Circuit Court for Carroll County
Case No. 06-K-17-048626

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 958

September Term, 2018

DUSTIN REED BARTON

v.

STATE OF MARYLAND

Wright,
Kehoe,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: May 16, 2019

The appellant, Dustin Reed Barton, was convicted in the Circuit Court for Carroll County by a jury, presided over by Judge Richard R. Titus, of second-degree assault. On appeal, the appellant raises two contentions:

1) THE TRIAL COURT ERRED IN PERMITTING THE STATE TO QUESTION THE SOLE DEFENSE WITNESS, APPELLANT'S WIFE, ABOUT THE CREDIBILITY OF THE STATE'S WITNESSES.

2) THE TRIAL COURT ERRED IN REFUSING TO GIVE A SELF-DEFENSE INSTRUCTION.

Factual Background

The entire incident on trial in this case involved a heated argument between the appellant and the alleged assault victim, the appellant's wife Lindsay Webb, in their automobile along the side of the road in Westminster on the morning of May 28, 2017. The key question, the only real question, in the entire case was whether an indisputably fierce argument actually evolved into a physical altercation and, if so, whether the appellant, in the course of that altercation, assaulted his wife.

The story told by the wife on the witness stand corresponded precisely with the story told to Maryland State Trooper Corey Rafter by the appellant. According to both stories, the appellant and his wife had gone to church that morning before going to the Carroll Hospital Center to see their infant daughter, who was in a special care unit at the hospital. The wife was apparently very upset that morning and a hot argument between the two of them ensued. They were both "screaming" and "yelling." The argument ranged over "pretty much everything. Money. Being stressed. Having to drive to see our daughter. His work situation. He was missing a lot of work. Just everything." As the argument continued,

the wife, who was driving, pulled the car over to the side of the road beside The Cow, an ice cream shop. Again according to both, the appellant started "punching the dashboard and hitting the seat" in anger. The wife then slapped the appellant several times. At that point, a car pulled up behind them and the people in the car started yelling at them. The appellant told the interlopers it was none of their business and told them to leave.

At the core of this case is a single simple factual dispute. Did the appellant actually hit his wife? Or did he hit only the dashboard and the seat? Everything else is so much surrounding sound and fury. The eye of the hurricane is that simple question: Did the appellant assault his wife or did he assault only the dashboard?

To that critical fact, only two witnesses testified. The wife testified that the appellant never struck her but that he hit, in anger, the dashboard and the seat. Testifying that the appellant hit his wife, however, was Stephanie Morfessis. Ms. Morfessis, who was on her way to Starbucks with her boyfriend, was traveling on the far side of the road, across from where the appellant's pickup truck was pulled over on the shoulder. She saw the appellant standing outside the passenger window of the pickup truck. She saw what she "believed" was the appellant's fist "winding back and . . . going into the car, making contact with [the wife's] face." According to Ms. Morfessis, the appellant punched his wife, who was in the driver's seat, four or five times. The force of the blows was such that it caused the wife's hair to "fly back and forth." The wife, according to Ms. Morfessis, "wasn't doing anything, she wasn't necessarily fighting back as far as I can remember."

Ms. Morfessis testified that she pulled over and told the appellant to "stop." He looked at her and said, "If you don't get the fuck out of here you're going to be next." Ms. Morfessis drove down the road a bit, pulled into a driveway, and told her boyfriend to call the police. When the 911 operator wanted the license plate number of the pickup truck, Ms. Morfessis turned back and began following the pickup truck as it drove away. The case for assault rests exclusively on the testimony of Ms. Morfessis.

In interesting contrast to the testimony of Ms. Morfessis is that of Dr. Robert Wack. His testimony largely parallels that of Ms. Morfessis except with respect to the one critical question. On that question of whether the appellant assaulted his wife, the testimony of Dr. Wack was inconclusive whereas the testimony of Ms. Morfessis was dispositive.

Dr. Wack was on the road at the same time as Ms. Morfessis, but he was driving on the same side of the road on which the pickup truck was stopped, approaching it from the rear. He saw a man standing outside the closed driver's side of the vehicle having a "conversation or something" with the person in the driver's seat. That man then walked around to the passenger side of the truck, opened the door, and, leaning inside, made a motion with "his arm coming up and down." The man made that motion three or four times. Although Dr. Wack could not see the driver, he believed the man could have been throwing punches. He acknowledged, however, that he could not see inside the truck and could not say what, if anything, was actually hit.

