UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1886

September Term, 2016

LARRY STEELE

v.

STATE OF MARYLAND

Meredith,
Reed,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: June 27, 2017

* 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.

Appellant, Larry Steele, was tried and convicted by a jury in the Circuit Court for Montgomery County (Burrell, J.) of battery. Appellant was sentenced to ten years' imprisonment on October 27, 2016, the sentence to commence retroactively on February 10, 2016. The instant appeal followed, wherein, Appellant posits the following questions for our review:

1. Did the trial court err by refusing to give the requested instruction on self-defense?
2. Did the trial court err by denying the motion for mistrial made during the prosecutor's rebuttal argument?
3. Is the evidence legally insufficient to sustain Appellant's conviction for battery?

FACTS AND LEGAL PROCEEDINGS

On October 7, 2015, Christina Alford was renting a room at the Radisson Hotel in Rockville, Maryland. Alford, who lives in Sacramento, California, came to Maryland "on business," *i.e.*, Alford testified for the State that she was "escorting," her designation of prostitution. A friend posted advertisements for her services on an internet website, backpage.com,[1] where Appellant discovered her advertisement. The pictures used in the advertisements were of women other than Alford.

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[1] *See* Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 16 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622, 196 L. Ed. 2d 579 (2017) ("Backpage.com provides online classified advertising, allowing users to post advertisements in a range of categories based on the product or service being sold. Among the categories provided is one for 'Adult Entertainment,' which includes a subcategory labeled 'Escorts.' The site is differentiated by geographic area, enabling users to target their advertisements and permitting potential customers to see local postings."). *See also* Derek Hawkins, *Backpage.com Shuts Down Adult Services Ads After Relentless Pressure from Authorities*, WASH. POST (Jan. 10, 2017), https://goo.gl/Z4cBYa ("Backpage.com abruptly closed its adult advertising section in the United States on Monday, saying years of government pressure left it no choice but to shutter its most popular and lucrative feature.").

On the morning of October 7th, Appellant, unknown to Alford at the time, texted her to schedule a meeting at her hotel room at 10:30 a.m. and agreed upon a fee of $220. The messages came from telephone number (505) 403-1061. By 11:00 a.m., Appellant had not arrived at the hotel room. Alford texted him, asking: "Where are you?" She received a telephone call at 11:17 a.m. and, shortly thereafter, a man whom she identified as Appellant, arrived at her room.

According to Alford, she was wearing a robe when Appellant entered the room. He placed $220.00 on the dresser next to the television set and then he undressed fully and laid down on the bed. Alford knelt on the bed beside him and began to touch him, whereupon Appellant said**,** "Wait. You're moving too fast," then grabbed her hand and stood up. Alford testified, "And then he grabbed one of my arms and I thought that he was maybe pulling me closer to him but then he squeezed it a little too tight. And then he tried to grab the other one." According to Alford, Appellant grabbed her wrist and tried to push her hand behind her back "like a police officer would when they are arresting you." Appellant told her that he was a police officer, that he was placing her "under arrest" and that he needed to tie her up until his partners could come into the room. Alford testified that she did not believe that Appellant was actually a police officer, but that his behavior frightened her and she needed to fight him because he was hurting her. She testified that she feared that he would rape her.

Alford continued to struggle with Appellant while she was still kneeling on the bed and managed to get her hands free from Appellant, but that he "wouldn't let [her] go towards the door[,]" so Alford "asked him if [she] could go sit down in the corner

like away from the door[.]" She indicated that she would "stop resisting" if Appellant allowed her to "go sit in the corner" and that, if he was a police officer, he needed to show her his badge and bring in his alleged "partners." Alford testified that she was "begging him to stop" and asked him "over and over again" to "[p]lease just leave." However, Appellant continued to "insist[] that he was a police officer and that [she] was under arrest and that his partners were coming in." According to Alford, Appellant asked her if she worked for a man named "Pablo" and said that he was looking for underage girls.

Eventually, Appellant permitted Alford to "sit in the corner." She testified that she was approximately five or six feet from Appellant, but that he was in between her and the exit to the hotel room. It was at this point that Alford retrieved a knife from a necklace sheath located by the television. She unsheathed the knife, intending to "scare him away," then further backed away from Appellant and asked him to leave. Alford testified that, although Appellant was naked, "he could have gotten his clothes and he could have backed off [and] . . . unlocked the door and opened it and left."

