UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1006

September Term, 2015

ALLEN DERICK MILLER

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, J.

Filed: August 17, 2016

A jury in the Circuit Court for Prince George's County convicted Allen Derick Miller, appellant, of second-degree assault and openly carrying a dangerous weapon with intent to injure. The court sentenced appellant to a term of imprisonment of ten years, with all but three years suspended, for second-degree assault, and a concurrent term of three years for openly carrying a dangerous weapon, to be followed by a five-year period of probation. Appellant raises two issues for our review, the first of which we have rephrased:[1]

> 1. Did the trial court abuse its discretion in permitting portions of the prosecutor's rebuttal argument?
>
> 2. Did the trial court err in denying Appellant's motion for judgment of acquittal on Count 3 [openly carrying a dangerous weapon]?

For the reasons that follow, we agree with the parties that the evidence is legally insufficient to sustain the conviction for carrying a dangerous weapon, and we reverse that judgment. As to the first question, however, we answer in the negative and affirm appellant's conviction for second-degree assault.

[1] Appellant's first question, verbatim from his brief is:

> Did the trial court err in permitting the prosecutor, over objection, to argue in rebuttal that Appellant's failure to remain at the scene and volunteer information to police was evidence of his guilt?

BACKGROUND

In the fall of 2014, Noe Canales placed a personal ad on Craigslist seeking a date or companionship.[2] Appellant responded to Ms. Canales's ad, and they agreed to meet at a McDonald's in Hyattsville on November 7th. Ms. Canales testified that appellant offered her $100, and later $200, for the date, but she refused the money. Appellant arrived at the agreed place and told Ms. Canales that he needed to change before going to the movies. He asked Ms. Canales to follow him, and the pair walked for "between five and ten" minutes before arriving at a building that Ms. Canales described as an apartment building or nursing home.

Appellant broke into the building, explaining to Ms. Canales that management had not given him a key, yet. He explained that management was aware that he "popped" the door to gain access. Ms. Canales followed him inside. Appellant went into a first-floor bathroom and asked Ms. Canales, three times, to follow him. She refused. Appellant then asked Ms. Canales to follow him up the stairs.

Upon reaching the third floor, appellant turned to Ms. Canales and said, "We going to do this easy. I want you to lay down and we are going to do this the easy way." Appellant brandished a knife. The testimony as to what occurred was conflicting. At some point, Ms.

[2] Craigslist is a website containing "[l]ocal classifieds and forums" wherein people may find advertisements for "[j]obs, housing, goods, services, romance, local activities, advice – just about anything really." FACTSHEET, https://www.craigslist.org/about/factsheet (last visited July 28, 2016).

Canales attempted to use pepper spray and a Taser. Appellant and Ms. Canales struggled over the knife. Appellant stabbed Ms. Canales several times in the back. Ms. Canales opened the door leading from the stairwell into the second floor of the building and screamed for help. An "older lady" called police and told Ms. Canales that "everything okay." In response, appellant ran from the building.

Detective Scott Ratty of the Hyattsville City Police Department was the lead investigator. Upon responding to the apartment building, Detective Ratty observed items strewn about the stairwell, including Ms. Canales's Taser and pepper spray. He also noticed blood leading down to the second floor door. Police recovered the knife, which Alana Andrews, an evidence technician, described as a black-handled folding knife. On November 10, 2014, Ms. Canales identified appellant in a photographic array as her assailant.

On November 14, 2014, Detective Ratty interviewed appellant at the police station, and the interview was recorded.[3] Detective Ratty noted that, at the time of the interview, appellant appeared to have "two or three or four" scratches on his face. In the interview, appellant admitted that he stabbed Ms. Canales, but asserted that he did so in self-defense after she attempted to tase him.

Appellant was charged with first-degree assault, second-degree assault, and openly carrying a dangerous weapon with the intent to injure. At trial, appellant elected not to

[3] A portion of the audio- and video-recorded interview was played for the jury at trial, but the transcript merely provides: "(Video played.)"

testify. The court reserved on appellant's motion for a judgment of acquittal as to the weapon charge. The jury subsequently acquitted appellant of first-degree assault. The jury convicted appellant of the remaining charges.

