Circuit Court for Carroll County
Case No. C-06-CR-22-000471

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 28

September Term, 2023

TRAMELLE CORTEZ HORSEY

v.

STATE OF MARYLAND

Wells, C.J.,
Graeff,
McDonald, Robert N.
(Senior Judge, Specially Assigned),

JJ.

Opinion by McDonald, J.

Filed: August 27, 2024

*Under Maryland Rule 1-104, an unreported opinion may not be cited as precedent as a matter of *stare decisis*. It may be cited for its persuasive value if the citation conforms to Rule 1-104(a)(2)(B).

After a jury trial in the Circuit Court for Carroll County, Appellant Tramelle Cortez Horsey was convicted of theft of property valued between $100 and $1,500, in violation of Maryland Code, Criminal Law Article , §7-104, and was acquitted of an assault charge. In his appeal of the conviction, Mr. Horsey argues that the trial court abused its discretion by: (1) rejecting a defense request to have a potential defense witness invoke her Fifth Amendment privilege in the presence of the jury; (2) declining to give a "modified missing witness" instruction requested by the defense; and (3) overruling a defense objection to part of the prosecutor's rebuttal closing argument.

As explained below, the trial court did not abuse its discretion in any of these regards. We therefore affirm Mr. Horsey's conviction.

I

Factual and Procedural Background

A. The Incident

The charges in this shoplifting case arose out of an incident that occurred in a Walmart store in Sykesville, Maryland on December 23, 2021.[1] That day, Mr. Horsey went to the store to do some holiday shopping. He was joined by his son and his son's mother, Claudia Garner. They went to the self-checkout register with their cart, which contained various items, including two television sets. While Ms. Garner completed her transaction, the Walmart employee who was staffing the self-checkout line removed the anti-theft devices from both televisions. Ms. Garner then remained at the register to

[1] The facts stated in this introductory paragraph were not contested.

complete the transactions, and Mr. Horsey headed towards the store exit with the televisions. Larry Schuyler, a Walmart employee who had been posted near the exit to check customers' receipts, asked Mr. Horsey to display his receipt. Mr. Horsey told Mr. Schuyler that Ms. Garner was paying at the self-checkout register. Mr. Horsey and his son then stood near the door with the shopping cart, and Mr. Schuyler proceeded to check other customers' receipts. Mr. Horsey again moved towards the exit, and Mr. Schuyler again asked for the receipt. A scuffle between the two men ensued and Ms. Garner joined in. Mr. Schuyler fell to the floor and hit his head. Ms. Garner and Mr. Horsey left the store with the merchandise.

Mr. Horsey was charged with second-degree assault, robbery, and theft of one television, charged as theft of property valued at more than $100 and less than $1,500.[2]

B. The Trial

1. The Prosecution Case

At trial, the State called three witnesses to testify. The first was a former Walmart employee who had been working at the store as a loss-prevention associate on the evening of the incident and had viewed Walmart's video recording of Mr. Horsey's actions at the self-checkout register. The recording was introduced into evidence. Narrating it, the witness testified that, while she was employed at Walmart, its technology had enabled her to zoom in on the register screen and on the actions of a man whom she identified in court as Mr. Horsey. She testified that the man had scanned various items, including one

[2] The televisions were priced at $169.00 each.

television, but that both televisions had not been scanned. Still narrating the video recording, she testified that it next appeared that there was an issue with the payment and that the employee staffing the registers came and voided some purchases. The video then showed a woman wearing red clothing "trying to make payment." Viewing the video, the witness had been able to see that both the male customer and the female customer had scrolled through the list of their scanned items on the register screen.

The witness had also been able to view and print out Walmart's receipt for purchases made at that register at the particular time. That receipt, which was introduced into evidence, showed the purchase of only one television. The witness testified that "two TVs were not paid for." She stated that the Walmart employee who staffed the self-checkout line had removed Walmart's anti-theft devices from both televisions before Mr. Horsey left the register with them but that the "transaction was not done."

