UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1967

September Term, 2013

TYRONE LEWIS

v.

STATE OF MARYLAND

Berger,
Leahy,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: August 7, 2015

Tyrone Lewis, appellant, was convicted in the Circuit Court for Prince George's County of first degree murder, first degree felony murder and related charges. He presents the following question for our review:

> "Did the prosecutor's inappropriate comments in rebuttal closing argument deprive appellant of a fair trial?"

We shall answer that question in the negative and affirm.

I.

Appellant was indicted in the Circuit Court for Prince George's County with murder, kidnapping, armed carjacking, armed robbery, conspiracy to commit kidnapping, conspiracy to commit carjacking and related handgun offenses. The jury convicted appellant of first degree murder, first degree felony murder, kidnapping, armed robbery, robbery, conspiracy to commit kidnapping, conspiracy to commit armed robbery, use of a handgun in the commission of a crime of violence, the unlawful possession of a regulated firearm and the possession of an unregistered rifle/shotgun.[1] The court sentenced appellant to a term of life imprisonment without the possibility of parole for first degree murder, thirty years consecutive for kidnapping, twenty years consecutive for armed robbery, thirty years consecutive for conspiracy to commit kidnapping, twenty years consecutive for conspiracy

[1]The Court granted appellant's motion for a judgment of acquittal as to armed carjacking and conspiracy to commit armed carjacking. The State nolle prossed one count of the use of a handgun in a crime of violence and the unlawful sale of a registered firearm.

to commit armed robbery and twenty years consecutive for use of a handgun in a crime of violence.[2]

The following evidence was presented at trial. Appellant's co-conspirator, Linwood Johnson, recounted the basic narrative surrounding appellant's crimes in his testimony. On September 21, 2011, appellant, Linwood Johnson and Ivan Newman kidnapped, robbed and murdered Lenwood Harris, an acquaintance of appellant, because appellant wanted money to assist his friend, Kelvin Walker, who was incarcerated in the Charles County Detention Center and needed $400 for a bail bond.

Johnson testified that appellant called him on September 21, 2011 and informed him that Walker "had got locked up and it was a situation we needed to take care of." Johnson drove to meet appellant, and the two men picked up Newman. Once the three men were together, appellant began "explaining the situation, what was going to go down that night." Appellant stated that "this guy he knows had some money and some drugs and he was going to rob him." Appellant was referring to Lenwood Harris, a local businessman who owned a small clothing company, Mycha, and had sold clothing previously to appellant. Appellant arranged to meet Mr. Harris in Alexandria, Virginia. While appellant was coordinating with Mr. Harris by cell phone, appellant, Johnson and Newman gathered supplies including a shotgun, a handgun, a large white van, masks, gloves, duct tape and several "walkie-talkies."

[2]The court merged first degree felony murder with first degree murder, robbery with the armed robbery and unlawful possession of a regulated firearm and possession of an unregistered shotgun/rifle with use of a handgun in the commission of a crime of violence.

When the men arrived in Virginia, they put on masks and gloves, grabbed the guns and met Mr. Harris. Appellant, who was carrying the shotgun, instructed Mr. Harris to get into the van. Appellant, Johnson and Newman duct taped Mr. Harris' ankles together, his hands behind his back and his mouth shut. Appellant had Johnson remove the duct tape from Mr. Harris' mouth, and he began to question Mr. Harris about the drugs and money that appellant believed that he possessed. Mr. Harris said "basically that he didn't really have no money on him at that time." Appellant, Johnson and Newman decided to leave the area to "see was the guy lying." They left Virginia, with Johnson driving the van, appellant in the back seat with Mr. Harris and Newman following in Mr. Harris' car.

On the drive back to Maryland, appellant began to argue with Mr. Harris. Johnson testified as follows:

> "THE STATE: When Mr. Lewis was asking for the money and the drugs, did he get anything from the guy?
>
> JOHNSON: I think the guy had $50 in his pocket.
>
> THE STATE: Any drugs or anything like that?
>
> JOHNSON: No.
>
> THE STATE: Did the guy have a wallet?
>
> JOHNSON: He had a wallet.
>
> THE STATE: What happened with that?
>
> JOHNSON: He had some credit card and some other identification in it.

> THE STATE: What happened with that?
>
> JOHNSON: Ty got the wallet, took the credit card out of it, the bank card, and basically said — the guy told him, look, I got like $300 on a bank card. You can have that.
>
> THE STATE: What did Mr. Lewis respond?
>
> JOHNSON: He was basically at that point, you got to have more than this. But, you know, the guy was like I don't have more than this."

