UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0803

September Term, 2014

JARON TYREE GRADE

v.

STATE OF MARYLAND

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Woodward, J.

Filed: January 8, 2016

Appellant, Jaron Tyree Grade, was convicted by a jury in the Circuit Court for Baltimore County of two counts of first degree murder and one count of use of a handgun in the commission of a felony. After appellant was sentenced to two life sentences, concurrent, to be followed by a consecutive 20 years for use of a handgun, appellant timely appealed, presenting the following questions for our review:

1. Did the trial court err in denying [a]ppellant's motion to exclude irrelevant expert testimony?

2. Did the trial court err in allowing the State to make improper and prejudicial comments at closing argument?

3. Did the trial court err in admitting unduly prejudicial and inflammatory evidence?

For the following reasons, we shall affirm.[1]

BACKGROUND

On September 13, 2003, Natasha Heath hosted a party at her residence, located at 959 Punjab Drive, Essex, Maryland. Heath invited the victims, Ricardo Cabera and Broadus "Teon" Funderburke. She also invited her sister, Keisha Williams, and her boyfriend, Jerome Vines.

At around 12:45 a.m., Heath was outside her residence with a group of friends, including Funderburke, when a person nicknamed "Country," arrived. Heath started to introduce Funderburke to Country, but, at that same moment, Otis "Chuck" Jones "came

[1] This case represents appellant's appeal from his retrial, following the Court of Appeals' reversal and remand in *Grade v. State*, 431 Md. 85 (2013).

around to the back of [Funderburke] and just shot him in the back of his head." Funderburke fell on Heath, and Heath saw Jones continue to shoot, approximately five or six times, from less than 18 inches away. Heath was shot twice in the leg during this incident. Meanwhile, as Jones continued to shoot Funderburke, Heath heard "a whole lot of shots" coming from her right. However, Heath did not see who else was shooting, other than Jones, and on cross-examination, she agreed that she never saw appellant with a weapon.

Jennerio Shird testified pursuant to an arrangement with the State whereby he would receive leniency in an unrelated handgun case in exchange for his testimony in this case. Shird testified that he went to the party with his cousins, Jerome Vines ("Jerome") and Brandon Vines ("Brandon"). Appellant, whom Shird knew through mutual friends, was already there with Jones. During the party, Shird went to a liquor store with appellant and bought some Hennessy. Shortly after they returned, the liquor ran out, and there was an altercation between appellant and some other individuals. Another witness, Shanika Gray, testified that the argument involved "all the guys that were at the party." Gray clarified that Funderburke was "in the middle" of the altercation, but she could not recall if appellant was involved.[2]

At some point after this altercation, Shird looked through a window and saw appellant outside, holding a revolver. Shird also saw appellant hand a gun to Jones. Shird

[2] Shanika Gray would later testify that, as she was leaving the party, she heard gunshots and saw a flash, but she was unable to identify anyone involved.

watched as appellant began "pursuing this kid, man. He was just shooting. The kid was trying to get away from him, man." Shird saw appellant shoot this person three or four times. Shird also saw Jones shoot a second person. Shird would later testify that Cabera was the first person he saw appellant shoot, and Funderburke was shot second. After the shooting, Shird left the party and went home.

About four days later, Shird and his cousins met appellant at appellant's residence in Baltimore. At that time, appellant admitted his involvement in the shooting. Shird explained that the shooting was all because of "[a] bottle of Hennessy."

Jerome testified that, at some point during the party, he went for a walk with Williams. When they were about a half a block away, Jerome heard approximately five gunshots. Jerome could see muzzle flashes coming from two guns. The two guns did not sound the same, according to Jerome. Jerome could not see the shooters. When he got back to the party, Jerome noticed that appellant and Jones were no longer there.

Four days later, Jerome was at appellant's home in Baltimore with Brandon and Shird. Jerome testified that appellant stated "that the guy told him to, 'Calm your boy down,' and at that time he turned his back and he shot him." Jerome clarified that appellant admitted that he shot Cabera.

As part of the police investigation, appellant's residence was under surveillance by the Baltimore County Police Department. Still photographs were taken from a recording of that surveillance. Shird confirmed that he, Jerome, and Brandon were photographed with appellant, outside of appellant's residence, when appellant admitted to being involved

in the shooting. Jerome agreed that he saw a still photograph from the surveillance recording of this meeting. But, Jerome did not agree with defense counsel's question that he was laughing and joking at the time appellant told him about the shooting.

Williams was present at the party and testified that she saw a number of individuals, including the two victims, appellant, and Jones. At around 1:00 a.m., she and Jerome walked outside, then a short distance up the street to the right and away from the party. When they turned to go back, Williams heard approximately two or three "fairly loud" gunshots. She also saw "flares" coming from two separate guns. One flare was coming from the street, and the other one was coming from the sidewalk near the house.

As Jerome ran back towards the house, Williams stayed on the street and saw appellant and Jones "take off running past me but on the opposite side of the street." Appellant and Jones fled immediately after the shooting stopped. Williams testified that she could not see what they were holding in their hands, but "one was tucking something under his shirt and the other was holding his pants up." Williams agreed on cross-examination that she never saw a gun.

As a result of the shooting, Ricardo Cabera sustained three gunshot wounds, including one to the chest, one to the back, and one to the groin. Two large caliber, copper jacketed bullets were recovered from Cabera during an autopsy. Funderburke sustained three gunshot wounds, including one to the head, the left buttock, and the left forearm. Two large caliber, copper jacketed bullets were recovered from Funderburke during an

autopsy. The cause of death for both victims was multiple gunshot wounds, and their manner of death was by homicide.

A total of five bullets were examined in this case by an expert. That expert testified that two bullets were fired from one handgun, and three Remington bullets were also fired from one handgun. The expert could not testify, however, whether one or two guns were used in the shooting.