However, according to Alford, Appellant "ran straight towards" her, pushing her back in the chair and trying to get the knife away from her. During the struggle, the upholstered chair was slashed and Appellant exclaimed that Alford stabbed him. Alford responded: "I didn't stab you. You have the knife. You had my hand . . . . [Y]ou're going to cut yourself by holding the knife." They continued to struggle, with Appellant "trying to get [the knife] out of [her] hand."

Alford then testified that Appellant did the "[s]ame little police move" as before

and “went to try to put [her] hand behind [her] back,” at which point “the knife went straight in [her] side.” The injury was a “really deep cut into her rib cage[,]” which required “about 15 stitches and ten staples[.]”Alford testified that the knife was in her hand during the entire struggle.

After she sustained the injury, Alford testified that she let go of the knife and again asked Appellant to “please get off” of her and that she would not contact the police. Appellant grabbed the knife and threw it into the trashcan. Appellant then dressed and took the $220 previously placed on the dresser. He then located Alford’s handbag and removed some money, but then returned it. Appellant obtained her identification card, wrote down information on a piece of paper and, according to Alford, said, “I’m going to keep this . . . if you call the police or if anything happens, I’m going to have your information.” He then retrieved the knife from the trashcan, wrapped it in toilet paper and left the hotel room.

Alford testified that**,** after Appellant left the room, she called her mother and, taking her mother’s advice, proceeded to the hospital. She was treated at the hospital for a deep cut to her ribcage as well as cuts and scrapes. While she was there, hospital personnel contacted the police. Alford spoke with Detective Tara Baione of the Montgomery County Police Department and provided her with a description of Appellant, his clothing, his distinctive shoes and the cell phone number that he had used to contact her. She identified Appellant as her assailant in the courtroom.

On cross-examination, Alford acknowledged that she had not been truthful in her report to Detective Baione in stating that she wore her knife around her neck. She also

admitted that she used the names "Alicia" and "Vanessa" on backpage.com and used photographs of other women in the advertisements. Alford further admitted that she had been arrested in June 2016 in Montgomery County and that, after her arrest, she went back to California. The prosecutor**,** who had prosecuted Appellant, told Alford that he would "look into" her case, but he did not make any promises to her. At the time of Appellant's trial, she was not aware of what had happened to her case, but she "prayed it would go away."

Detective Baione testified that, on October 7, 2015, she received a telephone call to respond to Shady Grove Hospital for a stabbing. She spoke to Alford before she received treatment and described her as shaken and upset. Alford admitted to engaging in prostitution and she described her assailant as a black male, six feet tall, with "chocolate colored skin" and distinctive shoes, *i.e.*, black loafers with large silver buckles. She also provided Detective Baione with the text messages from her phone.

Detective Baione testified that the room at the Radisson Hotel was processed by the forensic services personnel who recovered biological evidence there. Detective Baione traced the telephone number and discerned that the same telephone number had been used to contact a taxicab, which had delivered a passenger to the Shady Grove Metro Station. Detective Baione reviewed video surveillance footage from the Metro Station and saw images of a man matching the description Alford had given them getting out of a cab and proceeding down an escalator. Still photos taken from the surveillance tape showed the man wearing the distinctive shoes with the silver buckles. Detective Baione developed Appellant as a suspect and obtained a warrant for his arrest.

After Appellant's arrest, Detective Baione swabbed his mouth for biological evidence. A sample had also been obtained from Alford while she was at the hospital.

David Morehead, a Forensic Specialist for the Montgomery County Police, testified that he responded to the Radisson Hotel, processed a room for evidence and took photographs. He found a necklace with a knife sheath and he swabbed a door handle and submitted the swabs to the evidence unit. He also searched a stairwell, took photographs there and recovered a knife, which had a triangular blade and a T-shaped handle that was identified at trial as State's Exhibit No. 28. Swabs were taken from the knife in an effort to obtain biological evidence.

Mary Hardy, Forensic Biologist with the Montgomery County Crime Laboratory, testified as an expert witness in the analysis of DNA. She analyzed samples submitted to the laboratory in connection with this case, including swabs taken from the interior door handle of the hotel room, the knife blade and the knife handle. She concluded that the swabs from the three locations contained mixed DNA profiles from at least two individuals, one of whom was an unknown male contributor. Later, when she was provided with the known DNA sample from Appellant, she determined, "with a 99.9 percent degree of confidence, that Larry Steele is the source of the major DNA profile obtained from all three of those samples with the exception of an identical twin." On cross-examination, Hardy acknowledged that she could not determine how DNA was deposited on the objects.

