UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2587

September Term, 2015

DOUG JOSEPH STAUB

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.
Dissenting Opinion by Arthur, J.

Filed: December 14, 2016

Tried by a jury in the Circuit Court for Howard County, appellant, Doug Joseph Staub, representing himself, was convicted of second-degree assault.[1] The trial court sentenced him to four years in prison, suspending all but 30 days. Thereafter, appellant, with the assistance of counsel, timely noted this appeal, presenting two questions for our consideration, which we have consolidated and rephrased:[2]

> Did the trial court abuse its discretion in instructing the jury on second-degree assault and in responding to a question relating to that instruction from the jury during its deliberation?

For the reasons that follow, we conclude that the trial court abused its discretion in instructing the jury on the charge of second-degree assault and in fashioning a response to the jury's question based on that instruction. Therefore, we shall reverse the judgment of the circuit court and remand the matter to that court for a new trial.

FACTS AND LEGAL PROCEEDINGS

Brian Clark, an avid bicyclist, averages "a couple hundred miles a week" cycling on the roads of Howard County. On the evening of April 16, 2015, Clark and a friend,

[1] Prior to the selection of the jury, the State *nolle prossed* the remaining charges in the indictment, all related to traffic offenses.

[2] The questions as presented by appellant in his brief are:

> 1. Did the trial court err in instructing the jury on second-degree assault?
> 2. Did the trial court err in its response to a question from the jury during deliberations?

along with approximately eight other riders, undertook a 24 to 25-mile group ride, beginning at the Race Pace bicycle shop in Columbia, Howard County.[3]

Clark's bicycle was equipped with a flashing light for safety, as well as a rear facing "Fly6" video/audio camera, which was mounted on the rear of the bicycle, "on basically the tube that holds the seat." The camera was in use on April 16, 2015 and recorded Clark's ride, including a confrontation with appellant. The video was shown to the jury and admitted into evidence at trial as State's exhibit 1.

Clark testified that, during the ride, he passed appellant, whom Clark believed to have stopped his minivan in the middle of the road in wait for the cycling group. As Clark and two other riders rode past him at approximately 18 miles per hour, appellant moved his car to keep up with the cyclists and beeped his horn, yelled, and cursed at them from his car, as if the cyclists had done something wrong.

At one point, the Fly6 video showed Clark riding in the left side of the lane, nearly into oncoming traffic; Clark explained that appellant had slammed on his brakes and swerved in an apparent attempt to get Clark to ride into his van. As a result, Clark was forced to jump the curb and ride on the sidewalk.

As Clark continued straight on the road, appellant turned right in his van. When a member of the cycling group yelled to Clark that he was going the wrong way, however, Clark turned around to find appellant speeding up and slowing down to block him from getting over to the right side of the road.

[3] Clark had not cycled the chosen route before that day, and, of the group, Clark knew only Mark Avie, the friend who suggested the ride.

Eventually, appellant exited his van and confronted Clark, admonishing him to stay to the side of the road. Clark called appellant a "fucking idiot," advised appellant he had a camera, and filmed him and his license plate so the police could later identify the man "who was basically trying to attack me with his car." Clark testified that appellant responded by striking the camera with his hand as Clark sat on his bicycle.

During cross-examination, appellant asked Clark why the video showed the bicycle falling to the ground, and Clark answered, "Because you hit my bike, and you hit me in the back." When appellant characterized the bicycle as having been thrown down or dropped by Clark, however, Clark did not disagree and said he took "a couple steps away from the bike" at that point, before his companion said, "let's go."[4]

Clark alerted the police to the confrontation with appellant when he returned to the bike shop later that evening.

Erik Anderson was a member of Clark's riding group on the evening in question. During the ride, Anderson stated, appellant honked and followed closely behind him in his van. Thinking that appellant was trying to signal that a rider behind him had a problem, Anderson slowed down to let the vehicle pass. Instead of passing, however, appellant pulled up beside him and starting yelling things out his window to the effect that the cyclists should not be there.

[4] On the video comprising State's exhibit 1, it appears that the bicycle with the rear-facing camera attached falls to the ground after appellant makes a movement toward it with his hand, but it is not apparent from the video what caused the bike to fall or whether appellant touched the bicycle, Clark, both, or neither.

When Clark passed Anderson, it appeared to Anderson that appellant sped up to catch Clark. Anderson observed appellant acting aggressively toward Clark—speeding up in front of him and then putting his brakes on so Clark could not get past him.

At one point, Anderson yelled to Clark that he had made a wrong turn; appellant waited for the pair to turn around and then used his vehicle to push Clark toward the center of the road. Then, appellant pulled over and exited his vehicle, and it appeared to Anderson that he was beckoning Clark for a fight.

