Circuit Court for Baltimore City
Case No. 118351012

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0296

September Term, 2023

STEVE SCAFF

v.

STATE OF MARYLAND

Nazarian,
Zic,
Harrell, Glenn T., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: September 30, 2024

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

Appellant, Steve Scaff, was convicted of first-degree assault and multiple handgun charges by a jury after a seven-day trial in the Circuit Court for Baltimore City in July 2019. Mr. Scaff brought an alibi defense, arguing that he was not present during the incident at issue. Mr. Scaff argues that the State's closing argument included facts which should have been delivered through expert testimony and that both the closing argument and cross-examination of witnesses included impermissible comments that shifted the burden of proof from the State to Mr. Scaff regarding his alibi defense.

QUESTIONS PRESENTED

Mr. Scaff presents two questions for our review:

1. Did the trial court abuse its discretion by allowing the [State] to argue facts not in evidence and outside the realm of common experience on a key issue at trial?

2. Did the trial court abuse its discretion by allowing the [S]tate to shift the burden to Mr. Scaff to prove his defense?

For the reasons that follow, we answer Mr. Scaff's questions in the negative, and therefore, affirm the judgments of the circuit court.

BACKGROUND

This case arose from a shooting incident in Baltimore, Maryland on November 11, 2018.[1] The shooting victim testified that he heard several gunshots as he pulled through an intersection, and that as he looked out of the side window of his car, a black car sped by him with someone leaning out the window firing a gun. The victim followed the black car to obtain its license plate number and called 911. At a stoplight, he pulled up

[1] The following facts were agreed to by both Mr. Scaff and the State.

directly to the left of the black car. The victim stated during the 911 call that he had a clear view of the men in the black car, and described them as lighter-skinned African American men in their 20s. He also noted that the driver was wearing a bandana.

As both cars sped through the intersection, the black car pulled in front of the victim's car, and the black car stopped, preventing him from proceeding forward. He could see the license plate and relayed the license plate number to the 911 operator as 5BE5478 and 5B54578. The car chase continued, with someone hanging out of the passenger window of the black car and shooting at him. The driver also pointed a gun at him, which he described as a black semiautomatic. At least two bullets hit the victim's car, but he was not injured.

The victim was able to lose the black car in traffic and made his way to his house. Detective Keith Savadel interviewed the victim that evening, who described the people in the black car as "light-skinned black men in their 20s, wearing orange bandanas." Based on the information relayed on the 911 call, Detective Savadel determined that the vehicle in question was likely a Nissan sedan registered to Mr. Scaff's then-wife. A different police officer presented two photo arrays to the victim, one of which included Mr. Scaff and the other included Mr. Scaff's brother, Ronald Lewis. The victim identified Mr. Scaff and described him as the driver of the black car involved in the shooting. The victim then identified Mr. Lewis as the passenger of the black car. He again identified Mr. Scaff as the driver of the black car at trial.

Mr. Scaff was charged with one count each of attempted first-degree murder; attempted second-degree murder; conspiracy to commit first-degree murder; first-degree

assault; second-degree assault; reckless endangerment; conspiracy to commit reckless endangerment; wear and carry a deadly weapon with the intent to injure; use of a handgun in a felony or crime of violence; conspiracy to use a handgun in a felony or crime of violence; wear, carry, or transport a handgun on the person; conspiracy to wear, carry, or transport a handgun on the person; wear, carry, or transport a handgun in a vehicle; conspiracy to wear, carry, or transport a handgun in a vehicle; transporting a loaded handgun in a vehicle; and conspiracy to transport a loaded handgun in a vehicle.

As part of his defense at trial, Mr. Scaff presented witness testimony to support that he had an alibi the night the car chase occurred. Mr. Scaff and Chaniya Stanfield, the mother of his children, testified as follows: Mr. Scaff was in New York on November 10, 2018; Mr. Scaff arrived at Ms. Stanfield's place of residence in Baltimore around 3:30 a.m. on November 11, 2018 because she was having contractions; they were at Ms. Stanfield's house until around 4:00 p.m., when they went to Mercy Medical Center together in an ambulance; they remained at the hospital until around 10:00 p.m. on November 11, 2018, when the contractions stopped.