After the State rested its case, the court denied Appellant's Motion for Judgment of Acquittal. Appellant was advised of his right to testify and/or produce evidence on

his behalf. Despite counsel's proffer that he intended to request that the court give a self-defense instruction, arguing that the testimony of the victim, Alford, provided the basis for the instruction, Appellant declined to testify.

In response to the request of Appellant's counsel for a ruling as to whether Appellant had produced evidence that shifted the burden, the court ruled:

> There is nothing additional. If there is not going to be any testimony, there is nothing additional. And I don't see how—I mean a reasonable jury could infer that he meant the natural and probable consequences of his actions *by initiating the contact and pushing the weapon into her ribs.* So, again the motion for judgment of acquittal is denied.

(Emphasis supplied).

At the conclusion of the trial, the jury acquitted Appellant of several offenses, including assault in the first degree and robbery, but returned a guilty verdict on the lesser included charge of battery.

DISCUSSION

I.

Appellant initially contends that the trial judge erred by refusing to give an instruction to the jury defining self-defense. Notwithstanding Alford's testimony that she initially "viewed Appellant as the aggressor," Appellant maintains that he acted in self-defense after Alford "raised the fight to the deadly force level" by producing a knife. Appellant posits that Alford's escalation established the first element of self-defense and her testimony "produced some evidence of the remaining elements[.]" Therefore, Appellant asserts that the court erred in refusing to give an instruction to the jury defining self-defense.

The State's response is that the trial judge properly ruled that the issue of self-defense was not generated by the evidence. According to the State, Appellant failed to provide the threshold, *i.e.,* "some evidence**,**" for any of the requisite factors of the affirmative defense. Regarding deadly force, the State argues that Appellant is still not entitled to an instruction on self-defense because, when Alford produced the knife, she backed away from Appellant, pleaded with him to leave and Appellant had a "known and available avenue of retreat the entire time," but chose to charge at Alford and wrestle with her for the knife. Finally, the State asserts that any error in failing to give a self-defense instruction was harmless because Alford's testimony established that a battery occurred, even if the stabbing had not happened.

Maryland Rule 4–325 governs instructions to the jury in criminal cases. Subpart (c) provides:

> 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 need not grant a requested instruction if the matter is fairly covered by instructions actually given.

Additionally, "[t]he defendant is entitled to have the jury instructed on any theory of the defense that is fairly supported by the evidence." *Fleming v. State*, 373 Md. 426, 432 (2003) (citations omitted). "[I]f the requested instruction has not been generated by the evidence, the trial court is not required to give it." *Id.* This determination is a question of law for the lower court. *Id.* at 433. On appeal,

> [o]ur review is limited to determining 'whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired.' There must be 'some evidence,' to support each element of the defense's legal theory before the requested

> instruction is warranted.

Marquardt v. State, 164 Md. App. 95, 131 (2005) (citations omitted).

In determining what satisfies the threshold of "some evidence," the Court of Appeals has explicated:

> 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.

Dykes v. State, 319 Md. 206, 216–17 (1990) (Emphasis supplied). If there is "some evidence" to support the requested instruction, then, on appeal, we review "the evidence in the light most favorable to the accused." *Fleming*, 373 Md. at 433.

Accordingly, we are tasked with determining if there was "some evidence" generated at trial that Appellant acted in self-defense.[2] The trial judge found that the victim's testimony alone did not sufficiently generate the requested instruction for self-defense; specifically, Alford's testimony did not implicate the second, third and fourth elements of the defense.

The Maryland Criminal Pattern Jury Instruction (MPJI-Cr) which delineates Self-Defense provides the following:

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[2] Bryant v. State, 83 Md. App. 237, 245 (1990). "Imperfect self-defense is an aspect of homicide law and nothing more. Outside of homicide law, the concept doesn't exist . . . . Although discussions of self-defense in the context of homicide cases understandably have dominated the field, the simple and frequently neglected larger truth is that the defense of self-defense applies to assaultive crimes generally."

> Self-defense is a complete defense and you are required to find the defendant not guilty if all of the following four factors are present:
>
> > (1) the defendant was not the aggressor [[or, although the defendant was the initial aggressor, [he] [she] did not raise the fight to the deadly force level]];
> >
> > (2) the defendant actually believed that [he] [she] was in immediate and imminent danger of bodily harm;
> >
> > (3) the defendant's belief was reasonable; and
> >
> > (4) the defendant used no more force than was reasonably necessary to defend [himself] [herself] in light of the threatened or actual harm.