DISCUSSION

I. Rebuttal Argument

In closing arguments to the jury, appellant's counsel argued, in part, as follows:

> You heard Mr. Miller in that video [the interview]. He spoke to Detective Ratty. **He was very forthcoming. He talked to Detective Ratty and told him what actually happened.**
>
> He was first a little bit reluctant to say what actually happened, to say what happened at the McDonald's. Understandably so, sort of this sensitive topic, but then he says this is what happened. He tells you, he tells Detective Ratty.
>
> **And he has no obligation to. He was told he has no obligation to talk to the police, that he has the absolute right to remain silent, but he volunteers this information. He volunteers what actually happened.**
>
> And Detective Ratty, nobody, was able to shake that story. That's what happened. Mr. Miller was attacked by Noe Canales. The State says no motive. There is definitely a motive. It would be $200.
>
> Noe Canales talked about the purse and that she had what, money and bank cards in the purse. Did you – I hope that you heard from Detective – or Technician Andrews, she didn't have bank cards or money. She had lubricant and condoms in that purse.
>
> The person who had cash was Mr. Miller. He was an easy mark. He was an easy target. You heard him on that video, a little slow, very trusting, and he trusted this person. He trusted her.

> And what did she do? She goes into the back, into – behind him, follows behind him and thinks, oh, well, this is an easy $200. All I have to do is take that taser, take that stun gun, incapacitate him, take his $200. That's it.
>
> Well, her plan went to pot when he wasn't incapacitated, and he fought back, and he did what he needed to do to defend himself. And yes, absolutely, he said on that video, **"Yes, I stabbed her, but the reason was, because she attacked me. She used that stun gun against me."**
>
> That stun gun has two prongs on it, two prongs that connects to the skin. It incapacitates you or stuns you. Two marks on Mr. Miller's face. Two marks. So yeah, that's what she did. Noe Canales tried to incapacitate Mr. Miller. Tried to take his money. Thought, ah, this is the perfect crime. I'll follow him. I'll pretend like, you know, we're going to have sex.
>
> She uses that stun gun to try to incapacitate him, but he fights back. He doesn't know what's going to happen. He is fearful for his life at that point.
>
> The State talks about the size difference.[4] There's not much of a size difference after you get stunned by an operable stun gun. There's no size difference that matters at that point. So Mr. Miller did what he needed to do.
>
> * * *
>
> **And that's what he did, he acted in self-defense. He was attempting simply to get away.** How do we know that? Notice what's left at the scene. The knife. He doesn't run with the knife. He doesn't try to take the knife with him. He leaves it there.
>
> The only reason he used that knife was to defend himself. That was it. So this story made up by Noe Canales, that she had this money, and she was fearful that he was going to take her money, we know from her purse isn't true.

(Emphasis added).

[4] Ms. Canales testified that she is 5'4" tall and weighs "[b]etween 150 and 160." She estimated appellant at 6'5" and weighing approximately 250 pounds.

In response, the following occurred during the State's rebuttal argument:

[THE STATE]: And you remember from the interview that he [appellant] did admit that yes, he did offer money. He couldn't remember how much it was. And then the detective said, "Well, was it $5, a thousand dollars?" He said, "I think it was a hundred." And again, that corroborates what Noe said.

[Appellant's counsel] says that he, the Defendant, was very forthcoming. Was he really very forth coming? You remember from the video when the Defendant was being questioned by Detective Ratty? Oh, I don't know what you're talking about. No, I never gave that address to anybody. No, I never met anybody off Craig's List [sic]. No, I don't know. I didn't do anything. I don't know what you're talking about.

At this point, he probably realized that the jig was up, because then the detective started asking him about phone conversations. And he probably knows that it's not that hard to get phone records and to corroborate or clarify.