Anderson observed appellant make contact with Clark's bicycle—"his bike seat or his bike bag"—while Clark was standing next to the bicycle, holding it. Appellant, he said, "reached out and was swatting his bike, or pulling on his bike, or something like that." When asked if he saw appellant strike Clark, Anderson answered, " I saw Mr. Staub strike Mr. Clark's bike or gear," that is " [h]is bike bag, or his bike seat." Anderson was unaware whether the bicycle made contact with Clark as a result.

Appellant's attempt at testifying on his own behalf was met with numerous objections by the State, most of which were sustained by the court as comprising argument rather than testimony. In his closing, appellant argued that the cyclists violated numerous rules of the road and put him in fear by swerving in front of his car. Pointing to the video of the incident, appellant denied striking Clark's body or putting him in fear of offensive contact to support the charge of assault, but he admitted to touching the camera mounted on Clark's bicycle.

DISCUSSION

Appellant contends that the trial court erred in granting the State's request for a

modified jury instruction on the battery version of assault because the instruction improperly implied to the jury that Clark's bicycle was an extension of his person. Whether the bicycle was an extension of Clark's body, and, therefore, whether striking the bicycle amounted to offensive physical contact with Clark, appellant continues, should have been left to the jury to determine as a factual matter. Similarly, he concludes, when the jury, during its deliberations, sent a note to the court asking, "Is the camera which is on the bike an extension of Brian Clark's person?" the court compounded its instructional error in answering the question in the affirmative, as its answer invaded the fact-finding province of the jury.

The State first raises a preservation argument with regard to the jury question and supplemental instruction portion of the issue, on the ground that appellant's simple suggestion that the court answer the jury's question with a "No" differs from the argument he makes on appeal, that is, that whether the camera was mounted on the bicycle such that it was an extension of Clark's person was for the jury to decide.[5] If preserved, the State

[5] We quickly dispatch the State's preservation argument. In our view, appellant adequately made known to the court his objection to its proposed answer to the jury's question, in accordance with Maryland Rules 4-323(c) and 4-325(e).

During discussion of the proposed answer to the jury's question about whether the bicycle was an extension of Clark's person, appellant did not simply propose that the court answer, "No," as the State suggests. He also stated, "I believe that it is not an extension of his person. I believe it is an outside factor. . . . I don't know, we don't have the bike to look at to see exactly how it is placed on the bike." In addition, when the court asked whether appellant agreed that, pursuant to the testimony that the camera was attached to the bicycle seat, it was an extension of his person, appellant answered, "I don't believe so."

The court was thus aware of appellant's objection and position that the bicycle was not an extension of Clark's person as a matter of law and noted his objection for the record. Therefore, we will not find a waiver of the *pro se* defendant's right to raise (continued…)

contends that the facts established at trial demonstrated that the bicycle was intimately associated with Clark and was therefore an extension of his person as a matter of law. As such, the trial court did not abuse its discretion in giving the State's requested instruction or in fashioning its answer to the jury's question and supplementing its instruction during its deliberations.

The State, proceeding solely on the charge of second-degree assault, requested that the trial court instruct the jury on all three modalities of assault—intent to frighten, attempted battery, and battery—according to Maryland Pattern Jury Instruction-Criminal ("MPJI-CR") 4:01(a), (b), and (c).[6] The State further requested a non-pattern addition to

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the issue on appeal by his unartful objection and failure to except to the supplemental instruction after it was given.

[6] MPJI-CR 4:01 reads:

> The defendant is charged with the crime of assault.
> (a) INTENT TO FRIGHTEN
> Assault is intentionally frightening another person with the threat of immediate [offensive physical contact] [physical harm]. In order to convict the defendant of assault, the State must prove:
> (1) that the defendant committed an act with the intent to place (name) in fear of immediate [offensive physical contact] [physical harm];
> (2) that the defendant had the apparent ability, at that time, to bring about [offensive physical contact] [physical harm]; and
> (3) that (name) reasonably feared immediate [offensive physical contact] [physical harm]; [and]
> [(4) that the defendant's actions were not legally justified.]
>
> (b) ATTEMPTED BATTERY
> Assault is an attempt to cause [offensive physical contact] [physical harm]. In order to convict the defendant of assault, the State must prove:
> (1) that the defendant actually tried to cause immediate [offensive physical contact with] [physical harm to] (name); (continued…)

the instruction, on the ground that the application of force to something connected to Clark's person would have an "assaultive effect." It was the State's position that by hitting Clark's bicycle, "knowing that it was going to push over Mr. Clark," appellant assaulted Clark, and the additional instruction would "give[] a little bit more detail, or more information to the jury to consider."

