Circuit Court for Washington County
Case No. 21-K-16-053106

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2154

September Term, 2017

JARVIS ANTONIO COLEMAN-FULLER

v.

STATE OF MARYLAND

Reed,
Friedman,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: October 30, 2018

Jarvis Coleman-Fuller, appellant, was convicted by a jury sitting in the Circuit Court for Washington County of possession of heroin and possession of cocaine.[1] Appellant raises the following three questions on appeal, which we have rephrased for clarity:

I. Did the trial court err in denying appellant's motion for a mistrial after the court admitted into evidence a statement he made to the police that was not provided in discovery?

II. Did the trial court err in instructing the jury on flight because the instruction: 1) violated appellant's rights against self-incrimination, and 2) was not generated by the evidence?

III. Did the trial court err in allowing the State in closing argument to impinge appellant's right against self-incrimination by highlighting that he did not testify?

For the reasons that follow, we shall affirm.

FACTS

Three police officers with the Narcotics Task Force of the Washington County Sheriff's Office testified for the State. Sergeant Mark Price testified that on August 17, 2016, he and his partner were sitting in an unmarked police car in the back parking lot of the Hagerstown library. A couple of parking spaces over, appellant was sitting alone in the driver's seat of his car. After several minutes, appellant exited his car and began walking across the parking lot. The officers, who were wearing their "RAID" vests, exited their car and walked toward him. According to Sergeant Price, as they approached, appellant glanced toward them and then ran in "the opposite direction of us." The officers

[1] The jury acquitted appellant of possession with the intent to distribute heroin and possession with the intent to distribute cocaine. The court sentenced appellant to concurrent one-year terms of imprisonment on the possession convictions.

gave chase on foot, and appellant was ultimately arrested nearby. Officer Brian Hook, who had been in the area and had joined the chase in his car, searched appellant following his arrest. Officer Hook recovered $21 from appellant's left front pants pocket; $1,900, which was comprised of 30 $20 dollar bills and 13 $100 dollar bills, from his right front pants pocket; a cell phone; and a set of keys, which included a room key to a local motel.

Appellant's car was towed to a police lot, and a search warrant was obtained. Officer Frank Toston executed the warrant and recovered a Styrofoam cup from the open console of appellant's car. Inside the cup was a baggie of 4.49 grams of heroin and a baggie of 7.78 grams of cocaine, including two smaller baggies of .15 grams and .16 grams of cocaine. Officer Toston, who was admitted as an expert in the investigation of trafficking of controlled dangerous substances, opined that appellant could have possessed the heroin and cocaine with the intent to distribute.

Appellant presented no testimonial evidence.

DISCUSSION

I.

Appellant argues that the trial court erred when it denied his mistrial due to a discovery violation that resulted in the improper admission during Officer Toston's testimony that appellant indicated at the time of his arrest that his cell phone contained a security code. Appellant argues that the trial court's error was two-fold: 1) by not ruling that there was a discovery violation, the trial court failed to exercise its discretion in denying his mistrial request, and 2) admission of his statement that his cell phone contained a security code "was so damaging that a mistrial was the only option."

Md. Rule 4-263, governing discovery in circuit court, states that the State shall provide the defense, without the necessity of a request, "[a]ll written and all oral statements of the defendant . . . that relate to the offense charged[.]" Rule 4-263(d)(1). The Rule further provides that if the trial court finds that a party has failed to comply with this Rule, "the court *may* . . . strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances." Md. Rule 4-263(n) (emphasis added). The purpose of the Rule is to prevent surprise and to give the parties sufficient time to prepare their case for trial. *Jones v. State*, 132 Md. App. 657, 678, *cert. denied*, 360 Md. 487 (2000). We review de novo whether a discovery violation has occurred, but we review under an abuse of discretion standard what remedy, if any, the trial court imposed. *Cole v. State*, 378 Md. 42, 56 (2003) (citations omitted). "The exercise of that discretion includes evaluating whether a discovery violation has caused prejudice." *Id*.