The jury failed to reach a verdict on the two attempted murder charges and conspiracy to commit murder, but convicted Mr. Scaff of first-degree assault and the handgun charges. At a subsequent jury trial in March 2020, Mr. Scaff was acquitted of the attempted murder charges and the conspiracy to commit murder charge.

At a post-conviction hearing on April 6, 2023, Mr. Scaff was granted the right to file a belated notice of appeal after the circuit court found that Mr. Scaff's trial counsel

was ineffective for not filing one. This appeal followed. Additional facts are presented as necessary.

DISCUSSION

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE STATE'S REBUTTAL CLOSING ARGUMENT TO INCLUDE STATEMENTS ABOUT THE HUMAN ABILITY TO IDENTIFY FACES.

A. The Parties' Contentions

Mr. Scaff argues that the State "impermissibly argued facts, on a key issue at trial, that were not in evidence and are not common knowledge." Mr. Scaff contends that "the [State] argued, essentially as an expert witness, about the ability of humans to quickly recognize faces. These facts had not been proven at trial and were outside the common knowledge of jurors."

The State argues that its rebuttal comment regarding the human ability to recognize faces is one of common knowledge, not expert information, and that "[a]ttorneys may remind jurors of facts they already know." We agree with the State.

During the State's rebuttal closing argument to address Mr. Scaff's counsel's argument that the victim was not reliable in his identification of Mr. Scaff, the following occurred:

> [COUNSEL FOR THE STATE]: There are things that don't stick in your mind, ladies and gentlemen. If you ever have children, you know that when they're growing up, they're learning about ability to identify faces. It's an integral part of our brain. We look at different things, animals, dolphins --
>
> [COUNSEL FOR MR. SCAFF]: Your Honor, I'm going to object.

* * *

THE COURT: And what's the nature of your objection?

[COUNSEL FOR MR. SCAFF]: Is [the State] an expert on facial recognition?

THE COURT: He doesn't have to be. He's not testifying. Right?

[COUNSEL FOR MR. SCAFF]: Yes. But he's relaying --

THE COURT: This is rebuttal rebutting your argument about [the victim's] ability to identify Mr. Scaff.

[COUNSEL FOR MR. SCAFF]: I recognize that, Judge. And he's doing that. And I don't object to him doing that. I'm objecting to him talking about how children's brains work and how the brain develops into facial recognition if he's not an expert --

THE COURT: Mr. Scaff -- he doesn't have to be an expert, sir. He doesn't have to be an expert. This isn't testimony.

[Prosecutor], you want to be heard?

[COUNSEL FOR THE STATE]: No, Your Honor. Simply arguing facts that are known to any trier of fact based on their own life experiences. Everyone with a child. Many people have had children.

[COUNSEL FOR MR. SCAFF]: I don't know anything about facial recognition or how the brain works.

THE COURT: So I'm going to overrule the objection. But I'm going to ask you to be very limited, sir.

* * *

[COUNSEL FOR THE STATE]: Ladies and gentlemen, your ability to recognize faces is something that's innately human. Technology companies are spending billions of dollars trying to teach computers how to conduct facial recognition. It's

> something your brain can do in milliseconds. We look at people. We see, recognize things about their faces, things that we could never put into words, but if you see somebody and then you see them on the street, you're able to get a good enough look at them depending on the circumstances of how you saw them, you're going to recognize them. It doesn't matter whether or not you can describe it in words. You know what you saw.
>
> In this case, you saw the photo array that [he] conducted. He recognized that face as soon as he saw it.

The State concluded its closing rebuttal without any further objections from Mr. Scaff's counsel.

B. Standard of Review

"The determination and scope of closing argument is within the sound discretion of the trial court." *Pickett v. State*, 222 Md. App. 322, 330 (2015) (citation omitted). A reviewing court should only interfere with a circuit court's decision if there has been an abuse of discretion "of a character likely to have injured the complaining party." *Id.* at 330-31 (citation and internal quotation marks omitted). There has been an abuse of discretion if "no reasonable person would take the view adopted by the [circuit] court, or when the court acts without reference to any guiding rules or principles." *Id.* at 331 (citations and internal quotation marks omitted).

