Circuit Court for Montgomery County
Case No. C-15-CR-22-000161

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1941

September Term, 2023

MARIO MATTHEW SAMM

v.

STATE OF MARYLAND

Reed,
Shaw,
Zic

JJ.

Opinion by Shaw, J.

Filed: February 21, 2025

*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 Rule 1-104(a)(2)(B).

Appellant Mario Matthew Samm was charged with first-degree murder, second-degree murder, first-degree felony murder, and use of a firearm in a crime of violence in the Circuit Court for Montgomery County. Appellant elected a trial by jury, and he testified that he acted in self-defense. The prosecutor, in rebuttal closing argument, argued that the only testimony supporting Appellant's self-defense theory came from him. Defense counsel objected to the statement, arguing that it improperly shifted the burden of proof to Appellant. The court overruled his objection. Appellant was subsequently found guilty of one count of second-degree murder and one count of use of a firearm during the commission of a crime of violence. He was sentenced to fifty-five years' incarceration and five years of probation upon his release. Appellant noted this timely appeal. He presents one question for our review:

> Whether the trial court committed error when it permitted the State, over Defense Counsel's objection, to make a statement during its closing argument that improperly shifted its burden of disproving self-defense to the defense, thereby creating for the defense the burden of establishing perfect self-defense?

For the following reasons, we hold that the circuit court did not err. We affirm.

BACKGROUND

On December 23, 2021, Appellant visited a friend, Jahan Darvish, at his apartment located in Germantown, Maryland. Several of Darvish's friends including, Samira Shahamatdar and Joseph West, his roommate, were present when Appellant arrived. Shahamatdar was in the same room with Appellant and Darvish, while West remained in his bedroom. During the visit, Darvish and Appellant began arguing over the price of

drugs, and both individuals retrieved their firearms. Shahamatdar "went to the bathroom hoping by the time [she got] out" the dispute would be over. When Shahamatdar exited the bathroom, Appellant pointed his firearm at her and Darvish. Darvish then attempted to retrieve the firearm from Appellant. Shahamatdar hid in a closet and observed Appellant on top of Darvish. She then heard multiple gunshots. West, having also heard the gunshots, opened his bedroom door and saw an individual standing over Darvish. West then saw the individual approach his door. He ran and escaped through his bedroom window. Appellant fled the apartment. Darvish later died from his injuries.

Appellant was charged with first-degree murder, second-degree murder, first-degree felony murder, and use of a firearm in a crime of violence. Appellant elected a jury trial and testified in his defense. He admitted to being in Darvish's apartment. He stated that another individual, Aaron Ray, pointed a firearm at him and, in order to defend himself, Appellant "turned around . . . and [] shot out into the living room area" where Darvish and Ray were present. None of the State's witnesses testified that Ray was in the apartment on that day.

The judge gave the jury a self-defense instruction, over the State's objection, stating:

> In order to convict the defendant, the State must prove that self-defense does not apply in this case. This means that you are required to find the defendant not guilty unless the State has persuaded you beyond a reasonable doubt that at least one of the four factors [sic] complete defense was absent.

Defense counsel began his closing argument by speaking to the jury about the State's burden of proof. He stated that Appellant "is presumed innocent" and "[t]he State has to prove . . . beyond a reasonable doubt, that he's guilty[.]" Counsel also informed the

jury that the closing arguments were not evidence but, rather, "opinion[s] on the evidence." Prior to discussing the merits of Appellant's case, defense counsel again emphasized the burden of proof, stating:

> I don't even need to make a closing argument. I could just sit down right now because the State's the one that has to prove my client guilty. My client does not have to prove that he's innocent. Yet he decided to take the stand and you all observed him, and he told his version of the story.

Defense counsel then spoke to the jury about the lack of motive in the case and he criticized the police department for its failure to properly investigate the crime scene. Defense counsel, again, reminded the jury of the burden of proof.

Defense counsel argued that the State's witnesses should not be believed because of inconsistencies in their testimony:

> I know the State touched on this a little bit, and I'm not going to bore you by going through the entire credibility jury instruction. It's kind of long. It's up to you [to] decide who was credible or not, but I will say this, this is not in dispute. The State's witnesses were incredibly inconsistent in their testimony. Look at all the differences that I've noted here.
>
> How many people were in the apartment? What happened in Mr. Darvish's bedroom? What happened in the living room? What was the friend wearing? How could my client have white jeans and a dark hoodie, but people inside the apartment are describing someone with dark jeans and a light hoodie? Maybe because two people were in the apartment. The number of guns, the drug use, the types of guns, the drugs consumed by Mr. Darvish, all of these things are inconsistent, which is why you cannot believe the State's witnesses.

