying your motion because it was absolutely a motion. Thanks.

At that point, the bench conference concluded and the prosecutor continued with her closing argument. Again, no curative instruction was issued by the court.

Appellant contends that the trial court abused its discretion when it denied his motion for a mistrial. He argues that by highlighting the lack of an explanation for his injuries, the prosecutor improperly commented on the appellant's decision to not take the stand. Only appellant could have provided the jury with the explanation for his injuries, appellant argues. Therefore the prosecutor's comments violated appellant's right to remain silent. Appellant maintains that the prejudice inflicted by these comments could only have one remedy: a mistrial.

The State counters that the prosecutor, in highlighting for the jury that there was no explanation for appellant's injuries, was commenting only on the evidence put before the jury by the defense. We agree. As we will explain, the prosecutor did not step out of bounds by pointing out the lack of evidence to support appellant's contention that Ms. Riley was the source of appellant's injuries.

A. The Standard of Review

"It is well settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge's determination will not be disturbed on appeal unless there is abuse of discretion." *Simmons v. State*, 436 Md. 202, 212 (2013) (quoting *Carter v. State*, 366 Md. 574, 589 (2001)). If an improper statement is made before the jury, the judge "'must assess [its] prejudicial impact… and assess whether the prejudice

can be cured.' If the prejudice cannot be cured, 'a mistrial must be granted.'" *Walls v. State*, 228 Md. App. 646, 668 (2016) (quoting *Carter v. State*, 366 Md. 574, 589 (2001)).

B. The Prosecutor Did Not Comment on Appellant's Failure to Testify

Maryland courts have long held it inappropriate for a prosecutor to comment on a defendant's failure to testify in a criminal trial. The United States Supreme Court prohibited such comment in *Griddin v. California*, 380 U.S. 609, 614 (1965), but that protection was afforded to Maryland defendants decades earlier in *Smith v. State*, 169 Md. 474 (1936) (hereinafter *Smith I*). The protection against prosecutorial comment on the accused's failure to testify comes from the Fifth Amendment of the United States Constitution, which privileges against self-incrimination, as well as Article 22 of the Maryland Declaration of Rights[1] and Section 9-107 of the Court and Judicial Proceedings Article ("CJP") of the Maryland Code.[2] *Id.*

The Maryland test for whether a prosecutor's remarks constitute an impermissible comment on a defendant's failure to testify was articulated in *Smith I,* 169 Md. 474 (1936). In that case, an appeal from a bastardy conviction, Smith claimed the judge should have declared a mistrial after the state's attorney, during closing arguments,

[1] Article 22 of the Maryland Declaration of Rights states, in pertinent part, "[t]hat no man ought to be compelled to give evidence against himself in a criminal case."

[2] CJP § 9-107 states, "A person may not be compelled to testify in violation of his privilege against self-incrimination. The failure of a defendant to testify in a criminal proceeding on this basis does not create any presumption against him."

pointed to Smith and said, "This prosecuting witness has testified that this defendant is the father of the child, and *this defendant has sat here all during the trial and has not denied his fatherhood*." *Id.* at 476 (emphasis added). The Court held the remark unquestionably improper because "it was susceptible of the inference by the jury that they were to consider the silence of the traverser in the face of the accusation of the prosecuting witness as an indication of his guilt." *Id.*[3]

A more recent *Smith v. State*, 367 Md. 348, 354 (2001) (hereinafter *Smith II*), reiterated the test. During closing argument in a case concerning stolen leather goods, the State told jurors they should ask themselves, "*What explanation* has been given to us *by the defendant* for having the leather goods? Zero, none." *Id.* at 352 (emphasis in original). The Court of Appeals concluded that the prosecutor's rhetorical question-and-answer was not simply a comment on the evidence:

> [W]e cannot conclude that the prosecutor's comments merely addressed the lack of evidence to explain Smith's possession of the leather goods. To so conclude would ignore the prosecutor's explicit reference to the defendant and the insinuated duty of the defendant personally to offer an explanation for his possession of the property. The prosecutor's comment went beyond any qualitative assessment of the evidence in that, when he asked the jury "what explanation has been given to use by the defendant," he effectively suggested

[3] The error was not deemed prejudicial, however, because the court, following Smith's prompt objection, "fully, correctly, and impressively advised the jurors of the privilege of the accused not to testify" and instructed them that his no presumption of guilt could be taken from Smith's "neglect or refusal to testify." *Id.* at 477. "The error was followed so closely by its adequate correction at the hands of the court that the minds of the jurors could not have been prejudiced against the accused by the remark."

> that the defendant had an obligation to testify at trial. This burden-shifting is contrary to the basic tenets of our criminal justice system. . . .

Id. at 359.