Cautioning that deviating from the pattern jury instructions can cause "issues," the court nonetheless agreed to give the State's requested instruction. The court instructed the jury in accordance with MPJI-CR. 4:01 (a), (b), and (c) and added the following non-pattern instruction on the crime of assault:

> Assault is also the unjustified, offensive, and non-consensual application of force by direct or indirect physical contact to the person of another, or an extension of that person, i.e., for example, the clothing of that person. *In order to convict the Defendant of assault, the State must prove that the Defendant caused offensive physical contact with Brian Clark. That the contact was a result of an intentional or reckless act of striking the bike, knowing that it was an extension of Brian Clark's person.* And that the contact was not consented to, or legally justified by Brian Clark. (Emphasis added).

> (2) that the defendant intended to bring about [offensive physical contact] [physical harm]; and
> (3) that the defendant's actions were not consented to by (name) [or not legally justified]. (notes on use)
>
> (c) BATTERY
> Assault is causing offensive physical contact to another person. In order to convict the defendant of assault, the State must prove:
> (1) that the defendant caused [offensive physical contact with] [physical harm to] (name);
> (2) that the contact was the result of an intentional or reckless act of the defendant and was not accidental; and
> (3) that the contact was [not consented to by (name)] [not legally justified].

During its deliberations, the jury sent the court two questions. First, it asked, "To be guilty of 2nd degree assault does the defendant have to be guilty of Intent to Frighten and Attempted Battery and Battery. Or can it be any one of the 3 conditions?" (Emphasis in original). The court instructed the jury that assault could be proved by "any one of the three."

Shortly thereafter, the jury asked: "Is the camera which is on the bike an extension of Brian Clark's person?" The prosecutor requested that the court instruct the jury that it was, "[d]epending upon where they found that Brian was seated." Appellant argued that the bike was not an extension of Clark's person, particularly as there had been no testimony as to exactly how the camera, which was arguably the only part of the bike that he had touched, was attached to or placed on the bike. The court, reasoning that, based on the testimony, Clark was touching the bicycle and was close to it at the time appellant hit it or the camera, ruled that the bike was an extension of Clark's person. The court therefore answered the jury's question, "YES, it is."

It is within the trial court's discretion whether to give a particular jury instruction, and we review that decision under an abuse of discretion standard. *Appraicio v. State,* 431 Md. 42, 51 (2013). And, "'[w]here the decision or order of the trial court is a matter of discretion it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id*. (quoting *Atkins v. State*, 421 Md. 434, 447 (2011)).

The main purpose of jury instructions is "'to aid the jury in clearly understanding the case, to provide guidance for the jury's deliberations, and to help the jury arrive at a

correct verdict. Jury instructions direct the jury's attention to legal principles that apply to the facts of the case.'" *Dickey v. State,* 404 Md. 187, 197 (2008) (quoting *General v. State,* 367 Md. 475, 485 (2002)).

Maryland Rule 4–325(c), which governs the procedure a court must follow when giving instructions to the jury, states:

> **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 may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

Rule 4–325(c) "'requir[es] the trial court to give a requested instruction under the following circumstances: (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, 302–303 (2006) (quoting *Ware v. State,* 348 Md. 19, 58 (1997)). In evaluating whether competent evidence has been adduced to generate the requested instruction, we view the evidence in the light most favorable to the defendant. *General*, 367 Md. at 487.

In addition, supplemental instructions may be given in response to a jury question. Rule 4-325(a). "[C]ourts must respond with a clarifying instruction when presented with a question involving an issue central to the case." *Cruz v. State,* 407 Md. 202, 211 (2009). In answering a jury question, however, a trial court must not respond a manner that is "'ambiguous, misleading, or confusing.'" *Appraicio*, 431 Md. at 51 (quoting *Battle v. State,* 287 Md. 675, 685 (1980)).

Although Rule 4–325(c) requires jury instructions to be given on the applicable law, the same does not apply to facts and factual inferences. *Patterson v. State,* 356 Md. 677, 684 (1999). Because of its "high and authoritative position," the trial court should take great care in its remarks and should refrain, "'either directly or indirectly, from giving expression to an opinion upon the existence or not of any fact, which should be left to the finding of the jury.'" *Atkins*, 421 Md. at 444-45 (quoting *Dempsey v. State,* 277 Md. 134, 149 (1976)).