Appellant took Mr. Harris' debit card and recorded the PIN number in his phone.

While appellant, Johnson and Newman were driving back into Maryland, appellant removed his mask. Mr. Harris recognized appellant and referred to him by name. Johnson was alarmed that appellant had removed his mask and testified as follows:

> "JOHNSON: At that point, I was like, you know, why are you doing something so stupid like this? Take off your mask? I mean, the guy done recognize you. I mean, are you crazy or what? If you're robbing somebody, you don't take off your mask.
>
> * * *
>
> THE STATE: And what did Mr. Lewis say to that?
>
> JOHNSON: He was, like, don't worry about it. I gon' take care of it."

Later, appellant asked to go to a landfill but Johnson preferred to go to their "stash" house. Johnson testified to their conversation as follows:

> "We were having a conversation. I was like why we going to a landfill this time of night? He was like, basically, he was

> saying, you know, what I got to do. And he was basically referring to he got to eliminate the guy since he done recognize his face, who we are. And I was like, oh, this is getting way out of hand here. This wasn't part of my plan to be a part of this. Then I was like, hold it, man. We got a stash house we have in Ft. Washington. Let's go to the stash house."

Once they arrived at the stash house, appellant stated that he wanted to move Mr. Harris into the house. Johnson cut the duct tape from his feet. Appellant, Johnson and Newman walked Mr. Harris over towards the house. When they got to the house, appellant insisted that they walk around to the side rather than entering through the front door. Johnson testified that, once they reached the side of the house, "before we know it, bam. Ty shot [Mr. Harris]" in the back of the head with the shotgun.

Following the murder, appellant, Johnson and Newman ran back to the vehicles. They drove Mr. Harris' vehicle to a nearby apartment complex, searched the vehicle for other valuables and abandoned it. The three men attempted unsuccessfully to withdraw money from ATMs in Maryland, but were able ultimately to withdraw $200 from an ATM in Alexandria, VA. Appellant and Johnson returned to the stash house where they had killed Mr. Harris. Johnson and appellant noticed two wells on the property, removed the covering from one of the wells and threw Mr. Harris' body inside. They replaced the covering on the well and covered as much blood as they could with dirt.

Detective Allison Hamlin testified that she recovered a spent shotgun shell casing from a closet in appellant's basement while executing a search warrant on the premises.[3] Prior to trial, Johnson led police to the place where he had hidden the 12-gauge, sawed-off shotgun that he testified appellant had used to kill Mr. Harris.[4] Scott McVeigh, a forensic firearms and tool mark examiner, compared the shotgun shell recovered from appellant's basement to the shotgun Johnson had hidden in the woods and the wadding and pellets recovered by the medical examiner from Mr. Harris' head. He testified that, to a reasonable degree of scientific certainty, the shell recovered from appellant's basement matched the shotgun. He could not say with absolute certainty that the shell matched the padding and the pellets from Mr. Harris' head because there were insufficient markings, but he testified that everything that he was able to see was consistent.

Wendy Dunham, Chief Security Officer for Virginia Commerce Bank, testified that someone attempted to use Mr. Harris' debit card several times on September 22, 2011, the day after the murder. During one of these attempted transactions, a surveillance camera

[3]Johnson testified that, at the time that appellant, Johnson and Newman fled the scene of the murder, the bullet was still in the shotgun because the gun was old and did not function properly. He explained as follows:

> ". . . when you fire the shotgun, the casing and the bullet gets stuck in the chamber. You have to take a metal rod and from the barrel you have to jig it out."

At the time of the murder, Johnson stated that appellant did not have the metal rod with him.

[4]Johnson testified that appellant stored the weapon initially at appellant's home, but that several weeks later he gave it to Johnson, who buried it in the woods.

aimed at one of the ATMs showed someone attempting to use the card at 1:05 a.m., 1:06 a.m. and 1:08 a.m. The State introduced images from the security footage, along with photographs of appellant's tattoos and birthmarks. In one of the surveillance images, the person using the ATM had his arm extended towards the camera in order to use the machine. A large tattoo on his inner arm read "57 crooks" surrounded by distinctive markings, matching a tattoo on appellant's arm.