MPJI-Cr 5:07.

In defending oneself against an aggression, if the force is disproportionate to the force faced or if deadly force is used against an unarmed aggressor, then the initial aggressor may become the victim and entitled to an instruction on self-defense. *Watkins v. State*, 79 Md. App. 136, 139 (1989). S*ee also Lambert v. State*, 70 Md. App. 83, 93 (1987) (citation omitted) ("One is not privileged to use deadly force in defending oneself against non-deadly force."). Accordingly, when "the defender counterattacks, using excessive and unreasonable force in a manner reasonably calculated to cause death or great bodily harm, then the original attacker becomes the defender." *Tipton v. State*, 1 Md. App. 556, 562 (1967).

However, this general prohibition against the use of deadly force against an unarmed assailant is not absolute; "[t]his is not inevitably the case for 'account must be taken of the respective sizes and sex of the assailant and defendant, of the presence of multiple assailants, and of the especially violent nature of the unarmed attack.'" *Lambert,* 70 Md. App. at 93 (quoting W. LAFAVE & A. SCOTT, *Criminal Law*, at 456–

57 (2d ed. 1986)).

In *Watkins, supra*, we held that the initial aggressor was entitled to an instruction on self-defense. In that case, the victim, who was physically "bigger" than the Appellant, advanced toward the unarmed Appellant with a knife. 79 Md. App. at 93. We noted:

> Since the Appellant did testify as a competent witness, there was obviously *some evidence* before the jury which, if believed, generated the issue calling for the requested instruction. The failure to give a requested instruction on a critical issue fairly generated by the evidence is reversible error.

Id. (second emphasis added).

In the instant case, Appellant cites Alford's testimony that he "was unarmed and completely naked" when she "raised the fight to the deadly force level[,]" *i.e.*, pulled a knife, in support of his claim that he actually believed that he was in immediate or imminent danger of bodily harm, thereby satisfying the first element to establish self-defense. Appellant does not point to any evidence that would satisfy the first element regarding his *first* physical attack upon Alford. Despite this, the trial judge did not dispute that this element was supported by the evidence. In its brief, the State responds:

> [A]t the moment when Alford drew the knife in response to Steele's unprovoked attack, she was five or six feet away from him and backing further away, telling Steele to 'back away' from her and 'begging him' to 'please just leave.' Although she drew the knife, she did not assault Steele with it; instead she retreated further (although she might have had no duty to do so).
>
> Moreover, Steele had a known and available avenue of retreat the entire time—he was between Alford and the door—but instead, he 'ran straight towards' Alford to wrest the knife away from her. Finally, causing the knife to stab Alford was plainly an excessive use of force where Alford was not attempting to harm Steele but was begging him to leave.

The evidence is undisputed that Appellant was the initial aggressor; however, in

considering the first prong of the MPJI-Cr 5:07, the court stated: "[Well the first prong was that the defendant was not the aggressor. *** I mean you can get that from her testimony." Accordingly, the "some evidence" threshold for the first element has been satisfied.

Regarding the remaining elements, Appellant reasons as follows:

> Ms. Alford's testimony also produced some evidence of the remaining elements of self-defense. She testified that Appellant tried to get the knife out of her hand. He tried to place her hand—with the knife in it—behind her back. As soon as Ms. Alford released the knife, Appellant took it and backed away. He put his clothes on, took the knife out of the hotel room, and disposed of it in the stairwell. From this evidence, the trial judge should have found that Appellant met his burden of producing some evidence to establish his actual belief that he was in immediate and imminent danger of bodily harm, that his belief was reasonable, and that he used no more force than was reasonably necessary to defend himself under the circumstances of this case.

We disagree. Alford testified that, although she pulled a knife on Appellant, she backed away from him, pleaded with him to leave the room and that Appellant was closer to the exit than she was. Unlike *Watkins*, Appellant has failed to produce some evidence that established his actual belief that he was in immediate and imminent danger of bodily harm, that the belief was reasonable or that no more force than was reasonably necessary to defend himself was used. On the contrary, there was evidence that, after Alford backed away from him and pleaded with him to leave, Appellant ran straight at her and initiated a second physical assail, culminating in the stabbing of Alford. Accordingly, the trial court properly ruled that Appellant failed to meet the "some evidence" threshold to support a jury instruction defining self-defense.

