Circuit Court for Baltimore City
Case No. 118088022

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0227

September Term, 2019

LAMONT KYLER

v.

STATE OF MARYLAND

Friedman,
Beachley,
Wells,

JJ.

Opinion by Wells, J.

Filed: April 17, 2020

A jury empaneled in the Circuit Court for Baltimore City convicted appellant, Lamont Kyler, of first-degree murder, conspiracy to commit first-degree murder, use of a firearm in the commission of a crime of violence, and possession of a firearm with a disqualifying conviction. The court sentenced him to life imprisonment on the murder count, and consecutive sentences on the handgun counts. The main evidence against Kyler was a police officer's identification of him as one of two suspects shown in surveillance videos of the scene of the homicide.

Kyler appeals and presents four questions for our review:

1. Was the evidence legally sufficient to support the convictions?
2. Did the trial court err in refusing to give a cross-racial identification instruction?
3. Did the trial court err in giving a "mere presence" instruction to the jury?
4. Did the trial court err when it overruled Kyler's objection to the State's purported burden shifting during closing argument?

We conclude that the evidence was sufficient to sustain Kyler's convictions and do not perceive that the circuit court otherwise erred. We, therefore, affirm the convictions.

FACTUAL AND PROCEDURAL BACKGROUND

On September 4, 2017 at approximately 12:30 p.m., Detective Steve McDonnell from the Baltimore City Police Homicide Division ("BPD") responded to a call for a shooting near the 7-Eleven at 4401 Belair Road. When BPD arrived on the scene the victim, Tyrone Ray, Jr., had already been transported to Johns Hopkins Hospital where he

was pronounced dead after having sustained 24 gunshot wounds. BPD investigated the crime scene—a grassy area on the side of the 7-Eleven parking lot—and recovered some evidence which consisted of bloody clothing, a cell phone, crutches, and shell casings. Det. McDonnell testified that a 911 caller described a white Infiniti leaving the area at the time of the shooting with a partial tag number of 497 or 794.

Over the next two days, the police obtained surveillance footage from a camera at the 7-Eleven, from a City Watch camera, and from a few neighboring businesses, including the Seven Day Mart and the Wing It Carry Out. The police took stills from the 7-Eleven video showing a white Infiniti sedan and two African-American men police believed were involved in the homicide and disseminated them as a "Be-On-The Lookout" ("BOLO") flyer throughout the city police department. On September 8, the police released flyers and a video clip showing the suspects from the Seven Day Mart surveillance video to the public through multimedia sources.

On September 12, Detective Nicholas Wellems from the Northeast District of the BPD contacted Det. McDonnell claiming to recognize one of the suspects in the disseminated video clip. The next day he identified Lamont Kyler in a photographic array as the person he saw in the video. Det. McDonnell testified that in his interview with him, Det. Wellems said he had contact with Kyler in 2015. Det. Wellems testified that he arrested Kyler on July 2, 2015 and had seen him in court for around thirty minutes in January 2016.

Det. McDonnell also testified that some of the evidence they recovered seemingly had no connection to Kyler. For example, on September 6, 2017, BPD received

information about a recent stop of a vehicle with the tag 3BZ4974, which contained the same three digits reported by the 911 caller and included in the BOLO. The police then put out another BOLO with the now complete tag number. The police were then able to identify one person who had used the white Infiniti - Keyon Evans. He was stopped the day before Ray's murder driving that car. The registered owner of the Infiniti happened to be a woman named Tierra Rooks. The police located the Infiniti and processed it for fingerprints. Fingerprints matching those of a Joshua Beech and a Rodney Evans (not Keyon) were found in the Infiniti; the police found no fingerprints matching Kyler's. The shell casings recovered from the crime scene matched those from a firearm used by a Devin Segar in 2015. The police did not recover the gun.

BPD arrested Kyler on March 16, 2018. Beginning December 11, 2018, Kyler and a co-defendant were tried by a jury in the Circuit Court for Baltimore City. At the four-day trial, the videos from the 7-Eleven, Seven Day Mart, and Wing It Carry Out, as well as stills made from them, were presented to the jurors as evidence. The jury convicted Kyler of first-degree murder, conspiracy to commit first-degree murder, use of a firearm in a crime of violence, and possession of a firearm with a disqualifying conviction. The court sentenced Kyler to life imprisonment plus twenty-five years. This timely appeal followed.

Additional facts will be supplied as necessary.

DISCUSSION

I. Sufficiency of the Evidence

Kyler asserts that the evidence, which he claims is nothing more than Det. Wellems' identification testimony, was insufficient to support his conviction. Kyler emphasizes that

there were no eyewitnesses to the crime. He notes that there was no forensic evidence that connected him to the vehicle seen in the surveillance videos on the day of the murder. Further, Kyler contends the State could not prove a connection between him and his co-defendant nor show a connection between him and Ray, the decedent. Additionally, Kyler points out that the State provided no motive for him to have murdered Ray.

The State counters the evidence was sufficient. In addition to Det. Wellems' identification of Kyler, the jurors also had the benefit of viewing each of the surveillance videos obtained from the neighborhood stores. The jury also viewed stills made from those videos and could compare the persons depicted in those images with Kyler as he sat before them at trial. The State argues, if the jurors found Kyler was one of the men seen in the videos, they could reasonably infer that he participated in Ray's murder.

We agree with the State. In assessing the sufficiency of the evidence for a criminal conviction, the reviewing court determines "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Taylor v. State*, 346 Md. 452, 457 (1997) (citations omitted). As we explain, the evidence was sufficient to convict Kyler.

