Circuit Court for Baltimore County
Case No. 03-K-17-002261

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2320 & No. 128

September Term, 2017 &
September Term 2018

ROBERT MUNK AND BLAKE MUNK

v.

STATE OF MARYLAND

Berger,
Reed,
Wilner, Alan M. (Senior Judge, Specially Assigned)

JJ.

Opinion by Wilner, J.

Filed: April 23, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Robert and Blake Munk, a father and son, were co-defendants in a criminal case tried in the Circuit Court for Baltimore County. Both prosecutions arose from an assault and attempted robbery allegedly committed by Blake on Rob H. on April 10, 2017. Both defendants were convicted of second-degree assault and sentenced to terms in prison – Robert for eight years, Blake for ten years – and both have appealed. They were acquitted of the attempted robbery. We consolidated the appeals and shall deal with them in this one Opinion. Robert's culpability was as an accessory.[1]

UNDERLYING FACTS

Most of the evidence presented at trial was from video cameras in various places that recorded the locations and actions of the three men and from the testimony of witnesses to the assault and a police detective. Neither defendant testified; nor did they call any witnesses. The incident began on the afternoon of April 10, 2017, when Robert and Blake arrived at the Modern Liquors store in Dundalk in Robert's blue truck, which he parked across the street from the store. Shortly after their arrival, Mr. H. pulled up and parked his car behind the truck. Mr. H. was a regular customer of the store, which, in addition to selling alcoholic beverages, also had a check-cashing service and sold other products. Mr. H. went there that day to cash his payroll check and purchase some steaks.

As Mr. H. approached the store, he observed Blake walk between the two vehicles and stare at him. Robert and Blake soon followed him into the store. Mr. H. first went to

[1] We shall use the first names of the defendants simply to distinguish between them. We use only the first initial of the victim's last name to protect his privacy as best we can.

the check-cashing counter in the rear of the store. Robert was observed near the front of the store fumbling through his wallet, as if looking for something. After a quick conversation between him and Blake, Robert looked toward the back of the store. He and Blake then left the store and returned to their truck without transacting any business.

A camera showed that the Munks got into the truck and briefly left the scene but returned to the same spot just before Mr. H., who, after having cashed his paycheck and purchased some steaks, also left the store, got into his car, and drove to his home a short distance away. The Munks followed him in their truck.

After Mr. H. exited his car and was walking toward his house, Blake, wearing a gray hooded sweatshirt, approached and asked him for directions. Mr. H., carrying his box of steaks in one hand, retrieved his cell phone with the other in order to assist Blake. Blake then threw a punch at Mr. H., who ducked but tripped and fell to the ground. Blake then began punching Mr. H. and reaching into his pockets. Mr. H. yelled for help. His fiancé and a neighbor came to his assistance and pulled Blake off of him. The assault lasted about 30 seconds. During the altercation, Mr. H., his fiancé, and the neighbor heard Blake asking why Mr. H. was having sexual relations with Blake's wife. One witness heard Blake say, "that's what you get for [having sex with] my wife"[2] Mr. H. immediately denied the accusation, and no evidence was presented to support it.

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[2] Blake's accusation actually embodied a more guttural term to define his complaint – a term that once was found inappropriate for use in movies or on television (or, indeed, in civil conversation) but now seems to be not just commonly used but proudly and ubiquitously so. At the risk of being regarded as prudish, we shall not sink to Hollywood's low standards. The reader will get the point.

With the arrival of assistance, Blake fled. One of the neighbors saw him enter the truck, which was stopped about a half-block away and, upon his entry, was driven away quickly. The neighbor was able to see some of the characters on the license plate, which was partially obscured by a white cloth that, to the neighbor, appeared to have been placed intentionally. Two days later, Robert was stopped in his truck and arrested. Blake was arrested the following day. During a subsequent investigation, the police recovered the gray hooded sweatshirt Blake was seen wearing during the assault.