II

Appellant next contends that the trial court erred in denying his Motion for

Mistrial, made during the State's rebuttal closing argument, when the Assistant State's Attorney referenced Appellant's failure to produce evidence of his disappointment with Alford. Appellant's trial counsel argued that the Motion for Mistrial should have been granted because, while there is latitude afforded to attorneys in opening and closing arguments, an accused's right to a fair trial cannot be violated. Appellant maintains that this error cannot be harmless and his conviction and sentence should be reversed.

The State responds that the prosecutor's statement was not improper; rather, it was "a legitimate response to argument by the defense" and did not target Appellant's failure to testify or suggest that he was "required to and failed to explain his actions personally on the witness stand." According to the State, "the prosecutor's rebuttal was explicitly framed as a direct response to the explanation of events that Steele's counsel had already provided in his closing argument." Furthermore, the State maintains that, if the prosecutor's statement was "ill-considered, it was justified under the invited response doctrine."

In Maryland, attorneys are afforded "great leeway" during closing argument regarding their presentation of the case to the jury; however, the accused's Constitutional rights cannot be violated. *Sivells v. State*, 196 Md. App. 254, 270 (2010) (citations omitted). "Despite our long history of protecting defendants' right not to testify, a prosecutor may summarize the evidence and comment on its qualitative and quantitative significance." *Smith v. State*, 367 Md. 348, 354 (2001). The Court of Appeals reiterated the test for determining whether a prosecutor's remarks were improper: "[I]s the remark 'susceptible of the inference by the jury that they were to

consider the silence of the traverser in the face of the accusation of the prosecuting witness as an indication of his guilt[?]" *Id.* 354 (citation omitted).

The trial court is in the best position to determine whether a prosecutor's closing remarks are "improper or prejudicial." *Sivells,* 196 Md. App at 271 (citation omitted).

> In deciding whether there was an abuse of discretion, we examine whether the jury was actually or likely misled or otherwise 'influenced to the prejudice of the accused' by the State's comments. Only where there has been 'prejudice to the defendant' will we reverse a conviction.

Whack, 433 Md. at 742–43 (citations omitted) (noting that "not every ill-considered remark made by counsel . . . is cause for challenge or mistrial").

In *Sivells*, we noted that an analysis of the propriety, *vel non*, of a prosecutor's closing comments requires several steps:

> Initially, we must assess whether the prosecutor's comments, standing alone, were improper. If so, we assess whether, in light of the argument made by defense counsel, the prosecutor's comments were a reasonable response pursuant to the 'opened door' doctrine or the invited response doctrine. If not, we must determine whether reversal is required because, under the totality of the circumstances, the comments were likely to have improperly influenced the verdict.

Id. at 271.

The invited response doctrine involves "a prosecutorial argument . . . made in reasonable response to improper attacks by defense counsel." *Id.* at 283 (quoting *Lee v. State*, 405 Md. 148, 163 (2008)).

> There are two important points to remember about the invited response doctrine. First, analysis pursuant to this doctrine is appropriate 'only when defense counsel first makes an improper argument.' Second, the invited response doctrine does not condone an improper argument by the prosecutor when it is in response to an improper argument by the defense. Rather, it merely provides that, in the context of the arguments as a whole, reversal is not required.

Id. (citations omitted).

Furthermore, "[a]n improper argument by defense counsel sufficient to invoke the 'invited response' doctrine is one that goes outside the scope of permissible closing argument and 'invite[s] the jury to draw inferences from information that was not admitted at trial.'" *Mitchell v. State*, 408 Md. 368, 382 (2009) (quoting *Lee*, 405 Md. at 166).

"Where . . . the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared[.]" *Hubbard v. State*, 395 Md. 73, 91 (2006) (quoting *Illinois v. Somerville*, 410 U.S. 458, 462 (1973)). It is an "extreme sanction" that is sometimes necessary when there is "such overwhelming prejudice" and "no other remedy will suffice to cure the prejudice." *Burks v. State*, 96 Md. App. 173, 187 (1993). It is precisely due to this extreme nature of the sanction that a motion for mistrial "should only be granted where manifest necessity as opposed to light or transitory reasons, is shown." *Ezenwa v. State*, 82 Md. App. 489, 518 (1990).