Essentially, Kyler takes issue with the jury's reliance on Det. Wellems' testimony that he recognized Kyler in the videos, as well the inference drawn by the jury that the men in the videos committed the murder. But neither the assessment of witness credibility nor the weighing of potential inferences before the trier of fact are tasks within the province of this Court. As the Court of Appeals said in *Briggs v. State*, 348 Md. 470, (1998), the reviewing court does "not inquire into the credibility of witnesses or weigh the evidence to

ascertain whether the State has proven their case beyond a reasonable doubt; that is the responsibility given to the trier of fact." *Id.* at 475. Applying that same principle in *Reeves v. State*, 192 Md. App. 277 (2010), this Court denied a sufficiency challenge where victims and police officers provided contradictory testimony describing the appellant. We reasoned, "[t]o the extent that [the victim's] and the officers' identifications of appellant were allegedly vague or inaccurate, the jury accepted their testimony, and we will not disturb that determination." *Id.* at 307.

Here, the jury did not need to rely entirely on Det. Wellems' credibility, since, as the State points out, the jurors saw both the surveillance videos showing the suspects on the day of the crime and Kyler in person at trial. The surveillance videos were supplemented by stills that showed closer views of the suspects, which could reasonably be used to confirm their identities. But if the jurors could not independently and definitively conclude that one of the suspects was Kyler, they were free to rely on Det. Wellems' testimony if they found him credible. We shall not attempt to reweigh the detective's credibility.

The jury was likewise free to infer from the evidence that the men in the videos committed the murder. Our Court of Appeals has explained

> A valid conviction may be based solely on circumstantial evidence. The same standard applies to all criminal cases, including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts.
>
> A trial court fact-finder, i.e., judge or jury, possesses the ability to "choose among differing inferences that might possibly be made from a factual situation" and this Court must give deference to all reasonable

> inferences the fact-finder draws, regardless of whether we would have chosen a different reasonable inference.

State v. Suddith, 379 Md. 425, 430 (2004). This Court has similarly explained, "[c]hoosing between competing inferences is classic grist for the jury mill." *Cerrato-Molina v. State*, 223 Md. App. 329, 337 (2015).

While we defer to the inference the jury seemingly made that the men in the video committed the homicide, we independently conclude the surveillance videos and derivative stills provide sufficient evidence to support the inference. We note the following: Camera Two from the Seven Day Mart video shows the white Infiniti pull on to Kavon Avenue at 12:12 p.m. At 12:15 p.m., two men, one wearing a longer than usual gray hooded sweatshirt, and the other in a black hooded sweatshirt, can be seen exiting the vehicle, and then getting back into the Infiniti as it backs up to park on the other side of the street. At 12:17 p.m. the two men exit the car again and walk down an alley perpendicular to Kavon Avenue. Less than a minute later, they walk back to the Infiniti and, get back inside, and the car pulls out of view. Around 12:23 p.m. one can see the Infiniti driving once again, this time moving quickly down Kavon Avenue. Although there are no close-ups of the suspects' faces on Camera Two, their clothing may be clearly seen.

Camera Three from the Seven Day Mart shows the Infiniti driving by the entrance of that store at 12:12 p.m. At 12:15 p.m., the same two men can be seen walking down and then back out of the alley. Barely within the camera's view is the Infiniti, which the men get in and out of. Around 12:17 p.m., the suspects can be seen once more walking down the alley, emerging on Kavon Avenue, and getting into the Infiniti, which pulls away

a minute later. Again, around 12:23 p.m. the Infiniti can be seen driving quickly down Kavon Avenue. Camera Six from the Seven Day Mart, shows the alley and the same two men clearly and completely as they walk up and then quickly back down the alley at 12:15 p.m. At 12:17 p.m. they can be seen once more walking up the alley, then turning back again.

Camera One from 7-Eleven shows what appears to be the same two men, based on their clothing, walking across the parking lot around 12:21 p.m. At 12:24 p.m., a patron who had just walked out of the 7-Eleven can be seen ducking and running a few steps in the other direction, and moments later the two men sprint across the parking lot. Again, their clothing—particularly the distinctive long gray hooded sweatshirt of the one suspect—indicates they are the same two men. Camera Two from 7-Eleven shows the opposite angle, with the two men walking across the parking lot at 12:21 p.m. Although this camera does not have a close-up view, the men can be seen walking across the street from the 7-Eleven, then back to the grassy area next to the 7-Eleven. A minute later, a person can be seen walking toward them on crutches and the two suspects come face-to-face with the person. The camera's view is partly obscured by a vehicle, but the heads of the three men are still visible above the vehicle. In an instant, the head of the person on crutches drops out of view, and at the same moment, two people outside of 7-Eleven duck down and run in the opposite direction. The two suspects are seen sprinting back across the 7-Eleven parking lot.

In each of the videos, the two men can reasonably be identified as the same pair given the corresponding times of the videos, the locations of the men, and their clothing.

On review of the evidence, the inference that the two men in the video committed the homicide was not unreasonable, and so we see no reason to disturb the jury's verdict.

In sum, we decline to second guess the jury. We also decline to weigh competing inferences about whether the men in the videos committed the murder, in light of the existence of evidence that sufficiently supports the inference the jury apparently made. We hold the evidence was not insufficient so as to warrant disturbing the jury's verdict.

II. Jury Instructions

A. Refusal to give cross-racial identification instructions

Kyler asserts the circuit court erred in refusing to give his requested cross-racial identification instruction. He argues this case was ripe for the instruction, given (1) the sole witness to identify Kyler from the video and in a photo array was Det. Wellems, a man of a different race from Kyler, who had seen him on no more than three occasions over the course of two years, and (2) Det. Wellems' identification of Kyler in the video and photos was uncorroborated. The State counters the circuit court properly used its discretion in declining to give such an instruction, since there was no evidence to suggest Det. Wellems had any difficulty identifying Kyler, or any general difficulty identifying persons of another race.