In *Simmons v. State*, 436 Md. 202, 212 (2013), the Court of Appeals recently spoke about the standard of review regarding a trial court's decision to grant or deny a mistrial. The Court stated:

> "It is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge's determination will not be disturbed on appeal unless there is abuse of discretion." *Carter v. State*, 366 Md. 574, 589, 785 A.2d 348, 356 (2001). "In the environment of the trial the trial court is peculiarly in a superior position to judge the effect of any of the alleged improper remarks." *Wilhelm v. State*, 272 Md. 404, 429, 326 A.2d 707, 723 (1974). "The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able . . . to note the reaction of the jurors and counsel to inadmissible matters. That

> is to say, the judge has his finger on the pulse of the trial." [*State v.*] *Hawkins*, 326 Md. [270,] 278, 604 A.2d [489, 494 (1992)].

Id. (brackets added). The decision to grant a mistrial "is an extraordinary act which should only be granted if necessary to serve the ends of justice." *Cooley v. State*, 385 Md. 165, 173 (2005) (quotation marks and citation omitted). "The possible prejudice that a defendant may suffer as a result of alleged misconduct forms the threshold for the decision whether to grant a mistrial." *Id.* "The determining factor as to whether a mistrial is necessary is whether the prejudice to the defendant was so substantial that he was deprived of a fair trial." *Id*. (quotation marks and citations omitted). A trial court abuses its discretion when its actions are "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Simmons*, 436 Md. at 212 (quotation marks and citations omitted).

During cross-examination and re-cross-examination of Officer Toston, defense counsel sought to discredit the police investigation by eliciting that the police did not obtain fingerprint or DNA analysis to tie appellant to the drugs recovered in his car or a search warrant for appellant's cell phone. On re-direct examination, the State asked Officer Toston why he did not get a search warrant for the cell phone, and the officer explained that the phone had a security code and his department did not have the equipment to open a phone with a security code. On re-cross-examination, the following colloquy occurred:

> [DEFENSE COUNSEL]: So you tried to access the phone without a warrant? That's always how you can find [the] security code so you tried to access the phone without ever even applying for a warrant, correct?

> [WITNESS]: I can say sir that it was determined that there was a security code on the phone and if I recall at the arrest scene [appellant] indicated that there was a security code.
>
> [DEFENSE COUNSEL]: Well objection in terms of, it's not responsive number one and number two it was never provided.

(Emphasis added). The court overruled the objection.

After the officer finished testifying and was excused, defense counsel moved for a mistrial. Defense counsel argued that the State had failed to provide appellant's statement in discovery and "if I would have known the statement [existed] I never would have asked the question." The State responded that "[t]here's not a statement that I'm aware [of]. All I know is that they couldn't get into the phone. I know what was said on the stand. I don't know anything about that. All I know is that they couldn't get into the phone." The trial court denied the motion for mistrial, stating:

> So, I don't think in this case that it's prejudicial to [appellant]. I understand you were trying to make hay on your cross-examination in terms of the thoroughness of [their] investigation. If this would have been a discovery violation I'm not entirely clear but let's say for the sake of argument it is[,] I don't think that you were having asked the question and the answer that was given I don't think it was prejudicial to [appellant] in the least. And so I'm not going to, if you're asking for a mistrial, I decline to find manifest necessity for a mistrial and I decline to impose any sanction if in fact this is a discovery violation.

Contrary to appellant's argument, the trial court exercised its discretion. Although the trial court was unsure whether a discovery violation had occurred, the court ruled that if there had been a discovery violation, it would have declined to impose any sanction because there was no prejudice. That ruling was an exercise of its discretion. *Cf. Thomas*

v. State, 397 Md. 557, 572 (2007) (even if there had been a discovery violation, the proper focus and inquiry is whether the defendant had been prejudiced).