The State's second witness was Mr. Schuyler. He testified that his job at Walmart was to stand near the exit and ask customers for their receipts to verify that they had paid for the merchandise that they were taking out of the store. Asked how he selected the customers to ask for a receipt, he responded that "generally, we would ask persons that did self-checkout to verify their receipts." On the evening in question, a man whom he identified in court as Mr. Horsey approached with two televisions, and Mr. Schuyler asked to see his receipt. The man told Mr. Schuyler that "the person was still in the self-checkout lane" and went to stand near the wall with a young person. Mr. Schuyler did not know "who was making the purchases that [the man] had" and did not have a direct view of the self-checkout register. After Mr. Schuyler had checked some other customers' receipts,

the man "began to move forward." Mr. Schuyler stepped in front of him and asked him again for his receipt. At that point, Mr. Schuyler testified, the man "just pushed" him, whereupon Mr. Schuyler "clutch[ed] him" so that he could scream for an alarm to other employees to contact the store manager or police. A person in a red coat then grabbed him, and he fell to the floor and lost consciousness. Walmart's security camera had captured a limited view of the scuffle; the State introduced it into evidence.

The State's third witness was a bystander who was shopping at the Walmart that night. She testified that she saw a Walmart employee ask a customer for a receipt, that the customer "was not having it," that the employee was "just like I need a receipt before you can head out, sir"; that the customer was "like, no, I'm not going to give you my receipt"; and that, "so the Walmart customer pushed the Walmart employee and then the Walmart employee defended himself, and that's when the Walmart customer grabbed the Walmart employee and slammed him to the floor." Then, the witness testified, the customer left the store, "came back to threaten the Walmart employee and then left."

2. The Defense Case

Mr. Horsey himself was the sole defense witness who appeared before the jury. He testified as follows: He had come to Walmart that evening because he wanted to equip a video gaming room for his son for Christmas. He had just bought a computer monitor, paying at a regular cashier line with cash, when his son and Ms. Garner came into the store. His son explained to them that it would be cheaper to buy a television set instead and that a gaming room should have two sets. Mr. Horsey then went to the customer service desk and exchanged the monitor for a television set. He was at the self-checkout line with Ms.

Garner and a cart that contained two television sets and other items. He showed the receipt for the first television to the checkout host in order to leave the checkout with it, and also showed the host on the screen that he had rung up the second television. After looking at the screen, the host released both televisions to Mr. Horsey by removing the anti-theft devices attached to them. When Mr. Horsey saw "thank you for shopping at Walmart" on the register screen, he began walking towards the door with the televisions. As he walked towards the door, Mr. Schuyler asked Mr. Horsey for a receipt. Mr. Horsey responded that "my wife has the receipt right now…[S]he's buying some trinkets or whatever." He had transferred money to Ms. Garner "right there" for all of the purchases on the screen. The transfer took a long time, and she used two cards for those purchases.

Asked whether he had the receipt for the first television, Mr. Horsey stated that he did not because it was "lost in the mix up" with Mr. Schuyler at the exit, that, "[w]ell, the receipt was left in the cart. Well, actually, so my other receipt was left in the cart after we – after the television and the rest of the stuff was paid for. It was left with the other receipt. Well, to be carried with the other receipt." Asked again about that receipt, he responded that "[i]t was lost," and that he "never thought that it was going – that anything was going to come from the situation." He then testified that he thought that Ms. Garner "probably lost it" when it was in her hand. He also testified that she had gotten the receipt, that he saw on the video that she was "trying to show it to [Mr. Schuyler]," that at the time he heard her offer it to Mr. Schuyler, and that he was "not sure" whether she still had it. On cross-examination, Mr. Horsey stated that he had had a receipt from the register, the receipt from the return, and the receipt from the "actual purchase." Asked to confirm that he had

testified that "there [are] missing receipts," Mr. Horsey responded, "I didn't say anything was missing. I said that I do not have the receipts here." Asked whether he had asked his lawyer to subpoena receipts, he responded that he had not.

3. Ms. Garner Invokes her Fifth Amendment Privilege and Declines to Testify

Pretrial Discussion

During a motions hearing on the morning of trial, the prosecutor informed the court that the State was considering prosecuting Ms. Garner for her participation in the incident and requested that, if Ms. Garner was called as a defense witness, the trial court advise her of her Fifth Amendment privilege in front of the jury.[3] Defense counsel joined in that request on the grounds that the defense wanted the jury to know that the defense had tried to obtain her testimony. The trial court expressed a concern that invocation of the privilege by Ms. Garner in front of the jury would actually prejudice Mr. Horsey's defense. The court then reserved ruling on the request until the defense decided whether to call her.