Defense counsel urged the jury to credit Appellant's testimony arguing that it was "corroborated" and he "waived his Fifth Amendment privilege, and he subjected himself to cross-examination by the State." In closing his argument, defense counsel stated, "I

don't have the burden to prove my client innocent. It's their burden to prove him guilty. They haven't even come close."

In his rebuttal closing argument, the prosecutor argued that the jury should give credit to the testimony of the State's witnesses. He referred to the self-defense instruction, stating:

> **Prosecutor:** You guys are going to get self-defense instruction. They care so little about it–
>
> **Defense Counsel:** Objection.
>
> **Prosecutor:** –that they didn't even address it.
>
> **The Court:** Sustained.
>
> **Prosecutor:** So one of the things that you need to know is the information for self-defense only comes from the defendant.
>
> **Defense Counsel:** Objection.
>
> **The Court:** This is rebuttal.

The prosecutor resumed his argument and stated that "[t]he burden in this case is beyond a reasonable doubt." He explained the concepts of reasonable doubt and circumstantial evidence to the jury. The State then addressed defense counsel's arguments regarding a lack of motive. In closing, the prosecutor explained the elements of first-degree murder and asked the jury to find Appellant guilty.

Following deliberations, the jury found Appellant guilty of one count of second-degree murder and one count of use of a firearm during the commission of a crime of

violence. He was sentenced to fifty-five years' incarceration followed by five years' probation. Appellant noted this timely appeal.

STANDARD OF REVIEW

Because improper burden-shifting is a violation of the constitutional rights of a criminal defendant, this Court analyzes such claims for error under a *de novo* standard of review. *Harriston v. State*, 246 Md. App. 367, 372 (2020) (citing *Molina v. State*, 244 Md. App. 67, 174 (2019)). Our determination is "without deference to the circuit court." *Id.*

DISCUSSION

Appellant argues that the court erred in allowing the State, over defense counsel's objection, to tell the jury during rebuttal closing argument that "the information for self-defense only comes from the defendant." He contends the statement improperly shifted the burden of proof on the issue of self-defense from the State as it is the State's burden to prove beyond a reasonable doubt that a defendant did not act in perfect or imperfect self-defense. Appellant argues that "it cannot be said that there is no reasonable possibility that the verdict might have been different, but for the error."

The State argues that the prosecutor's statement did not shift the burden of proof. Instead, the State contends that the prosecutor's statement rebutted defense counsel's closing argument that Appellant's testimony was more credible than the testimony of the State's witnesses. The State emphasizes that the prosecutor was "factually (and accurately) describ[ing] the nature of the proof presented in Samm's case." The State further argues that the prosecutor was highlighting the "long-accepted proposition that fact-finders can

consider 'whether the witness has a motive not to tell the truth' or 'has an interest in the outcome of the case.'" The State notes that the jury was instructed by the court that the State must prove that self-defense does not apply. The prosecutor also informed the jury that the State had the burden of proving Appellant was guilty beyond a reasonable doubt immediately after defense counsel's objection.

When making closing arguments, "attorneys, including prosecutors" are afforded "a great deal of leeway[.]" *Whack v. State*, 433 Md. 728, 742 (2013). Prosecutors have "liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Spain v. State*, 386 Md. 145, 152 (2005) (quoting *Degren v. State*, 352 Md. 400, 429 (1999)). The "regulation of closing arguments falls within the sound discretion of the trial court[.]" *Frazier v. State*, 197 Md. App. 264, 283 (2011). "Improper closing argument remarks will only warrant reversal if they 'actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.'" *Id.* (quoting *Spain*, 386 Md. at 158).