So finally, it was only then that he is like, okay, here's what happened. Yeah, I stabbed her, but it was self-defense.

* * *

Now, well, he couldn't have done this if it wasn't self-defense because he even left a knife. Well, he left a knife because Noe started screaming, "Help, help, help."

And Noe told you that we – there was a struggle over the knife. And yeah, during the struggle, I think Noe said I thought I had cut him or I know that the knife was up by his face. It may have scraped him.

So we know that Noe, at some point, had taken possession of the knife. So that's why he left it. It wasn't because he was in fear.

And who is the one who fled? He did. Who's the one who didn't call the police? Him. He didn't call the police or wait around to say –

[APPELLANT'S COUNSEL]: Your Honor –

[THE STATE]: – oh, my God, I was in this building –

[APPELLANT'S COUNSEL]: Your Honor, objection.

THE COURT: Free to comment on the law. Free to comment on the facts.

[THE STATE]: Thank you.

> **He never stuck around to say, I was in this building, and this person, I was walking and next thing you know, they tried to tase me, or they tased me and hit me with a – with pepper spray. No.**
>
> Of course, he had a week to think up a story. He had to go with something, and that's what he went with, but the evidence does not bear it out. The Defendant thought on November 7th that Noe, all 5'4" of her was easy pickings.

(Emphasis added).

On appeal, appellant contends that the court erred in permitting the State to make the comments, highlighted in bold above, during its rebuttal argument. Appellant concedes that the State's argument relating to his flight from the apartment building was a permissible commentary on his conduct, but he argues that the commentary as to his failure to call police or to speak with them at the crime scene was an improper infringement on his constitutional right to remain silent. Moreover, appellant contends that this error was not harmless.

The State contends that the prosecutor's remarks in rebuttal were not a commentary on appellant's silence, but rather they were directed at appellant's conduct following the incident. The State argues that the challenged remarks built on the prosecutor's commentary as to appellant's flight and were a proper response to appellant's closing argument. In

addition, observing that the prosecutor's rebuttal argument was not substantive evidence of appellant's guilt, and assuming that the prosecutor's argument referenced pre-arrest silence, the State contends that the argument was permissible to impeach appellant's claim of self-defense. Moreover, the State contends that any error in permitting the argument was harmless.

The Court of Appeals has commented on the scope of permissible closing argument as follows:

> "As to summation, it is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range. Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted or treated in his own way. . . . Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of the witnesses which the prosecution produces."

Mitchell v. State, 408 Md. 368, 380 (2009) (quoting *Wilhelm v. State*, 272 Md. 404, 412 (1974)). Recognizing the "great deal of leeway" afforded to counsel in closing arguments, the Court has held: "'The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.'" *Whack v. State*, 433 Md. 728, 742 (2013) (quoting *Spain v. State*, 386 Md. 145, 152 (2005)).

Accordingly, "[w]hether a reversal of a conviction based upon improper closing argument is warranted 'depends on the facts in each case.'" *Id.* (quoting *Wilhelm*, 272 Md. at 415). The Court of Appeals has noted that "the trial judge is in the best position to gauge the propriety of argument in light of such facts," and, therefore, "'[a]n appellate court should not disturb the trial court's judgment absent a clear abuse of discretion by the trial court of a character likely to have injured the complaining party.'" *Mitchell*, 408 Md. at 380-81 (quoting *Grandison v. State*, 341 Md. 175, 225 (1995)). "In deciding whether there was an abuse of discretion, we examine whether the jury was actually or likely misled or otherwise 'influenced to the prejudice of the accused' by the State's comments." *Whack*, 433 Md. at 742 (quoting *Wilhelm*, 272 Md. at 416). We will reverse a conviction based upon the State's closing arguments "[o]nly where there has been 'prejudice to the defendant[.]'" *Id.* at 742-43 (quoting *Rainville v. State*, 328 Md. 398, 408 (1992)). Furthermore, the Court has recognized that counsel "may not 'comment upon facts not in evidence or . . . state what he or she would have proven. It is also improper for counsel to appeal to the prejudices or passions of the jurors, or invite the jurors to abandon the objectivity that their oaths require." *Mitchell*, 408 Md. at 381 (internal citations omitted).

