Circuit Court for Montgomery County
Case No. 128406C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1591

September Term, 2016

ROBEL HAILESELASSIE

v.

STATE OF MARYLAND

Graeff,
Leahy,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: October 17, 2017

In August 2016, a jury in the Circuit Court for Montgomery County convicted Robel Haileselassie, appellant, of first-degree assault. The court sentenced appellant to a term of twenty years' imprisonment, five years suspended. Appellant presents three questions for our review:

1. Whether the [c]ircuit [c]ourt erred when it refused to instruct the jury on self-defense and hot-blooded response to adequate provocation?

2. Whether the [c]ircuit [c]ourt's supplemental jury instructions were unjustified and prejudicial to [appellant] in response to an appropriate defense closing argument focused on intent?

3. Whether the [c]ircuit [c]ourt erred when it refused to allow [appellant's] counsel to question Yohannes [the victim] about his martial arts training?

For the reasons that follow, we hold that the circuit court did not err, and affirm appellant's conviction.

BACKGROUND

In the late evening on August 6, 2015, Jeremy Brown ("Brown"), along with Matthew Savage ("Savage") and Hillman Bates ("Bates"), went to a bar called Odalis in Silver Spring, Maryland. While at the bar, Brown noticed that his friend, Gabriel Yohannes ("Yohannes") was also at the bar, sitting with a male friend and a female friend named Emylou Cantangui ("Cantangui"). Brown and his two friends took seats on the other side of the bar from Yohannes. According to Brown, appellant and his friends were attempting to order drinks from the bar, and appellant kept bumping into the back of Brown's chair. In response, Brown stood up and told appellant that he could have Brown's chair.

Appellant and Brown "had words," arguing over whether Brown should have complained that appellant was bumping into Brown's chair.

During Brown's argument with appellant, Yohannes walked over and told appellant to leave Brown alone, and that Brown was Yohannes's friend. Both Brown and appellant told Yohannes to not get involved, but Yohannes remained. According to Samuel Luke ("Luke"), one of appellant's friends who happened to be at Odalis the night of the incident, Yohannes hit appellant in the face. Appellant then grabbed Yohannes's shirt, and the two fell to the ground. According to Yohannes, however, the situation only escalated when appellant shoved him. After the shove, a fight broke out between appellant's group and Yohannes's group. The incident developed into a brawl, with people wrestling, pushing each other, throwing chairs, and slipping on spilled drinks. Brown and his two friends, Savage and Bates, attempted to break up the fight. Luke observed Yohannes on top of appellant with his arms wrapped around appellant's head in some form of headlock[1] that Luke associated with those used in action movies. Savage pulled Yohannes off appellant, and the situation temporarily calmed down.

After the fighting ceased, appellant grabbed Yohannes's and Cantangui's cellular phones, which were laid out on the table where they had been sitting, and told them "you're not going anywhere." Appellant headed for the door, and Yohannes chased after him.

[1] Throughout the transcript, the witnesses, attorneys, and trial court refer to the terms "headlock," "chokehold," and "guillotine" seemingly interchangeably.

Yohannes caught up to appellant near the foyer area, and put appellant in another chokehold. Yohannes applied some extra pressure to the hold, but believed that it was "not enough to choke [appellant] to death or anything." According to Luke, however, Yohannes lifted appellant with enough force that appellant's feet lifted off the ground, with Yohannes's arms wrapped around appellant's throat for the duration of the choke. Appellant surrendered one of the phones to Savage, and Yohannes released the choke.

Yohannes then went to Cantangui to confirm that her phone had been returned to her. When Cantangui could not find her phone, Yohannes followed appellant outside, and asked for appellant to return the second phone. According to Yohannes, appellant approached him with his hands to his side, as if he were making a fist, causing Yohannes to instinctively throw a punch. Yohannes recalled that after throwing his punch, appellant ducked under and stabbed Yohannes in the back two times.

Other witnesses remembered the events differently. Bates confirmed that when he came outside, Yohannes and appellant were both throwing punches at each other, with Yohannes landing a punch that caused onlookers to gasp. According to Bates, during the fight, Yohannes wrapped up appellant and placed appellant in yet another headlock or chokehold. Bates saw appellant make what appeared to be "a couple quick jabs," and Yohannes immediately grabbed his side and ran into the bar while appellant ran away from the scene.

Luke recalled that Yohannes, upon exiting Odalis, charged at and then punched appellant in the face. After landing the punch, Luke observed Yohannes place appellant in

a type of headlock, and observed appellant make small punching gestures. According to Luke, Yohannes suddenly released his hold and ran inside Odalis while appellant ran away.