"The State is prohibited under the Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights from commenting on a defendant's decision to not testify at trial." *Molina*, 244 Md. App. at 174. This Court has held that "burden-shifting claims, made in response to prosecutorial comments on a lack of evidence supporting the defense, are borne out of the defendant's constitutional right to refrain from testifying." *Harriston*, 246 Md. App. at 372 (citing *Molina*, 244 Md. App. at 174). When a prosecutor comments on the "'defendant's failure to produce evidence to

refute the State's evidence . . . [it] might well amount to an impermissible reference to the defendant's failure to take the stand.'" *Id.* at 373 (citing *Molina*, 244 Md. App. at 174). The prosecutor's comment need not be "'tantamount to one that the defendant failed to take the stand[.]'" *Id.* (citing *Molina*, 244 Md. App. at 174). The prosecutor's comments may, in some instances, still amount to "'an improper shifting of the burden of proof to the defendant.'" *Id.* (citing *Molina*, 244 Md. App. at 174).

"Maryland appellate courts have not been quick to label as burden-shifting prosecutorial closing comments on a shortage of defense evidence."[1] *Id.* at 379. *Smith v. State*, 367 Md. 348 (2001), is instructive. *Id.* at 373. In that case, Smith elected not to testify at his criminal trial for theft and related charges. *Smith*, 367 Md. at 351–52. During closing arguments, the prosecutor stated:

> The Judge has said that you can look backwards in this case. Look to see who ends up with the property and then you can work backwards and here if the recent unexplained possession of stolen property allows you to work backwards to conclude, hey, this guy was the thief, this guy was the burglar. In making that conclusion, ask yourself this. *What explanation* has been given to us *by the defendant* for having the leather goods? Zero, none.

Id. at 352 (emphasis in original). A jury convicted Smith on all counts, and he appealed his convictions. *Id.* In reversing Smith's conviction, the Maryland Supreme Court held

[1] This Court previously examined whether a prosecutor's comment on a shortage of self-defense evidence constitutes burden-shifting when we decided *Burks v. State*, 96 Md. App. 173 (1993). There, during rebuttal closing arguments, a prosecutor addressed defense counsel's self-defense argument by commenting on a lack of witnesses. *Id.* at 203–04. We held that the prosecutor's argument was "a legitimate comment upon the appellant's dearth of testimony to support" his self-defense argument, and it did not shift the burden of proof to the defense. *Id.* at 204. We found such comments to be "the purpose of jury argument." *Id.* at 205.

that the prosecutor's comment "referred to the defendant's decision to exercise his constitutionally afforded right to remain silent." *Id.* at 358. The court stated that the prosecutor was not commenting on "the defense's failure to present witnesses or evidence" but rather "the failure of the defendant alone to provide an explanation." *Id.* The prosecutor's comment was "susceptible of the inference by the jury that it was to consider the silence of the defendant as an indication of his guilt." *Id.* The court explained that the prosecutor could not "suggest that the defendant had an obligation to testify at trial." *Id.* at 359. However, it was permissible "to argue or comment that the unexplained possession of recently stolen goods permits the inference that the possessor was the thief." *Id.* The court held that the prosecutor's comments "impermissibly commented on [Smith's] failure to testify." *Id.* at 361.

In the case of *Molina v. State*, the appellants were charged with financial exploitation of a vulnerable adult and related charges. 244 Md. App. 67, 83 (2019). The case proceeded to trial, and during its rebuttal closing argument, the State argued:

> Now for two hours we hear about all of these misstatements of fact. We hear about attacks on the prosecutor. You hear about questions that weren't answered or were answered from witnesses. You hear about how the prosecutors are trying to cover all this stuff up. But where in those two hours did you hear anything about where that money went and why that money was spent in [Gustave's] best interests or according to his wishes? When did you hear that? For two hours we listened. When did you hear it? When did you hear that?

Id. at 171–72. This Court affirmed the appellants' convictions, finding that burden-shifting did not occur. *Id.* at 176. We distinguished the prosecutor's comments in *Molina* from those in *Smith*, stating that "[u]nlike in *Smith* . . . the prosecutor in this case directed her

comments to the defense attorney's recitation of the evidence. The prosecutor's remarks were limited in scope to the comments of defense counsel." *Id.*

In the case of *Pietruszewski v. State*, the prosecutor criticized the testimony of the defendant's alibi witnesses:

> They [i.e., the father and girlfriend of defendant] never went and talked to the police. They never contacted the State's Attorney's Office. They came here today and told you ["]this is the wrong man. They arrested the wrong man.["] But did they ever tell the police that? Did they ever tell anybody that in the last ten months? Did they ever say any of that to anybody? No. They just came in here today and said, ["]oh, yeah, yeah, he was at a motel.["]