Maryland Rule 4–325(c) concerns jury instructions and says, in part, that,

> [t]he 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 need not grant a requested instruction if the matter is fairly covered by instructions actually given.

Maryland appellate courts have utilized a three-part test for reviewing a trial court's decision whether to provide a requested instruction: (1) "whether the requested instruction was a correct statement of the law;" (2) "whether it was applicable under the facts of the case;" and (3) "whether it was fairly covered in the instructions actually given." *Gunning v. State*, 347 Md. 332, 340 (1997) (quoting *Grandison v. State*, 341 Md. 175, 211 (1995), *cert. denied*, 519 U.S. 1027 (1996)). Kyler and the State disagree primarily on whether the second prong was satisfied.

The Court of Appeals' explanation in *Gunning v. State*, 347 Md. 332 (1997) made clear the second prong, particularly where identification is an issue, is not measured in "absolute[s]":

> If a party requests an instruction on identification, therefore, the trial judge should first evaluate whether the evidence adduced at trial suggests the need for the requested instruction. In making this determination the court *might consider* such factors as any equivocation associated with the identification, the extent to which mistaken identification is reasonably at issue and the existence of, or lack of corroboration of the eyewitness identification.
>
> We do not find instructions on such issues to be always mandatory, but neither do we consider them never necessary nor *per se* improper. . . We instead recognize that an identification instruction may be appropriate and necessary in certain instances, *but the matter is addressed to the sound discretion of the trial judge.*

Id. at 347–48 (emphasis added). We applied this analysis to our review of a decision whether to provide a cross-racial identification instruction in *Smith v. State*, 158 Md. App. 673, 689 (2004), *rev'd on other grounds*, 388 Md. 468 (2005) ("*Smith I*"), and reiterated that position in *Janey v. State*, 166 Md. App. 645, 668 (2006). In line with *Gunning*, *Smith I* and *Janey*, we review for an abuse of discretion the circuit court's determination whether

the evidence made applicable the cross-racial identification instruction. *See also Kazadi v. State*, 240 Md. App. 156, 190 (2019), *rev'd on other grounds*, __Md.__(Sept. Term 2019, Case No. 11 (filed January 24, 2020)).

In his reply brief, Kyler concedes that our Court of Appeals has not mandated the use of cross-racial identification instructions in certain circumstances, but counters that other jurisdictions have. In fact, in support of his main contention—that a cross-racial identification instruction should be given when identification is a critical issue in a case and an eye-witness' cross-racial identification is not corroborated—he quotes this Court's discussion of what is required by the New Jersey state courts:

> In *Cromedy*, 727 A.2d at 467, the New Jersey Supreme Court emphasized that an instruction on cross-racial identification "should be given only when ... [1] identification is a critical issue in the case, and [2] an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability." Consequently, even if Janey had been tried in New Jersey, where the *Cromedy* standard requires that an instruction on cross-racial identification be given under certain circumstances . . . .

Janey, 166 Md. App. at 664. While we supported the consideration of these factors in *Janey*, we did not present them as part of a required test. As we explained in *Smith*, where the appellant urged application of this test, "[t]he short answer to appellant's argument is that *Cromedy* is based on New Jersey law, which is inconsistent with Maryland law." 158 Md. App. at 696–97.

On the facts before us in *Janey* we affirmed the circuit court's refusal to give a cross-racial identification instruction, emphasizing the matter was within the sound discretion of the trial judge. We observed that even under the *Cromedy* test (were it to have applied), the instruction would not have been required since identification was not a central issue

and identification of the defendant had been corroborated. *Id.* at 664. We also noted that because the witness testified he had difficulty identifying African-American persons, a cross-racial instruction would have been redundant. *Id.* at 664–65.

Before *Janey* we decided *Smith I*, where we held the circuit court had not abused its discretion in refusing to provide a cross-racial identification instruction where the witness expressed that she was particularly good with faces, and "there was no evidence of any problem associated with cross-racial identification." *Smith*, 158 Md. App. at 704. There, we similarly held that the court did not err in disallowing defense counsel from arguing issues of cross-racial identification in closing arguments, since there was no evidence race played a factor in the witness' identification of the suspect. *Id.* at 705–06. The Court of Appeals reversed our decision on the latter issue, reasoning that because "the victim's identification of the defendants was anchored in her enhanced ability to identify faces . . . defense counsel should have been allowed to argue the difficulties of cross-racial identification in closing argument." *Smith v. State*, 388 Md. 468, 488–89 (2005) ("*Smith II*"). The court did not reach the separate issue of the propriety of cross-racial identification instructions. *Id.* at 470.

These opinions did not establish a floor for when cross-racial identification instructions must be given in our circuit courts. Rather, they dealt with facts where the instruction would not have been necessary even when analyzed under a test adopted in another jurisdiction. This is most clearly demonstrated by two statements in *Janey*. *First*, we explained that the Court of Appeals' recent holding in *Smith II* that "it is reversible error for a trial court to prevent a defendant from attacking the prosecution's evidence

during closing argument . . . does not support the conclusion that a trial court commits reversible error if it declines to give the jury an instruction on cross-racial identification." *Janey*, 166 Md. App. at 662–63. *Second*, we concluded by saying "it would be helpful if the Court of Appeals provided guidance as to when and under what circumstances" it would be "appropriate for a trial court to mention specific factors [the jury should consider in its evaluation of eyewitness testimony], including cross-racial identification." *Id.* at 667.

Janey made clear that a trial judge may not arbitrarily refuse to provide a cross-racial identification instruction: "[I]t would be an abuse of discretion for the trial judge to apply a uniform policy of rejecting all requested instructions that are not covered by some pattern instruction." *Id.* at 666. Rather, the trial judge should "resolve discretionary matters" with "regard to the particulars of the individual case." *Id.* (quoting *Gunning*, 347 Md. at 352).