Thus, it is improper for a trial court to express its opinion on "a question of fact which the jury is to pass on" because such commentary invades the province of the jury. *Gore v. State,* 309 Md. 203, 213 (1987). Further, an instruction is improper "'when [it] operate[s], ultimately, to relieve the State of its burden of persuasion in a criminal case, *i.e.,* its burden of proving beyond a reasonable doubt all the facts necessary to constitute the offense.'" *Atkins*, 421 Md. 443 (quoting *State v. Evans,* 278 Md. 197, 207 (1976)). As we explained in *Janey v. State*, 166 Md. App. 645, 655 (2006) (quoting *Patterson*, 356 Md. at 684-85):

> . . . Elements, affirmative defenses and certain presumptions relate to the requirement that a party meet a burden of proof that is set by a legal standard. A trial judge must give such an instruction if the evidence generates the right to it because it sets the legal guidelines for the jury to act effectively as the trier of fact. An evidentiary inference. . ., however, is not based on a legal standard but on the individual facts from which inferences can be drawn and, in many instances, several inferences may be made from the same set of facts. A determination as to the presence of such inferences does not normally support a jury instruction.

Considering the particular facts in the present matter, the trial court abused its discretion by giving the State's requested additional jury instruction on second-degree

assault and in supplementing that instruction with an affirmative answer to the jury's question as to whether Clark's bicycle was an extension of his person. The instructions, taken together, improperly invaded the province of the jury.

As no evidence was presented that Clark was in fear of offensive physical contact or harm by appellant, and there appeared to be no dispute that appellant did not come in contact directly with Clark's body, the only way the jury reasonably could have found appellant guilty of assault was if it determined that Clark's bicycle was an extension of his person and that appellant's striking of the camera attached to the bicycle amounted to an indirect offensive touching of Clark. Whether the bicycle was an extension of Clark's body under the circumstances of his confrontation with appellant was a factual issue for the jury to determine, especially in light of the fact that the trial testimony was unclear whether Clark was sitting on, or merely touching, the bicycle when appellant hit the camera attached to it, and the video recording of the incident does not make his position clear.[7]

Instead, the court's instructions implying, and then declaring, that the bicycle was, as a matter of law, an extension of Clark's person improperly advised the jury that the State was not required to produce evidence of that fact. As in *Atkins*, "[t]his would, and did, infringe on [appellant's] right to have the jury, rather than the judge, determine the facts and for the State to prove guilt beyond a reasonable doubt. It was therefore error for the trial judge to give the instruction." 421 Md. at 454. *See also State v. Bircher*, 446 Md.

[7] Indeed, the prosecutor stated, during discussions with the court on the proposed response to the jury's second question, that whether the camera was an extension of Clark's person "[d]epend[ed] upon where [the jury] found that Brian was seated."

458, 465-66, *reconsideration denied* (March 24, 2016), *cert. denied*, 137 S. Ct. 145 (2016) (A trial court should "avoid answering questions in a way that improperly comments on the evidence and invades the province of the jury to decide the case.").

We emphasize, however, that "'[t]he failure to grant an affirmative instruction does not remove the availability of the inference.'" *Patterson,* 356 Md. at 685 (quoting *Bailey v. State,* 63 Md. App. 594, 611–12 (1985)). To be sure, an assault can be committed by a touching of the victim or something attached to the victim, *Vogel v. State*, 315 Md. 458, 461 n.3 (1989), and the prosecutor was certainly free to argue that the manner in which Clark used or held the bicycle rendered it an extension of his body for purposes of proving second-degree assault. But, "statements from counsel and instructions from the bench are quite different, and what might be appropriate argument coming from counsel could constitute an abuse of discretion coming from the trial judge." *Appraicio,* 431 Md. at 55. In this case, the trial court did, indeed, abuse its discretion in instructing the jury.[8]

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY REVERSED; CASE REMANDED TO THAT COURT FOR A NEW TRIAL; COSTS ASSESSED TO HOWARD COUNTY.

[8] We cannot find that the court's error was harmless beyond a reasonable doubt, *see Dorsey v. State*, 276 Md. 638, 659 (1976), as the court's original and supplemental instruction to the jury at least implied that the jury need not determine whether Clark's bicycle was an extension of his person as a matter of fact because the court instructed that it was as a matter of law. It is therefore at least possible that the jury's verdict was based on the court's erroneous instructions rather than its own determination of the factual matter.

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I agree with the majority that the circuit court responded incorrectly to the jury's question, but I disagree that Mr. Staub has preserved that issue for appellate review. When the jury asked whether the camera on Mr. Clark's bicycle was an extension of his person, Mr. Staub did not make the argument that he makes on appeal, *i.e.,* that the answer was for the jury to decide. Instead, Mr. Staub argued that the camera was not an extension of Mr. Clark's person.

On the basis of the positions taken by the parties, the circuit court faced a binary choice between instructing the parties that the camera was an extension of Mr. Clark's person (as the State said) or that it was not an extension of his person (as Mr. Staub said). I would not fault the circuit court for failing to choose a third way that Mr. Staub did not advocate. Mr. Staub may have failed to advocate the third way because he was a layperson representing himself, but he does not get a break from the preservation rules because he had a fool for a client.