THE ISSUES

Robert raises three issues: (1) whether the Circuit Court abused its discretion in refusing to ask four requested questions on *voir dire*; (2) whether the evidence was sufficient to support his conviction for second-degree assault; and (3) whether the court committed plain error by allowing the State's rebuttal closing argument to commence in the absence of Robert and his attorney, who were late returning to court after a brief break.

Blake complains about other things: (1) that the court erred in joining and then refusing to sever his case from Robert's; (2) that the court abused its discretion in finding good cause to postpone trial of his case; and (3) that the court also abused its discretion in overruling his objection to what he regards as a burden-shifting argument in the State's rebuttal closing argument.

ROBERT'S COMPLAINTS

Voir Dire

Robert proposed a number of *voir dire* questions that the court did not ask in the form proposed. In this appeal, he complains only about four of them:

- Have you, any member of your family, or any of your close friends, ever been the victim of a crime?
- Have you, any member of your family, or any of your close friends, ever been accused of a criminal conduct other than a minor traffic offense?
- Have you, any member of your family, or any of your close friends, ever been incarcerated in a jail or penal institution within the last five years?
- Does any member of the panel or any member of your family have any pending case in the Circuit Court for Baltimore County or any other Federal or State court? If so, in what court is the case pending, and are you the plaintiff or the defendant and what kind of case is involved?[3]

With respect to the last three questions, Robert relies heavily on *Benton v. State*, 224 Md. App. 612 (2015), in which this Court found an abuse of discretion in the refusal of the trial court to ask whether any prospective juror or a close personal friend or relative had ever been charged with or convicted of a "serious offense" or a crime other than routine vehicle violations.

Citing earlier cases, the *Benton* Court confirmed that Maryland courts employ limited *voir dire*, the "sole purpose of which is to ensure a fair and impartial jury by

[3] The first three questions were all part of Request No. 12. The fourth question was Request No. 13.

determining the existence of [specific] cause for disqualification". The Court noted as well that the Court of Appeals had identified "two broad areas of inquiry that may reveal cause for a juror's disqualification: (1) examination to determine whether the prospective juror meets the minimum statutory qualifications for jury service, and (2) examination to discover the juror's state of mind as to the matter in hand or any collateral matter reasonably liable to have undue influence over him." *Id.* at 623, citing *Pearson v. State*, 437 Md. 350, 356 (2014) and *Washington v. State*, 425 Md. 306, 312-13 (2012). *See* also *Collins v. State*, ____ Md. ___ (No. 54, S.T. 2018, Op. filed 4/2/19). Although the *Benton* Court viewed the questions at issue as overbroad, it concluded from *Pearson* that "it is incumbent upon the trial court to rephrase an 'overbroad proposed *voir dire* question [that] encompasses a mandatory *voir dire* question.'" *Benton* at 626.[4]

The *Benton* Court observed that, under Maryland law (Md. Code, § 8-103(b)(4) and (5) of the Courts Article), a person who (1) has been convicted in a Federal or State court of record of a crime punishable by imprisonment for more than six months, or (2) had received a sentence of imprisonment for more than six months, or (3) had a charge pending in a Federal or State court of record for a crime punishable by imprisonment

[4] Allowing the court to rephrase a proposed question, particularly one that is overbroad, emanates from the broad discretion that the court has in conducting or supervising a *voir dire* examination. In *State v. Shim*, 418 Md. 37, 55 (2011), the Court held that "[a] proposed *voir dire* question need not be in perfect form, and the court is free to modify the proposed question as needed." In *Pearson*, the Court, citing *Shim*, stated that "[w]here an overbroad proposed *voir dire* question encompasses a mandatory *voir dire* question, however, a trial court should: (1) rephrase the overbroad proposed *voir dire question* to narrow its scope to that of the mandatory *voir dire* question; and (2) ask the rephrased *voir dire* question." 437 Md. at 369, n.6.

exceeding six months, is not qualified for jury service. Applying the requirement of rephrasing overbroad questions that incorporate a basis for seeking disqualifying information, the Court held that the trial court's refusal to rephrase the proposed questions was error and reversed the conviction.

