Circuit Court for Montgomery County
Case No. 137549C

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 462

September Term, 2022

JERMAINE ARTESE THOMAS

v.

STATE OF MARYLAND

Wells, C.J.,
Shaw,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 28, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Convicted by a jury in the Circuit Court for Montgomery County of two counts of second degree burglary and one count of conspiracy to commit second degree burglary, Jermaine Artese Thomas, appellant, presents for our review one issue: whether the court erred "in allowing improper and prejudicial closing argument." For the reasons that follow, we shall affirm the judgments of the circuit court.

At trial, the State called Karissa Warren, who testified that she is a regional culinary manager for a food vendor known as "Smart Lunches." When Ms. Warren began working for Smart Lunches in October 2018, Mr. Thomas was the company's delivery driver, "[m]aintenance person," and "longest standing employee." In January 2020, Mr. Thomas and Smart Lunches "decided . . . to part ways," and Mr. Thomas's last day of employment was January 31, 2020. On or about March 17, 2020, Ms. Warren noticed that a cooler and "[c]ases of food" were missing. Ms. Warren subsequently checked the company's "extra space storage unit" and discovered that the unit had been burglarized and "[t]here were several kitchen equipment items missing."

During Ms. Warren's testimony, the State introduced into evidence five video recordings:

- A March 14, 2020 recording of the storage unit, in which Ms. Warren recognized Mr. Thomas's "work vehicle from another job," and Mr. Thomas and a second man removing numerous items from the unit;

- A March 15, 2020 recording of the storage unit, which shows the second man arriving in Mr. Thomas's work vehicle and removing additional items from the unit;

- A May 7, 2020 recording of the storage unit, in which Ms. Warren recognized Mr. Thomas's "personal vehicle," and Mr. Thomas and a second man attempting to enter the unit, on which the lock had been changed;

- A May 7, 2020 recording made at the location of Smart Lunches's kitchen, in which Ms. Warren recognized Mr. Thomas exiting his vehicle and walking to the company's storage trailer, which was later determined to be missing two "totes;" and

- A June 7, 2020 recording of the kitchen location, in which Ms. Warren recognized Mr. Thomas and a second man "walk from the entrance . . . to [a] van, get into the van, and drive off."

Appellant contends that the court "erred in allowing [the prosecutor to make] improper and prejudicial statements at closing argument." During his closing argument, defense counsel stated, in pertinent part:

> Mr. Thomas did know, Jermaine did know about all the cameras outside. He knew about the cameras in the storage facility. He knew that if he went there without permission, without authorization from somebody that he was going to be recorded. He had been there for eight years. We heard from Ms. Warren that he moved everything into that unit with Phil who was her boss. And his direct supervisor was Don who not her boss but was his direct supervisor. Two other people that could have given him permission that we did not hear from. Why would he go through and do things that he knew he would be recorded, particularly at the storage facility where he knew he would be recorded if he didn't have permission.

In his rebuttal argument, the prosecutor stated, in pertinent part:

> There is absolutely no indication whatsoever that there was possible permission or possible consent from anybody else. Defense counsel said two names, Don and Phil, and said there was possible consent or could have been provided consent by these individuals. There is no evidence of that in this case. That is not something you can consider. Defense counsel and the defense has as much of a right to subpoena witnesses as the State does. The fact that there's no witness here to testify to what defense counsel just said is something you can take into consideration.

Defense counsel lodged an objection, which the court overruled.

Mr. Thomas now contends that the court erred in overruling the objection, because the prosecutor's remarks were "improper and prejudicial statements regarding Mr.

Thomas'[s] obligation to present evidence to the jury," "effectively shifted the burden of proof to" him, and "deprived him of his right to a fair trial." *Mitchell v. State*, 408 Md. 368 (2009), is instructive. Mitchell was tried

> for attempted murder and related offenses. During his closing argument, defense counsel called attention to certain potential witnesses that the State did not call. Defense counsel stated, among other things, that "the idea . . . is to bring . . . *all* the evidence into court" (emphasis added). According to defense counsel, some eyewitnesses did not testify, and Wali Henderson, whom the police initially thought was involved in the incident, as well as Mitchell's alleged accomplices, should have been present at trial. In response to these statements by defense counsel, the prosecutor remarked in rebuttal closing argument that both the State and the defense have the power to subpoena witnesses. The prosecutor then commented that "[the defense] had an equal right to present [the witnesses named by defense counsel] if [the defense] thought it would contradict something [the State] presented."

Id. at 371.

On appeal to the Supreme Court of Maryland (at the time named the Court of Appeals of Maryland),[1] Mitchell contended "that the prosecutor's remarks calling attention to the defendant's subpoena power improperly shifted the burden of proof." *Id.* at 372. Rejecting Mitchell's contention, the Court stated:

> By saying "[l]et's bring Wal[i] Henderson," [and Mitchell's alleged accomplices,] into the courthouse, . . . defense counsel argued the relevancy of their absences and the weakness in the State's case. This maneuver opened the door for the prosecutor to offer an explanation as to why those witnesses were not present. Moreover, defense counsel's choice of language . . . associated the jurors with the defense, as if the jurors were entitled to see

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[1]At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Rule 1-101.1(a) ("[f]rom and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland").

> these witnesses and somehow were prevented from doing so by the State. In light of such language, a response by the prosecutor calling attention to Mitchell's subpoena power was fair comment.

Id. at 388-89 (citation and quotations omitted). The Court further stated:

> Even if the prosecutor's remarks were improper, . . . an analysis of Mitchell's "burden-shifting" argument in context, as our case law requires, would also mandate the conclusion that the prosecutor's remarks in rebuttal argument could not have shifted the burden of proof. Here, during his opening statement and closing argument, defense counsel emphasized to the jury that it was the State's burden to prove the defendant's guilt. More importantly, the court carried out its function and instructed the jury as to the burden of proof. Moreover, immediately preceding counsel's closing arguments, the court noted to the jury that such arguments are not evidence and that the jury was entitled to draw any reasonable inference from the evidence, and not just the inferences that counsel asked them to draw.

Id. at 392-93 (citations omitted).

We reach a similar conclusion here. By saying that the jury "did not hear from" two people "that could have given [Mr. Thomas] permission" to access the storage locker, defense counsel argued the relevancy of their absences and a weakness in the State's case. This argument opened the door for the prosecutor to offer an explanation as to why those witnesses were not present. Also, defense counsel's choice of language associated the jury with the defense, as if the jury was entitled to see these witnesses and somehow was prevented from doing so by the State. In light of such language, a response by the prosecutor calling attention to Mr. Thomas's subpoena power was fair comment. Even if the prosecutor's remarks were improper, the court, like in *Mitchell*, instructed the jury as to the burden of proof, that "closing arguments of lawyers are not evidence," and that the jury was entitled to "draw any reasonable conclusion from the evidence that [they] believe[d] to be justified by common sense and [their] own experiences." Also, defense

counsel repeatedly emphasized during his closing argument that it was the State's burden to prove Mr. Thomas's guilt. Under these circumstances, the prosecutor's remarks in rebuttal argument could not have shifted the burden of proof, and the court did not err in overruling the objection to the remarks.

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