C. Discussion

"It is well established that 'attorneys are afforded great leeway in presenting closing arguments to the jury.'" *Pickett*, 222 Md. App. at 329 (quoting *Degren v. State*, 352 Md. 400, 429 (1999)). "[I]t is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate

inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range." *Wilhelm v. State*, 272 Md. 404, 412 (1974). Counsel may also, in closing argument, make "reasonable and legitimate inferences . . . from the facts which were of such general notoriety as to be matter of common knowledge and matters within the cognizance of the jury from their own observations." *Id*. at 445. Matters "within the common knowledge of an average person" do not require expert testimony. *Steamfitters Loc. Union No. 602 v. Erie Ins. Exch.*, 469 Md. 704, 737-38 (2020).

The Supreme Court of Maryland elaborated on the scope of closing arguments:

> While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments to opposing counsel, generally speaking, liberal freedom of speech should be allowed. . . . He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

Wilhelm, 272 Md. at 413. "[I]t is common and permissible generally for the prosecutor and defense counsel to comment on, or attack, the credibility of the witnesses presented." *Spain v. State*, 386 Md. 145, 154 (2005). It is not permitted, however, for counsel, "over proper objection, to state and comment upon facts not in evidence or to state what he could have proven." *Wilhelm*, 272 Md. at 413.

The State's closing rebuttal argument responded to Mr. Scaff's closing argument that the victim could not have credibly identified Mr. Scaff from their encounter during the car chase, an issue "central to the case." Mr. Scaff contends that the State argued

facts not in evidence, as there was "no testimony at trial about the ability of the human brain to recognize faces quickly." Mr. Scaff argues that:

> The average juror is not an expert on facial recognition, does not know how babies' brains develop to recognize faces, does not know if faces can be recognized in milliseconds, and does not know if a person will recognize a face if he sees it again (even if he cannot express why in words). These kinds of arguments are outside the purview of the average person and are improper without some grounding in expert testimony.

The State did not present expert testimony as to how humans' brains develop; the State reminded the jury that people develop the ability to recognize faces, and that people are able to recognize faces quickly. The State's closing rebuttal argument was limited to "reasonable and legitimate inferences" based on "matters within the cognizance of the jury from their own observations" regarding the human ability to recognize faces and recognize them quickly. *Wilhelm*, 272 Md. at 445. Expert testimony was not required to support these statements because they are "within the common knowledge." *Steamfitters Loc. Union No. 602*, 469 Md. at 737. Further, it is clear from the record that the circuit court recognized Mr. Scaff's counsel's objection concerning the facts outside of evidence in the State's closing when it thoughtfully responded, "So I'm going to overrule the objection. But I am going to ask you to be very limited, sir." The circuit court found that the State could continue with its closing in a limited manner because the State was not acting as an expert offering testimony. In light of the leeway afforded to counsel in closing arguments, we hold that the circuit court did not abuse its discretion by allowing the State to comment on the human ability to recognize faces during its closing rebuttal

argument, particularly where the defense, in its closing, attacked the victim's ability to recognize Mr. Scaff as the driver of the black car involved in the assault.

II. THE CIRCUIT COURT DID NOT ERR BY ALLOWING THE STATE TO HIGHLIGHT THE LACK OF DOCUMENTARY EVIDENCE CORROBORATING MR. SCAFF'S ALIBI.

A. The Parties' Contentions

Mr. Scaff argues that "the [State] impermissibly shifted [the burden of proving a criminal defendant guilty at trial], in cross-examination of defense witnesses and closing argument, to Mr. Scaff to prove his alibi." He contends that "[the State] improperly shifted the burden of proof to Mr. Scaff to prove his innocence through records" because "[the State] argued that Mr. Scaff, through his counsel, should have proven his alibi by subpoenaing ambulance and hospital records."

The State argues that it "did not shift the burden of proof. It properly used its cross-examination and closing argument to demonstrate the weakness of [Mr.] Scaff's alibi."

During trial, Mr. Scaff and Ms. Stanfield testified that he was with Ms. Stanfield on the day of the car chase (November 11, 2018); they stated Mr. Scaff was at Ms. Stanfield's house and then Mercy Medical Center as a result of her having contractions. The State asked Mr. Scaff if he had any logs from Mercy Medical Center "where [he] logged in as a visitor[.]" The State also asked Mr. Scaff if he had "a copy of the medical records" from that day. Mr. Scaff did not have visitor logs or medical records. The State asked, "But that's not because those medical records don't exist?" and Mr. Scaff

responded, "Oh, no. They definitely exist." The State then asked if Mr. Scaff would be on Mercy Medical Center's surveillance video, to which he replied he would.