Dr. Wack pulled over about 20 yards in front of the pickup truck and observed the man get in the passenger side of the truck. As the truck began driving, Dr. Wack could

ascertain that the driver was a woman. He continued to follow the truck until it turned into a parking lot for the Carroll Hospital Center. The woman driving the truck dropped off the man at the entrance of the hospital and then went on to park the truck. She used her cellphone and then went into the hospital. Dr. Wack's testimony helped to fill out the context, but it did not help to resolve the single critical question.

The testimony of Trooper Corey Rafter also turned out to be only peripheral in terms of its ultimate significance. When he arrived at the Carroll Hospital Center, he spoke briefly with Dr. Wack in the parking lot and then went into the building. The front desk clerk, who had observed the appellant and his wife still arguing with each other, directed Trooper Rafter to the birthing center. Trooper Rafter interviewed the appellant first, while the wife minded the baby. Trooper Rafter did observe a small cut with fresh blood on the appellant's left thumb and asked him about it. The appellant admitted that "he may have been hitting things." The cut, of course, has no ultimate significance because it could as readily have been caused by a collision with the dashboard as by contact with his wife's jaw.

As Trooper Rafter then interviewed the wife, she was completely calm and did not appear to him to have been the victim of an assault. She advised him that "her hair had been pulled" but that "nothing physical" otherwise occurred. When he asked her to roll up her sleeves, however, he observed bruising on her arm. He photographed the bruises. Trooper Rafter did not observe any bruising to the wife's face or any visible damage to her hair or fingernails. He acknowledged that had she been punched hard in the face multiple times, he would have expected there to be marks on her face. He further acknowledged that

the bruising on her arm looked as if it had been caused by being grabbed and not by being punched. All of Trooper Rafter's testimony, however, was only peripheral. This entire case hinged on the weight of Ms. Morfessis's testimony that she actually saw the appellant's fist "make contact" with his wife's face rather than her inferring that from the surrounding circumstances.

"Were They Lying?" Questions

In view of these simplistic circumstances, we are chagrined to have the appellant presume to make a legal mountain out of a factual molehill. He invokes, and the State responds accordingly, a whole line of cases such as Bohnert v. State, 312 Md. 266, 539 A.2d 657 (1988); Fisher v. State, 128 Md. App. 79, 736 A.2d 1125 (1999); Hunter v. State, 397 Md. 580, 919 A.2d 63 (2007); and Parker v. State, 189 Md. App. 474, 985 A.2d 72 (2009), and the slowly, and painfully, developing body of law prohibiting the asking by the State of "Were they lying?" questions. Intriguing as that evolving body of law might be in other more promising circumstances, it is completely inappropriate in a minor factual skirmish such as this to unlimber such heavy artillery.

Hunter v. State, 397 Md. 580, 919 A.2d 63 (2007), does, indeed, hold that it is error to permit the State to ask a criminal defendant (in this case the cross-examination in issue was of the defendant's wife) so-called "Were they lying?" questions about witnesses whose testimony contradicted the position taken by the defendant.

> [T]he 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.

397 Md. at 596.

The core rationale from which the Hunter holding had proceeded was the well-reasoned opinion of Judge Orth in Bohnert v. State, 312 Md. 266, 539 A.2d 657 (1988). Bohnert established that because the credibility of a witness is a matter exclusively for determination by the jury, to permit a witness, expert or otherwise, to offer his or her assessment of another witness's credibility is an intrusion on the prerogative of the jury. The Hunter extension, however, was to look at the question, "Were they lying?" mechanistically rather than to inquire more deeply into whether the words necessarily requested an assessment of credibility.[1]

In this case, however we are spared any anguish over the Hunter gloss on Bohnert by the saving grace of non-preservation. The State's case of assault against the appellant was based entirely on the testimony of Ms. Morfessis, who was driving by in the opposite direction when she looked over and saw the appellant hit his wife in the face four or five