Most recently in *Kazadi* we affirmed the circuit court's refusal to give New Jersey's cross-racial identification instructions (the same instructions requested and refused in *Janey*) where two Hispanic witnesses independently identified the African- American defendant. *Kazadi*, 240 Md. App. at 192, 194. We found persuasive the trial judge's consideration of the fact that the witnesses expressed certainty in identifying the defendant, and that the defendant was their neighbor of two-and-a-half years. *Id.* at 194. We held the trial judge had not abused his discretion, given his observations that this was "not the prototypical scenario contemplated in the New Jersey [cross-racial] instruction," and that the instruction might "prejudice or confuse the jury, by suggesting that jurors should disregard or discount the identifications made by [the witnesses], based solely on the

difference in appellant's race." *Id.* We reiterated our position in *Janey* that "a court may reasonably exercise its discretion by considering whether such an instruction will be misunderstood as a judicial directive that the cross-race effect is a universal phenomenon at work in every identification involving a witness and suspect of a different race or ethnicity." *Id.*

In sum, the issue of whether to give an instruction regarding cross-racial identification has now been addressed in four reported Maryland cases, none of which has held the trial court abused its discretion in failing to give such an instruction. *See Kazadi*, 240 Md. App. at 191 (explaining at the time of that opinion, only three such cases had been reported and none had found an abuse of discretion in the refusals below). We find *Janey* and *Kazadi* particularly instructive in showing our appellate courts have yet to establish a trigger for when cross-racial instructions must be provided, despite our general agreement with the consideration of factors adopted by New Jersey courts. Further, these decisions emphasize that our inquiry on review is not whether *we* might have considered other factors in determining whether to provide the instruction or have reached a different conclusion as to its applicability. Rather, the true inquiry is whether the trial judge abused their discretion by arbitrarily refusing to give such an instruction, or by failing to consider the unique factors of the case before them.

Here, we cannot say the circuit court judge arbitrarily refused to give the instructions, or that she failed to consider unique facts of the case. She explained:

> THE COURT: The Court has had an opportunity to do a bit of research and review the case law as well as the rules in this matter. And there

> was no – there was no language issue or language barrier in this case, which I believe was substantial in at least one of the others.
>
> There has been no evidence presented that the identifying witness had any difficulty selecting [Kyler] from the photographic array or from the video. And there was no evidence that the witness had any difficult identifying African Americans in general.
>
> The witness did not indicate he was not sure. As a matter of fact, the witness indicated that he was sure. The only thing the witness was not sure of was the name.
>
> The court . . . finds that this instruction is really not applicable under the facts of this case, that the evidence was not sufficient to generate this instruction, that the identification made in this case is fairly covered in the instructions that will be given, and that there are really no doubts raised with regards to – there was no evidence with regards to any doubt to the reliability of the eyewitness testimony in this particular matter.
>
> And more importantly, the instructions that will be given will be sufficient in this matter. So your request for the cross-racial identification instruction will be denied.

Defense counsel noted his objection and then confirmed with the court that he would be able to argue the cross-racial misidentification issue in closing. The court agreed. Accordingly, in closing, defense counsel directed the jury's attention to the issue briefly:

> Now let's take Wellens [sic] for a moment. Now, I'm not saying this to try and trigger any type of issues or anything like this. But it is not a far off thing that I say when people that are not of the same race have a difficulty identifying someone of a different race. It's called a cross-racial identification.
>
> There's a reason why that's a term, because you have to look at that with some concern.

We conclude the court did not abuse its discretion in refusing to provide a cross-racial identification instruction as Kyler requested. At this point in the development of Maryland's jurisprudence on cross-racial identification instructions, we cannot say the trial

judge was obligated to provide such an instruction, or that she abused her discretion in not providing one, fully acknowledging the difference in race between Det. Wellems and Kyler, and that Det. Wellems' identification of Kyler had not been corroborated. The trial judge applied the same reasoning as did this Court in *Smith I* by relying on the absence of any evidence indicating that a witness had trouble making a cross-racial identification. As the cases discussed make clear, the decision to provide a cross-racial identification instruction lies within the discretion of the trial judge. Until our courts require such instructions in specified instances as New Jersey's Supreme Court has done, *see Cromedy*, 727 A.2d at 467, our trial courts are not obligated to ground their decisions on those considerations. Thus, we hold the trial judge did not abuse her discretion in deciding not to provide the cross-racial identification instruction in Kyler's case.

B. Use of the "Mere Presence" Instruction

Kyler posits he was entitled *not* to have the "mere presence" instruction given, since it "presented the defendant's presence at the scene of the crime as fact," and thus conflicted with his mistaken identification defense. The State counters the circuit court properly exercised its discretion in providing the presence instruction, since it was generated by the evidence, was a correct statement of law, and was not fairly covered by other instructions.

Kyler's argument here relates again to the second prong of the three-part test for reviewing jury instructions and hinges on language from *Brogden* providing, "[W]ith respect to the law to be applied in the case, when requested, it is the duty of the trial judge to instruct on . . . any defenses *supported by the evidence*…[.]" *Brogden*, 384 Md. at 641

(emphasis in original). Kyler's nuanced argument, as we understand it, is that the presence instruction related to a defense—i.e., that he may have been present at the shooting, but nonetheless did not commit the homicide—that he did not argue and that ran counter to his defense theory of misidentification.

At issue is the following instruction:

> THE COURT: A person's presence at the time and place of a crime, without more, is not enough to prove that the person committed the crime.
>
> The fact that a person witnessed a crime, made no objection, or did not notify the police does not make the person guilty of the crime.
>
> However, a person's presence at the time and place of the crime is a fact in determining whether the defendants are guilty or not guilty.