Detective Jordan Swonger testified for the State as an expert in cell phone and cell site technology. First, Detective Swonger testified regarding appellant's phone calls. On September 21, the day of the murder, there were a total of eleven phone calls back and forth between appellant and the victim, corroborating Johnson's allegation that appellant had spoken to the victim repeatedly on the phone in order to lure him into a meeting. Appellant called Kelvin Walker repeatedly as well, consistent with the State's theory that appellant wanted to rob Mr. Harris in order to post bail for Walker. Between September 21-22, there were twenty-one phone calls between appellant and Walker. In the three to four day period surrounding the murder, Detective Swonger testified that appellant and Johnson were in regular contact, calling each other a total of ninety-one times. Second, Detective Swonger testified as to the locations of the cell towers used by appellant's, Johnson's and Mr. Harris' phones on September 21-22. He stated that appellant's phone utilized a series of towers, beginning in the early morning hours of September 22, that would have been consistent with Johnson's testimony that appellant went to Virginia to attempt to withdraw money from Mr.

Harris' bank and with Sebrina Walker's testimony that he was in the area when police searched Johnson's vehicle.

Sebrina Walker testified that she saw appellant twice on September 21-22, 2011 — once to obtain money to post bond for her son and once when he visited her apartment after her son was released — and that both times he was traveling with Johnson. In the first encounter, appellant contacted Ms. Walker to offer to help her post bail for her son, appellant's friend Kelvin Walker. Appellant, who was traveling with Newman and Johnson, met with Ms. Walker on September 21 and gave her $ 200.00. Early the next morning, appellant visited Ms. Walker's apartment. Ms. Walker testified that, although appellant was the only one that came into her apartment, Johnson was traveling with appellant and slept in the car while appellant was visiting. While appellant was in the apartment, police responding to a call about a suspicious vehicle questioned Johnson and searched his vehicle. They found three ski masks, three pairs of work gloves, two walkie-talkies, tools, pliers and latex medical gloves. Ms. Walker testified that she told appellant that police were searching Johnson's vehicle and he stayed in the apartment until the police departed.

Officer William Mayhew of the Charles County Police Department testified that he responded to a call for a suspicious vehicle on September 22, 2011, at approximately 5:50 a.m. The car was parked on Allan Court, approximately 100 to 150 feet away from Ms. Walker's home. Mayhew observed a man, later identified as Johnson, sleeping in the front passenger seat of the car. Mayhew woke Johnson and obtained his consent to search the

vehicle. He testified that Johnson was extremely nervous, wearing dark sweats that were not suitable for the warm weather and changed his story several times. Mayhew seized a dark colored ski mask, a pair of work gloves, a small hand held walkie talkie and several small tools, pliers and screwdrivers from a fanny-pack Johnson was wearing. He seized another, matching walkie-talkie, a large number of tools, two ski masks, two sets of work gloves, numerous DVDs, CDs, camcorders and latex medical gloves from Johnson's car. Mayhew did not arrest Johnson. He testified that, at the time, he was not aware of Lenwood Harris' disappearance.[5]

Detective Michael Crowell of the Prince George's County Police Department testified that he interviewed Johnson on January 31, 2012 as a person of interest in the investigation of Mr. Harris' disappearance. Detective Crowell testified that Johnson had not been arrested or charged at that point, but came voluntarily to the Criminal Investigation Division. After speaking with Johnson, Detective Crowell and another Detective followed Johnson to a wooded area, where Johnson had hidden the shotgun. Additionally, Johnson led detectives to an area of the side ramp from Interstate 495 to Highway 295, where they found a potato chip bag containing a cell phone and a memory card. Finally, Johnson lead the detectives to

[5]Johnson testified police officers approached his vehicle and awoke him with a flashlight. They asked for his identification, which he provided. They asked him if he had drugs, and he responded that he did not. Finally, they asked for consent to search his vehicle. Johnson testified that he consented to the search.

the stash house, where Harris' body had already been removed from the well where it was found earlier in the investigation.

Appellant was arrested and charged as noted above.

This appeal centers on three statements made by the State during its rebuttal closing argument. In the first statement, the State alluded to appellant's prior conviction. In the second statement, the State arguably mischaracterized a statement by defense counsel when responding to appellant's arguments regarding the origin of a particular bullet. In the third statement, the State referred to "silence" on a certain issue in a manner which appellant claims constituted an impermissible comment on appellant's right to remain silent or shifted the burden of proof.