The State asked Ms. Stanfield if she brought a billing statement from her insurance company for the ambulance and hospital visit, or if she brought a copy of any of her medical records. Ms. Stanfield said she did not bring any of those records with her to court.

During its rebuttal closing, the State argued:

> Ladies and gentlemen, [Ms. Stanfield]'s in a tough spot. She has children in common with this man. He's committed a very serious crime. That doesn't give her the right to come up here and lie to this [c]ourt. And I'd submit to you that that is what she did. They have absolutely no supporting records for this. All somebody has to do is walk down there with a subpoena. They have the same right of compulsory process that the State does. They can take one sheet of paper, walk down there, go to Mercy Medical Center and say I want the visitor records for November 11, 2018.

Mr. Scaff's counsel objected, and the court replied, "Overruled. It came out in testimony sir." The State continued, "They did not do that because [Mr. Scaff's] name is not in those records."

B. Standard of Review

An appellate court reviews a circuit court's "allowance of allegedly improper remarks by a prosecutor under an abuse of discretion standard." *Pietruszewski v. State*, 245 Md. App. 292, 318 (2020) (citation omitted). "Where a party complains that the trial judge's action abridged a constitutional right, however, [an appellate court's] review is *de novo*." *Savage v. State*, 455 Md. 138, 157 (2017). "[A] burden-shifting claim is an

allegation of a constitutional right," so "our review is without deference to the circuit court." *Harriston v. State*, 246 Md. App. 367, 372 (2020) (citation omitted).

C. Discussion

When a defendant chooses to present a defense, as Mr. Scaff chose to present an alibi defense here, the State may "comment on [the] qualitative and quantitative significance" of the evidence. *Smith v. State*, 367 Md. 348, 354 (2001). "For [the State] to compare the great weight of the State's evidence with the insubstantiality or non-existence of the defense evidence is just what it says it is, a comment on the relative weight of the evidence[.]" *Martin v. State*, 113 Md. App. 190, 253 (1996). Here, the State's questions during cross-examination and relevant portion of its rebuttal closing argument addressed the "non-existence" of evidence that would support Mr. Scaff's alibi defense. The State did not shift the burden.

Mr. Scaff's case is similar to the defense presented in *Pietruszewski*. Mr. Pietruszewski presented two witnesses—his former girlfriend and his father—to support his alibi defense, claiming that they both were with Mr. Pietruszewski in a hotel room the night of the robbery. *Pietruszewski*, 245 Md. App. at 300. "During cross-examination, [Mr.] Pietruszewski's father admitted that he did not bring to court any receipts or records regarding that hotel stay." *Id.* During the State's closing argument, "the prosecutor drew the jury's attention to the limited credibility of the two defense witnesses who both had a motive to lie for the defendant and who failed to bring to court any receipts or other records that could have improved the credibility of their testimony[.]" *Id.* at 320. This Court agreed with the State "that the challenged argument in this case

merely pointed out the weakness in the credibility of [Mr.] Pietruszewski's alibi witnesses, including the lack of corroborating evidence that their testimony suggested would have been reasonably available." *Id.* at 322. This Court also concluded that "the lack of any documentation . . . [was] directed at the credibility of the testimony that was given by the witnesses." *Id.* at 322.

Mr. Scaff's case closely mimics Mr. Pietruszewski's case. The State cross-examined Mr. Scaff and Ms. Stanfield about the lack of documentation supporting their testimony. The State's cross-examination and relevant closing argument commented on the credibility of Mr. Scaff's and Ms. Stanfield's testimony and highlighted the "lack of corroborating evidence that their testimony suggested would have been reasonably available." Accordingly, we conclude that the circuit court did not err by allowing the State's cross-examination and closing argument.

CONCLUSION

We hold that the circuit court did not abuse its discretion by allowing the State to discuss the human ability to recognize faces in its closing rebuttal argument. The State did not present expert testimony; it only commented on "matters within the cognizance of the jury from their own observations[.]" *Wilhelm*, 272 Md. at 445. We further hold that the circuit court did not err by allowing the State to comment on the lack of documentation supporting the testimony of Mr. Scaff and Ms. Stanfield regarding Mr. Scaff's alibi defense.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.