Detective Gerald D'Angelo, who has since retired from the Baltimore County Police Department, was the lead detective assigned to this case. One bullet was found at the crime scene, but no casings, and no guns were ever recovered. During the course of the investigation, on or around October 3, 2003, Detective D'Angelo spoke with appellant at appellant's residence. In that initial conversation, appellant told the detective that he went to the party alone, he left in a "hack," or an unlicensed cab, and was home when the shooting occurred. Appellant did not know anyone by the name "Chuck." After that, Detective D'Angelo left appellant's residence. Detective D'Angelo returned to appellant's residence again on October 10, 2003, and, in a signed question and answer statement, appellant maintained that he went to the party alone and did not know Jones.

Detective D'Angelo also interviewed appellant's girlfriend, Latonya Shuron, who gave a statement concerning this incident. Shuron was called to testify by the State, but, because the trial court found that she was "feigning . . . lack of knowledge," Detective D'Angelo was permitted to read her prior statement to the jury. In that statement, Shuron informed the detective that, after she fell asleep, appellant took her car, and both he and

Jones went to the party. When appellant and Jones returned to her home, appellant told Shuron that he left her car at the party because there had been a shooting. Shuron stated that appellant left the car behind because "[h]e was scared." Appellant also told Shuron that he did not know what caused the shooting.

Appellant testified on his own behalf at trial. Appellant stated that Shuron took him and Jones to the party. Appellant did not have a gun with him that night, and he also did not see Jones with a gun. Appellant denied shooting anyone. In fact, appellant testified that he left the party before the shooting and stayed with Shuron afterwards. Appellant did not know either of the victims in this case and denied getting into an argument with them at the party.

Appellant further testified that he spoke to a police officer several days later, told him that he did not know anything, and he did not want to speak to him. Appellant also testified that the reason he denied knowing Jones was because the officer continued to try to question him, and "I started being reluctant to his questions." He testified that his written statements to the police were not truthful. However, he felt obligated to answer the police questions "[w]hen my mother was home, yes."

On cross-examination, appellant agreed that he gave a written statement at his residence when his mother was home. Although the officer did not physically threaten him, appellant testified that "[h]e kept on pursuing me after I told him to leave me alone." And, this happened in the presence of his mother as appellant stated, "[y]eah, she's the one that let them in."

On further cross-examination, appellant testified that he left the party and went to a "hang-out spot" in East Rock Village. Appellant agreed that he was with other people at around the time the shooting allegedly took place. The following testimony then ensued without objection:

> Q. So, if I understand you correctly. At the time the shooting took place, there are friends of yours that could account for your whereabouts, is that correct –
>
> A. Well, it been –
>
> Q. Those people are not here today, is that correct?
>
> A. You're gonna let me answer the question, first?
>
> Q. Sure, absolutely.
>
> A. Well, the people who were around – it was 10 years ago or 11 years ago.
>
> Q. Okay. What are these people's names then?
>
> A. It was a few females that I messed with in the area. I really don't – one was on my job [sic], her name is Jasmine.
>
> Q. Jasmine, okay.
>
> A. Yeah, she was living in the neighborhood.
>
> Q. So, she worked at your job, is that correct?
>
> A. Yes.
>
> Q. So if you wanted to identify Jasmine and pull her into court by power of subpoena, you could do that, is that correct?
>
> A. No, I couldn't have.
>
> Q. So, something is preventing you from doing that?

A. I didn't want it [sic] involve anybody in this.

Q. All right. You're on trial for murder, but you don't want to involve her?

A. Yeah, I ain't have to give myself like [sic] explain myself to you.

Q. But you would think it's important if somebody –

A. Very, important, absolutely.

Q. – if somebody could account for your whereabouts when this shooting was taking place?

A. Not saying I was at her house directly at that time, because I don't know when it happened. I don't know exactly when it occurred, the shooting. I didn't hear anything. I don't know when it exactly when it went up.

We shall include additional facts in the following discussion.

DISCUSSION

I.

Appellant first contends that the trial court erred by not excluding a firearm expert's testimony that results of a ballistics examination were inconclusive regarding whether one or two handguns were used in the shooting. Appellant argues that inconclusive test results are irrelevant and, therefore, inadmissible. The State responds that the trial court properly exercised its discretion because the testimony was relevant and helpful to the jury. We concur with the State.

Prior to trial, and after jury selection, appellant moved *in limine* to exclude the testimony of Michael Thomas, the firearms examiner, that the results following his microscopic examination of the ballistics evidence were inconclusive as to whether one or

two handguns were used in the shooting. Defense counsel quoted from the expert's report concerning the five bullets that were recovered and examined in this case:

> "QB; Question Bullet 1 and Question Bullet 2 were fired from one unknown firearm. Question Bullets 3, 4, and 5 were fired from an unknown firearm. At this time it cannot be determined if one or two firearms were used to fire the bullets – fire these five bullets."

Appellant contended that the inconclusive results were irrelevant and inadmissible. The State responded by agreeing that the expert "cannot say that they're so similar that they were either fired from the same handgun or fired from a different handgun." However, the State continued, just because the results were inconclusive did not make them any less probative or inadmissible.

Following defense counsel's reference to *Diggs v. State*, 213 Md. App. 28 (2013), *aff'd sub nom*. *Allen v. State*, 440 Md. 643 (2014), the trial court inquired:

> THE COURT: A nonconclusive expert's test is irrelevant, represents nothing, and should not be admitted. Under all circumstances whether it be DNA, whether it be ballistics or whether it be fingerprint analysis, you think that's the proposition that that case stood for?
>
> [DEFENSE COUNSEL]: Certainly. We have DNA analysis all the time now. It exonerates significant people in this community. I'm thinking of a case I had a long time ago. A guy leaves a baseball cap at the scene of an armed robbery. They swab it, they find his DNA in there. They said that's his cap, he was at the armed robbery. Very conclusive. If they swabbed it and say his DNA is nowhere in that cap, that would be evidence of exoneration, innocent. If they said we can't tell, I don't think that's admissible.