The facts pertinent to each of these statements are as follows. First, the State mentioned appellant's prior conviction in its rebuttal closing argument. Appellant and the State agreed to stipulate to appellant's prior conviction of a crime that disqualified him from possessing a regulated firearm. Appellant stipulated to his prior conviction as follows:

> "STIPULATION BY THE PARTIES
> Defendant's prior conviction of a disqualifying crime which prohibits him from possessing a regulated firearm
>
> The State of Maryland and [appellant] do hereby agree and stipulate to the following:
>
> 1. That the Defendant, Tyrone Lewis, has been convicted of a crime which disqualifies him under Maryland Law from possessing a regulated firearm.

> The parties agree that this stipulation will be presented to the jury as evidence of agreed facts and the State of Maryland will not be required to introduce evidence in regard to the matters set forth herein."

During the State's rebuttal closing argument, the State discussed appellant's prior conviction as follows:

> "THE STATE: And as far as Mr. Johnson and his history, yes, he has a previous conviction. For what? Theft? *Well, so does Mr. Lewis. He has a conviction, too.*
>
> DEFENSE COUNSEL: Objection
>
> THE COURT: Overruled.
>
> THE STATE: He stipulated to it. He has a conviction.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.
>
> THE STATE: You were all here when he read the stipulation. That's why he isn't allowed to have a gun, right? Just so we get past that."

The second statement related to the State's response to appellant's argument regarding the origin of the bullet found in appellant's basement. In his closing argument, defense counsel attempted to explain the presence of the bullet in appellant's house. He argued as follows:

> ". . . And [the prosecutor] made a jump that I consider very unfair — and I hope you recognized it. He started out here is the shell, the expended cartridge from the shotgun that killed Lenny Harris, suggesting that that shell had been established in

> evidence as having been the expended shell from the shotgun blast that killed Mr. Harris. Not true.
>
> If you remember the testimony of Officer McVeigh of the Firearms Examination Unit, who looked at that and drew the conclusion that that shell had at one time been fired from this weapon. But he clearly said he couldn't say when it was fired. He couldn't say where it was fired or by whom it was fired. So that is not established by the evidence."

In its rebuttal closing argument, the State argued as follows:

> "THE STATE: Here's something else that corroborates Linwood [Johnson]. That shot shell in the house. When Linwood was arrested, he didn't get out. How else did that shot shell that links to that gun get into that house? And for defense counsel to try to say that that's not the shot shell that comes from that gun, I don't think that's quite accurate.
>
> DEFENSE COUNSEL: Objection. I didn't say that.
>
> THE COURT: They're both 12-inch, both 7-and-a-half, both Winchester.
>
> THE COURT: Overruled."

Finally, appellant objected to the State's comment regarding security footage from one of the ATMs used by appellant when he was attempting to withdraw money from Mr. Harris' account. The film showed someone with distinctive tattoos and a birthmark identical to appellant's attempting to use the card. In rebuttal closing argument, the State reproduced images from the video for the jury and stated as follows:

> "I'm going to end with this. Can you believe that defense counsel got up here and talks to you about beyond a reasonable doubt and talks to you about DNA, which I think we have totally explained, and talks to you about fingerprints. *And yet, for*

> *whatever reason, totally, totally ignores this (pointing). People, how do you explain this?* How do you explain that at the King Street station, the King Street branch at exactly 10:28, look at the man who is approaching and he's got the ATM card and the phone in his hand. And he would need the phone, because [Johnson] was pretty consistent about that. With all the excitement going on that night, it would be typical for [appellant] to keep track of that four-digit number. Got to put it in your phone to remember it.
>
> There he is approaching the ATM. Here he is. Defense counsel totally ignores that. And if he's going to ignore that, he's definitely going to ignore that. I mean, that's like having a signature. It's not just '57 Crooks.' It's the birth mark right underneath the 'o' in '57 Crooks.*' How do you even explain that? You know how he explains it? He doesn't. Just silence. Absolute silence.*
>
> How does Linwood Johnson make that up? He doesn't. Because what Linwood Johnson told you was the truth. He shared with you what he did and why he's guilty and he told you why he's guilty (pointing)."

As indicated, appellant was convicted and sentenced. This appeal followed.

II.

Before this Court, appellant argues that the State's inappropriate comments in rebuttal closing argument deprived him of a fair trial. He alleges that the prosecutor's comments suggested to the jury that appellant had a prior criminal conviction for robbery, shifted the burden of proof to the defense, commented on appellant's failure to testify and misstated defense counsel's argument, all of which deprived appellant of a fair trial.

The State argues that the statements were proper and, if improper, do not entitle appellant to a new trial. Any prejudice to appellant was slight, and the court re-instructed the jury following closing arguments about the burden of proof, the presumption of innocence and the fact that closing arguments are not evidence.