During the final confrontation, Yohannes sustained four knife injuries: a knife wound that pierced his kidney, a wound which hit a vertebra, a cut to his elbow or tricep, and a cut to his thumb. Yohannes's injuries were so severe that he had to have his kidney removed in order to save his life.

Following a four-day jury trial, appellant was convicted of first-degree assault, but acquitted of attempted second-degree murder. Appellant timely appealed. We shall provide additional facts as necessary.

DISCUSSION

I. Requested Jury Instructions on Mitigation Defenses

Appellant first argues that the trial court erred by failing to provide two separate requested jury instructions: self-defense, and hot-blooded response to adequate provocation. Maryland Rule 4-325(c) states, in pertinent part, that, "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." "An appellate court reviews a trial court's decision not to grant a jury instruction under an abuse of discretion standard." *Hajireen v. State*, 203 Md. App. 537, 559 (2012) (citing *Gimble v. State*, 198 Md. App. 610, 627 (2011)). "An abuse of discretion occurs where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Id*. at 552 (internal citations and quotations omitted).

> To be entitled to a mitigation jury instruction,
>
> > the defendant has the burden of initially producing some evidence on the issue of mitigation or self-defense . . . sufficient to give rise to a jury issue . . . . Once the issue has been generated by the evidence, however, the State must carry the ultimate burden of persuasion beyond a reasonable doubt on that issue.

Wilson v. State, 422 Md. 533, 541 (2011) (internal citations and quotation marks omitted).

The Court of Appeals has described "some evidence" as follows:

> *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. Then the baton is passed to the State. It must shoulder the burden of proving beyond a reasonable doubt to the satisfaction of the jury that the defendant did not kill in self-defense.

Dykes v. State, 319 Md. 206, 216-217 (1990). The Court of Appeals has recognized that requiring the defendant to initially produce some evidence of mitigation or self-defense does not offend due process because the State retains the ultimate burden of proving the absence of mitigation. *Sims v. State*, 319 Md. 540, 553 (1990). Applying these principles to this case, appellant bore the burden of producing "some evidence" of self-defense or

hot-blooded response to adequate provocation in order to generate the issue for jury consideration.[2]

A. Self-Defense

In order to receive a self-defense jury instruction, a criminal defendant must produce some evidence showing that the defendant:

> (1) had reasonable grounds to believe him or herself in apparent imminent or immediate danger of death or serious bodily harm from an assailant;
> (2) in fact believed him or herself to be in such danger;
> (3) was not the aggressor or provoked the conflict;
> (4) used no more force than the exigency required.[3]

State v. Martin, 329 Md. 351, 357 (1993). In *Martin*, Martin and the victim, Wayne Gordy, were sitting with a group of others in a parking lot, arguing with each other. *Id*. at 354. Gordy told Martin to "go on and get out of there and don't come back unless I tell you you can" and that "this time would be different, it would be me [Gordy] kicking your [Martin's] ass all across this parking lot." *Id*. Gordy followed Martin briefly as Martin left the parking lot. *Id*. Later that day, Gordy, who had also left the parking lot area, returned with a friend

[2] Because we conclude that appellant did not produce "some evidence" to generate the mitigation defenses, we need not decide the viability of those defenses vis-à-vis the crime of first-degree assault. *See State v. Jones*, 451 Md. 680 (2017).

[3] In his brief, appellant correctly articulates the distinction between "perfect" and "imperfect" self-defense. Whereas the elements above articulate the requirements for "perfect" self-defense, "imperfect" self-defense does not require the first element—that there be reasonable grounds for a defendant to believe him or herself in immediate danger. *State v. Martin*, 329 Md. 351, 357 (1993). Appellant does not specify whether he should have been entitled to a "perfect" or "imperfect" self-defense. However, as we will explain, the trial court correctly found that appellant failed to establish the second element—his subjective belief that he was in such danger.

and saw Martin sitting in his car. *Id*. Gordy approached Martin's vehicle and then Gordy's friend heard a gunshot. *Id*. at 355. The friend saw Gordy fall and Martin drive away. *Id*.

At his trial, Martin established that he had been drinking beer almost continuously throughout the day of the shooting. *Id*. Martin's brother testified that Martin would sometimes drink to the point where Martin "could not remember where he had been or what he had done." *Id*. Martin's brother testified that when officers arrested Martin, they were "more or less . . . holding him up because he couldn't hardly [sic] walk on his own." *Id*. Martin himself testified that he did not remember the shooting, and that he suffered from memory loss for approximately a year prior to the shooting. *Id*. Martin requested an imperfect self-defense jury instruction, which the trial court denied. *Id*. at 356.