We disagree with Kyler's contention that the instruction treated his presence at the scene of the homicide as fact. This contention fails to properly consider context—essentially, the other instructions that the court gave after the mere presence instruction. *See, e.g.*, *Jones v. State*, 310 Md. 569, 589 (1987), *vacated on other grounds*, 468 U.S. 1050 (1988) ("The propriety of a specific jury instruction may not be considered in isolation, apart from its overall context. On the contrary, it should be considered within the context of all the instructions given the jury."). The mere presence instruction was immediately followed by the following set of instructions:

> THE COURT: **The burden is on the State to prove beyond a reasonable doubt** that the offenses were committed and **that the defendants were the persons who committed it—or them.**
>
> You have heard evidence about the identification of the defendants as the persons who committed the crime. You should consider the witness' opportunity to observe the criminal act and the person committing it,

> including the length of time the witness had to observe the person committing the crime, the witness' state of mind, and other circumstances surrounding the events.
>
> You should also consider the witness' certainty or lack of certainty, the accuracy of any prior description, and the witness' credibility or lack of credibility, as well as any other factors surrounding the identification.
>
> You have heard evidence that prior to trial witnesses have identified the defendants by photographic array. The identification of the defendant or of a defendant by a single witness as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant. **However, you should examine the identification of the defendant with great care.**
>
> **It is for you to determine the reliability of any identification and give it the weight you believe it deserves.**

(emphasis added). Especially in light of the emphasized instructions, as well as the efforts made by the parties during trial to either prove or refute that Kyler was one of the two men in the video footage, it seems unlikely the jury would have interpreted the presence instructions to mean it need not decide whether Kyler was in the video.

The mere presence instruction reminds the jury that even if the defendant was present at the scene of the crime they still must decide whether the defendant committed the crime's *actus reus.* This makes the presence instruction distinct from an instruction regarding an affirmative defense, as was at issue in *Brogden*, 384 Md. at 641–42. There, the defendant was charged with violating a statute that prohibited carrying a handgun, and he did not argue any defense at trial. *Id.* at 632–33. The Court of Appeals held the trial judge erred in providing the jury with a supplemental instruction (after a jury question) stating the burden was on the defense to prove the defendant had a handgun permit, if one existed. *Id.* at 634. The Court explained, "[b]ecause petitioner chose not to pursue a

defense relating to him possessing a license for a handgun (or any defense), there was absolutely no reason for the trial judge, over objection, to instruct the jury as to the law of handgun licenses and its effect on the burden of proof (whatever that might be)." *Id.* at 644.

Importantly, having a handgun permit was an express exception to the statute under which Brogden was convicted. *Id.* at 642. Since it was thus not one of the crime's elements, "it was not the responsibility of the State to prove that the exception did not apply, but it was exclusively within petitioner's discretion as to whether he would pursue such a defense." *Id.* at 643. In contrast, regarding Kyle's convictions, first-degree murder does not, and need not, list as an exception "presence at the scene of the homicide without participation." Md. Crim Law § 2-201. A person fitting this description simply will not satisfy the *actus reus* element of murder. Accordingly, the State needed to prove beyond a reasonable doubt not only that Kyler was one of the men in the video (i.e., present at the scene of the crime) but that he also committed the homicide. Therefore, a mere presence defense theory need not have been interposed by Kyler for the instruction to have been appropriate. The Court of Appeals recognized this distinction in *Brogden*:

> [W]hen a penal act contains an exception so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omission or other ingredients which constitute the offense, the burden is on the State to prove beyond a reasonable doubt, that the offense charged is not within the exception. In other words, when an exception is descriptive of the offense or so incorporated in the clause creating it as to make the exception a part of the offense, the State must negate the exception to prove its case. *But, when an exception is not descriptive of the offense or so incorporated in the clause creating it as to make the exception a part of the offense, the exception must be interposed by the accused as an affirmative defense.*

Id. at 643 (quoting *Mackall v. State*, 283 Md. 100, 110–11 (1978)) (emphasis supplied by *Brogden*).

Brogden does not support Kyler's position that the mere presence instruction introduced a defense that was within his discretion to not have put before the jury. In our view, the case indicates the mere presence instruction was actually in Kyler's favor. We agree with the State that if the jury accepted Kyler's misidentification theory, it would have disregarded the presence instruction entirely, and if it did not accept the theory, the instruction would still have aided the defense in reminding the jury it must still decide whether those men committed the murder.

Finally, we note that at oral argument, we raised the possibility of the applicability of our holding in *Perry v. State*, 150 Md. App. 403 (2002), *cert. denied*, 376 Md. 545 (2003). There, the defendant, on trial for first-degree, premeditated murder, initially requested and was denied provision of jury instructions on aiding and abetting and on the general law of being a principal in the second degree. *Id*. at 444. Defense counsel nonetheless asserted in closing arguments the theory that the defendant may not have been a principal in the first degree, stressing that no evidence placed the defendant at the scene of the crime and that the evidence indicated two people were involved. *Id*.

During deliberations, the jury sent a note asking whether first-degree, premediated murder required both a finding that the defendant was present at the murder and that he took a physical act leading to the death. *Id*. at 445. Defense counsel objected to any supplemental instruction, despite his earlier request for such an instruction. *Id*. The trial court decided to provide a supplemental instruction on aiding and abetting and clarified its

requirement that the State demonstrate both that the defendant was present at the scene of the crime and that he willfully participated with the intent of making the crime successful. *Id*. at 446. The mere presence instruction was included in this larger instruction. *Id*.