III.

The determination of whether comments in closing argument are proper lies within the sound discretion of the circuit court. *Degren v. State*, 352 Md. 400, 431 (1999). We reverse only where the circuit court clearly abused its discretion and any improper comments by the State prejudiced the accused. *Id.*

Counsel have great latitude in the presentation of closing arguments. *Id.* at 429-31. Counsel's latitude is not unlimited, however. *Id.* A statement is improper where the State's comments misled or were likely to have misled the jury to the defendant's prejudice or where the State's remarks violated the defendant's constitutional rights. *Wise v. State*, 132 Md. App. 127, 142 (2000). Not every improper comment by the State constitutes reversible error. *Spain v. State*, 386 Md. 145, 158 (2005). In deciding whether to reverse, we consider several factors, including the severity of the remarks, the measures taken by the trial court to cure any possible prejudice and the weight of the evidence against the defendant. *Id.* at 159. We consider the effect of any improper comments cumulatively to determine "the prejudice that

each of the statements, and all of them together, created in the minds of the jurors . . . ." *Lawson v. State*, 389 Md. 570, 600 (2005).

We address first appellant's argument that the State suggested that appellant had a prior robbery conviction. Appellant maintains that he was highly prejudiced because defense counsel had just argued to the jury that witness Johnson should not be believed because he had a theft conviction, and hence, he was dishonest. He posits that the State's suggestion that appellant had a robbery conviction served the same purpose to the jury—to discredit, shame and distrust appellant.

The State argued, in rebuttal closing, as follows:

> "And as far as Mr. Johnson and his history, yes, he has a previous conviction. For what? Theft? Well, so does Mr. Lewis. He has a conviction, too."

Appellant and the State stipulated that appellant had a prior conviction that disqualified him from possessing a regulated firearm. The State did not offer any evidence as to the exact nature of appellant's prior crime and, indeed, could not have offered such evidence properly under Maryland law. *See Carter v. State*, 374 Md. 693, 720-21 (2003) (holding that a trial court may not allow the State to introduce evidence of the name or nature of a previous conviction once appellant has offered to stipulate to the existence of a crime that disqualifies him from possessing a regulated firearm). Although it would have been improper for the State to inform the jury of the name or nature of appellant's previous conviction, that is not what occurred. Whatever ambiguity there may have been in the statement "Well, so does Mr.

Lewis" was clarified when the State continued, "He has a conviction, too." The latter sentence made clear to the jury that the commonality between appellant and Johnson was that both men had a prior conviction, not that those convictions were necessarily of the same nature.

The record is clear that at no time did the State tell or argue to the jury that appellant had a prior *robbery* conviction. At best for appellant, the jury might have inferred, from the colloquy, that appellant had a prior conviction for theft. Even if the jury so concluded, any error on the part of the State was harmless error. We hold that the State's comments regarding appellant's prior conviction did not imply that appellant had been convicted of any particular crime, and therefore did not mislead the jury as to the facts in evidence. *See Degren*, 352 Md. at 429-31.

The State's misstatement regarding appellant's closing argument about the shotgun shell, if it misled the jury at all, did not prejudice the defendant. *See Degren*, 352 Md. at 429-31. Defense counsel contended, in his closing argument, that, although the shotgun shell found in appellant's home matched the shotgun to which Johnson led police, there was no proof that the shell found in appellant's home was the shell that killed Mr. Harris. Defense counsel argued that the shell could have been fired at any time, by any person. In its rebuttal closing argument, the State alleged as follows:

> "Here's something else that corroborates Linwood [Johnson]. That shot shell in the house. When Linwood was arrested, he didn't get out. How else did that shot shell that links to that gun

> get into that house? And for defense counsel to try to say that that's not the shot shell that comes from that gun, I don't think that's quite accurate."

There is no evidence that the State's error was intentional. At worst, the State's comment implied that appellant denied that the shotgun shell in his home came from the shotgun recovered by police, rather than simply from the blast that killed Mr. Harris. It did not misstate any facts in evidence. The variation in the State's characterization of the reasons that appellant questioned the relevance of the shell found in his home — that is, whether he was questioning the time of its creation or its origin more broadly — was slight. It is unlikely that any reasonable juror would interpret the statement to "denigrate defense counsel." Any error was harmless beyond a reasonable doubt.