The Defense Requests that Ms. Garner Invoke the Privilege in Front of the Jury

After Mr. Horsey's testimony concluded, the defense counsel advised the court during a bench conference that she would next be calling Ms. Garner as a witness and that she expected Ms. Garner to decline to testify on the basis of her Fifth Amendment privilege. Counsel explained the rationale for having Ms. Garner invoke the privilege in front of the jury:

[3] As both parties have noted, Ms. Garner was later charged with theft in the District Court of Maryland, pled not guilty with an agreed statement of facts, and was granted probation before judgment with a condition of paying restitution to Walmart.

> I think not allowing it in front of the jury is prejudicial for Mr. Horsey because they will wonder why she is not testifying. She can enlighten the jury a bit about how the payments were made and about the earlier television – what he said about the earlier purchase.
>
> But I know that she is very worried about being charged, and I think she plans to invoke. And I think it would be helpful for the jury to see that she is not refusing to testify because she is not willing to help Mr. Horsey but for other reasons. **{T.2 93}**

As the prosecutor began to respond, the court stated that it had reviewed *Gray v. State*, 368 Md. 529 (2002), a case involving a defense request that a witness invoke the Fifth Amendment before the jury, for the factors to apply in deciding whether that procedure was permissible in a particular case and was skeptical that those criteria were satisfied in this case. In response to the prosecutor's observation that Ms. Garner's invocation of the Fifth Amendment would "help[] us as much as them," the court stated, "I agree. I think it will create a prejudice." The court said it would rule on the defense request after questioning Ms. Garner outside of the presence of the jury.

Out of the jury's presence, the court advised Ms. Garner that "because of your presence or embodiment in this event …, it is possible that the State could still choose to charge you with criminal charges out of the event," and that "anything that you testify to could potentially be used against [you] in the criminal prosecution of you." The court questioned Ms. Garner on whether she understood the Fifth Amendment privilege and asked her whether she intended to invoke it. After she said that she would, the court found that she had a legitimate basis for doing so. The defense then elicited from Ms. Garner testimony that she had been willing to testify, but that she changed her mind when defense counsel told her that the prosecutor had disclosed that the State was looking into

prosecuting her. At that point, the prosecutor told the court that "[w]e intentionally told [defense counsel] that we were considering charging so she could take that into consideration in how she tried her case without being surprised. We intentionally did not try to intimidate this witness by telling her don't testify or we are going to charge you." The prosecutor added, "[w]e never contacted the witness and said we are going to charge you." Defense counsel stated that "it wasn't a decision yet, but it was pretty clear that they intend [to charge Ms. Garner], and I did let Mr. Horsey know first and then talked to Ms. Garner about it. So it is an intimidating situation, even though they had other reason to share the information."

The Trial Court Denies the Defense Request

The court then heard argument on the request to have Ms. Garner invoke the Fifth Amendment privilege in the jury's presence. Defense counsel stated that, although there was a "two-edged sword" aspect to the question, the defense believed that "the benefit [of Ms. Garner invoking the privilege before the jury] would outweigh the prejudice" because Ms. Garner would have been able to corroborate Mr. Horsey's testimony and it would be helpful for the jury to see why Ms. Garner was not testifying. The prosecutor stated that the State no longer joined in the request because it would have used the invocation only to impeach other testimony by Ms. Garner, and it no longer appeared that Ms. Garner would testify.

The trial court denied the request. Referring to *Gray* as the precedent applicable to a defense request to have a witness invoke the Fifth Amendment in the jury's presence, the court found that the circumstances that justified that procedure in *Gray* were not present in

Mr. Horsey's case. One *Gray* factor, the court stated, was whether sufficient evidence was proffered to show that the witness, rather than the defendant, committed the crime, such that prohibiting the witness from invoking the privilege in the jury's presence would unfairly prejudice the defendant. In Mr. Horsey's case, the court stated, "it is a situation where the question is whether they did anything at all, and [the testimony] would not necessarily exculpate the defendant." The court stated that it had also referred to *Johnson v. State*, 228 Md. App. 391 (2016), involving a prosecution request, for other factors, including "how intimately involved [the witness was] in the activity." As to the *Johnson* factors, the court found that the invocation of the privilege before the jury "would create a prejudice and a negative effect, frankly, for the Defendant …." The court concluded that there was not sufficient evidence or a proffer that "this person committed the crime and not the Defendant" and denied the defense request to have Ms. Garner invoke the privilege in front of the jury.

The defense then rested its case without calling Ms. Garner to testify. The prosecution did not put on a rebuttal case.

4. Jury Instruction Concerning the Absence of Ms. Garner as a Witness

After the close of evidence, the trial court held a conference with counsel to discuss jury instructions. The defense asked the judge to give what it termed a "missing witness" instruction concerning Ms. Garner.