The court disagreed with appellant's argument, and denied the motion *in limine* as follows:

> I appreciate your advocacy. Believe me, counsel, I like good advocacy, I'm just not sure that I understand or accept your premise or your logic here. I don't believe that case stands for the proposition that all inconclusive expert testimony is irrelevant and heretofore should be kept out, not admitted.
>
> I'm gonna deny the motion. You can make your objection at the time they ask to admit it, make your pitch, and you could certainly argue to the jury they should give zero weight to it because of the inconclusive nature of the testimony, but I don't think I agree with premise [sic]. So, I'm gonna deny the motion.

During trial, Michael Thomas was accepted as an expert in the field of firearm and toolmarking identification and comparison. Over a renewed objection, Thomas testified that he examined five bullets, all of them hollow-points, in connection with this case. Thomas testified that he examined two bullets, admitted as State's Exhibits 16 and 17 at trial. His opinion, within a reasonable degree of certainty in his field of expertise, was that these two bullets were fired from the same revolver.

Thomas also examined three bullets, admitted at trial as State's Exhibits 18, 19, and 34. His opinion was that these three bullets were manufactured by Remington, and that all three were fired from the same handgun.

When asked to compare the first set of two bullets to the second set of three bullets, Thomas testified as follows:

> The general vast characteristics, that is, the number of lands and grooves, the direction of the twists, the dimension of rifling between the two are very similar. However, between the two I was not able to determine any individual characteristics, the things that I have to go by to make an identification between the two groups that was similar. **So, the fine stria that I look at, these fine markings on here I was not able to say that this group and that group were fired from the same firearm.**

> However, all I could do using my prudence and my judgment to say [sic] I can't eliminate the two. Simply because with two different grand [sic] of ammunition, two different sizes of ammunition and what's microscopically a little bit differently in dimensions, they may mark different enough so that **I can't exclude them from being fired from the same gun.**

(Emphasis added).

Thomas further testified that there were "some different characteristics" between the two sets of bullets, but not enough to make an identification. He also opined that the two sets "probably" came from different manufacturers, with the second set being made by Remington.

On cross-examination, Thomas agreed that it was fair to say that the test results were inconclusive as to whether one or two guns were used in this case. Further, he confirmed that all five bullets were .38 caliber, and that caliber could be used in both a revolver and a semiautomatic weapon.

Considering these facts in light of the question presented, Maryland Rule 5-702 provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill experience, training or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

The "'admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom

constitute a ground for reversal.'" *Bomas v. State*, 412 Md. 392, 406 (2010) (quoting *Bloodsworth v. State*, 307 Md. 164, 185 (1986)). "We review the trial court's decision to admit or reject expert testimony for an abuse of discretion only." *Cantine v. State*, 160 Md. App. 391, 405 (2004), *cert. denied*, 386 Md. 181 (2005). Moreover, "[o]nce the court admits the expert testimony, the weight to be accorded it is for the trier of fact." *Fitzwater v. State*, 57 Md. App. 274, 281-82 (1984).

To be admissible, expert testimony must be predicated on a factual basis sufficient to give the expert's opinion probative value. *Bohnert v. State*, 312 Md. 266, 274 (1988) (citation omitted). In other words, an expert's conclusions must be based on more than mere conjecture or speculation. *Id.* at 275 (citation omitted). In addition, "the testimony must also reflect the use of reliable principles and methodology in support of the expert's conclusions." *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 183 (2003). Ultimately, "in order for evidence to be admissible, it must be relevant." *Thomas v. State*, 429 Md. 85, 95 (2012). "Pursuant to Md. Rule 5-401, evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id.* at 95-96 (quoting Rule 5-401).

The State's theory in this case was that there were two shooters, *i.e.*, appellant and Jones. In support of that theory, there was direct eyewitness evidence from Shird that he witnessed both men separately shoot Cabera and Funderburke. Further, there was also circumstantial evidence suggesting more than one handgun was used. For instance, as

Heath was laying under Funderburke and getting shot by Jones, she heard a second set of gunshots off to her right. Additionally, Jerome saw muzzle flashes from two guns. Finally, Williams witnessed "flares" coming from two guns. She also saw both appellant and Jones fleeing from the scene, immediately after the shooting. One of them was putting something under his shirt, while the other was holding his pants up.

By contrast, appellant testified in his own defense and denied any involvement in the shooting. It was appellant's defense theory "that all shots were fired by Otis 'Chuck' Jones." Thus the issue before the jury was whether one or two guns had been used to kill Cabera and Funderburke.

We are persuaded that Thomas's expert opinion was probative of the one or two guns issue. Thomas testified that two of the five bullets were fired by the same weapon, and the other three bullets were fired by the same weapon. Although the two sets of bullets were the same caliber and could be fired from the same weapon, Thomas could not conclude that both sets of bullets were fired from the same gun, nor could he exclude them from being fired from the same gun.

Thomas's testimony established that the five bullets connected to the case were examined by a firearms expert. Thus the jury could not draw an inference against the prosecution based on a failure to perform such examination. Moreover, Thomas's testimony did not support or reject the State's theory of two guns or appellant's theory of one gun. The testimony thus enabled the jury to focus on the other evidence that they

deemed credible in deciding whether one or two guns were used to kill Cabera and Funderburke. That evidence, as discussed, weighed heavily in favor of the State.

This Court's recent case of *Clark v. State*, 218 Md. App. 230 (2014), supports our determination of relevance. In *Clark*, a handgun was recovered in connection with a robbery. *Id.* at 237. Christina Tran, who was accepted as an expert in the field of forensic serology and DNA analysis, testified that swabs from the gun yielded a mixed DNA profile from at least two contributors, and that Clark could not be included or excluded as a possible contributor. *Id.* at 240. Clark argued the inconclusive results were inadmissible because they were irrelevant. *Id.* at 237-38. This Court disagreed, observing:

> [T]he inconclusive DNA test result on the gun may well have been relevant to show that the State performed a DNA test at all. As the prosecutor pointed out, without that evidence the defense could argue that the State had not performed a DNA analysis of the gun that, if performed, could have ruled out the appellant.

