UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1084

September Term, 2016

SAMUEL DAVID STATON

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Raker, Irma S.
(Senior Judge, specially assigned),

JJ.

Opinion by Raker, J.

Filed: April 17, 2017

Samuel David Staton appeals from his convictions in the Circuit Court for Frederick County for two counts of second degree child abuse. He presents two questions for our review:

> "1. Did the circuit court err in permitting one witness to testify concerning the credibility of a second witness?
>
> 2. Did the circuit court err in refusing to instruct the jury on motive?"

We find no error and shall affirm.

I.

The Grand Jury for Frederick County indicted appellant, Samuel David Staton, with two counts of second-degree physical child abuse. On June 2, 2016, the jury convicted him on both counts. The circuit court sentenced appellant to two concurrent sentences of fifteen years, suspend all but eighteen months, with three years probation.

The following evidence was presented at trial: On June 2, 2015, "L.," a nine-year-old minor child, arrived at school with marks and bruising on his face. Kelly Glotfley, a social worker employed by the Frederick County Department of Social Services, interviewed "L." and testified at trial that "L." informed her that his father slapped him in the face five times with an open hand. Frederick City Police Officer Deborah Kidwell responded to the school, took photographs of "L.'s" injuries, which were admitted into evidence. Officer Kidwell interviewed appellant and Mrs. Staton, parents of "L.," who

both gave statements that were audio-visually recorded. The State played appellant's statement for the jury.

Appellant testified at trial, that on the evening of June 1, 2015, he slapped "L." once across the face to discipline him for refusing to do his homework, for screaming at him, and for failing to calm down after appellant carried him to his bedroom and shut the door. Mrs. Staton testified that she was at work, but appellant called her and told her about the incident.

At trial, Mrs. Staton stated that she did not see a mark on "L." when she went into his bedroom the next morning to wake him for school. "L." would not get up for school and as she sat on his bed, he kicked her repeatedly.[1] As punishment for refusing to get up, and for kicking her, she removed his lava lamp from his room. She stated that "L." became upset, yelled at her, kicked her, and tried to keep her from taking the lamp. Appellant testified he awoke to the sounds of his wife and son yelling at each other. "L." testified at trial that his father entered the room, slapped him "five or four times" in the face, his nose bled, and his father hit him on the arm with a belt. Appellant admitted to striking "L." in the face approximately five times with an open hand and to striking him two times with a belt as punishment. He testified he intended to strike "L." on the backside with the belt but admitted he may have missed and struck him on the arm. In his interview with Officer Kidwell, appellant claimed that the minor child had been behaving badly for a couple

[1] The circuit court admitted photographs showing bruises on Mrs. Staton's legs and side, which she testified were caused by the minor child's kicks.

months before the above incident, he and his wife decided recently to use corporal punishment, and he had not seen his wife and "L." fighting initially. The State asked Mrs. Staton to comment as to the accuracy of her husband's statements:

> "[PROSECUTOR]: So if your husband said that you guys had been having ongoing problems for several months and that you'd decided to start using corporal punishment, *would that be accurate*?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: Would that be accurate?
>
> [THE WITNESS]: No.
>
> ***
>
> [PROSECUTOR]: Okay. So if, if your husband told the detective that he did not see anything physical between you and your son.
>
> [THE WITNESS]: Mmm-hmm.
>
> [PROSECUTOR]: *Is that true*?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [DEFENSE COUNSEL]: Your Honor, can, can I be heard on that?
>
> THE COURT: Sure. Yes.
>
> [DEFENSE COUNSEL]: I don't know how she would know if, what the Defendant saw. It, the –
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> ***

[PROSECUTOR]: I can rephrase it.

THE COURT: Okay. She'll rephrase it. Thanks.

[DEFENSE COUNSEL]: Thank you.

[PROSECUTOR]: So your testimony here today is that your husband came into the room when L. was hitting and kicking you.

[THE WITNESS]: Ah, that's correct.

[PROSECUTOR]: Okay. And if, if he told Detective Kidwell that he was not in the room when that was going on, that he did not come into the room while there was a physical altercation, *would that be accurate*?

[DEFENSE COUNSEL]: Objection.

THE COURT: Grounds on that?

[DEFENSE COUNSEL]: It, it's the same thing. What, she's, [the Prosecutor] is asking if the hus – if the husband's statement that he was not in the room at the time of the altercation whether that would be accurate or not. I mean it, it's calling for her to speculate on the, I think it calls for speculation. *She, it's calling basically for her to opine on the* –

THE COURT: I, I –

[DEFENSE COUNSEL]: *– veracity of the* –

THE COURT: Do you want to ask it a different way? But I mean basically she, she can say if someone, if you're saying X and someone else said Y, would that be. . . .

[DEFENSE COUNSEL]: I, I think that's also, I think that's a hypothetical too. I think that's, calls for, it's a hypothetical.