In support of the request, defense counsel asserted that Ms. Garner would have been able to corroborate Mr. Horsey's testimony on various matters, including that she lost the receipt for the other television, that she and Mr. Horsey had shown the receipt for the other

television to the self-checkout host, and that the host had then removed the anti-theft devices from the televisions before Mr. Horsey took them to the exit. Stating that Ms. Garner would have testified if she had not been "worried about the threat of being charged," defense counsel asked for "a witness instruction with a direction to the jury that she was not allowed to testify due to that threat, and there should be an inference that her testimony would have been favorable to the Defense." Defense counsel asserted that Ms. Garner was "uniquely available" to the prosecution because it had the option of giving her immunity from prosecution.[4]

The trial court ruled that Ms. Garner's invocation of the Fifth Amendment did not generate a missing witness instruction. The court noted that it did not matter that the State had disclosed to the defense the possibility of charging Ms. Garner because, given the evidence of Ms. Garner's involvement in the events, the Court "was going to have an obligation to advise her of her Fifth amendment privilege regardless." The court further

[4] The proposed jury instructions that the defense submitted to the court before trial listed the numbers of numerous instructions from the Maryland Criminal Pattern Jury Instructions. The list did not include MPJI-Cr 3:29, the pattern "missing witness" instruction. That instruction reads:

> You have heard testimony about [witness's name], who was not called as a witness in this case. If a witness could have given important testimony on an issue in this case and if the witness was peculiarly within the power of the [State][defendant] to produce, but was not called as a witness by the [State] [defendant] and the absence of that witness was not sufficiently accounted for or explained, then you may decide that the testimony of that witness would have been unfavorable to the [State][defendant].

Maryland Criminal Pattern Jury Instructions ("MPJI-Cr") 3:29.

noted that the State had no obligation to grant Ms. Garner immunity in order to remove the possibility of prosecution.

The trial court then proposed instead to give an "unavailable witness" instruction to the effect that Ms. Garner was unavailable to testify and that the jury should not draw any inference from either party's failure to call her. The court reasoned that the instruction would provide a more neutral explanation for Ms. Garner's absence than having "a person that is intimately involved with the Defendant invoking a Fifth Amendment privilege in front of the jury," because the instruction "can't be misinterpreted by the jury to imply criminal liability." The defense acquiesced in the instruction as an alternative and preserved its objection to the court's refusal to give a missing witness instruction; the prosecution did not object.

Later, when it instructed the jury, the court told the jury:

> The Court has determined that Claudia Garner … is unavailable as a witness in this case and that no inference may be drawn from the failure of either party to call her as a witness in this case."

The defense did not state any objections after the court gave its instructions.

5. Closing Arguments

In its closing argument, the prosecution directed the jury's attention to Walmart's print-out of the receipt for the purchase of one television, not two, at the self-checkout register. For its part, the defense directed the jury's attention to the video footage of the self-checkout host removing the anti-theft devices from the televisions and argued that Mr. Horsey was not the aggressor in the encounter with Mr. Schuyler, who, the defense argued, had physically tried to stop Mr. Horsey from leaving the store. As to that, defense counsel

stated, "So we don't have the receipt to prove it, but you can see from the video why [Mr. Horsey] would think he was free to leave." In rebuttal, the prosecutor addressed Mr. Schuyler's actions as follows:

> Ladies and gentlemen, the testimony is clear, not just from Mr. Schuyler, but from [the bystander], that when the Defendant approached, he was asked for a receipt. He did not show one. He was never willing to show a receipt. Ladies and gentlemen, you have the video and you can see for yourself.
>
> ***
>
> I understand that not everybody really wants to show a receipt at Walmart, but unfortunately, it is a necessity in today's day and age. And when you are carrying out electronics, you are expected to have a receipt. And when you are asked for it, you are expected to produce it, period.
>
> The Defendant's testimony was self-serving, and there is nothing that supports the Defendant's testimony. In the video you do not see Mr. Schuyler touch the Defendant, and you have two witnesses who have come into court and sworn under oath that Mr. Schuyler did not touch the Defendant. Watch the video. Watch the demeanor and the behavior [of] everyone involved.
>
> If there was a receipt, it could have been produced. The reason a receipt was not produced is because that television was stolen.

Defense counsel interposed: "Objection, Your Honor. She is shifting the burden on that issue." The court overruled the objection, and the prosecutor turned to whether the defense had shown the elements of self-defense.