On appeal to the Court of Appeals, Martin argued that, although there was no evidence of his mental state at the time he shot Gordy, the trial court could have inferred his mental state based on the circumstances leading up to the altercation. *Id*. at 361. In response to that argument, the Court noted how a criminal defendant could introduce evidence of his subjective mental state, stating, "The question of one's state of mind, or his intention, at a particular time is one of fact, and is subjective in nature. Therefore, it must be determined by a consideration of his acts, conduct and words." *Id*. at 363 (internal quotation marks omitted). The Court concluded, "We hold that where the defendant's subjective belief at a particular time must be shown to generate a defense, *only evidence bearing directly on that issue will suffice*." *Id*. at 368 (emphasis added). Without any evidence bearing directly on Martin's subjective mental state at the time of the shooting,

Martin failed to adduce "some evidence" and therefore was not entitled to a self-defense jury instruction.

Here, the trial court found that "there [was] not a scintilla of evidence of a subjective belief of the [appellant] at the time he used the deadly or dangerous force with the knife." We agree with the trial court. The only evidence reflecting appellant's mental state was that, prior to the stabbing, appellant told Yohannes, "you're not going anywhere." Although there was evidence that Yohannes placed appellant in some form of chokehold, Bates testified that appellant did not appear to gasp for breath, did not appear to pass out, and did not appear to go limp.

Appellant argues that by virtue of being trapped in Yohannes's chokehold, he sufficiently generated some evidence indicating his subjective belief that he was in immediate danger of serious harm or death. Specifically, appellant asserts, "Clearly, evidence that [appellant] was being choked permitted the jury to infer he was in danger of death or serious bodily harm" and "the fact that [appellant] did not use the knife until the third time he was being choked by Yohannes supports self-defense because it is more likely that [appellant] believed *this time was different*, and that he believed himself in danger of serious bodily harm or death."

The issue here is whether appellant introduced some evidence demonstrating that he subjectively believed he was in danger of serious harm or death. That Yohannes had placed appellant in a chokehold would have permitted the jury to consider whether appellant *objectively* had reasonable grounds to believe himself in immediate danger of

serious harm or death—but that fact alone fails to demonstrate appellant's *subjective* mental state through his acts, words, and conduct.[4] *Id*. at 363. Furthermore, the notion that appellant subjectively believed "this time was different" is not supported by any evidence.

As in *Martin*, appellant proffered no evidence of his subjective mental state at the time of the crime. He asks us to infer his subjective mental state from the fact that Yohannes was applying a chokehold at the time of the stabbing. However, we conclude that evidence of the chokehold and appellant's responsive stabbing of Yohannes is legally insufficient to carry appellant's burden to introduce "some evidence" that he subjectively believed he was in danger of serious bodily harm or death.

Finally, we note that in explaining its decision, the trial court recited analysis from *Wilson v. State*, 195 Md. App. 647 (2010), a mitigation instructions case which the Court of Appeals ultimately reversed in *Wilson v. State*, 422 Md. 533 (2011).[5] We note that,

> where the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm. In

[4] We note that there is no evidence on this record indicating how tight, how painful, or how dangerous the third chokehold was. Instead, the evidence simply reflects that during the third altercation, Yohannes restrained appellant by applying a chokehold.

[5] A careful reading of the two *Wilson* cases shows that the Court of Appeals did not disagree with our Court's interpretation of the law. Rather, the Court of Appeals took issue with our Court's assessment of the legal significance of the facts presented there. In our *Wilson*, we wrote, "every inane statement does not *ipso facto* satisfy the burden of production[,]" and that "It may take only slight evidence to generate a jury issue, but slight evidence must still be somewhat more than preposterous." 195 Md. App. at 668. The Court of Appeals responded that "it was not for the court to determine whether [the slight evidence] was preposterous and/or inane[,]" holding that the evidence was sufficient to generate self-defense as an issue for the jury. *Wilson*, 422 Md. at 543.

> other words, a trial court's decision may be correct although for a different reason than relied on by that court.

Robeson v. State, 285 Md. 498, 502 (1979). As we explained above, the record adequately demonstrates that the trial court reached the correct decision.