On appeal to this Court, Perry argued that the provision of the supplementary instruction was not generated by the evidence in the case, and therefore violated Rule 4-325(c). We readily rejected his contention, reasoning that Rule 4-325(c) is not offended by even "totally unnecessary and gratuitous instruction[s]." *Id*. We explained that while unnecessary jury instruction is "unfortunate" and "happens all the time," such instruction "only runs the risk of boredom." *Id*. at 448. We further opined:

> Actually, there is some justification for some of the overly inclusive instructions that are frequently given. In doubtful or ambiguous situations, the discreet thing to do is to tell the jury more than it needs to know rather than run the risk of denying the jury necessary knowledge. When in doubt, it is better to err on the side of over-inclusion rather than under-inclusion. That is why over-inclusion has never been made the occasion for reversible error.

Id. (emphasis added).

Even though at oral argument we raised the possible application of *Perry*, we conclude it is inapposite to the facts here. For one thing, Kyler does not claim a Rule 4-325(c) violation. Rather, he asserts the court erred in giving an instruction the impinged on his chosen defense constituted reversible error. That issue was not considered in *Perry* but was considered in *Brogden*. Nonetheless, for the reasons stated, we conclude *Brogden* does not support Kyler's claim that the court put before the jury a defense that he did not raise. Finding no other support for Kyler's contention, we conclude the circuit court did not err in providing the mere presence instructions.

C. Burden-shifting

Kyler asserts he is entitled to a new trial because during the State's closing argument it shifted the burden of proof by "faulting [Kyler] for not introducing photographs of, or eliciting testimony concerning alternate suspects" to support the defense's theory of mistaken identification. The State counters that the challenged part of its rebuttal closing argument was permissible under the "opened door" doctrine, as a reasonable response to defense counsel's closing arguments. Finally, the State asserts even if the prosecutor's statements were improper, they do not amount to reversible error, because they did not mislead the jury into thinking that in the absence of other potential suspects it must convict Kyler.

We conclude that although the prosecutor's statements may have gone further than simply commenting on the defense's production of evidence, the court corrected the error and the comment was harmless. Since, as we will explain, Kyler's burden-shifting allegation asserts the violation of a constitutional right, our review is without deference to the circuit court. *Molina v. State*, 244 Md. App. 67, 174 (2019) (citing *Savage v. State*, 455 Md. 138, 157 (2017)).

This Court's recent analysis in *Molina* illustrates that colorable burden-shifting claims, made in response to prosecutorial comments on a lack of evidence supporting the defense, are born out of the defendant's constitutional right to refrain from testifying. *Molina*, 244 Md. App. at 174. There, we explained that the Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights provide a defendant with the right to not have the prosecutor comment on his decision to not testify.

Id. (citing *Savage v. State*, 455 Md. 138, 157 (2017)). We also explained how this constitutional right may be implicated by a prosecutor's attacks on a lack of evidence provided by the defense:

> Maryland decisional law has interpreted this prohibition to protect defendants from indirect comments as well as direct ones. Indeed, the Court of Appeals has observed that a prosecutor's comment on a "defendant's failure to produce evidence to refute the State's evidence ... might well amount to an impermissible reference to the defendant's failure to take the stand." But even if the comment was not "tantamount to one that the defendant failed to take the stand," the Court continued, "it might in some cases be held to constitute an improper shifting of the burden of proof to the defendant."
>
> The State's comment on the defense's failure to produce evidence, however, will not always amount to impermissible burden-shifting. For instance . . . the State may "argue or comment that the *unexplained* possession of recently stolen goods permits the inference that the possessor was the thief." In fact, the State can even request that the court instruct the jury that such an inference is permissible. This is because a factual inference in the State's favor, left unrebutted by the defense, does not shift to the defendant a burden either of persuasion or of going forward with evidence.
>
> But the State may not exceed the bounds of permissibly commenting on the absence of evidence by commenting, instead, directly on the defendant's failure to testify.

Id. at 174–75 (internal citations omitted) (emphasis in the original). We find *Smith v. State*, 367 Md. 248 (2001) instructive in distinguishing between permissible and impermissible comments. There, the defendant was found in possession of stolen leather goods and did not testify. *Molina*, 244 Md. App. at 175 (citing *Smith*, 367 Md. at 351–52). The prosecutor instructed jurors to ask themselves, "*What evidence* has been given to us *by the defendant* for having the leather goods? Zero, none." *Id.* (emphasis in *Smith*). The Court

of Appeals held those comments violated the defendant's constitutional right to remain silent, explaining:

> The prosecutor did not suggest that his comments were directed toward[ ] 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.

Id. (citing *Smith*, 367 Md. at 358).

We compared *Smith*'s facts to the facts before us in *Molina*, where the defendants claimed the prosecutor impermissibly shifted the burden of proof to them and effectively commented on their failure to testify. 244 Md. App. at 172–73. At issue were the prosecutor's comments in closing:

> We listened to about two hours of Ana Molina's attorney talk to us about facts that are simply not correct. . . 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. In contrast to *Smith*, we found these comments permissible, distinguishing them "as highlighting the lack of any evidence explaining the defendants' possession of recently stolen goods," rather than amounting to comment on the defendant's own failure to testify, which is a violation of the defendant's constitutional rights. *Id.* at 176.

Funkhouser v. State, 51 Md. App. 16 (1982) is helpful. There, the defendant claimed the prosecutor made an "improper comment on his failure to testify," pointing to two statements made in closing:

> We have presented all the evidence to you. What about the defendant's case? Interesting. Not one bit of evidence is offered as far as the rape itself or the kidnapping....
>
> * * *
>
> Five witnesses are called. None speak of the rape or the kidnapping. All they talk about is a fight that night, a fight at the house....