6. The Verdict

The jury found Mr. Horsey guilty of theft and robbery and acquitted him of assault. The court concluded that the jury's verdicts on the assault and robbery charges were inconsistent, directed judgment in Mr. Horsey's favor on the robbery charge, and convicted Mr. Horsey of theft.

II

Discussion

Mr. Horsey poses three questions, which we have modified slightly:

1. Did the trial court abuse its discretion when it rejected the defense request to have a potential defense witness invoke her Fifth Amendment privilege in the presence of the jury?

2. Did the trial court abuse its discretion when it declined to give a "modified missing witness instruction" and instead gave an "unavailable witness" instruction as to a potential defense witness who had invoked her Fifth Amendment privilege after being informed that she faced potential prosecution concerning the same incident that gave rose to the charges at trial?

3. Did the trial court abuse its discretion when it overruled a defense objection to part of the prosecutor's rebuttal closing argument?

A. Whether the Trial Court Abused its Discretion When it Denied the Defense Request that Ms. Garner Invoke Her Fifth Amendment Privilege Before the Jury

1. The General Rule and a Limited Exception

The Fifth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that "[n]o person … shall be compelled in any criminal case to be a witness against himself[.]" *See also* Maryland Declaration of Rights, Article 22. This privilege extends not only to a criminal defendant, but also to a witness called to testify in a criminal trial. *See Gray*, 368 Md. at 550 (discussing invocation of the privilege of by a witness). As a "general rule," the privilege may not be invoked by a witness in front of the jury in a criminal case. *Simmons v. State*, 392 Md. 279, 294 (2006).

At the same time, the Sixth Amendment to the United States Constitution entitles a defendant to "fully present" his or her defense to the jury. *Gray* 368 Md. at 560-61. To accommodate that right, a trial court has the discretion in some circumstances to make a "limited exception" to the general rule against having a witness in a criminal case invoke the witness's Fifth Amendment privilege in the jury's presence. *Simmons*, 392 Md. at 294-95; *see also Gray*, 368 Md. at 533, 561 (for "guidance purposes," describing the trial court's discretion). That exception applies when a criminal defendant is defending against the charges on the theory that the witness, rather than the defendant, committed the crime, wants to call the witness only to have the witness invoke the Fifth Amendment privilege in front of the jury, and has proffered to the trial court "sufficient other evidence … that, if believed by any trier of fact, might link the accused witness to the commission of the crime." *Gray*, 368 Md. at 564; *see also Simmons*, 392 Md. 279, 294-95 (discussing *Gray*). Under those circumstances, the adverse inference that a jury is likely to draw from an invocation of the privilege by the witness when asked generally about the involvement of the witness in the offense – that the witness committed the crime instead of the defendant – may have some relevance to the defendant's guilt. After determining that there is sufficient other evidence from which the jury could "possibly" find the witness culpable of the crime, "the trial court has the discretion to permit, and limit as normally may be appropriate, the defendant to question the witness, generally, about his involvement in the offense, and have him invoke his Fifth Amendment right in the jury's presence." *Gray*, 368 Md. at 564.

In essence, these principles track the Maryland Rules: A trial court faced with a request to have a witness invoke the privilege in the jury's presence must determine the relevance of the testimony, as also required by Md. Rule 5-401, and may limit it, as also allowed by Rule 5-403. *Gray*, 368 Md. at 560-61 (quoting this Court's explanation of that point in *Gray v. State*, 137 Md. App. 460, 468-69 (2001), *rev'd and remanded*, 368 Md. 529 (2002)). In exercising its discretion, the trial court is to consider whether the defendant would be unfairly prejudiced by a denial of the defendant's request and "should always … remember[]" the right of criminal defendants to fully present their defense to the jury. *Id*. at 561.

2. The Limited Exception Did Not Apply Here

In this case, Mr. Horsey argues that the trial court violated his Sixth Amendment right to fully present his case by declining his request to have Ms. Garner invoke her Fifth Amendment privilege in front of the jury. In support of that argument, Mr. Horsey asserts that Ms. Garner's invocation of the privilege in front of the jury would have explained to the jury that her failure to testify was due to her fear of prosecution, not to any lack of willingness to corroborate or add to his testimony. While conceding that this case is distinguishable from cases like *Gray – i.e.,* cases in which the defense is that the witness, not the defendant, committed the crime – Mr. Horsey argues that the "*Gray* rule" should apply to witnesses called for "exculpatory purposes" like Ms. Garner.