[1] After the assassination of President Kennedy in Dallas and the subsequent murder of the assassin, Lee Harvey Oswald, by Jack Ruby, Ruby himself was put on trial for murder. Posit hypothetically the following question being put to Ruby on his cross-examination by the Government: "If, Mr. Ruby, 38 independent eyewitnesses have testified that they saw you point a pistol at Oswald's stomach and fire five shots into it, are you saying that they are all lying?" Whatever the words, a fair reading of them would seem to be that Ruby was not being asked to assess the credibility of the 38 witnesses. A fairer reading would be that the Government was accusing Mr. Ruby of himself being the liar. That would obviously not be an occasion to apply Bohnert v. State. See the dissenting opinion of Judge Battaglia, joined by Judge Harrell, in Hunter v. State, 397 Md. at 598–606.

Words have context. It may be the context rather than the literal words themselves that determine the meaning. This is the nub of irony. When Mark Antony told the crowd, "But Brutus is an honorable man," he was really telling the crowd that Brutus was not an honorable man. Words cannot always be taken literally.

times. Our focus is on the State's cross-examination of the wife about Ms. Morfessis's testimony. The lone objection came after the following question.

> Q Okay. So, at the time of this incident it is your testimony that the people driving by that saw Mr. Barton hitting you were mistaken --
>
> [Defense counsel]: Objection.
>
> [The prosecutor]: -- he never hit you?
>
> [Defense counsel]: [Mischaracterization] of her testimony.
>
> THE COURT: Overruled. She can answer.

(Emphasis supplied).

We note in passing that the State's question erroneously stated that multiple persons had been driving by and saw the appellant hit his wife. That was not correct. Ms. Morfessis was the only witness to an actual assault.

The question to which the appellant objected, moreover, was not a "Were they lying?" or "Was she lying?" question. The question simply asked if the wife believed that Ms. Morfessis was "mistaken." Such a question does not run afoul of Hunter. A witness is fully at liberty to dispute the testimony of another witness by asserting that the other witness is mistaken. Joseph F. Murphy, Jr. Maryland Evidence Handbook, Sect. 1303 (4th ed. 2010).

A precise objection to a particular question, moreover, does not embrace an entire extended discussion. In Wimbish v. State, 201 Md. App. 239, 260–61, 29 A.3d 635 (2011), Chief Judge Krauser wrote for this Court:

> "It is well established that a party opposing the admission of evidence 'shall' object 'at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived.'" Ware v. State, 170 Md. App. 1, 19–20, 906 A.2d 969 (2006) (quoting Md. Rule 4–323(a)) (additional citations omitted); see also Md. Rule 5–103(a) ("Error may not be predicated upon a ruling that admits . . . evidence unless the party is prejudiced by the ruling, and . . . a timely objection or motion to strike appears of record . . . ."). Moreover, "objections must be reasserted unless an objection is made to a continuing line of questions." Ware, 170 Md. App. at 19, 906 A.2d 969 (citing Brown v. State, 90 Md. App. 220, 225, 600 A.2d 1126 (1992)). That is, to preserve an objection, a party must either "object each time a question concerning the [matter is] posed or . . . request a continuing objection to the entire line of questioning." Brown, 90 Md. App. at 225, 600 A.2d 1126.

(Emphasis supplied).

The appellant also contends that the State asked the forbidden "Was he lying?" question twice in its cross-examination of the wife with respect to the testimony of Trooper Rafter. That is incorrect. At most, it happened once, not twice. The testimony of Trooper Rafter that the wife was being asked about was so peripheral that any dispute between the wife and the trooper is essentially trivial.

One of the questions concerned whether the wife, in an earlier interview with Trooper Rafter, had told him that at one point the appellant had gotten out of the car in order to yell at her.

> Q So you do not recall saying that Mr. Barton got out of the car, do you recall telling the trooper that part, that you pulled over and Mr. Barton got out of the car to yell at you?
>
> A No.
>
> Q Okay. So, that is wrong, Trooper Rafter is wrong about that?
>
> [Defense counsel]: Objection.

THE COURT: A --

[Defense counsel]: Judge, can we approach?

THE COURT: Sure.

(Emphasis supplied).

After a brief bench conference, the cross-examination continued:

> Q Ms. Webb, are you denying making a statement to Trooper Rafter that at one point Mr. Barton got out of the car at the incident that occurred? And came up to your window?
>
> A He never got out of the car.