As to appellant's second argument, that admission of the alleged discovery violation was so prejudicial that a mistrial was the only option, we find that argument meritless. Appellant never explains how he was prejudiced or why "a mistrial was the only option." We are mindful of what we have noted before that although the purpose of discovery is to prevent surprise, "defense counsel frequently forego requesting the limited remedy that would serve those purposes because those purposes are not really what the defense hopes to achieve. The defense, opportunistically, would rather exploit the State's error and gamble for a greater windfall. . . . [H]owever, the 'double or nothing' gamble almost always yields 'nothing[.]'" *Jones v. State*, 132 Md. App. 657, 678 (2000) (internal quotation marks and citation omitted). In declining to grant appellant's mistrial request, we cannot say that the trial court abused its discretion in determining that the testimony did not cause appellant such substantial prejudice that he was deprived of a fair trial, such that a mistrial was the only viable option.

II.

Appellant argues that the trial court erred in giving the jury an instruction on flight. Appellant's argument is two-fold. First, the flight instruction violated his rights against self-incrimination, guaranteed through the Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights, because the instruction amounted to a comment on his failure to take the stand and explain why he fled. Second,

the evidence adduced at trial failed to generate the instruction because it failed to meet two of the four *Thompson v. State*, 393 Md. 291 (2006) inferences. The State argues that his first argument is meritless and his second argument is not preserved for our review. We agree.

Here, the trial court instructed the jury on flight as follows:

> A person's flight immediately after the commission of a crime is not enough by itself to establish guilt. But it is a fact that may be considered by you as evidence of guilt. Flight, under these circumstances, may be motiv - Let me start that sentence again. Flight, under these circumstances, may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there's evidence of flight. If you decide there is evidence of flight you then must decide whether this flight shows a consciousness of guilt.

The instruction is nearly identical to the Md. Pattern Jury Instruction.[2] Appellant objected to the flight instruction given, arguing that the instruction "almost caus[es] the Defendant to have to testify" to explain why he fled. The trial court noted that instruction was straight from the pattern jury instructions and overruled the objection.

[2] MPJI-Cr 3:24 provides:

> A person's flight [concealment] immediately after the commission of a crime, or after being accused of committing a crime, is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt. Flight [concealment] under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight [concealment]. If you decide there is evidence of flight [concealment], you then must decide whether this flight [concealment] shows a consciousness of guilt.

A. Flight instruction violated appellant's constitutional rights?

Appellant cites two cases which generally state that it is impermissible for an adverse inference to be drawn against a witness who asserts his privilege against self-incrimination. *See Lawson v. State*, 389 Md. 570 (2005) and *Smith v. State*, 367 Md. 348 (2001). He then applies the above general principle to his case and argues:

> [A] flight instruction given in a criminal case – and directly on the heels of an instruction on the defendant's right not to testify – invites the jury to impermissibly draw [] an adverse inference against the defendant, resulting in improper burden-shifting. It is manifestly evident, then, that under such circumstances an instruction on flight as consciousness of guilt is tantamount to comment on a criminal defendant's failure to testify or to present evidence to the contrary, and ,thus, a violation of the federal and/or State constitutional right against self-incrimination and is burden-shifting.

Based on the above reasoning, he then urges us to reverse his convictions.

The two cases appellant cites in support of his argument, however, are not applicable to the situation before us. In *Lawson*, 389 Md. at 593, the Court of Appeals reversed Lawson's convictions for sexual assault, in part, because the State "insinuated [in closing argument] that the burden was upon the petitioner to prove that the child [victim] was lying[.]" In *Smith*, 367 Md. at 352 and 358-59, the Court of Appeals held that the State's remark in closing argument, "What explanation has been given to us by the defendant for having the leather goods? Zero, none[,]" violated Smith's State and Federal rights against self-incrimination. These cases are burden-shifting cases because the State insinuated in closing argument that the accused was to offer an explanation on the evidence. In contrast the case before us concerns a jury instruction that permits the jury to make an inference of guilt, but that the jury need not draw that conclusion and the inference itself is insufficient

to establish guilt. We note that appellant cites no authority in Maryland, or any other jurisdiction, that states that a proper flight instruction (that is generated by the evidence) violates a defendant's right against self-incrimination or constitutes improper burden-shifting.