In our view, the "limited exception" announced in *Gray* does not apply to every invocation of the Fifth Amendment by a witness whose testimony might exculpate a defendant in some way. As articulated by the *Gray* Court, the exception applies when the

defendant seeks to place the sole blame for the crime on the witness. Here, Mr. Horsey did not proffer evidence, or even argue, that Ms. Garner, not he, had committed the crime. Instead, Mr. Horsey's narrative was that he had already purchased the first television set before he and Ms. Garner brought their cart with two televisions to the self-checkout lane and that she was still paying for the second television when he began to approach the exit. Thus, as noted by the trial court, Mr. Horsey's defense was that no crime had occurred, not that Ms. Garner had committed it. As Mr. Horsey has acknowledged, Ms. Garner's invocation of her Fifth Amendment privilege did not meet the conditions set in *Gray* for having a criminal non-party witness invoke the privilege in front of the jury. The trial court did not abuse its discretion when it denied Mr. Horsey's request to have Ms. Garner invoke her privilege in the jury's presence.

3. Potential Prejudice to the Defense if the Exception Were Extended

Even if the "limited exception" of *Gray* were extended to exculpatory witnesses generally, the same result would pertain here. As noted by the United States Supreme Court, "[i]t is said that when a witness is asked whether he participated in criminal activity with the defendant, a refusal to answer based on the privilege against self-incrimination tends to imply to the jury that a truthful answer would be in the affirmative." *Namet v. United States*, 373 U.S. 179, 185-86 (1963); *see also Johnson v. State*, 228 Md. App. 391, 421–22 (2016) ("[C]ourts have recognized that, where a witness is asked about criminal activity in which he or she allegedly participated together with a codefendant, an assertion of the Fifth Amendment privilege may suggest to the jury the guilt of both the witness and the defendant."). In this case, the trial court concluded that Ms. Garner was "intimately

involved" and that her invocation of the privilege before the jury would "create a prejudice and a negative effect" for Mr. Horsey. The record supports that conclusion. Given that circumstance, the trial court did not abuse its discretion when it found that that inference would be both unduly prejudicial and irrelevant.

In sum, both *Gray* and the application of the Maryland Rules on the admissibility and exclusion of relevant evidence support the trial court's exercise of its discretion in this case: Ms. Garner's mere invocation of her privilege was not probative of the issues in the case and, if anything, could be misused by the jury to infer that both she and Mr. Horsey were guilty of the charged offenses.

B. Whether the Trial Court Abused its Discretion When it Declined to Give the "Modified Missing Witness Instruction" Requested by the Defense

Mr. Horsey argues that the trial court abused its discretion by denying his request for what he describes as a "modified missing witness instruction."[5] During a conference concerning the court's jury instructions, the defense asked the court to include an instruction that informed the jury that Ms. Garner had not testified as a result of her invocation of her Fifth Amendment privilege, attributed her absence as a witness to the State, and advised the jury that it could infer that her testimony would have been favorable to Mr. Horsey. The court denied the request and instead gave a neutral instruction that told the jury that "[t]he Court has determined that Claudia Garner … is unavailable as a

[5] At trial, both the parties and the court referred to the requested instruction as a "missing witness" instruction and addressed it as one. In this Court, Mr. Horsey refers to it as a "modified missing witness instruction" and addresses the elements set forth in MPJI-Cr 3:29. See footnote 4 above.

witness in this case and that no inference may be drawn from the failure of either party to call her as a witness in this case."

1. Preservation

Preliminarily, we address whether Mr. Horsey preserved this issue for appellate review. Maryland Rule 4-325(f) provides: "No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." The defense did not object on the record at that time. However, a party will be deemed to have "substantially complied" with this rule when the party has asserted an objection on the record with "a definite statement of the ground for objection unless the ground for objection is apparent from the record," and "a renewal of the objection after the court instructs the jury would be futile or useless." *Gore v. State*, 309 Md. 203, 209 (1987). In short, "if the record demonstrates the trial court recognizes that an effective objection has been made, the issue has been preserved for appellate review." *Watts v. State*, 457 Md. 419, 428 (2018); *see also Sequeira v. State*, 250 Md. App. 161, 196–98 (2021) (discussing the cases on substantial compliance). Here, the defense objected on the record to the trial court's failure to give the requested instruction and the trial court thoroughly considered the request and ruled on it. The defense thus substantially complied with Rule 4-325(f).