245 Md. App. 292, 320–21 (2020). There, we noted our holding in *Simms v. State*, 194 Md. App. 285 (2010), where we explained that a prosecutor's comment "'on the nonproduction of corroborating alibi witnesses, is merely pointing out the weakness in [a] defendant's case.'" *Id.* at 321–22 (quoting *Simms*, 194 Md. App. at 320–21). When a "'defendant produces no testimony to support an alibi,'" the prosecutor is prohibited from "'commenting on the nonproduction of alibi witnesses'" as it "'is not exposing a weakness in defendant's case, but is rather improperly shifting the burden of proof to the defendant.'" *Id.* (quoting *Simms*, 194 Md. App. at 321). Based on the holding in *Simms*, we held that the burden of proof had not been improperly shifted to the defendant because the prosecutor "merely pointed out the weakness in the credibility of Pietruszewski's alibi witnesses, including the lack of corroborating evidence that their testimony suggested would have been reasonably available." *Id.* at 322.

In the case of *Harriston v. State*, defense counsel argued during closing arguments that the State failed to investigate and present testimony involving cell phone data in a

murder case. 246 Md. App. 367, 377–78 (2020). During the State's rebuttal closing argument, the State made clear to the jury that it had the burden of proving Harriston's guilt. *Id.* at 378. Immediately after, it stated that defense counsel had access to the same cell phone data and also neglected to investigate the data:

> When the Defense tells me he is most offended by the phone records not being checked, who submitted those for identification to have the detective look at them? The Defense. They had the same phone records. He has no obligation to put on a case whatsoever. They chose to put on a case. Why didn't they talk about the phone records? He had them the entire time.

Id. at 379. We explained that "[u]nlike *Smith*, the prosecutor did not call out Harriston's failure to provide an explanation for his innocence." *Id.* at 380 (citing *Smith*, 367 Md. at 351–52). The prosecutor did not tell the jury "that the defendant should have produced certain evidence" but rather that "the phone records may not have been significantly helpful to either party's case" considering neither party chose to investigate them. *Id.* We also noted that *Smith* was distinct "in another important respect. While the prosecutor pointed out the defense did not discuss the phone records, a lack of explanation for the records' (still unknown) contents is not indicative of Harriston's guilt." *Id.* In *Smith*, "a lack of explanation for [the] defendant's possession of stolen goods" was indicative of guilt. *Id.* We held that the prosecutor's comment on the phone records during closing arguments did not amount to improper burden-shifting and was, instead, a "narrowly tailored response to the defense's closing remarks." *Id.* at 381.

In the case at bar, Appellant testified that Aaron Ray was the initial aggressor and that he acted in self-defense. During closing arguments, defense counsel argued that

Appellant's version of the events was more credible and that there were inconsistencies in the testimonies of the State's witnesses. The State then argued that the only testimony that supported Appellant's self-defense theory came from him. In so doing, the State implied to the jury that Appellant's version of the events was untruthful because he was motivated by self-interest. As we see it, the State's comment on the lack of corroborating witnesses merely rebutted defense counsel's argument that the State's witnesses were not believable. The prosecutor's statements highlighted the State's perceived weakness in Appellant's case, which is the purpose of a rebuttal closing argument. The prosecutor did not improperly shift the burden of proof during his closing argument.

Assuming, *arguendo,* that the prosecutor did improperly shift the burden of proof, we hold that there is no evidence that the jury was misled or likely misled by the statements. In cases where a prosecutor has improperly shifted the burden of proof, the trial court's error is not reversed unless "the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Pickett v. State*, 222 Md. App. 322, 330 (2015). Appellate courts examine several factors in determining whether an error is reversible, such as "'the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused.'" *State v. Newton*, 230 Md. App. 241, 255 (2016) (quoting *Spain*, 386 Md. at 159).

Here, defense counsel, during his closing argument, reminded the jury on multiple occasions about the burden of proof. In its rebuttal closing, the State acknowledged this

burden. The comment made by the State about Appellant's credibility was isolated, it was one sentence, and it was not repeated. The jury had been properly instructed, and the instructions were sent to the jury room for their further review and consideration. We note also that much of the evidence was not disputed. In sum, we find no merit in Appellant's contention that the jury was misled or likely influenced to Appellant's prejudice. We hold that there was "no reasonable possibility that the verdict might have been different, but for the error."

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