At the bench conference after the only objection that was made, defense counsel gave as the reason for his objection that he believed the interview in question had been with Trooper Eckert rather than with Trooper Rafter. Self-evidently, this had nothing to do with "Were they lying?" questions. After that, moreover, there was no further objection. The word "lying" was never actually uttered, either in the question or in the objection.

The appellant's third and final complaint about the cross-examination of his wife is a bit of a tempest in a tea pot. In the State's case in chief, Trooper Rafter testified that when he interviewed the wife at the hospital, he noticed several bruises on her arm. With her permission, he took a photograph of the bruises. He later wanted to take a second picture, but the wife declined to be photographed again. The wife, on cross-examination, disclaimed all memory of that second request. It was the prosecutor who mischaracterized her testimony as an assertion that Trooper Rafter was lying rather than the more innocuous circumstance that she could not remember.

I don't ever remember him telling me that my bruises were worse and that he wanted to take a picture.

Q So--

A He had already taken a picture in the hospital.

Q So, if Trooper Rafter testified today that he wanted to take a second set of photos because your bruises were worse, he is lying to the jury?

[Defense counsel]: Objection. That is [mischaracterizing] what she said. She said she did not recall.

THE COURT: Overruled. She can answer.

[Webb]: I don't remember him ever asking to take another picture of my bruises.

(Emphasis supplied).

The objection was clearly based on the prosecutor's mischaracterizing the wife's earlier testimony. Her claimed lack of memory never suggested that Trooper Rafter was lying. The objection did not charge a violation of Hunter v. State. It charged the prosecutor with having put in the wife's mouth something that she never said. Quite aside from the fact that there was no objection to the "Were they lying?" form of questioning forbidden by Hunter, this entire line of inquiry about Trooper Rafter's observation of bruises is far down an absolutely irrelevant tangent.

The assault in this case alleged that the appellant hit his wife in the face or head with his fist four or five times. He was not charged with having grabbed or squeezed his wife's arm. The wife testified as to no such grabbing of her arm. The appellant's statement to the police acknowledged no such grabbing of his wife's arm. The testimony of Ms. Morfessis,

which was the sole testimony that an assault even took place, made no mention of the appellant's grabbing of his wife's arm. Dr. Wack saw nothing except the appellant's arm going in and out of the window. The very notion of bruises on the wife's arm escalating into the corpus delicti of the assault is nothing but rank after-the-fact speculation by Trooper Rafter, a non-eyewitness. The whole line of questioning was about an irrelevancy.

Even if, arguendo, there were some sort of error buried in this quest for an irrelevant answer, we would be persuaded beyond a reasonable doubt that such error was indisputably harmless.

No Jury Instruction On Self-Defense

The appellant did not request a jury instruction on the subject of self-defense. He nonetheless objected when no such instruction was given. He now contends that it was reversible error for the court not to have given such an instruction.

We hold that Judge Titus was correct in finding that the evidence did not generate the defense of self-defense. Our analysis will not take us long. Of the elements that are required to generate a self-defense instruction, two of the elements are subjective beliefs on the part of the defendant asserting self-defense. It is required that the defendant actually believed he was in immediate or imminent danger of bodily harm. It is also required that the defendant actually believed that the amount of force he used in alleged self-defense was no more force than was necessary to defend himself in light of the threatened or actual harm. Both are subjective states of mind.

In this case, the appellant did not testify in his own defense. In such a case, it is exceedingly difficult for a defendant to prove his subjective state of mind. It is theoretically possible to do so, of course, when on rare occasions there is other actual alternative evidence of what a defendant was actually thinking. The presence and adequacy of such alternative evidence is rare, however, and mere speculation will not do.

In this case, there was absolutely no evidence that the appellant subjectively believed that he was in immediate or imminent danger of bodily harm. There was absolutely no evidence that the appellant subjectively believed that the amount of force he used, striking at his wife's face or head through the passenger window of the car, was no more force than was necessary to defend himself in light of the threatened or actual harm. In view of his position of relative safety outside the car, it would be difficult for such a subjective belief, even if credited, to be deemed reasonable. Any theory of self-defense in this case would have been purely speculative. We affirm Judge Titus's finding that a case of possible self-defense had not been generated by the evidence.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.