The precise analysis was that the question of whether any juror was "currently charged with or had previously been convicted of a serious crime" was directed at a "specific cause for disqualification," namely either pending charges or prior conviction of a crime carrying a sentence exceeding six months in prison. *Benton*, at 626. With the focus of the question being a "serious crime" *committed by the juror him/herself*, that connection was reasonable. A serious crime is likely to permit a sentence of more than six months, and it would have been a simple thing to substitute the six-month requirement for the word "serious," most likely without any objection.

That is not the case here. The Court made clear in *Pearson* that a trial court must ask a *voir dire* question *only* if it is "reasonably likely to reveal [specific] cause for disqualification" and not one that is "merely fishing for information to assist in the exercise of peremptory challenges." *Pearson*, 437 Md. at 357, quoting in part from *Washington v. State, supra*, 425 Md. at 315 and *Moore v. State*, 412 Md. 635, 663 (2010). In *Perry v. State*, 344 Md. 204, 218 (1996), *cert. denied*, 520 U.S. 1146 (1997) and later in *Pearson*, 437 Md. at 358, the Court pointed out that a juror's prior experience as a defendant "in a criminal proceeding of any kind, or in one involving a crime of violence is not *per se* disqualifying" and "[i]t is even less tenable to argue that a juror is

disqualified simply because of the experience of a member of the juror's family or on the part of a close personal friend."

Greater latitude on the part of the court may be necessary in some instances with respect to questions going to subjective bias, simply because it is so personal and can arise from a myriad of circumstances. Questions going to statutory disqualifications should be more razor-like because the statute lays it out. Is there any juror who is not a citizen of the United States (not is there any juror who was born in a foreign country); is there any juror who is not at least 18 years old (not is there any juror who is unable to purchase alcoholic beverages); is there any juror who cannot comprehend English (not is there any juror whose native language is French); is there any juror who was sentenced to or served more than six months in prison or been convicted or charged with a crime carrying a sentence of more than six months?

If that is what the party wants to know, for purposes of determining whether a juror is legally qualified to act as a juror, the appropriate question is easy to ask, and defense counsel was afforded an opportunity to clarify what she wanted. Had she done so and made clear that she was focusing on § 8-103(b)(4) of the Courts Article, the court most likely would have rephrased the question, or asked her to do so, and propounded it. As proposed, the questions had no clear connection with a statutory disqualification but sought information more for the purpose of exercising a peremptory challenge.

There is a limit on requiring judges to act as co-counsel during *voir dire*. We find no abuse of discretion or other error in refusing to ask the last three questions posed.

With respect to the first question – whether any juror, or family member, or close friend had ever been the victim of any crime – the simple answer was supplied in *Pearson*, where the Court held that "consistent with existing case law . . . we conclude that a trial court need not ask during *voir dire* whether any prospective juror has ever been the victim of a crime." 437 Md. at 359, assigning three reasons for that conclusion, one being that "a prospective juror's experience as the victim of a crime lacks 'a *demonstrably strong correlation* [with] a mental state that gives rise to [specific] cause for disqualification." *Id.* at 359. (Emphasis in original, quoting from *Curtin v. State*, 393 Md. 593, 607 (2006). That was the precise reason given by the trial court here – "almost all of us have had something stolen from us maybe when we were ten" and "[i]t doesn't really go to the ability to be fair and impartial in this case." We find no abuse of discretion or other error in the court's refusal to ask that question.

Sufficiency of the Evidence

There is no dispute that Robert's conviction was based on his role as an accomplice. He, himself, did not assault Mr. H.

The standard for determining the sufficiency of evidence in a criminal case is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Suddith*, 379 Md. 425, 429 (2004). In determining whether that test was met, we must view the evidence "in the light most favorable to the prosecution and give due regard to the [fact finder's] finding of facts. Its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the

credibility of witnesses." *Coles v. State*, 374 Md. 114, 121-122 (2003). Those standards apply equally to direct and circumstantial evidence. Thus, "proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts." *State v. Suddith, supra*, 379 at 430.