We turn to appellant's argument that the State commented impermissibly on appellant's silence and shifted the burden of proof to the defendant. Appellant argues that the State referenced appellant's decision not to testify and implied that he bore the burden of responding to the State's evidence, particularly the video ATM surveillance. As a threshold matter, we note that appellant's argument before this Court that the State commented improperly on his silence or failure testify is not preserved for our review. This argument was never raised before the circuit court and is clear appellate afterthought. Rule 8-131. Before the trial court, defense counsel presented one basis for his objection and mistrial motion—that the State attempted improperly to shift the burden of proof to the defendant by suggesting to the jury that the defense counsel should have refuted appellant's

tattoo picture at the ATM. When a party gives specific grounds for an objection, that party will be limited on appeal to those grounds and will be deemed to have waived all other grounds. *Thomas v. State*, 301 Md. 294, 330 (1984)("[O]ur cases make plain that where specific grounds for an objection are given, the party objecting is held to those grounds and all others not specified are waived"); *State v. Jones*, 138 Md. App. 178, 218 (2001) (stating that a general objection ordinarily preserves all grounds of an objection which exist, but when particular grounds are stated, a party is limited on appeal to those grounds and all others not stated are waived).

In his motion for a mistrial, defense counsel argued as follows:

> "But more importantly, at least three times in the rebuttal argument the State improperly attempted to shift the burden of proof to the defendant by saying that we should have called Ivan Newman or Corrine Watson, I should say. That was improper. *That I should have, as defense counsel,* should have refuted his tattoo pictures at the ATM. We have no burden to do that. He said to the jury, how do you explain that? It's not *my* burden to explain that.
>
> That's it. So we move for a mistrial based on improper argument." (Emphasis added)

The State responded, arguing that the comments did not shift the burden of proof. The State did not mention appellant's right not to testify. The court ruled as follows:

> "THE COURT: I'm going to deny the motion for a mistrial. I've already instructed as to the burden. I've already instructed as to the fact that argument of counsel is just that and it's their recollection that controls. And I will be happy to reiterate that again.

> [DEFENSE COUNSEL]: I would ask the Court to reiterate both of those, *including the burden, that the defense has no burden*." (Emphasis added).

Appellant moved for a mistrial on specific grounds, arguing that the State's comments had the effect of shifting the burden of proof. When that motion was denied, appellant requested a curative instruction on the same grounds. He never stated that the comment referred to appellant personally rather than to defense counsel and therefore, violated his constitutionally protected right against self-incrimination. His argument that the State was referencing his failure to testify is not preserved.

Even assuming *arguendo* that appellant's argument was preserved, we would hold that the State's remarks were not improper. After commenting extensively about the defense counsel's argument, the prosecutor argued as follows:

> "There he [appellant] is approaching the ATM. Here he is. Defense counsel totally ignores that. And if he's going to ignore that, he's definitely going to ignore that. I mean, that's like having a signature. It's not just '57 Crooks.' It's the birth mark right underneath the 'o' in '57 Crooks.' How do you even explain that? You know how he explains it? He doesn't. Just silence. Absolute silence."

The prosecutor's comments need to be analyzed in context. The comments were in direct response to defense counsel's immediately preceding closing argument. In context, the comments were not "susceptible of the inference by the jury that they were to consider the silence of the traverser . . ." but, rather, were a comment on the defense counsel's argument regarding a central piece of evidence. *See Smith v. State*, 367 Md. 348, 354 (2001) (emphasis

removed). The prosecutor's argument as to the absence of any explanation of a critical piece of evidence was not burden shifting. Moreover, the jury instructions made clear to the jury that the burden of proof is upon the State and remains upon the State until the jury is convinced of defendant's guilt beyond a reasonable doubt. [6]

To the extent that appellant is arguing that the prosecutor was referring to appellant's lack of any explanation, even assuming *arguendo* that the issue is before us properly, we would find that in context, the remark was directed not towards appellant but to his counsel. As such, the State did not comment upon appellant's right to remain silent either directly or indirectly.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[6]The court instructed the jury initially as follows:

> "The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This burden remains on the State throughout the trial. The defendant is not required to prove his innocence; however, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty, nor is the State required to negate every conceivable circumstance of innocence.
>
> * * *
>
> Now, the defendant has an absolute constitutional right not to testify. The fact that the defendant did not testify must not be held against the defendant and must not be considered by you in any way or even discussed by you."

Moreover, the trial court repeated its instruction regarding the burden of proof to the jury after counsel finished closing arguments and the court denied appellant's motion for a mistrial.