Id. at 241.

Moreover, appellant's reliance on *Porter Hayden Co. v. Wyche*, 128 Md. App. 382 (1999), *cert. denied*, 357 Md. 234 (2000), is misplaced. There, plaintiff George Wyche, Jr., worked at the Bethlehem Steel Sparrows Point steel plant for approximately 42 years. *Id.* at 385. Upon his retirement in 1993, Wyche was diagnosed with lung cancer. *Id.* at 386. The issue on appeal concerned whether the trial court erred in not applying the cap for noneconomic damages following the jury verdict in Wyche's favor. *Id.* at 387. Simply stated, Wyche had the burden of proving that his cause of action accrued before the effective date of the cap, *i.e.*, July 1, 1986. *Id.* at 387-88. The only evidence on that

question came from the testimony of one of the experts, Dr. Edward Gabrielson, a pathologist. *Id.* at 389. Dr. Gabrielson testified that Wyche's adenocarcinoma, first detected by x-ray in 1993, probably came into existence five to ten years before that date, and probably "toward the longer interval of that five to ten-year window." *Id.* at 390.

This Court held that Dr. Gabrielson's testimony was insufficient to meet Wyche's burden of proof:

> All that one can infer from Dr. Gabrielson's estimate is that the tumor may have pre-dated the 1986 cut-off date – or that it may not have. If the tumor began forming five or six years prior to 1993, the cap would apply. If it began forming seven or more years prior to 1993, the cap would not apply. The testimony proves nothing.

Id. (emphasis omitted).

Accordingly, we concluded:

> In summary, a sole expert's bare comment that a tumor *could have* existed prior to the effective date of the cap statute fails to meet the burden this Court placed on a plaintiff in [*Owens-Corning v.*] *Walatka*, [125 Md. App. 313 (1999)], "to produce *evidence that is probative* with respect to when the plaintiff's disease came into existence . . . ."

Wyche, 128 Md. App. at 391 (quoting *Walatka*, 125 Md. App. at 333).

Wyche concerned whether the expert evidence was sufficient to meet a burden of proof, more specifically, the plaintiff's burden of persuasion. *See* 2 MCCORMICK ON EVIDENCE § 336 at 644 (7th ed. 2013) ("The term [burden of proof] encompasses two separate burdens of proof. One burden is that of producing evidence, satisfactory to the judge, of a particular fact in issue. The second is the burden of persuading the trier of fact that the alleged fact is true.") (footnotes omitted); *see also Evans v. State*, 28 Md. App.

640, 710 n. 41 (1975) ("'Contemporary writers divide the general notion of burden of proof into a burden of producing some probative evidence on a particular issue and a burden of persuading the fact finder with respect to that issue by a standard such as proof beyond a reasonable doubt or by a fair preponderance of the evidence.'") (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 695 n. 20 (1975)), *aff'd*, 278 Md. 197 (1976). By contrast, the question in this case relates to the burden of production and whether the expert testimony was probative on a material fact. *See Smith v. State*, 218 Md. App. 689, 704 (2014) ("Evidence is material if it bears on a fact of consequence to an issue in the case."). Thus we conclude that *Wyche* is distinguishable, and the firearm expert's opinion was admissible.

Finally, we also are persuaded that any error was harmless beyond a reasonable doubt:

> To prevail in a harmless error analysis, the beneficiary of the alleged error must satisfy the appellate court "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." "'To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record.'"

Frobouck v. State, 212 Md. App. 262, 284 (2013) (internal citations omitted), *cert. denied*, 434 Md. 313 (2013).

Here, not only did Shird identify appellant as one of the shooters, numerous eyewitnesses offered evidence suggesting that more than one gun was used during the murders. Additionally, defense counsel relied on the fact that the expert's own tests were

inconclusive: "[H]e can't say whether one or two guns were used. He does not know. It's inconclusive. That's why I objected to that, because I believe that an inconclusive result is not proof of anything." Given such statement, it is unlikely that appellant was prejudiced by the expert's opinion that he was unable to determine whether the two sets of bullets he examined were fired from one or two handguns. Accordingly, any error was harmless.

II.

Appellant next asserts that the trial court not only erred, but plainly erred by not, *sua sponte*, taking any action regarding the prosecutor's improper and prejudicial comments during rebuttal closing argument. The State does not address whether the comments were improper, but responds that they do not rise to the level warranting plain error review. We agree.

Appellant first avers that the following remarks by the State misstated the reasonable doubt standard:

> Thank you, your Honor. Now, it's tough for me to stay away from this. Counsel started this argument by suggesting that I might talk about smoke and mirrors and so forth, but basically the whole thing he just did was attack the State. He basically said this is some sort of conspiracy. We basically gave Jennerio [Shird] the story so it would fit into what we know.
>
> Detective D'Angelo trampled on the Defendant's rights. We showed you photographs to inflame you. He basically said it's okay for the Defendant to lie to the police because that's what happens in the city, but then bust on Jennerio for not being incredibly honest from the get-go. So, what is he trying to do? He wants it both ways, it doesn't work that way. It always baffles me when defense attorneys as they always do, it must be Criminal Defense 101 to talk about the amazingly high burden that the State has, beyond a reasonable doubt. Ladies and gentlemen, again, common sense, life

> experience. I'm sure some of you read newspapers, some of you watch the news. There's a courthouse just like this in virtually every county in Maryland. There's a courthouse just like this in virtually every county of all 50 states. There are jurors sitting in boxes just like this all over the country. People are found guilty of crimes every single day. **Are you confident we got the right guy? That's all it is, are you confident?**

(Emphasis added).