The substantive standards for accomplice liability were summarized in *Sheppard v. State*, 312 Md. 118, 122 (1988). An accomplice is a person who, "as a result of his or her status as a party to an offense, is criminally responsible for a crime committed by another." *Id.* That responsibility may take two forms: "(1) responsibility for the planned, or principal offense (or offenses), and (2) responsibility for other criminal acts incidental to the commission of the principal offense." *Id.* We are dealing in this case with the first form. To establish complicity for the principal offense, "the State must prove that the accused participated in the offense either as a principal in the second degree (aider and abettor) or as an accessory before the fact (inciter)." *Id.*

In this case, reasonable inferences may be drawn that (1) as Mr. H. left his car to go into the store, Blake recognized him as someone Blake thought was having an affair with Blake's wife and then, or when they were in the store, informed Robert of that belief; (2) Robert and Blake followed Mr. H. into the store at least in part to surveille Mr. H., as they conducted no other business there; (3) while Mr. H. was still in the store, Robert managed to partially obscure his license plate with a rag; (4) they followed Mr. H. in Robert's truck when Mr. H. left the store and drove to his house, (5) Robert parked his truck a half-block from Mr. H.'s house and waited in the truck while Blake approached

Mr. H. on foot and assaulted him; and (6) when Blake returned, Robert provided the "getaway" service. That suffices to prove at least the aiding and abetting prong of accomplice liability – driving Blake to and from the scene with knowledge that Blake intended to harm Mr. H. and did, in fact, harm him.

Denial of Right of Presence and Assistance of Counsel

At the conclusion of the initial round of closing arguments on the second day of trial, the court took what it announced would be a 15-minute recess, to be followed by the State's rebuttal argument. The jury was excused during that break. When court resumed, neither Robert nor his attorney was present. Counsel for Blake stated that he had seen them outside the courthouse smoking a cigarette. With the court's permission, he stepped out into the hallway to look for them, but they were not there. *Blake's* attorney objected to the court resuming its session without Robert and his attorney, but the court noted that they were aware that the break was only for 15 minutes and that more than 15 minutes had elapsed and found that their absence was voluntary. She overruled the objection, had the jury reseated, and directed the prosecutor to proceed.

The prosecutor had barely started on her rebuttal – less than two pages of transcript – when defense counsel appeared, as reflected by his statement recorded in the transcript, "Oh, my Lord." Although there was ample opportunity for the attorney to object to the court's resuming in his and his client's absence, either immediately or at any time thereafter, no such objection was made, and so any objection Robert may have had

clearly was waived. In this appeal, Robert seeks to avoid that waiver and be granted a whole new trial based on a theory of "plain error."

The plain error doctrine was explained in *State v. Rich*, 415 Md. 567, 578 (2010). It involves four considerations or criteria. First, there must be an error that has not been affirmatively waived. Second, the error must be clear or obvious and not subject to reasonable dispute. Third, it must have affected the appellant's substantial rights "which in the ordinary case means he must demonstrate that it 'affected the outcome of the [trial] court proceedings.'" Fourth, if those three criteria are met, the appellate court "has discretion to remedy the error – discretion which ought to be exercised only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.*

Unquestionably, a defendant in a criminal case has a right to be present at trial, including closing arguments. That is a fundamental right, both Constitutionally and pursuant to Md. Rule 4-231(b). The defendant has a right to have counsel present as well. That, too, is fundamental. Those rights can be waived however. Indeed, Rule 4-231(c) provides that the right to be present "*is* waived by a defendant [ ] who is voluntarily absent after the proceeding has commenced, whether or not informed by the court of the right to remain." (Emphasis added). The question here is whether the court was justified in concluding that the waiver in this case was voluntary – one that was knowing and intentional.