In *Woodson v. State*, 325 Md. 251, 267 (1992), the Court found that a jury might have "infer[red] guilt from Woodson's silence" after the prosecutor pointed to the defense trial table and said, "[T]hey have sat there for 6 days, not here," all the while pounding on the witness stand.[4] The Court held "it is plain that the only person at the defense trial table who could have sat in the witness stand was Woodson himself, and that the prosecutorial comment therefore invited attention to the fact that Woodson did not testify." *Id.*

The prosecutor in *Marshall v. State*, 415 Md. 248 (2010), made an even more explicit reference to the defendant's failure to testify in a trial for cocaine possession with intent to distribute. During defense counsel's closing argument, he referred to his client as a "cocaine addict" and argued he was only in the Fruitland house where he was ultimately arrested to "purchase[] cocaine." *Id.* at 254. In response, the prosecutor said during his closing argument, "*Mr. Marshall did not take the stand* so I ask you to take that with a great deal of caution when [defense counsel] tries to indicate a health problem for Mr.

[4] Woodson's convictions for the first-degree murder of a police officer and attempted second-degree murder of another officer, among others, were reversed on other grounds. Accordingly, the court did not necessarily decide that the prosecutorial comment "r[an] afoul of the constitutional protection against self-incrimination" and whether "the court's instruction to the jury adequately 'cured' the alleged improper prosecutorial remarks." *Woodson*, 325 Md. at 267.

Marshall." *Id.* at 255 (emphasis in the original). He later said, "*We don't have Mr. Marshall's thoughts* but we do have so many other pieces and when you put those pieces together, they spell out guilty." *Id.* at 256 (emphasis in the original). The Court found these to be "more direct comments on the defendant's decision not to testify" than the comments in *Smith II* and *Woodson*. *Id.* at 263. "The prosecutor's statements to the jury . . . were used to highlight the fact that the defendant did not testify in an effort to rebut the State's evidence. The prosecuting attorney clearly was using the defendant's silence as support for the State's case." *Id.* at 263–64.

There is an exception to the rule. In *Wise v. State*, 132 Md. App. 127, 139 (2000), a man convicted of possession of cocaine with intent to distribute challenged the prosecutor's comments during his closing argument, arguing that the prosecutor's comments on his failure to testify or call witnesses shifted the burden of proof to him. In opening statements, defense counsel had presented a version of events, including an innocent reason for defendant being at the scene and an aggressive police force baselessly pointing the finger at defendant for drugs left in the area by another party. *Id.* at 143-44. During closing arguments, the prosecutor made the following statements (emphasis in the original):

> There's no evidence that the defendant was waiting for a bus. Where did you hear that? You heard that in his opening statement which the judge just told you is not any more evidence than mine.
>
> *Nobody got on the stand and testified to that.*
>
> . . .

> There's no evidence that the police found the stash in an alley and grabbed an innocent man and charged him with it.
>
> *No witness got on the stand to tell you that, not even the defendant's sister.*

During the State's rebuttal, the prosecutor repeated similar statements (emphasis in the original):

> *My question to you is, where is his evidence for any of the arguments he made?*
>
> . . .
>
> *Where is his evidence that the defendant feared for his safety? Where is his evidence that [the] police were[] aggressive?*
>
> . . .
>
> *[W]here's his support for anything he told you?*

Id. at 139.

This Court ultimately found that the prosecutor's remarks did not violate Wise's right not to testify. Instead, there could "be no doubt that the prosecutor was referring to the failure of the defense attorney, who had made the claim during opening statement that he would produce certain evidence, to follow through." *Id.* at 143. The questions "Where is his evidence?" and, "Where is his support?" referred to evidence the defendant had said he would present. Subsequently, we held that this opening in *Wise* is limited to cases where the defense has promised to present evidence and then fails to do so. *Johnson,* 229 Md. App. at 184.

Appellant's contention that the prosecutor's comments implicated his failure to testify because they suggested that only he could have explained the injuries, is not persuasive. In opening arguments, appellant's trial counsel asserted that Ms. Riley was the cause of appellant's injuries. During the trial, appellant presented evidence on the issue, namely, his father's testimony regarding appellant's injuries when he came home the night of the incident. That the father's testimony was insufficient to connect the dots for appellant's theory regarding Ms. Riley causing his injuries does not change the fact that appellant placed the issue before the jury. Therefore, the prosecutor was entitled to comment on the evidence related to that issue.

The result might have been different if appellant had not presented any evidence at trial, as a similar comment in those circumstances might have veered into the prohibited territory of drawing attention to the defendant's failure to testify. However, appellant presented evidence in this case, although not regarding when he received his injuries. We conclude that the trial court did not abuse its discretion in denying appellant's request for a mistrial on the basis of the prosecutor's statements.

THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.