Next, appellant contends the prosecutor shifted the ultimate burden of proof. In its argument, the State noted that appellant claimed that he was coerced into making a statement because he did not want to talk to the police in front of his mother:

> I didn't get the thought from the Defendant's testimony that he is shy or a scared little guy, but he's hiding behind his mom. He didn't want to talk to the police, so he just tells some lie or story to get out of it. I said this before, when you're a suspect in a double murder, you tell the truth or you lie. Why do you lie? Because you're guilty.

The State then argued:

> In a case where the Defense chooses to put on no defense, you can't mention it, can't talk about it. Once they open the door and decide to put on a defense, if they choose to – they don't have to, but if they choose to we can talk about it, we can attack it. So, we learn today that there's some mysterious woman named Jasmine a co-worker of his. If you're on trial for a double murder and you don't want to get Jasmine from 11 years ago involved. Is that believable. Do you believe that? I don't. You can find people.
>
> **He couldn't find anyone to come in here and say where it was because it wasn't true. Hiding behind his mom. I'm sure she's one of the people standing right there. Why not put her on the stand to alibi him. He can't.** Don't be fooled by that. That's the conspiracy. The evidence is there, roll up your sleeves and do justice. Two counts of first-degree murder and the use of a handgun. Thank you.

(Emphasis added).

Because appellant offered no objection to either remark, he argues reversal is required under the plain error doctrine. Review for an unpreserved error is reserved for error that is "'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Savoy v. State*, 420 Md. 232, 243 (2011) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). And, "[p]lain error is error that is 'so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial.'" *Steward v. State*, 218 Md. App. 550, 565 (2014) (quoting *Diggs v. State*, 409 Md. 260, 286 (2009)), *cert. denied*, 441 Md. 63 (2014); *accord Malaska v. State*, 216 Md. App. 492, 524 (2014) (explaining that plain error review can remedy defects that denied "'a defendant's right to a fair and impartial trial'") (quoting *Diggs*, 409 Md. at 286), *cert. denied*, 439 Md. 696 (2014), and *cert. denied*, 135 S. Ct. 1162 (2015).

Establishing reversible error as to improper closing remarks is difficult when seeking relief based on an assertion of plain error. *See, e.g., Trujillo v. State*, 44 P.3d 22, 24 (Wyo. 2002) (noting "[w]e are reluctant to find plain error in closing arguments 'lest the trial court becomes required to control argument because opposing counsel does not object'") (quoting *James v. State*, 888 P.2d 200, 207 (Wyo. 1994)). This is due to the maxim that "[a] trial court is in the best position to evaluate the propriety of a closing argument . . . ." *Ingram v. State*, 427 Md. 717, 726 (2012) (citing *Mitchell v. State*, 408 Md. 368, 380-81 (2009)). Therefore, we shall not disturb the ruling at trial "unless there has been an abuse of discretion of a character likely to have injured the complaining party."

Grandison v. State, 341 Md. 175, 243 (1995) (citing *Henry v. State*, 324 Md. 204, 231 (1991), *cert. denied*, 503 U.S. 972 (1992)).

Appellant's first challenge is to the prosecutor's remark that reasonable doubt is equivalent to whether the jury was "confident" in its verdict. Appellant primarily relies upon *Carrero-Vasquez v. State*, 210 Md. App. 504 (2013). In that case, Carrero-Vasquez was convicted by a jury of possession of cocaine with intent to distribute, as well as related weapons and traffic offenses. *Id.* at 508. The primary issue on appeal concerned the following remarks made, notably over defense objection, by the prosecutor during rebuttal closing argument:

> The State does have a very high burden and my burden is to convince each and every one of you beyond a reasonable doubt. I am not required to prove guilty beyond all possible doubt or to a mathematical certainty. I am not required to negate every conceivable circumstance of innocence. My burden is high. I understand that. *Reasonable doubt. Trust your gut. If your gut says I think he's guilty, that's reasonable*.

Id. at 510.

This Court concluded that the remarks were improper because they misstated the reasonable doubt standard:

> Contrary to the State's contention that the prosecutor was only explaining to the jury how it should "assess[ ] the credibility of the witnesses," she was clearly urging the jurors to find appellant guilty beyond a reasonable doubt if their "gut" told them that he was. Not only was there utterly nothing in this comment that related this "gut" check to the jurors' assessment of witness credibility, but the comment plainly reduces proof "beyond a reasonable doubt" to a "gut" feeling.

Id. at 511.

This Court also held that the error in overruling defense counsel's objection to this remark was not harmless beyond a reasonable doubt. *Id.* at 515. In reaching this conclusion, we considered the severity of the remarks, the measures taken by the trial court to cure any potential prejudice, and the weight of the evidence against the accused. *Id.* at 512-13. The remarks, although isolated, came during rebuttal and "[were], quite literally, the last explanation the jury heard as to the weight and nature of the State's evidentiary burden." *Id.* at 512. Further, the court overruled the objection to the argument and took no curative action "to cure this gravely misleading remark by the State in describing its burden of proof . . . ." *Id.* Finally, where the evidence turned largely on issues of credibility of the State's witnesses, we could not conclude that the error did not influence the jury's verdict. *Id.* at 513.

We are not persuaded that the prosecutor's remarks in this case were as egregious as those in *Carrero-Vasquez*. Because there was no objection, unlike in *Carrero-Vasquez*, and the remarks here were not as egregious, we are persuaded that there was no plain error in this case. Indeed, we note that one out-of-state court has acknowledged that, in assessing reasonable doubt, a juror may consider the degree of confidence one would have when acting on an important matter, as follows:

> Appellant cites the 1979 edition of the Suggested Standard Criminal Jury Instructions, still mirrored in Pa.S.S.J.I. (Criminal) § 7.01, First Alternative (2005) ("A reasonable doubt is a doubt that would cause a reasonably careful and sensible person to hesitate before acting upon a matter of importance in his or her own affairs."). However, the most recent edition includes an alternative reasonable doubt instruction:

> [T]o find the defendant guilty beyond a reasonable doubt, you must be convinced of [his or her] guilt to the same degree you would be convinced about a matter of importance in your own life in which you would act *with confidence* and without restraint or hesitation.
>
> Pa.S.S.J.I. (Criminal) § 7.01, Second Alternative (2012).