Certainly, a trial court may not instruct a jury in a way that creates a conclusive presumption of a defendant's guilt. *See Sandstrom v. Montana*, 442 U.S. 510, 520-524 (1979). Permissible inferences of guilt are, however, permitted. *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157 (1979) ("The most common evidentiary device is the entirely permissive inference or presumption, which allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant.") (citation omitted). The difference between the two is crucial. A conclusive presumption instructs a jury that it must accept a presumptive fact if the State proves predicate facts, while a permissive inference suggests to a jury a possible conclusion to be drawn if the State proves predicate facts but does not require a jury to draw that conclusion. *Francis v. Franklin*, 471 U.S. 307, 313-15 (1985) (footnote omitted).

Here, the trial court's instruction on flight is clearly a "permissive inference" rather than a "mandatory presumption." *Id.* at 314 (discussing whether a jury instruction creates an evidentiary permissive inference or a mandatory presumption). The instruction clearly states flight "*may*" be considered as evidence of guilt but it is insufficient to establish guilt. The instruction goes on to provide that flight "*may* be motivated by a variety of factors, some of which are fully consistent with innocence." The inclusion of this language results

in an instruction that is not burden-shifting for it relieves any burden on appellant to explain his actions so as to prove his innocence. Appellant's counsel clearly recognized as much at trial when, in the midst of his argument, he stated that the Md. Pattern Jury Instruction on flight was "*almost*" burden-shifting. For the above reasons, it is clear to us that the trial court's charge on flight did not violate appellant's right against self-incrimination nor was it burden-shifting.

B. Flight instruction preserved and generated by the evidence?

Appellant next argues that the trial court erred in giving the instruction on flight because the instruction was not generated by the evidence. Specifically, appellant argues that the State failed to meet two of the four *Thompson v. State*, 393 Md. 291 (2006) inferences. He argues there was no evidence of flight, "only [his] mere departure from the scene," and the evidence of his departure from the scene did not suggest a "consciousness of guilt" that he had committed drug crimes. The State argues that appellant has failed to preserve this argument for our review because he did not raise it below, and in any event, the argument is meritless. We agree.

Md. Rule 4-325(e) 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." Appellant only objected to the flight instruction given because the instruction "almost caus[es] the Defendant to have to testify." He never objected on the ground that the instruction was not generated by the evidence. Accordingly, appellant

failed to preserve his argument for our review by not raising it below. Even if he had raised it below, however, we would have found no error.

> Md. Rule 4-325(c) governs how a trial court shall instruct a jury and provides:
>
> The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

The Rule requires a trial court to give a requested instruction under the following circumstances: "(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given." *Thompson*, 393 Md. at 302-03 (quotation marks and citations omitted).

In *Thompson*, the Court of Appeals engaged in a thorough analysis of the flight instruction under Maryland law. The *Thompson* Court affirmed the "propriety of flight instructions" where the evidence supports an inference of consciousness of guilt. *Id.* at 304 & n.2. As to whether a flight instruction was generated by the evidence, the *Thompson* Court reaffirmed its adoption of the four-inference test set forth in *United States v. Myers*, 550 F.2d 1036 (5th Cir.1977), holding that each of the following inferences must reasonably be drawn from the facts of the case: "(1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." *Id.* at 311-12 (quotation marks and citation omitted).

Appellant argues that the evidence failed to meet the first inference in *Thompson*, "because the evidence showed only mere departure" and "there was no clear indication that his departure was related to the police presence[.]" We disagree.

Appellant's argument that he "merely" left the scene strains credulity.

> "At its most basic, evidence of flight is defined by two factors: first, that the defendant has moved from one location to another; second, some additional proof to suggest that this movement is not simply normal human locomotion." 22 Charles Alan Wright et al., Federal Practice and Procedure § 5181 (1978 & Supp.2007). This additional proof of other than normal human movement also must reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt. *State v. Lincoln*, 183 Neb. 770, 164 N.W.2d 470, 472 (1969). In the context of leaving the scene of a crime, the classic case of flight is where a defendant leaves the scene shortly after the crime is committed and is running, rather than walking, or is driving a speeding motor vehicle. On the other hand, merely walking away from the scene of a crime ordinarily does not constitute flight.