We review a grant or denial of a motion of mistrial for abuse of discretion. The Court of Appeals, in *Nash v. State*, 439 Md. 53, 67 (2014), reiterated that "[a] court's decision is an abuse of discretion when it is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" (quoting *Gray v. State*, 388 Md. 366, 383 (2005)). A lower court's ruling will not be reversed simply because the appellate court would not have made the same decision. *Id.* "[A] trial judge is ordinarily in a uniquely superior position to gauge the potential for prejudice in a particular case, and therefore to determine

whether a mistrial is appropriate or required." *Watters v. State,* 328 Md. 38, 50 (1992).

The following are the relevant portions of closing arguments, rebuttal and corresponding colloquy in the instant case:

> [DEFENSE COUNSEL]: I don't want you to think that just because someone is a prostitute they are a liar.
>
> ***
>
> [S]he is who she is. She is a prostitute. They met voluntarily. She also happens to be not a truth teller.
>
> ***
>
> I talked to her about what she does so you can know in the realm of what she does that tells falsehoods. She misleads people. She uses different names. She says things she is not. She advertises different than who she is. That is the nature of what she does. Not that she is necessarily a liar. Okay?
>
> ***
>
> I don't want to tell you that just because she is a prostitute she is a liar but she does mislead people. You will have these ads that she posted that Larry Steele called on going to expect what was in these ads based on her words in these ads that she was someone else other than she appeared to be.
>
> They had engaged in a contract. Money was put on the dresser. It turned out that his disappointment in who she was evolved into an unintended, unexpected development. Now, the prosecutor talked about the minute Larry Steele grabbed her wrist that was an assault.
>
> The minute Larry Steele grabbed her wrist holding a knife that was not an assault. That was an action by Larry Steele to prevent her from doing something with that knife and he told her you are not who you are. I'm walking out and I'm taking my money back.[3]
>
> ***
>
> We have never contested from the beginning that Larry Steele wasn't involved in this case so most of the evidence that you have seen today other than her

[3] No testimony or evidence was offered by Appellant in support.

testimony he was there [sic]. He went there for this. He is (unintelligible) she is a prostitute. We have this. He wanted to get his money back.

She pulled out the knife. He grabbed her arm and cut herself [sic]. Bleeding, taking the knife, throwing it away down the stairs so she wouldn't have it anymore. And that's it. No crimes were committed by Larry Steele that day.

***

[ASSISTANT STATE'S ATTORNEY]: That promise that was made to you in opening statement that there was a fight because he was disappointed. That doesn't exist. That's not there.

That is what is called a fact that is not in evidence. Something for you not to consider or base a decision on. Where [is] the evidence of that? No witness said that. No evidence shows that. The argument is that he had no choice but to do this. Where is the evidence of that? There is no testimony to that. There is no indication of that in any of the exhibits. He wants you to hook into and hang your hat on speculation, guess work, hopes that this defendant that he can get away with stabbing someone.

Now, I guess despite the fact that he says don't consider she is a prostitute and then he spends most of his time waving these ads in your face he is telling you the only evidence is her word and you can't believe her because something she has done and a decision that she has made in her life [is] to accept money for sex.

Well, that's not true either because his blood is on that door handle. His blood is on that knife and yes *the defense has never disputed that he was there and he was involved. I wonder why. His blood is all over the place*.

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Move to strike. I defer (unintelligible).

THE COURT: I'm sorry?

[DEFENSE COUNSEL]: I'll defer to the motion later when he is done.

[ASSISTANT STATE'S ATTORNEY]: So he has to come up—I'm sorry. Did Your Honor wish—

THE COURT: At this time?

[DEFENSE COUNSEL]: No. I'll wait.

[ASSISTANT STATE'S ATTORNEY]: So he has to come up with some excuse and the excuse is just don't believe her.

[DEFENSE COUNSEL]: Same objection: We need to approach now, Judge.

THE COURT: Approach.

[DEFENSE COUNSEL]: He is making references to the defendant having to prove some kind of—it is a burden shifting. He says we have to come up with some proof.

THE COURT: The first statement that he said where the defendant never denied that he was there. I mean that is basically what you said.

[DEFENSE COUNSEL]: Okay.

THE COURT: All right, this one is going too far in terms of he has to prove something.

[ASSISTANT STATE'S ATTORNEY]: Well, I'm not suggesting that. I'm just responding to we've never disputed that he was there. I mean that was my direct quotes.

THE COURT: But the last statement you said in terms of he never produced anything there is no—

[ASSISTANT STATE'S ATTORNEY]: No, I didn't say he didn't produce anything.