Commonwealth v. Simpson, 66 A.3d 253, 274 (Pa. 2013) (emphasis added).

As for appellant's contention that the prosecutor also shifted the burden of proof by observing that appellant did not call any alibi witnesses, including his mother, we acknowledge that the prosecutor cannot comment on the defendant's failure to produce evidence because it could amount to an impermissible shift of the burden of proof. *See generally, Lawson v. State*, 389 Md. 570, 595 (2005) (citing *Eley v. State*, 288 Md. 548, 555 n.2 (1980)). *Woodland v. State*, 62 Md. App. 503 (1985), *cert. denied*, 304 Md. 96 (1985), relied upon by appellant, is instructive in this regard. There, in a prosecution for first degree murder, defense counsel, for purposes of jury *voir dire*, had provided a witness list that included the names of two individuals, purported character witnesses, who were never called to testify. *Id.* at 506. Woodland took the stand and denied any involvement in the crime, stating that he was at a friend's house during the shootings. *Id.* During cross-examination of Woodland, the prosecutor elicited from him the name of this friend, and also the fact that Woodland had spoken with the friend earlier on the day of the shootings, and that the friend would be home that evening. *Id.* The friend, who was incarcerated at the time, was never called to testify. *Id.*

During rebuttal closing argument, the prosecutor pointed out that neither of the two character witnesses who had been identified on Woodland's witness list, nor the "friend," had been called to testify for the defense. *Id.* at 506-07. The trial court overruled Woodland's objections. *Id.* at 507. The trial court also declined Woodland's request to instruct the jury on the State's burden of proof and on the lack of any obligation on the part of the defendant to produce evidence. *Id.* at 507-08.

On appeal to this Court, Woodland asserted that the trial "court erred in allowing the State to argue the inference to be drawn from a missing witness when the State was not entitled to a missing witness instruction." *Id.* at 508. He also contended that the trial court's error was enhanced by that court's refusal to instruct the jury on the proper burden of proof. *Id.* This error, he maintained, abridged his right to due process, because the State's summation "had the effect of shifting the burden of proof from the State to [Woodland]." *Id.* at 509.

Agreeing with Woodland, this Court ruled that the testimony of the two character witnesses would have been cumulative, and neither met the prerequisites for application of the missing witness rule. *Id.* at 511. Nor did the missing witness rule apply to the friend, because he was "not a material witness whose testimony would elucidate the transaction." *Id*. at 512. On the record before it, this Court ruled that the State's missing witness argument was improper. *Id.* at 514.

We also concluded that the prosecutor's argument on the two missing character witnesses was a comment upon facts not in evidence and upon the failure of Woodland to

call character witnesses. *Id.* at 515. Also, the prosecutor's argument based on the absence of Woodland's friend shifted the burden of proof to Woodland. *Id.* at 516. The fact that the trial court did not instruct the jury that Woodland did not have any burden of proof and did not have to call witnesses simply compounded the error. *Id.* Finally, because Woodland's character was an important issue in the case, the error was not harmless beyond a reasonable doubt. *Id.* at 517.

Woodland stands in contrast to the more recent case of *Mines v. State*, 208 Md. App. 280 (2012), *cert. denied*, 430 Md. 346 (2012). In that case, Mines argued that there were two instances in which the prosecutor shifted the burden of proof. *Id.* at 293. He complained that the prosecutor, during cross-examination of the appellant, improperly questioned him about his whereabouts at the time of the crime, pointing out that people who could substantiate Mines's story were not called to testify. *Id.* at 293-94. Mines argued that the questioning "'sent a message to the jury that it was [Mines's] responsibility to secure the presence of witnesses at trial . . . .'" *Id.* at 294. Mines also claimed that the State's reference in closing argument to a "failure to call certain witnesses amounted to a 'trespass upon [his] Constitutional rights.'" *Id.*

We disagreed that Mines was entitled to relief on this point:

> Neither *Robinson* [*v. State*, 20 Md. App. 450 (1974)], *Woodland*, nor *Wise* [*v. State*, 132 Md. App. 127 (2000)] involved the scenario presented in the instant case. **Here, the prosecutor's questions were directed to [Mines] after he took the stand, and involved whether there was support for factual claims raised by [Mines'] testimony.**

Mines, 208 Md. App. at 299 (emphasis added).

We also observed that "'[a] prosecutor's comment on a defendant's failure to call a witness does not shift the burden of proof, and is therefore permissible, so long as the prosecutor does not violate the defendant's Fifth Amendment rights by commenting on the defendant's failure to testify.'" *Id.* (quoting *United States v. Cabrera*, 201 F.3d 1243, 1250 (9th Cir. 2000)). We concluded:

> "The rule forbidding any reference to a defendant's failure to take the stand in his or her defense does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. Consequently, a prosecutor may properly comment on the defendant's failure to present exculpatory evidence which would substantiate the defendant's story as long as it does not constitute a comment on the defendant's silence."

Id. at 301 (quoting 75 AM. JUR. 2D *Trial* § 506 (2012)).

In this case, appellant testified in his own defense that he was elsewhere with friends when the shooting occurred. To the extent that the prosecutor's remarks addressed appellant's claim that he was with friends, we conclude that they were not improper. The prosecutor was entitled to address, during closing argument, appellant's alleged alibi, testified to during trial, concerning his whereabouts at the time of the incident.