B. Hot-Blooded Response to Adequate Provocation

Appellant next argues that the trial court erred by not providing a jury instruction for hot-blooded response to adequate provocation. A trial court must provide a provocation instruction when four requirements are met:

> (1) There must have been adequate provocation;
> (2) The killing must have been in the heat of passion;
> (3) It must have been a sudden heat of passion—that is, the killing must have followed the provocation before there had been a reasonable opportunity for the passion to cool;
> (4) There must have been a causal connection between the provocation, the passion, and the fatal act.

Wilson, 195 Md. App. at 680–81. "*Each of the four elements is a sine qua non for a defense of mitigation* based upon hot-blooded response to legally adequate provocation." *Id*. at 681 (quoting *Tripp v. State*, 36 Md. App. 459, 477 (1977)). "With the Rule of Provocation as with the imperfect defenses, the burden of production is on the defendant to generate a *prima facie* case with respect to each and every one of the four elements of the defense." *Id*.

In *Wilson*, the victim, Brian Adams, and his two friends encountered Wilson at a gas station. 195 Md. App. at 657. Adams and Wilson exchanged verbal barbs, including Adams threatening to shoot Wilson, and Adams's friends threatening to fight Wilson. *Id*. Stating that he did not want any conflict, Wilson left the gas station, and went to his

grandmother's house. *Id*. at 666. While there, Wilson changed his clothes, called his cousin for "backup," and, after learning that his cousin was not available, grabbed a steak knife for "backup." Wilson then left his grandmother's house seeking to confront Adams and his friends. *Id*. at 667. Wilson came upon Adams and the two stared each other down. *Id*. at 672. Adams then pulled out a gun and, while smiling, pointed it at Wilson. *Id*. Somehow, Wilson grabbed the gun from Adams, and then pointed it at Adams. *Id*. Wilson would later testify that although less than a minute elapsed after he pointed the gun at Adams, he did wait before he pulled the trigger. *Id*. Wilson testified that, at the moment he pulled the trigger, he "was scared, [he] was mad . . . [he] felt challenged . . . . [He] had a lot of emotion running through [his] head at that time." *Id*. "When asked why he shot Adams four times, [Wilson] explained that he 'was just caught in the moment.'" *Id*. at 673.

On appeal, this Court affirmed the trial court's decision not to provide a voluntary manslaughter jury instruction. In reviewing whether Wilson acted in the heat of passion, we noted,

> For the nonce, we are making the point that [Wilson] never really actually described a sense of hot-blooded rage, let alone attributed such a sense of overpowering rage to the actions of Adams at the crime scene. *No one else, moreover, testified as to such a sense of rage on his part. This element of the defense, the actual state of rage in the mind of the defendant, is a subjective requirement.*

Id. at 682 (emphasis added). We concluded, "In this regard alone, the issue of hot-blooded response to provocation was not generated." *Id*. at 683.

Appellant argues that his use of a knife during the third altercation demonstrates that he had been adequately provoked, and that "A jury could reasonably infer that the

altercation outside was different than the brawl inside the bar where multiple people were attempting to break up the fight." As with the subjective mental state element for self-defense, there is no evidence on this record of appellant's mental state at the time of the stabbing. In short, we see no evidence that appellant stabbed Yohannes while enraged.

II. Supplemental Jury Instructions

During appellant's closing argument, his trial counsel told the jury to decide whether it was appellant's "intent to kill [Yohannes] or to get him off of him," and that appellant was the true victim while Yohannes was the aggressor. Finally, appellant's trial counsel stated, "I suspect that many of you expected that you would hear from me in this case about some issues that I've been forbidden to talk about." The State immediately objected and the trial court sustained the State's objection. At the State's request, following defense counsel's closing argument, the trial court provided a curative supplemental jury instruction, telling the jury "this [c]ourt has made a legal determination that self-defense is, the defense of self-defense is not available to the defendant in this case. So you may not consider self-defense or any other legal justification for this defendant's actions." We review a trial court's decision to grant or decline a jury instruction for an abuse of discretion. *Hajireen*, 203 Md. App. at 559.

Appellant first argues that "the curative instruction was wholly unnecessary because defense counsel's closing argument focused entirely on the lack of intent." We summarily reject this argument because, when appellant's counsel told the jury that there were "some issues that I've been forbidden to talk about," trial counsel was referring to his inability to

address self-defense. Indeed, appellant's trial counsel told the court "I think I am absolutely entitled to tell the jury that . . . self-defense is not in this case and I'm not allowed to discuss it and that I have to confine my discussion to intent, which is exactly where I was going." Because trial counsel acknowledged that he was attempting to introduce the concept of self-defense to the jury, and because we have established that appellant failed to generate some evidence for a self-defense instruction, the trial court properly exercised its discretion in telling the jury it should not consider a matter not generated by the evidence.