Hoerauf v. State, 178 Md. App. 292, 323-24 (2008) (footnote omitted). Moreover, Sergeant Price testified that when he and his partner, who were wearing "RAID" vests, exited their unmarked police car and walked toward appellant, who was walking across the parking lot, that appellant "looked over toward us" and then "began to run [in] the opposite direction of us." A chase ensued. This is classic evidence of flight. *Cf. Id.* at 324 (noting that "the classic case of flight is where a defendant leaves the scene shortly after the crime is committed and is running, rather than walking[.]").

Appellant also argues that the evidence elicited at trial failed to meet the third inference in *Thompson* – that the evidence show that he was running from the police because of the drugs found in his car. He argues that there was no link between his alleged

flight and the drugs, suggesting the possibility that he was engaged in some other conduct that would explain his flight. Again, appellant's argument strains credulity.

In *Thompson*, the police attempted to stop the defendant because he matched the description of a suspect in a recent attempted robbery and shooting. 393 Md. at 294. Thompson biked away from the police when approached, leading to a chase and his eventual apprehension. *Id*. The police found a significant quantity of cocaine on him following his arrest. *Id*. Thompson later told the police that he ran because he did not want to be found in possession of the cocaine. *Id*. at 313. During trial for the robbery crimes, the trial court gave a flight jury instruction, and Thompson was later convicted of several crimes relating to the robbery. *Id*. at 300. The Court of Appeals reversed his convictions, holding that the flight instruction was given in error, explaining:

> The gravamen of the issue is whether Mr. Thompson fled in an attempt to avoid apprehension for the [robbery] crimes for which he was on trial. In the present case, the jury was not presented with evidence of what may have been an alternative and at least a cogent motive for Mr. Thompson's flight, specifically that drugs were found on his person. During his interview with police, Mr. Thompson asserted that he ran from them because he had drugs in his possession, which, according to the State, amounted to eighty-six vials of crack cocaine at the time of his arrest. He was in essence arrested *in flagrante delicto* with respect to the crime of possession of controlled dangerous substances. We find that this fact, which was known to all parties involved although not revealed to the jury, undermines the confidence by which the inference could be drawn that Mr. Thompson's flight was motivated by a consciousness of guilt with respect to the crimes for which he was on trial in the present case; it provides a foundation for the alternate, and equally reasonable, inference that Mr. Thompson fled due to the cocaine in his possession, an action a person in his position may have taken irrespective of whether he also shot and attempted to rob Mr. Gottesman. Mr. Thompson thus was placed in a difficult situation where he must either not object to the highly prejudicial evidence concerning his possession of a significant amount of cocaine being introduced to the jury to explain his flight (or perhaps forced to make a Hobson's choice to

> introduce such evidence himself), or decline to explain his flight and risk that the jury would not infer an alternative explanation for his flight.

Thompson, 393 Md. at 313–14 (footnotes omitted).

Here, there was no evidence that appellant ran for a reason other than drugs found in his car. Appellant never offered an alternate reason below or on appeal. We are mindful that "[s]imply because there is a possibility that there exists some innocent, or alternate, explanation for the conduct does not mean that the proffered evidence is *per se* inadmissible." *Thomas v. State*, 397 Md. 557, 578 (2007). Appellant's argument that there may have been an alternate explanation for his flight, without more, is insufficient to generate an issue that the State failed to meet the third inference. Accordingly, even if preserved, we would have found no error by the trial court in giving the requested flight instruction.

III.

Appellant argues that the trial court erred when the State, during closing argument, allegedly commented on his decision not to testify. The State disagrees, as do we.

The general rules in Maryland regarding the scope of permissible closing argument have been often stated:

> As to summation, it 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. Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way.... Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; 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.