However, the prosecutor went beyond challenging appellant's trial testimony and argued that appellant should have called his mother "to alibi him." The only time appellant's mother was referred to during trial was to explain why appellant may have felt coerced into making a written statement to the police. We are unable to find any evidence

suggesting that appellant was relying on his mother for an alibi to the underlying crime itself. Therefore, we conclude that this part of the prosecutor's argument was improper.

Nevertheless, we do not agree that appellant was prejudiced by this isolated remark, made during rebuttal closing argument. Indeed, the jury was repeatedly informed of the proper burden of proof, throughout the course of the entire trial. Prior to opening statements, the court informed the jury that "[a]t the conclusion of the State's case the Defendant may put forth evidence if he chooses to do so. He is not required to put on any evidence if he chooses not to do so." And, also during his opening statement, defense counsel informed the jury that appellant was presumed innocent, and that a conviction required proof beyond a reasonable doubt.

Moreover, the court instructed the jury from the first edition of the pattern instructions that appellant was presumed innocent, and that the State had the burden of proving his guilt beyond a reasonable doubt. *See* Maryland Criminal Pattern Jury Instructions 2:02, at 18 (1st ed. 2005) ("MPJI-Cr"). The jury was also informed that opening statements and closing arguments are not evidence. *See* MPJI-Cr 3:00, at 28. "Maryland courts long have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury's part to the contrary." *Spain v. State*, 386 Md. 145, 160 (2005). And, during closing argument, both the prosecutor and defense counsel reminded the jury that the State had the burden of proof.

Further, appellant was able to present his theory suggesting that the witnesses against him were not credible. Defense counsel argued that Detective D'Angelo was not "forthright," and suggested that his memory was selective, noting that "[w]hen the State asked him questions, his memory suddenly improved." As for the testimony of one of the State's eyewitnesses, Shird, defense counsel argued that that testimony

> was a lie. It was a lie in so many ways. It was a lie because it could not have happened as he said it happened. It was a lie because he couldn't have seen what he said he saw. It was a lie when he says that right before he sees my client handing a gun to someone outside and does nothing. Well, that's interesting. I'll go back and have another beer. It doesn't make sense.

In fact, defense counsel suggested that Shird, who the jury learned was testifying pursuant to a plea deal on an unrelated handgun possession charge, was "being protected here . . . ." Counsel continued: "Jennerio Shird, who in my view lied about everything he said, he said he was scared to death, scared for his life, but then four days later he appears on the porch – you saw the video – laughing up good old times. Scared of his life of that man, hanging out."

As noted, defense counsel also implied that appellant was coerced when he argued as follows:

> [Appellant] explained to you the police wouldn't let him be. They came to his house even though they disagree he didn't want to be involved. He lives in the city.
>
> Baltimore City is a culture where people wear shirts that say, "Snitches get stitches," we all know that. I think the State alluded to that. It's a dangerous place to be, and people don't want to get involved. He told you he didn't understand he was a suspect. He wanted them to go away. They kept coming and they kept coming.

> His mom was there, and they were making her uncomfortable. He was uncomfortable with his mom, so he tells them whatever he can to make them go away. He doesn't want to implicate anyone else. He doesn't want to be drawn into this as a witness.

We acknowledge that defense counsel's argument above was within the bounds afforded closing argument and did not warrant commentary from the prosecutor that appellant was required to call his mother "to the stand to alibi him." The prosecutor's improper remarks, however, were not so compelling, extraordinary, or exceptional to lead us to invoke plain error review. We also do not agree "that the cumulative effect of the prosecutor's comments was sufficiently prejudicial to deny [appellant] a fair trial." *See Lee v. State*, 405 Md. 148, 160 (2008); *see also Lawson,* 389 Md. at 604 (holding that "the cumulative effect of the prosecutor's remarks was likely to have improperly influenced the jury under the circumstances in the case at bar").

III.

Finally, appellant challenges the trial court's ruling admitting color photographs of Cabera, taken at the scene of the shooting, on the grounds that they were unduly prejudicial and inflammatory. We do not agree, because we agree with the State that the trial court properly exercised its discretion in admitting the photographs.

There is a two-part test in determining the admissibility of photographs. "[F]irst, the judge must decide whether the photograph is relevant, and second, the judge must balance its probative value against its prejudicial effect." *State v. Broberg*, 342 Md. 544, 555 (1996). A photograph is relevant if it "'assist[s] the jury in understanding the case or

aid[s] a witness in explaining his testimony . . . .'" *Mason v. Lynch*, 388 Md. 37, 49 (2005) (quoting *Hance v. State Roads Comm'n*, 221 Md. 164, 172 (1959)).

Second, when a photograph is relevant, "[t]he admissibility of photographs under this state's law is determined by a balancing of the probative value against the potential for improper prejudice to the defendant . . . . This balancing is committed to the trial judge's sound discretion." *Bedford v. State*, 317 Md. 659, 676 (1989) (internal citations omitted). The judge's determination "will not be disturbed unless plainly arbitrary." *Grandison v. State*, 305 Md. 685, 729 (1986), *cert. denied*, 479 U.S. 873 (1986); *see also Lovelace v. State*, 214 Md. App. 512, 548 (2013) ("'The trial court's decision will not be disturbed unless plainly arbitrary, . . . because the trial judge is in the best position to make this assessment.'" (quoting *Ayala v. State*, 174 Md. App. 647, 679 (2007), *cert. denied*, 401 Md. 173 (2007))).

In assessing whether there has been an abuse of discretion, the Court of Appeals has recognized that, even though photographs "may be more graphic than other available evidence ... we have seldom found an abuse of a trial judge's discretion in admitting them in evidence." *Hunt v. State*, 312 Md. 494, 505 (1988). Further:

> Among the scores of this Court's opinions involving the admission or exclusion of photographic evidence, it is extremely difficult to find cases in which this Court has held that the trial court's ruling, as to the admission or exclusion of photographs, constituted reversible error. The very few cases finding reversible error are ones where the trial courts admitted photographs which this Court held did not accurately represent the person or scene or were otherwise not properly verified.