Appellant also argues that he was prejudiced because the trial court's instruction "repudiated [counsel's] lack of intent argument and essentially instructed the jury that [appellant] either intended to murder or assault Yohannes." In his brief, appellant relies on *State v. Bircher* in arguing prejudice from supplemental jury instructions. 446 Md. 458 (2016). We do not find appellant's reliance on *Bircher* persuasive. There, the Court of Appeals affirmed the trial court's decision to give a "transferred intent" jury instruction during jury deliberations despite the instruction arguably negating Bircher's theory of the case. *Id*. at 474, 482. If it was proper in *Bircher* for the trial court to provide a supplemental instruction during jury deliberations which added a new theory of criminal liability as supported by the evidence, then we fail to see how the trial court erred in giving the supplemental instruction here. *Id*. at 482. Here, the trial court's supplemental instruction did not undermine the argument that appellant lacked intent. Instead, the supplemental instruction correctly clarified that the jurors could not consider the defense of self-defense

because appellant failed to produce some evidence on that issue. The supplemental instruction was a correct statement of the law, and was applicable given the facts and circumstances. *Evans v. State*, 174 Md. App. 549, 567 (2007). Accordingly, the trial court did not abuse its discretion. [6]

III. Evidence of Martial Arts Training

Finally, appellant argues that the trial court committed error by excluding, on relevancy grounds, evidence pertaining to Yohannes's martial arts training. Prior to trial, the State moved in limine to exclude "mention of [Yohannes's] studying or proficiency in mixed martial arts." The State argued that unless appellant could introduce evidence tending to show that he was aware of Yohannes's proficiency in martial arts on the night of the incident, such evidence would mislead the jury, and would have no effect on appellant's self-defense arguments. The trial court ruled that unless or until the jury heard evidence that appellant knew of Yohannes's training prior to or during the altercation, such evidence was irrelevant.

During the State's case, the State asked Yohannes on direction examination whether the "guillotine" choke he applied to appellant was "something that [Yohannes] learned how to do[.]" Yohannes replied, "Yeah, I did mixed martial arts for a little bit." On cross-

[6] In his brief, appellant also argues that the State's rebuttal argument was improper because it mischaracterized the trial court's supplemental jury instruction. Appellant did not preserve this issue for appeal by lodging an objection when the State made its rebuttal. "[A] defendant must object during closing argument to a prosecutor's improper statements to preserve the issue for appeal." *Shelton v. State*, 207 Md. App. 363, 385 (2012) (citing *Icgoren v. State*, 103 Md. App. 407, 442 (1995)).

examination, appellant's trial counsel asked Yohannes about the extent of his training. The State objected, and the trial court sustained the objection, reasoning that the evidence adduced thus far had not demonstrated that appellant himself knew about Yohannes's training on the night of the altercation.

According to appellant, the trial court's decision prevented him from establishing two necessary elements of self-defense: that appellant was not the aggressor, and that appellant was in immediate danger of death or serious bodily harm. *Martin*, 329 Md. 357.

As to whether appellant was the aggressor, appellant argues "evidence [of martial arts training] is relevant to corroborate that Yohannes was the first aggressor because an individual skilled in martial arts would easily believe that he faced no danger in instigating a third altercation with a 'little skinny kid.'" As to whether appellant was in immediate danger of death or serious bodily harm—the objective requirement for a self-defense instruction—appellant argues, "Regardless of whether [appellant] had prior knowledge of the training or a subjective belief his life was in danger, Yohannes's martial arts training bolsters the argument that [appellant] was in imminent or immediate danger of death or serious bodily harm."

Assuming, *arguendo*, that the trial court erred by excluding relevant evidence which would have showed that appellant was not the aggressor and that appellant was objectively in immediate danger of death or serious bodily harm, we hold that any such error was harmless. *Weitzel v. State*, 384 Md. 451, 461 (2004). As explained above, appellant failed to produce some evidence that he subjectively believed himself to be in immediate danger

of death or serious bodily harm. In order to receive a self-defense instruction—whether perfect or imperfect—appellant needed to generate some evidence of his mental state. Even assuming that appellant would have produced strong evidence tending to show that he was not the aggressor and that he was objectively in immediate danger of death or serious bodily harm, he still would not have been entitled to a self-defense instruction for the reasons stated in Part I of this opinion. Finally, we note that the trial court's decision to exclude the testimony during cross-examination was consistent with its ruling on the motion in limine, and that appellant's trial counsel lodged no objection to that ruling.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.