2. Merits

Mr. Horsey faces a higher hurdle on the merits. A trial court's failure to give a missing evidence instruction "is neither error nor an abuse of discretion." *Patterson v.*

State, 356 Md. 677, 688 (1999). A missing witness instruction tells the jury that, if a party fails, without adequate explanation, to call a material witness peculiarly within the power of that party to produce, the jury may infer that the witness's testimony would have been unfavorable to that party. *Harris v. State*, 458 Md. 370, 376 (2018); *Dansbury v. State*, 193 Md. App. 718, 741 (2010). Such an instruction thus concerns a factual inference that the jury may draw from an absence of certain evidence, rather than the law that the jury is to apply to the evidence. *Harris*, 458 Md. at 389-90. That distinction matters because while a trial court must give a "supported" instruction on the law upon request, it may deny a request for an instruction as to evidentiary inferences. *Patterson,* 356 Md. at 684-85; *see also, e.g., Colkley v. State*, 204 Md. App. 593, 620 (2012), *rev'd on other grounds sub nom. Fields v. State*, 432 Md. 650 (2013) ("Although it is sometimes error for a judge to give a Missing Witness Rule instruction where its preconditions have not been satisfied, … it is never error for a court, in its discretion, not to give the Missing Witness Instruction."); *Keyes v. Lerman*, 191 Md. App. 533, 546 (2010) ("Whether, in given circumstances, an unfavorable inference may be drawn from missing evidence or witnesses is a matter of *fact*, not law, and the court is under no obligation to give an instruction on the matter. It may do so, and in certain circumstances perhaps it should do so, but, as clearly stated in *Patterson*, failure to do so is not error or an abuse of discretion.").

In any event, the record did not support an inference that Ms. Garner was a "missing witness"—that, is, a witness "who is peculiarly available to one side and not the other, … whose testimony is important and non-cumulative and will elucidate the transaction, and

… who is not called to testify." *Pinkney v. State*, 200 Md. App. 563, 578 (2011), *aff'd*, 427 Md. 77 (2012) (citation and quotation marks omitted). Regarding the availability prong of the rule, the party seeking the instruction must demonstrate that "the missing witness was peculiarly within the adversary's power to produce by showing either that the witness is physically available only to the opponent or that the witness has the type of relationship with the opposing party that pragmatically renders his testimony unavailable to the opposing party." *Bereano v. State Ethics Comm'n*, 403 Md. 716, 742 (2008) (citation and quotation marks omitted). Examples of such a "relationship" between a party and a witness include a "family relationship, an employer-employee relationship, and, sometimes, a professional relationship. " *Pinkney*, 200 Md. App. at 578-79.

In this case, Ms. Garner was physically available to the defense—it called her to testify that she intended to invoke her Fifth Amendment privilege. Generally, a witness who asserts the privilege against self-incrimination is not "available" and cannot be the subject of a missing witness instruction. *Harris*, 458 Md. at 404. Further, as the trial court noted, the prosecution's disclosure to the defense that it was investigating Ms. Garner's conduct in the incident did not create a relationship between her and the State that as a practical matter would put her peculiarly within the State's power to produce. Instead, her testimony was equally unavailable to both parties.

The trial court did not abuse its discretion when it declined Mr. Horsey's request for a missing witness instruction regarding the absence of testimony from Ms. Garner.

C. Whether the Trial Court Abused its Discretion When it Overruled a Defense Objection to Part of the Prosecution's Rebuttal Closing Argument

Finally, Mr. Horsey argues that the trial court abused its discretion when it overruled defense counsel's objection to part of the prosecution's rebuttal closing argument. In particular, he focuses on the prosecutor's statement that "If there was a receipt, it could have been produced" and the reason no receipt was produced was "because that television was stolen." Mr. Horsey asserts that this statement improperly shifted the burden of proof to the defense.

1. Standards for and Limits on Closing Arguments of Counsel

When making a closing argument, counsel for both the defense and the prosecution may generally "state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence." *Henry v. State*, 324 Md. 204, 230 (1991), *cert. denied*, 503 U.S. 972 (1992). In doing so, counsel are given "wide latitude..., including the right to explain or to attack all the evidence in the case." *Trimble v. State*, 300 Md. 387, 405 (1984), *cert. denied*, 469 U.S. 1230 (1985). Specifically, "the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the prosecution produces." *Smith v. State*, 388 Md. 468, 487 (2005) (citation and quotation marks omitted). Closing argument gives counsel "an opportunity to creatively mesh the diverse facets of the trial, meld the evidence presented with plausible theories, and expose the deficiencies in his or her opponent's argument." *Henry*, 324 Md. at 230.