Mitchell v. State, 408 Md. 368, 380 (2009) (quotation marks and citation omitted). "What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Smith v. State*, 388 Md. 468, 488 (2005).

Even though generally "attorneys are afforded great leeway in presenting closing arguments to the jury[,]" *Degren v. State*, 352 Md. 400, 429 (1999) (citations omitted), there are acknowledged boundaries that counsel may not exceed, including commenting on a defendant's failure to testify in violation of the privilege against self-incrimination, protected by the Fifth Amendment of the United States Constitution and Article 22 of the Maryland Declaration of Rights. *Simpson v. State*, 442 Md. 446, 454-57 (2015). Nonetheless, a prosecutor may properly "summarize the evidence and comment on its qualitative and quantitative significance" and "lawyers have wide latitude to draw reasonable inferences from the evidence, and discuss the nature, extent, and character of the evidence." *Smith v. State*, 367 Md. 348, 354 (2001). In evaluating whether the State has improperly remarked on a defendant's right to remain silent, we determine whether the remark is "'susceptible of the inference by the jury that they were to consider the silence of the traverser in the face of the accusation of the prosecuting witness as an indication of his guilt.'" *Smith*, 367 Md. at 354-55 (quoting *Smith v. State*, 169 Md. 474, 476 (1936) (a bastardy case where the State prosecutor argued before the jury that "this defendant has sat here all during the trial and has not denied his fatherhood.")). This test is considered

"highly protective of a defendant's ability to exercise his Fifth Amendment right to remain silent[.]" *Simpson*, 442 Md. at 461 (quotation marks and citation omitted).

"An appellate court should not disturb the trial court's judgment absent a clear abuse of discretion by the trial court of a character likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 225 (1995), *cert. denied*, 519 U.S. 1027 (1996). "[W]e examine whether the jury was actually or likely misled or otherwise influenced to the prejudice of the accused by the State's comments" and will reverse "[o]nly where there has been prejudice to the defendant[.]" *Whack v. State*, 433 Md.728, 742-43 (2013) (quotation marks and citations omitted). In assessing whether the complaining party was prejudiced, we consider "the severity of the remarks, cumulatively, the weight of the evidence against the accused and the measures taken to cure any potential prejudice." *Lee v. State*, 405 Md. 148, 174 (2008) (citations omitted). A "trial judge is in the best position to gauge the propriety of argument in light of such facts," and an "appellate court should not disturb the trial court's judgment absent a clear abuse of discretion by the trial court of a character likely to have injured the complaining party." *Mitchell*, 408 Md. at 380-81 (quotation marks and citation omitted).

As stated above, the trial court gave the Md. Pattern Jury Instruction on flight. During rebuttal closing argument, the State argued:

> [THE STATE]: I'll touch a little bit about flight. Immediately after the commission of a crime flight is a fact or a factor of evidence of guilt. But as the Court read to you there could be other inferences in addition. In this particular case under these circumstances, facts of this particular case, the Defendant did flee and why did he do that. What would his motivation be?
>
> [DEFENSE COUNSEL]: Objection.

A bench conference ensued. Defense counsel requested a mistrial, arguing that the State "directly eluded [sic] to the fact my client did not testify[b]y saying what reason did he have to flee. . . . That flies in the face of his right to remain silent." After hearing the parties' argument, the court overruled the objection, stating:

> Okay. Alright. I understand why you're raising your objection [defense counsel]. I do think that the language which [the State] used on the record it does track the pattern jury instruction. And I know the Court is in the role of making sure that there's not argument that does infringe upon the Defendant's constitutional right to remain silent. I don't think that these comments do. I think that they are tracking a pattern jury instruction. Your objection is certainly preserved for the purposes of the appellate record. Alright. So I'm going to overrule the objection to make it clear.