Mason, 388 Md. at 52.

Here, Officer Eric Libby, employed at the time of the shooting as an officer with the Baltimore County Police Department, responded to the scene of the shooting and initially stood by the body of the first victim, Rico Cabera. After a while, Officer Libby changed his position at the scene and stayed with the other shooting victim, Funderburke, until this victim was pronounced dead. The State then sought to admit photographs of the crime scene through Officer Libby. After appellant objected, the following colloquy ensued:

> [DEFENSE COUNSEL #1]: [The Prosecutor] has some more pictures here, they're colored pictures. They're the same pictures of the same victim Rico Cabera. I think it's over kill. I think he's already introduced sufficient pictures showing this man was clearly shot. He has introduced evidence to prove I think to the satisfaction of the jury he was shot to death. I think these pictures are simply alarming. I think they are more prejudicial than probative and that they insight [sic] the passions of the jurors.
>
> THE COURT: [Prosecutor]?
>
> [PROSECUTOR]: Your Honor, I do have some case law that I brought with me. I could certainly recite a blurb of it. I can provide the actual copies of the case to defense counsel and your Honor, but in it it very clearly indicates that it's within your Honor's sound discretion to admit these photos.
>
> What we're trying to show is the location of the body at the actual crime scene, because we do have civilian witnesses that are going to describe how this unfolded. So this is important for that reason.
>
> Also these cases make it abundantly clear that when a jury is called upon to decide between first and second-degree murder, an accurate photo of what they call the atrociousness of the crime is very pertinent and it should be for the jury's consideration.
>
> [DEFENSE COUNSEL #1]: State's Exhibit 4, I think has accomplished all that with this poor guy's corpse lying there on the sidewalk. I didn't object to anything from the medical examiner

> which are pretty gruesome themselves, but this is over kill. This duplicates what's already been put in.
>
> [DEFENSE COUNSEL #2]: Your Honor, I would just argue –
>
> THE COURT: What's the purpose of State's Exhibit 6, how is that going to help the jury in determination of it?
>
> [PROSECUTOR]: Again, Your Honor, the case law makes it abundantly clear that, you know, what actually happened to the victim, the atrociousness of it is important when you're deciding between first and second-degree murder.
>
> THE COURT: Counsel, they're pretty graphic, but I don't think they are such that they would insight [sic] or inflame the jury prejudicially. I think they're important for the trier of fact to see all these photos. Your objection is noted. Objection, overruled.
>
> [DEFENSE COUNSEL #1]: Thank you.[3]

In considering this issue, *Bedford,* is most instructive. In that case, Bedford had been convicted by a jury of first degree premeditated murder and related counts. 317 Md. at 662. Bedford argued, *inter alia*, that the trial court improperly admitted nine color photographs of the victim. *Id.* at 663. Four photos showed the crime scene and the full body of the victim, one photo showed the injuries to the victim's hand and arms, and the four remaining photos were close-ups of injuries to the victim's head. *Id.* at 675. The Court of Appeals upheld the trial court's ruling admitting the photographs, stating:

> The admissibility of photographs under this state's law is determined by a balancing of the probative value against the

[3] The State then introduced photographs of Cabera at the crime scene into evidence. A photograph of Cabera lying on the sidewalk was previously admitted into evidence. In addition, the jury saw autopsy photographs of Cabera and Funderburke, that were also admitted into evidence.

> potential for improper prejudice to the defendant. *Mills v. State*, 310 Md. 33, 43, 527 A.2d 3, 7 (1987), *vacated on other grounds*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). This balancing is committed to the trial judge's sound discretion. *Johnson v. State*, 303 Md. 487, 495 A.2d 1 (1985). In *Johnson*, we reiterated that:
>
> > We have consistently held that whether or not a photograph is of practical value in a case and admissible at trial is a matter best left to the sound discretion of the trial judge . . . . A court's determination in this area will not be disturbed unless plainly arbitrary . . . . Under this standard, we have permitted the reception into evidence of photographs depicting the condition of the victim and the location of injuries of the victim's body at the murder site, . . . ; and the wounds of the victim. *Id.* at 502, 495 A.2d at 8 (citations omitted).

Bedford, 317 Md. at 676.

The Court explained that "'[t]he very purpose of photographic evidence is to clarify and communicate facts to the tribunal more accurately than by mere words.'" *Id.* at 676 (quoting *Johnson*, 303 Md. at 503-04). The Court also rejected Bedford's argument that a trial judge should err on the side of exclusion when a photograph has only "minimal significance," "no essential evidentiary value," and is "inflammatory." *Id.* at 677. The Court concluded:

> [W]e have not adopted such a test and require only that the trial judge not abuse his discretion. Using this accepted standard of review, we cannot find that the trial judge here failed to engage in a reasoned balancing process or that the disputed photographs were likely to distort the jury's deliberations. Accordingly, we find that the photographs were properly admitted.

Id.

Furthermore, under this standard the Court of Appeals has "permitted the reception into evidence of photographs depicting the condition of the victim and the location of

injuries upon the deceased, the position of the victim's body at the murder site, and the wounds of the victim." *Johnson*, 303 Md. at 502 (internal citations omitted); *see also Roebuck v. State*, 148 Md. App. 563, 594-600 (2002) (holding, in prosecution for first-degree murder, that photographs of victim's body were properly admitted into evidence in that they illustrated testimony of medical examiner and were probative as to issue of intent), *cert. denied*, 374 Md. 84 (2003).

The photographs of Cabera at the scene of the shooting were relevant to several issues in the case, including appellant's intent in this first degree murder case. We further conclude that the court properly exercised its discretion in admitting the photographs at trial.

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