THE COURT: It can be, but I'm not sure –

[DEFENSE COUNSEL]: Query –

THE COURT: – it is in this case. [Prosecutor].

[PROSECUTOR]: I think that the evidence is clear that's what the interview indicated and she's indicating something that could not coincide with that.

THE COURT: Okay. Objection's noted. Overruled. But . . .

[DEFENSE COUNSEL]: Thank you.

THE COURT: Keep within the boundaries if you can.

[PROSECUTOR]: *So would that be accurate*? That he was not in the room for any of the physical –

[DEFENSE COUNSEL]: I, I'd ask if the –

[PROSECUTOR]: – altercation –

[DEFENSE COUNSEL]: – question could be re-asked because –

THE COURT: Yeah, do you mind? That'd be great –

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[PROSECUTOR]: – that he came into the room while things were still going on physically with you and L. While L. was still hitting and kicking you. *Correct*?

THE INTERPRETER: (Speaks to the witness in Armenian.)

THE WITNESS: Mmm-hmm.

[PROSECUTOR]: So if he said that he didn't come in the room during any physical altercation, would that be accurate?

THE INTERPRETER: (Speaks to the witness in Armenian.)

THE WITNESS: Yes."

The trial court overruled defense counsel's objection, and permitted the witness to answer the State's questions.

At the close of all of the evidence, defense counsel requested the court to instruct the jury as to appellant's motive.

> "[DEFENSE COUNSEL]: Your Honor, I had emailed early this morning, ah, that I had requested that motive, ah, Pattern Jury Instruction 33 – 332, um, be put in and I think I gave a copy to Your Honor's clerk –
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> THE COURT: And I have and I got it and I read it –
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> [DEFENSE COUNSEL]: And I do think that since, when I look at the juxtaposition of the motive instruction with the pattern jury instruction for second degree, um, ah, physical abuse, um, there's, ah, language in the . . . in the instruction itself for second degree physical child abuse that says, 'A parent may use reasonable physical force to discipline a child. A parent may not use physical force simply to inflict pain upon the child.' Et cetera. Um, I think the Defendant's motive with regards to why he put his hands on his son is clearly from, it's been generated by the testimonial evidence that it was clearly for discipline purposes and not to inflict pain or harm, and I think for that reason, I think the motive instruction is completely appropriate and I would request it.
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> THE COURT: [PROSECUTOR].
>
> [PROSECUTOR]: I just think that that's covered under the child abuse statute. I mean that, that's all part of what, um, it, it, the instruction instructs is that reasonable force and, and it takes into account the behavior of the child. So it contemplates, um, that there is a, a, a, a motive for the behavior that could be justifiable and so I just think it's redundant. But, um . . .

> THE COURT: Okay. The Defense has asked for the motive on instruction, which is Maryland Pattern Jury Instruction Criminal what? What's the number? Somebody –
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> [DEFENSE COUNSEL]: Three-three-two.
>
> THE COURT: Three what?
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> [DEFENSE COUNSEL]: Three-thirty-two.
>
> THE COURT: Three-thirty-two. Ah, they argue that, um, there was evidence that the Defendant was, ah, not intending to harm his son, but simply to either defend his wife or to punish him. Or, am I getting your arguments right, Ms. –
>
> [DEFENSE COUNSEL]: Yes, that's correct, Your Honor.
>
> THE COURT: Okay. State, ah, contradicts that, um, and I, and I think appropriately so. I think that the State's argument is, is the correct one in this instance and the motive instruction is not going to be read. [Defense counsel], you'll be able to argue around that –
>
> [DEFENSE COUNSEL]: Understood, Your Honor –
>
> THE COURT: – too as well I think."

At the close of all of the evidence, the circuit court and counsel discussed proposed jury instructions. Defense counsel renewed her request for an instruction on motive; the court declined, again, stating that "[d]efense objections are noted, but other than that you're accepting what . . . I'm about to read." Both parties answered affirmatively, and the circuit court reiterated that the objections were "noted for the record . . . ." Following jury instructions, defense counsel did not renew an objection to the court's failure to instruct on motive. The jury convicted appellant on both counts of second-degree physical child abuse.

Following sentencing, appellant noted this timely appeal.

II.

Before this Court, appellant argues that the trial court erred in two respects: first, that the court erred in permitting one witness to testify concerning the credibility of a second witness, and second, that the court erred in declining to instruct the jury as to appellant's motive.

The State maintains that neither of appellant's appeal issues are preserved for appellate review. As to the merits, the State argues that the prosecutor was not asking one witness to comment on the credibility of another, but merely to clarify factual matters. Even if error, the State argues harmless error. As to the motive instruction, the State argues that the instruction was not required because the jury instructions given by the trial court covered appellant's defense of reasonable discipline, which covered motive.

III.