THE COURT: Well, I mean words to that effect.

[ASSISTANT STATE'S ATTORNEY]: I mean words to that effect weren't spoken. I said—I said—quoting [defense counsel] I said he has never—I said he has to come up with some other excuse. He has never disputed he was there because yes. His blood is all over there. How could you dispute that? So now he has to come up with some other excuse.

THE COURT: Okay. And what other excuse are you saying that he has come up?

> [ASSISTANT STATE'S ATTORNEY]: The speculation. I mean the whole point is that [defense counsel] is asking them to make findings of fact that are not supported by any testimony or evidence, specifically that there was a dispute about her not being the person in the photo. There is no evidence of that. There is no evidence of what photo he saw.
>
> There is no evidence he signed for it at all. Those are the specific ads that he viewed or that there was an argument that popped off as a result of him being dissatisfied. There is no evidence of that.
>
> THE COURT: There may be not [sic] the evidence of that and he can argue that but you can't imply that he is one who has to come up with evidence to the contrary. You can't do that.
>
> [ASSISTANT STATE'S ATTORNEY]: No. I have to be able to respond to arguments that are surrounding facts that are not in evidence.
>
> THE COURT: By saying there is no evidence of that—that's fine, *but by saying they haven't produced, that's not fine*.
>
> [ASSISTANT STATES ATTORNEY]: I didn't say that they haven't produced it.
>
> [DEFENSE COUNSEL]: I move for a mistrial. I think he did say that.
>
> [ASSISTANT STATE'S ATTORNEY]: I'll move on.
>
> THE COURT: Let's move on.

(Emphasis supplied).

In the instant case, Appellant provided the explanation during opening and closing arguments that he was disappointed with Alford because she advertised her services under a different picture. During closing rebuttal argument, the prosecutor addressed these explanations by drawing attention to the lack of evidentiary support. Appellant characterizes this as impermissible "burden-shifting" and contends that the trial court erred in denying his Motion for Mistrial. We disagree. As the above excerpt illustrates, the prosecutor did not say or infer that Appellant had a duty to produce

evidence. Simply highlighting that there was no testimony or exhibits, only "speculation" to support Appellant's explanations, does not constitute "burden-shifting" or improper prosecutorial remarks.

Appellant cites *Smith v. State*, 367 Md. 348 (2001), as analogous to the case *sub judice.* There, the Court of Appeals reversed this Court's ruling, holding that the State "impermissibly commented on Appellant's failure to testify." *Id.* at 361. In *Smith*, the prosecutor remarked to the jury during closing argument: "[W]hat explanation has been given to us by the Defendant?" *Id.* at 358. The Court held that, when the prosecutor rhetorically answered "zero, none," he was referencing the defendant's right not to testify. *Id.* The Court further reasoned:

> The prosecutor did not suggest that his comments were directed towards the defense's failure to present witnesses or evidence; rather, the prosecutor referred to the failure of the defendant alone to provide an explanation. The prosecutor's comments were therefore susceptible of the inference by the jury that it was to consider the silence of the defendant as an indication of his guilt, and, as such, the comments clearly constituted error.

Id. at 358.

In the instant case, there is an important distinction. The prosecutor was not commenting on Appellant's failure to provide an explanation or that he provided "zero" explanation; rather, the prosecutor commented on the lack of evidence to support Appellant's proffered explanation. The prosecutor expressly referenced witness testimony, exhibits and evidence generally. Our reading of the record supports the premise that the trial court's ruling was not "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Nash, supra.* Accordingly, we hold that the trial court did not

err in denying Appellant's Motion for Mistrial.

III

Appellant's final contention is that the evidence was legally insufficient to sustain his conviction for battery. Specifically, Appellant argues that the instruction given to the jury was for the "battery form of assault" and that "the minute Larry Steele grabbed [Alford's] wrist," while she held the knife, did not constitute an assault. Appellant's argument focuses solely upon the contact concerning the knife and Alford's subsequent injury as a result.[4]

The State responds that Appellant's sufficiency of the evidence argument "misses the mark entirely—for reason upon reason." First, it's "essentially just a rehash of his unsuccessful argument that an issue of self-defense was generated by the evidence." Second, "[t]he jury was free to reject Steele's preferred interpretation of the evidence." Third, Appellant "mischaracterizes the evidence[,]" namely, the fact that Alford maintained possession of the knife during the attack "does not negate any element of battery."