Id. at 29. Noting the circuit court provided instructions to the jury explaining the defendant had a right to not testify and that his exercise of that right could not be used against him, we held the prosecutor's statements were permissible, they did not refer to the defendant's failure to testify but rather the general lack of evidence. *Id.* at 30. We concluded, "[a] prosecutor should not be precluded from making fair comment on the entire evidence; not every neutral or indirect reference that the State makes which implicitly refers to a defendant's silence is improper comment." *Id.*

In *Burks v. State*, 96 Md. App. 173 (1993), in support of a self-defense argument, defense counsel attempted to characterize one of the murder victims as a person known to be violent. *Id.* at 204. In closing arguments, the prosecutor, in our estimation, aptly pointed out the defendant's self-defense argument consisted more of defense counsel's own "speculative rhetoric than it did of hard evidence." *Id.* at 204–05. The defendant claimed the prosecutor's comment in rebuttal was improper:

> What I want to know is, how do you know that the defendant is not capable of violence? Whose word do you have for that? The defense counsel's word for it ultimately because nobody came here to tell you he is not capable of violence. It is the defendant only who testified, and now I want to remind you, how do you know that Marvin Willis had been a violent person before this week? Because a defendant who claims self-defense is entitled to bring witnesses in here. . . .

Id. at 203–04. This Court did not find the comments improper, explaining it did "not remotely read" the prosecutor's comments as shifting the burden of persuasion to the defense. *Id.* at 204. Instead, we opined that pointing out such a shortcoming was the "purpose of jury argument." *Id.* at 205.

While the cases above did not rely on the so-called "open door" doctrine, the State nonetheless suggests we use that doctrine to find the prosecutor's challenged statements permissible. The "open door" doctrine permits "parties to meet fire with fire, as they introduce otherwise inadmissible evidence . . . in response to evidence put forth by the opposing side." *State v. Robertson*, 463 Md. 342, 352 (2019) (internal quotations and citations omitted). As our Court of Appeals recently explained,

> The open door doctrine authorizes admitting evidence which otherwise would have been irrelevant in order to respond to ... admissible evidence which generates an issue. In short, the doctrine makes relevant what was irrelevant. Given the doctrine's ability to enlarge the universe of relevant evidence at trial, the open door doctrine is a rule of expanded relevancy.

Id. at 352 (internal quotations and citations omitted). A trial court's determination that a party has "opened the door" for the opposing party to introduce rebuttal evidence is a legal question that is reviewed de novo. *Id.* at 352–53. Whether the rebutting party's subsequent use of evidence is proportionate to the evidence that "opened the door," however, is a separate question, and is reviewed for abuse of discretion. *Id.* at 357–58.

The Court of Appeals held in *Robertson* that defense counsel opened the door for the State to introduce evidence rebutting the defendant's good character, when defense counsel asked the defendant if he had previously been in "any kind of trouble." *Id.* at 359–

61. However, the Court held the State exceeded the scope of the open door doctrine when, rather than introducing the mere fact that the defendant had been in trouble for involvement in an altercation, it elicited details of the incident throughout trial. *Id.* at 361–63.

Shortly thereafter, in *State v. Heath*, 464 Md. 445 (2019), in response to defense counsel's claim in opening statement that the defendant was at a bar to find clients for his tattoo business, the State presented evidence that the defendant had admitted to police he went to a bar to sell drugs. *Id.* at 462. The Court held the prosecutor's response was improper even under the open door doctrine, because it introduced facts not relevant to the issues of the case—the defendant's culpability in the death and assault of other persons. *Id.*

We find *Robertson* and *Heath* less helpful than the burden-shifting cases previously discussed, because *Robertson* and *Heath* deal with the introduction of information squarely considered evidence,[1] versus a party's observation that its adversary has not provided certain evidence. We do, however, uncover two cases in which our appellate courts used the open door doctrine to analyze a prosecutor's comments on the defense's failure to introduce evidence.

The first of these is *Mitchell v. State*, 408 Md. 368 (2009), on which the State bases most of its argument that the prosecutor's statements were no more than a permissible response to defense counsel's closing. In *Mitchell*, the defense counsel in closing listed

[1] Notably, in *Heath* our Court of Appeals described the open door doctrine as "[a]n added layer to Maryland Rules 5-401 and 5-403" which "provide[] the scope for the admission of evidence." 464 Md. at 458–59.

persons who had been discussed at trial but were not called to testify. *Id.* at 376. Defense counsel said the absence of those witnesses created "a situation where a misidentification could take place," and suggested

> Let's bring Wal[i] Henderson here so we can see if he's a heavyset, dark-skinned man. Let's bring Antonio Corprew here so we can gauge his stature. Let's look at Man–Man, what does he look like? Get that hat out of the car. Does that hat fit his head?

Id. at 377. The prosecutor responded in his closing by saying:

> The defense made mention a couple times about what the State didn't present to you all. We never saw Cochran, never saw Corprew, never saw Turner, never saw Wal[i] Henderson…
>
> ***
>
> If [defense counsel] thought that them being here would have shown that something we presented was so contradictory to something about them, he could have brought them in as well. The defense has subpoena power just like the State does. You can't say why didn't the State present a witness, when they had an equal opportunity to present it to you, and then try to say, well, it wasn't presented. They had an equal right to present it if they thought it would contradict something we presented.

Id. at 377, 379. The Court of Appeals held the prosecutor's statements amounted to "fair comment" on the ground that defense counsel's statement "opened the door" for the prosecution to draw attention to the defense's subpoena power. *Id.* at 387–88. The Court highlighted that the defense, by suggesting it would have been helpful for additional named persons to testify, "argued the relevancy of their absences and the weakness in the State's case." *Id.* at 388–89.