That problem of determining the voluntariness of an unexcused absence was discussed in *Pinkney v. State*, 350 Md. 201 (1998) and *Collins v. State*, 376 Md. 359 (2003). When a defendant, or an attorney, fails to appear at the appointed time, the court must make a reasonable inquiry as to the reason for the non-appearance. If the investigation does not suggest that the absence was involuntary and "the information before the court implicitly suggests no other reasonable likelihood of involuntary absence, the court may . . . draw the *initial* inference that the defendant's absence was a knowing one and was sufficiently deliberate so as to constitute an acquiescence . . ." *Collins*, at 376-77 (Emphasis in original). If and when the defendant or attorney is found, he or she must be given an opportunity to explain the absence. *Id.*

When the defendant or attorney does not appear at all, even when aware of the proceeding, drawing an initial inference is more difficult because the possible reasons for the non-appearance are nearly limitless, and, to be reasonable, the inquiry needs to be more substantial. Calls are made to the defendant's home or detention center or the attorney's office, maybe to the homes of relatives. When the court, in the presence of the defendant and attorney, announces a brief break, however – in this case of 15 minutes – the reasonable expectation is that they will not wander off and will keep track of the time. Checking the hallway and possibly the closest rest rooms should suffice, and, if that proves fruitless and no information indicating an involuntary absence appears, the court may conclude, at least initially, that the absence is knowing and voluntary – negligent, perhaps, but knowing and voluntary. That is what occurred here. Indeed, the court was

reliably informed that they had left the courthouse to smoke a cigarette, and they certainly knew that they needed to be back within 15 minutes. There was no suggestion that they had fallen ill or suffered any other trauma or had no ability to keep track of time. Certainly, it was reasonable for the court to draw an initial inference that their failure to appear was voluntary – negligent, perhaps, but voluntary.

Apart from that, Robert and his attorney had the opportunity to offer an explanation, or at least an apology, only a minute or two (at most) into the rebuttal argument. Had they done so, the court could have remedied the situation by instructing the jury to disregard the page-and-a-half of argument and directing the prosecutor to begin again. No objection and no such request was made, however, which supports an inference that the momentary absence was, indeed, voluntary and, at the time, not regarded by Robert or his attorney as consequential. Apart from that, having read what the prosecutor said during the brief absence, we are hard-pressed to find that the error "affected the outcome of the [trial] court proceedings," especially when it could have been so easily corrected.

Whether we recognize plain error is discretionary, and, on these facts, we exercise that discretion not to recognize plain error.

BLAKE'S COMPLAINTS

Denying Severance

On May 23, 2017 – eleven days after the indictments were filed and seven months before trial – the State filed a motion for a joint trial of appellants, giving as reasons (1)

that they participated in the same acts or transactions that constituted the offenses, (2) that a joinder would save the time and expense of separate trials that would impose upon witnesses and the court, and (3) that it would not be prejudicial to the defendants. Blake objected, raising the prospect of a *Bruton* issue due to a confession by Robert that implicated Blake.[5] On June 12, 2017, the court entered a brief Order granting the State's motion but giving no reasons. Four days later, Blake filed a motion to strike that Order, complaining that it did not reflect that the court had given consideration to Blake's opposition. The court held the motion in abeyance, subject to a hearing.

Before that hearing could be scheduled, the State moved for and was granted a postponement of trial in Robert's case because of its failure to comply fully with discovery in that case. At the October 4, 2017 hearing on that motion, the State asserted that it would not be introducing any statements made by Robert that implicated Blake. The "*Hicks*" deadline was November 22.[6] No postponement was necessary in Blake's case, as all discovery had been completed. Nonetheless, the court found good cause for the postponement and set a new trial date for December 19, 2017.

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[5] In a nutshell, *Bruton v. United States*, 391 U.S. 123 (1968) precludes the joinder of defendants in a jury trial when (1) Defendant A has made a confession that implicates both Defendant A and Defendant B, (2) the confession is admissible against Defendant A but not Defendant B, and (3) Defendant A chooses not to testify and therefore is not subject to cross-examination.