We address first the State's preservation arguments. We hold that both issues are preserved for our review.

The record is clear that appellant objected on each occasion when the prosecutor asked Mrs. Staton whether her husband's testimony was accurate. Although the majority of defense counsel's reasons were that the prosecutor was asking the witness to speculate,

counsel did tell the court that "She, it's calling basically for her to opine on the . . . veracity of the . . . . [(counsel then cut-off by the court)]."

Defense counsel requested in writing, and verbally, the MPJI-Cr 3:32, Motive, and explained to the court before jury instruction why she believed the instruction was generated. The court made clear that "the motive instruction is not going to be read. . . . you'll be able to argue around that." While Md. Rule 4-325(e) requires an objection after the instructions are given, even though a prior request for an instruction was made and refused, a failure to so object is excused when there is substantial compliance with the Rule and an objection to the court's failure to give the requested instruction would be futile. *See Gore v. State*, 309 Md. 203, 208-09 (1987); *Bennett v. State*, , 568-69 (1962).

Turning to the merits, we agree with appellant that the trial court erred in overruling appellant's objection to the State's questions asking Mrs. Staton to comment on the credibility of her husband. One witness may not comment on the credibility of another witness. *Bohnert v. State*, 312 Md. 266, 277-78 (1988). The credibility of witnesses is for the trier of fact, in this case, the jury. The Court of Appeals explained in *Bohnert* as follows:

> "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. Therefore, the general rule is that it is error for the court to make remarks in the presence of the jury reflecting upon the credibility of a witness. It is also 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. . . .

> 'Whether a witness on the stand personally believes or disbelieves testimony of a previous witness is irrelevant, and questions to that effect are improper, either on direct or cross-examination.'"

Id. at 277 (internal citations omitted). We agree with the State, however, that after considering the entire record and the questions in context, that the error was harmless beyond a reasonable doubt. *Dorsey v. State*, 276 Md. 638, 658-59 (1976). The error could not have contributed to the guilty verdict because the witness's testimony was contradictory and confusing.

Turning to appellant's requested jury instruction on motive, we hold that the trial court did not err or abuse its discretion in declining to instruct the jury separately as to motive. Although ordinarily motive is not an element of a criminal offense, as to the crime of physical child abuse, reasonable parental discipline is a recognized defense. *See Bowers v. State*, 283 Md. 115, 126 (1978) (stating that "the parent of a minor child or one standing in *loco parentis* was justified in using a reasonable amount of force upon a child for the purpose of safeguarding or promoting the child's welfare. So long as the chastisement was moderate and reasonable, in light of the age, condition and disposition of the child, and other surrounding circumstances, the parent or custodian would not incur criminal liability for assault and battery or a similar offense.") (internal citations omitted).

Maryland Rule 4-325(c) requires a trial court to instruct a jury on a requested issue if:

> "(1) the requested instruction is a correct statement of the law;
> (2) the requested instruction is applicable under the facts of

> the case; and (3) *the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given*."

Thompson v. State, 393 Md. 291, 302-03 (2006) (emphasis added).

The motive instruction requested by appellant was from MPJI-Cr 3:32, Motive, and reads as follows:

> "Motive is not an element of the crime charged and need not be proven. However, you may consider the motive or lack of motive as a circumstance in this case. Presence of motive may be evidence of guilt. Absence of motive may suggest innocence. You should give the presence or absence of motive the weight you believe it deserves."

The court instructed the jury as to the elements of child abuse, stating as follows:

> "Ladies and gentlemen, the Defendant is charged with the crime of child abuse in the second degree. Child abuse is physical injury of a child under 18 years of age caused by a parent. In order to convict the Defendant of second degree child abuse the State must prove, one, that the Defendant caused physical injury to [L.] as the result of cruel or inhumane treatment or malicious act. Two, that at the time of the conduct [L.] was under 18 years of age. Three, that at the time the Defendant was the parent of [L.], and four, that as a result [L.]'s health or welfare was harmed or threatened. A parent may use reasonable physical force to discipline a child. However, a parent may not use physical force simply to inflict pain upon the child. In addition, a parent may not use, use physical force that is inhumane or cruel. In determining whether the physical force used by the parent was reasonable you should look at all of the surrounding circumstances including such factors as the age, physical and mental condition of the child, the behavior that led to the use of physical force, the extent and duration of the physical contact with the child, and the impact or injury to the child if any resulting from the use of the force."

Appellant did not object to this instruction. Indeed, this instruction permitted the jury to consider the parental motive in applying force to the child and advised the jury that if it considered the force used to be reasonable, the force was legally justified and not criminal conduct. The given instruction covered the defense of legal and justifiable discipline by a parent to a child and the separate motive instruction requested by defense counsel was not required or mandatory. We find no error or abuse of discretion in declining to instruct the jury with a separate instruction as to motive.

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