This Court also applied the open door doctrine in *Wise v. State*, 132 Md. App. 127 (1998)—a case Kyler quotes for the proposition that "Maryland prosecutors, in closing

argument, may not routinely draw the jury's attention to the failure of the defendant to call witnesses, because the argument shifts the burden of proof." *Id.* at 148. But even after recognizing this proposition, this Court held the prosecutor's remarks that the defense never called certain witnesses did not violate the defendant's constitutional rights. *Id.* at 148–49. Rather, we found the comments "a reasoned and justified" response to defense counsel's opening statement suggestion that jurors would hear from those witnesses. *Id.* at 148.

Here, in closing argument, Kyler's attorney said the following:

> [DEFENSE COUNSEL FOR KYLER]: There's no DNA. There's no latent prints. Well, there were latent prints but not of my client. There are latent prints of Joshua Beech and Rodney Evans.
>
> Ladies and Gentlemen, what do they look like? Do either of them look like individuals in that video? Do they look similar? Does my client have a brother? Two brothers? Three brothers? They didn't tell you any of those things.
>
> There's no connection to the car and my client. There's no connection to Keyon Evans anywhere. Here's the thing why are we assuming—I should say not "we," why is the detective assuming that Keyon Evans was the getaway driver? Because he's driven that car before?
>
> Well, why is he not necessarily the shooter. His girlfriend who owns and the car is registered to been only [sic] driving the car?
>
> And, hey, what about this? What's Keyon Evans look like? Does he look like one of the individuals in the video? You don't know. You have no idea what these other people look like. You have no idea what "Champ" looks like, Courtney Sampson.
>
> The only person anybody showed him was the one that the IBIS hit with the gun was used to murder the person who was charged for that.

> There's not only—there's no connection between my client, and the co-defendant, and with Keyon Evans. There's also [no] connection between my client and the victim.

And during the State's rebuttal closing, the prosecutor said the following:

> [PROSECUTOR]: It was someone else. It's the guy with the prints. It's Keyon Evans. It's—it's everybody but them. They threw everybody they could at you.
>
> But if there was a photograph of someone who looks similar to either one of their clients on the video, there was another photo from somebody with those fingerprints, do you think that would come out.
>
> [DEFENSE COUNSEL FOR KYLER]: Objection.
>
> THE COURT: Overrule.
>
> [PROSECUTOR]: Don't you think that would have been a question somebody might have asked?
>
> THE COURT: Keep it moving.
>
> [PROSECUTOR]: Yes, Your Honor.
>
> It's everyone but the defendants.

Drawing first on *Molina* and its comparison of its facts to those in *Smith*, we conclude that the prosecutor's statements do not fit, even indirectly, into the impermissible category of comments about the defendant's failure to testify. *Molina* teaches not only that a prosecutor's direct reference to the defendant's failure to provide evidence is problematic, but also that a prosecutor might impermissibly reference the defendant's failure to testify by pointing to a lack of evidence or explanation that only the defendant could provide. That is not true of the prosecutor's comments here. Whether another person named in the proceedings (aside from Kyler and his codefendant) looked similar to one of the two men

in the 7-Eleven store video would not have been something that Kyler was expected to know—much less to be the *only* person who would know that fact.

Because it is evident the prosecution's comments are a response to defense counsel's closing remarks, we also consider the open door doctrine. As we observed, the more recent cases of *Robertson* and *Heath* are not especially helpful to us, since they dealt with the prosecution introducing irrelevant, previously unknown evidence. We agree with the State that there is some similarity between its challenged statements and those held to be permissible under the open door doctrine in *Mitchell*. However, they are not perfectly analogous. While the *Mitchell* prosecutor merely reminded the jury that the defense also had subpoena power—a rather neutral reference—the prosecutor's statements here go a step further by implying the absence of such evidence surrounding other potential suspects favors the State and not the defense, because it *must* be that none of those other persons resemble the man identified as Kyler in the video. While the prosecutor's statement was surely made in response to defense counsel's implication that there might have been more fitting suspects than Kyler, we conclude the State likely exceeded, even if slightly, the "door" that was opened.

Nonetheless, we find any error in this regard to be harmless in light of the evidence presented in the videos and derivative stills. In *Dorsey v. State*, 276 Md. 638, (1976), the Court of Appeals adopted the following standard, drawn largely from *Chapman v. California*, 386 U.S. 18 (1967), for determining whether an error at trial was harmless:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way

> influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Dorsey, 276 Md. at 658–59.

If the jury had any doubt about whether Kyler was one of the the men depicted in the videos or the still images, the court's instructions made clear the jury could not convict him unless it determined that the State carried its burden of proof.

> THE COURT: The State has the burden of proving the guilt of the defendants beyond a reasonable doubt. This means that the State has the burden of proving beyond a reasonable doubt each and every element of the crimes charged.
>
> The elements of a crime are the component parts of the crime about which I will instruct you shortly. This burden remains on the State throughout trial. The defendants are not required to prove their innocence.
>
> * * *
>
> The burden is on the State to prove beyond a reasonable doubt that the offenses were committed and that the defendants were the persons who committed it—or committed them.

In *Funkhouser*, this Court was persuaded by the trial court's provision of similar instructions in holding that either burden-shifting had not occurred, or that if it did occur it was corrected. *Funkhouser*, 51 Md. App. at 30. Here, the court properly emphasized that the State was solely responsible to prove Kyler's guilt as to each element of each offense. The court specifically instructed that Kyler was not required to prove his innocence.

In sum, we are satisfied the State did not violate Kyler's constitutional right to refrain from testifying. And although it is a closer call whether the State exceeded the open

door doctrine in its challenged statements, we find that any error the State may have made was corrected and harmless.

CONCLUSION

We conclude that (1) the evidence was sufficient to support Kyler's convictions; (2) the circuit court did not err in refusing to give a cross-racial identification instruction; (3) the circuit court did not err in giving a "mere presence" instruction; and (4) any impermissible burden-shifting committed by the State in closing arguments was harmless. We, therefore, affirm the judgments of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY COSTS.