The Court of Appeals, in *Taylor v. State*, 346 Md. 452, 457 (1997), citing the oft-quoted decision of the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 319 ((1979), penned the standard of review for determining the sufficiency of the evidence in a criminal proceeding:

In reviewing the sufficiency of the evidence to sustain a criminal conviction, it

[4] In his brief, Appellant seeks to reiterate his trial counsel's closing argument concerning Appellant's thought process. In doing so, however, Appellant did not introduce evidence at trial to support these contentions; consequently, we will not consider them on appeal.

> is the duty of this Court to determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond reasonable doubt.'
>
> ***
>
> We do not measure the weight of the evidence; rather, our concern is only whether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt. The judgment of the circuit court will not be set aside unless clearly erroneous, with due regard given to the opportunity of the trial court to judge the credibility of the witnesses.

(Second emphasis supplied) (some citations omitted).

Formerly a common law crime, battery is now governed by the assault statutes, effective October 1, 1996. *Robinson v. State*, 353 Md. 683, 696 (1999). Md. Code Ann., Crim. Law ("C.L.") § 3–201(b) defines "assault" to mean "the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings." "Second-degree assault is a statutory crime that encompasses the common law crimes of assault, battery, and assault and battery." *Quansah v. State*, 207 Md. App. 636, 646 (2012). *See* C.L. § 3–203(a) ("A person may not commit an assault.").

"A battery is a touching that is either harmful, unlawful or offensive." *Id.* at 647. "[A]n assault of the battery variety is committed by causing offensive physical contact with another person." *Nicolas v. State*, 426 Md. 385, 403 (2012). A criminal battery may be intentional or unintentional. *Elias v. State*, 339 Md. 169, 183 (1995). However, in order to sustain a conviction for intentional battery, there must be "legally sufficient proof that the perpetrator intended to cause harmful or offensive contact against a person without that person's consent and without legal justification." *Id.* at 183–84. The contact may be direct or indirect. *Marquardt v. State*, 164 Md. App. 95, 129 (2005).

Furthermore, the accused need not intend to cause a specific injury; rather the "mere placing of one's hands upon the body of another without consent of the latter is sufficient in law, to constitute the offense." RICHARD P. GILBERT & CHARLES E. MOYLAN, JR., MARYLAND CRIMINAL LAW: PRACTICE & PROCEDURE § 3.1, at 47–48 (1983). *See also Marlin v. State,* 192 Md. App. 134, 166 (2010) ("A consummated intentional battery requires a general intent on the part of the perpetrator to hit the victim.").

The State is required to prove the following to sustain a conviction for battery:

> (1) the defendant caused offensive physical contact with, or harm to, the victim; (2) the contact was the result of an intentional or reckless act of the defendant and was not accidental; and (3) the contact was not consented to by the victim or was not legally justified.

Nicholas, 426 Md. at 403–04. *See also* MPJI–Cr 4:01 (2016 Supp.).

Applying the foregoing to the instant case, the trial judge instructed the jury as follows:

> The State must prove one, that the defendant caused offensive physical contact with or physical harm to Christina Alford. Two, that the contact was the result of an intentional or reckless act of the defendant and was not accidental and, three, that the contact was not consented to by Christina Alford.

Upon our review of the evidence presented, in the light most favorable to the State, we hold that a rational trier of fact could have found the essential elements of battery beyond a reasonable doubt. There are two instances presented in the evidence where Appellant engaged in intentional, offensive physical contact without Alford's consent. The first instance was the initial physical contact during which Appellant grabbed Alford's arm and put it behind her back when he attempted to "arrest" her as

he impersonated a police officer. The second offensive contact occurred when, after Alford produced the knife, Appellant charged at her and grabbed her again. Either contact with Alford would satisfy the elements of battery. However, the second offensive contact ended when Alford sustained physical injury from the knife. As we are tasked with reviewing the sufficiency of the evidence for the battery conviction, we decline to engage in a legal analysis, *sua sponte*, as to whether Alford's injury from the knife *per se* constituted a battery. Although Appellant's argument on appeal focuses solely upon the physical injury, he overlooks the other evidence presented upon which a rational fact-finder could find the essential elements of the crime of battery.

CONCLUSION

In sum, we hold that the trial court did not err by refusing to give the requested instruction on self-defense, the trial court did not err by denying Appellant's Motion for Mistrial and the evidence presented was legally sufficient to sustain Appellant's conviction for battery.

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