Appellant argues on appeal that the trial court erred in permitting the State "to make comments susceptible of the inference that they could consider the decision by [him] to not testify or present evidence." He cites *Smith*, 367 Md. at 358-59, where the Court of Appeals held that Smith's rights against self-incrimination were violated when the State improperly commented on his right not to testify during closing argument. The Court of Appeals explained its holding:

> In the instant case, the prosecutor's remarks to the jury, "what explanation has been given to us *by the Defendant*," and his answer, "zero, none," referred to the defendant's decision to exercise his constitutionally afforded right to remain silent. The prosecutor did not suggest that his comments were directed towards the defense's failure to present witnesses or evidence; rather, the prosecutor referred to the failure of the defendant alone to provide an explanation. The prosecutor's comments were therefore susceptible of the inference by the jury that it was to consider the silence of the defendant as an indication of his guilt, and, as such, the comments clearly constituted error.
>
> As is suggested above, we cannot conclude that the prosecutor's comments merely addressed the lack of evidence to explain Smith's possession of the leather goods. To so conclude would ignore the

> prosecutor's explicit reference to the defendant and the insinuated duty of the defendant personally to offer an explanation for his possession of the property. The prosecutor's comment went beyond any qualitative assessment of the evidence in that, when he asked the jury "what explanation has been given to us by the *defendant*," he effectively suggested that the defendant had an obligation to testify at trial. This burden-shifting is contrary to the basic tenets of our criminal justice system, an accusatorial system, where the question is whether the government has met its burden of proof.

Id. The State here, however, never mentioned appellant's name nor explicitly called out his failure to testify.

The facts before us are also unlike those in *Simpson*, *supra*. In that case, Simpson, following his arrest from crimes stemming from the arson of an automobile, wrote a statement to the police that the State viewed as a confession. At trial, the State told the jury during opening statements that "the Defendant **himself will tell you, number one, that he burned down that garage**—"; that he committed arson and "**he'll tell you why he did it[].**"; that in addition to "**the Defendant's own words,**" the State will produce evidence that he committed the crime; the State's witnesses will "**corroborate everything that the Defendant has said**"; and "**at the end of this trial I'm going to ask you to listen to what the Defendant has said, to listen to how his words are corroborated.**" *Simpson*, 442 Md. at 451. Simpson elected not to testify.

Following conviction, the Court of Appeals reversed. Although the Court conceded that the State may have only intended to refer to what Simpson had said in his statement to the police, the Court reasoned:

> We cannot reasonably expect or assume that the jury, presumably unfamiliar with the nuances of the law, evidentiary rules, and trial procedures, naturally would have inferred from the prosecutor's words that she must be referring to what the evidence will show that Petitioner *had said*, before trial, in one

> context or another. If anything, it is as or more likely that the prosecutor's remarks in opening statement—that "the defendant himself will tell you" and "he'll tell you why he did it"—regardless of what the prosecutor intended them to mean—were reasonably susceptible of the inference by the jury that Petitioner had an obligation to testify and, if he did not, the jury should view that as evidence of his guilt.

Simpson, 442 Md. at 461. Additionally, in *Marshall v. State*, 415 Md. 248 (2010), the Court of Appeals held that the State prosecutor "statements to the jury [in closing] that 'Mr. Marshall did not take the stand' and '[w]e don't have Mr. Marshall's thoughts' were used to highlight the fact that the defendant did not testify in an effort to rebut the State's evidence." *Marshall*, 415 Md. at 263. The Court in *Marshall* found these statements "direct comments upon the defendant's decision not to testify[.]" *Id.* at 263.

We find the above cases distinguishable. As stated above, the State never mentioned appellant's name or explicitly called out his failure to testify. The State never referred to what appellant might have said or could have said. Moreover, the remark tracked the language of the Maryland Pattern jury instruction on flight. Accordingly, we believe that the remarks, viewed in the context of the State's closing argument, were directed at the general weakness of the defendant's case, not the defendant's failure to testify. Therefore, under the circumstances presented, we are persuaded that the remark was not "susceptible of the inference" by the jury that they were to consider appellant's silence as evidence of guilt, and we find no abuse of discretion by the trial court in overruling appellant's objection.

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY APPELLANT.