[6] *State v. Hicks*, 285 Md. 310 (1979) and its progeny implement the requirements of Rule 4-271 that, in Circuit Court, trial must be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant and held within 180 days from the earlier of those events, subject to postponement for good cause.

The hearing on Blake's motion for severance occurred on December 14, 2017. Because of the State's agreement that it would not be offering any statements by Robert that implicated Blake, the alleged prejudice from the joinder shifted from a *Bruton* issue to the fact that Blake's case had been postponed beyond the *Hicks* deadline. The State argued that there would be 10 witnesses, the trial would take four days, all the evidence would be mutually admissible, and that it was the same evidence. After listening to argument, the court ruled that all or most of the evidence would be admissible at separate trials and there was no prejudice to Blake from a joint trial. On that basis, the court denied the motion to sever. Blake perseveres in his argument he was prejudiced by the joinder because his trial had to be postponed beyond the *Hicks* date solely because it was tethered to Robert's case and that their defenses were, in fact, antagonistic.

Severance and joinder are dealt with in Md. Rule 4-253. Subject to § (c) of the Rule, § (a) permits a joint trial of two or more defendants separately charged if they are alleged to have participated in the same series of acts or transactions constituting the offense. Section (c) permits the court to order separate trials if it appears that any party will be prejudiced by a joinder.

> Section (a) is based on a policy favoring judicial economy, to save the time and expenses of separate trials under the circumstances stated in the Rule. Section (c) recognizes that the "overbearing concern of the law" with respect to joinder or severance is to "safeguard against potential prejudice." *State v. Hines*, 450 Md. 352, 369 (2016). Prejudice, within the meaning of the Rule, is a term of art that "refers only

to prejudice *resulting* to the defendant *from* the reception of evidence that would have been inadmissible against that defendant had there been no joinder." *Id*., quoting from *Galloway v. State*, 371 Md. 379, 394, n.11 (2002). The trial judge has discretion in deciding how to safeguard against prejudice caused by joinder. *Hines, supra*, at 369.

In his brief, Blake asserts two reasons why severance was required – because his defense and Robert's were "antagonistic" and because, as a result of a joinder, trial in his case needed to be postponed solely because it was "tethered" to Robert's. The first prong of his argument was waived. In argument to the Circuit Court at the December 14 hearing, counsel noted that he had raised *Bruton* as a problem but acknowledged that the State had made clear that it was "not going to use statements of either Robert Munk or Blake Munk in this case." In light of that, he acknowledged, "I don't believe there is a cross examination issue at this point" and "I don't know that there would be that type of prejudice." He relied then only on the delay of Blake's trial.

There are two problems with that reliance. First, as noted above, prejudice, for purposes of severance, is limited to *Bruton*-type issues. Second, Blake presented no evidence of any actual prejudice to him likely to result from a month's delay. If a case is properly joined and a short delay is required in the companion case, there is good cause under *Hicks* for the delay. *McFadden v. State*, 299 Md. 55 (1984); *Satchell v. State*, 299 Md. 42 (1984). The Court exercised that discretion, and we find no abuse of it.

<u>STATE'S REBUTTAL ARGUMENT</u>

Blake's complaint here concerns one brief remark made by the prosecutor in her closing rebuttal argument. It needs to be taken in context.

Blake was accused not only of an assault on Mr. H. but also of attempting to rob him. Indeed, the attempted robbery was the only substantive issue in dispute. There was evidence that, during the assault, he had his hand in Mr. H.'s pocket, having previously seen him cash his payroll check at the store. In his opening statement, Blake's attorney told the jury that, during the assault, Blake never verbally demanded money but rather accused Mr. H. of sleeping with Blake's wife. "Those are not the words of a robber," the attorney said.