Conversely, counsel "may not argue inferences that are improper or are not warranted by the evidence," or that "diminish the presumption of innocence[.]" *Wilson v. State*, 370 Md. 191, 215 (2002).

Whether a particular argument exceeds the limits of permissible comment or argument by counsel depends on the facts of the case. "Because a trial court is in the best position to evaluate the propriety of closing argument as it relates to the evidence adduced in a case, the exercise of its broad discretion to regulate closing argument will not be overturned unless there is a clear abuse of discretion that likely injured a party." *Carroll v. State*, 240 Md. App. 629, 663 (2019) (internal citation and quotation marks omitted).

2. Application to this Case

For two separate reasons, we hold that the trial court did not abuse its discretion when it overruled the defense objection to the prosecution's statement during rebuttal closing argument.

First, it is not altogether clear that the prosecutor was referring to Mr. Horsey's failure to produce the receipt at trial, as opposed to his failure to produce it to Mr. Schuyler when the latter asked for it. The prosecutor made the challenged remarks in the course of an argument that focused on Mr. Horsey's actions during the incident and on the defense argument that Mr. Schuyler had been the aggressor. After arguing that "Mr. Horsey was never willing to show a receipt" and that Mr. Schuyler had "done nothing wrong" when he asked Mr. Horsey for a receipt, the prosecutor proceeded to use the word "produce" three times:

> I understand that not everybody really wants to show a receipt at Walmart, but unfortunately, it is a necessity in today's day and age. And when you are carrying out electronics, you are expected to have a receipt. *And when you are asked for it, you are expected to produce it, period*.
>
> The Defendant's testimony was self-serving, and there is nothing that supports the Defendant's testimony. In the video you do not see Mr. Schuyler touch the Defendant, and you have two witnesses who have come into court and sworn under oath that Mr. Schuyler did not touch the Defendant. Watch the video. Watch the demeanor and the behavior [of] everyone involved.
>
> *If there was a receipt, it could have been produced. The reason a receipt was not produced is because that television was stolen*. [emphases added].

A plausible reading of the prosecutor's argument was that she was using the verb "produce" in the context of her argument that customers are ordinarily expected to "produce" a receipt before taking merchandise out of a store. If so, the prosecutor's remark conveyed a proper comment on the evidence that Mr. Horsey never showed a receipt to Mr. Schuyler. In any event, given the arguable ambiguity, we are not persuaded that the trial court abused its discretion in overruling Mr. Horsey's objection; the trial court was in the best position to assess what the remark referred to.

Even if we were to assume that the prosecutor was commenting that Mr. Horsey had failed to introduce a receipt into evidence at trial, the result would be the same. In closing argument, a prosecutor may "meld the evidence presented with plausible theories, and expose the deficiencies in his or her opponent's argument." *Henry*, 324 Md. at 230. The prosecution's theory was that Mr. Horsey had paid for only one of the two televisions he took out of the store and that he had refused to show a receipt to Mr. Schuyler because he did not have a receipt for both. In his own testimony at trial, Mr. Horsey initially stated

that the receipt for the television was lost in the scuffle and that he had had the receipts for both televisions and his earlier return of the computer monitor. He later testified that he had not said that the receipt was missing, but instead had only said that it was not "here" – i.e., not in the courtroom. The prosecutor could fairly comment on the absence of the receipt and invite the jury to draw the plausible inference that there was no receipt at all for the second television. *See, e.g., Warren v. State*, 205 Md. App. 93, 137 (2012) (where the defendant had testified that he was wearing a Chicago Bulls hat at the scene on the night of the shooting, "the prosecutor was entitled to bring up that the hat was neither found at the crime scene, nor in evidence at trial."). That comment did not shift the burden of proof; it merely presented the theories that the prosecution had been asserting all along—that Mr. Horsey did not have a receipt for both televisions and pushed past Mr. Schuyler in order to remove them from the store.

Either way, the trial court, which was in the best position to assess the meaning and effect of the prosecutor's comments, did not abuse its discretion in overruling the objection.

III

Conclusion

For the reasons explained above, we hold that the trial court did not abuse its discretion regarding the rulings that Mr. Horsey has challenged on appeal. Accordingly, we affirm his conviction.

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