Blake did not testify. Mr. H. did testify. He said that Blake did have his hands in Mr. H.'s pocket, but, as to any verbal communication, he, his fiancé, and two neighbors all testified, consistently with Blake's attorney's opening statement, that the only verbal accusation by Blake – his only justification for the assault – was that Mr. H. was having an affair with Blake's wife which, in his testimony, Mr. H. denied. That was the evidence.

In her closing argument, the prosecutor, pushing the attempted robbery charge, alluded to that purported clandestine affair, referring to it as "red herrings." She said, "Right, the you're screwing my wife comment. What evidence was presented that Mr. [H.] is having some sort of an affair with Blake Munk's wife? Zero. I submit to you, and it's for you to decide, isn't it more likely that someone would yell that to try to prevent

neighbors from intervening and helping Mr. [H.]" No objection was made to that comment.

In his closing argument, Blake's attorney, in an attempt to have the jury focus only on the assault and not the attempted robbery charge, stressed that Blake's motive for the assault was that Mr. H. was having an affair with Blake's wife and that there was no attempt to rob him. Robert's attorney joined that chorus. Robert, too, was anxious to avoid the attempted robbery charge. His attorney, in closing argument, attributed the assault by Blake to a "hotheaded 31-year old guy, really, really, really mad, angry because he believed Mr. H. was or had sexual intercourse with his wife." In her rebuttal, the prosecutor made the comment, "So some of the facts that aren't in evidence in this case are what evidence is there that Mr. [H.] who is screwing [defense counsel's] client's wife? What evidence is there that he even has a wife?" Blake made a general objection to that comment, which the court overruled.

Blake treats that remark as an impermissible assertion that Blake had the burden of producing that evidence. He correctly points out that a prosecutor may not comment on a defendant's failure to testify.

It is settled law that a prosecutor is not permitted to comment upon the defendant's failure to present evidence to refute the State's evidence, because that could amount to an impermissible shift in the burden of proof. *Lawson v. State*, 389 Md. 570, 595 (2005). In *Wise v. State*, 132 Md. App. 127, 142 (2000), this Court confirmed that "[s]uch comments are impermissible whether they be intended to call attention to the defendant's

failure to testify or be of such character that the jury would naturally conclude that it was a comment about the failure to testify." It is permissible, as a general rule, for a prosecutor to call attention to the lack of evidence to establish a fact that the defense told the jury would be produced, but the *Wise* Court warned that "[c]alling attention to the fact that a defendant failed to present evidence sails dangerously close to the wind." *Id.*

The prosecutor's remark at issue here essentially dealt with an irrelevancy. There was no disagreement that Blake made the accusation. The assertion that he did came from the State's witnesses and no evidence was presented to the contrary. Robert's attorney, in argument, accepted that the accusation was made and that Blake believed it to be true. Although argument is not evidence, it certainly is reasonable to infer that, with the father's lawyer telling the jury that Blake *believed* the accusation to be true, the jury would accept that Blake was married and believed, whether true or not, that Mr. H. was having an affair with her. Whether Blake was, in fact, married was never at issue, so the fact that no evidence was produced, by anyone, that he was married really had no bearing whatsoever on his guilt or innocence of either the assault or the alleged robbery. Nor was the lack of evidence that Mr. H. was, or was not, having an affair with the wife relevant, except as to whether the accusation was merely a ruse, as the prosecutor argued, without objection, in her first closing remarks, or was actually believed by Blake, whether true or not, as Robert's attorney argued.

As we indicated, Mr. H. denied the accusation, stating that he did not know either Blake or his wife. If the State, whose witnesses testified to the accusation, wished to

further discredit the truth of the accusation, it could have produced its own witnesses to testify that Blake was not married or, if he was, that there was no such affair. The lack of evidence as to the existence of either a wife or an affair arose from the decision by both sides not to produce such evidence. Blake was not singled out by the brief irrelevant remark as being the reason. Given the context, there was no burden on the part of either side to produce evidence as to whether there was, or was not, an affair. It simply was irrelevant. We find no error in the court overruling the objection.

JUDGMENTS AFFIRMED; APPELLANTS TO PAY THE COSTS.