Impeachment

Appellant contends that this case is similar to *Smith v. State*, 367 Md. 348 (2001). In that case, Smith had been charged with, among other offenses, first-degree burglary and four counts of theft. *Id.* at 351-52. The State offered evidence that Smith had been in possession

of many of the recently stolen items. *Id.* at 351. As part of closing argument, the prosecutor, in commenting on the inference that may be derived from the exclusive possession of recently stolen items,[5] said, "What explanation has been given to us by the defendant for having the leather goods? Zero, none." *Id.* at 352 (emphasis omitted).

The Court of Appeals determined that "the prosecutor's remarks to the jury . . . referred to the defendant's decision to exercise his constitutionally afforded right to remain silent. The prosecutor did not suggest that his comments were directed towards the defense's failure to present witnesses or evidence[.]" *Id.* at 358. "[R]ather, 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[.]" *Id.* The Court concluded that the remarks were improper and referenced Smith's decision not to testify at trial. *Id. See also Marshall v. State*, 415 Md. 248, 255-56, 263-64, 267-68 (2010) (holding that prosecutor's comments, such as "Mr. Marshall did not take the stand" and "We don't have Mr. Marshall's thoughts," were impermissible comments on Marshall's decision not to testify and were not permissible pursuant to the invited-response doctrine (emphasis omitted)).

[5] This Court and the Court of Appeals have held that the fact-finder may infer from the exclusive possession of recently stolen items that the possessor is the thief. *See, e.g.*, *Hall v. State*, 225 Md. App. 72, 81-82 (2015).

In *Grier v. State*, 351 Md. 241, 253 (1998), during the State's case-in-chief, the prosecutor asked a police officer about statements that Grier made to police prior to his arrest as to his explanation for a fight in which he had been involved. 351 Md. at 248. Grier did not testify at trial. *Id.* The Court determined that Grier's silence in this pre-arrest period was in the presence of police officers and was not admissible as substantive evidence of his guilt. *Id.* at 252. Accordingly, evidence of pre-arrest silence, at least when it occurs in the presence of police officers, is not admissible as substantive evidence of guilt during the State's case-in-chief. *See id.* at 254-55. *See also Weitzel v. State*, 384 Md. 451, 456 (2004) (holding that tacit admission in face of police officer is ambiguous and inadmissible).

Relying, in part, on *Robeson v. State*, 39 Md. App. 365 (1978), *aff'd*, 285 Md. 498 (1979) and *Jenkins v. Anderson*, 447 U.S. 231, 235-38 (1980), the State contends that the prosecutor's comments during rebuttal were not offered as substantive evidence of appellant's guilt but were properly used to impeach appellant's claim of self-defense. In *Robeson*, Robeson was accused of shooting another man during a drug transaction. 39 Md. App. at 367-68. At trial, he testified in his defense and stated that he had called an ambulance after hearing gunshots and stayed on the scene until police arrived. *Id.* at 368. Robeson's girlfriend corroborated this account. *Id.* During Robeson's cross-examination, the prosecutor inquired as to why Robeson had not presented this information to police at the time of the incident and had, instead, remained silent. *Id.*

On appeal, Robeson argued that the State had violated his constitutional right to remain silent. *Id.* This Court determined that "'[s]ilence' in the constitutional sense is the Fifth Amendment right to remain silent when confronted by one's accusers following an arrest or in a custodial interrogation setting." *Id.* We concluded that the State's line of cross-examination was permissible to impeach Robeson's alibi:

> The subsequent questions by the State as to why the accused, an admitted eyewitness, did not contact the police, were germane to his conduct, *i.e.*, his hiding from the police. To deprive the State of the weapon of cross-examination with respect to pre-arrest conduct would in effect leave the defendant in a position where he might fabricate any exculpatory story he chose, to be unveiled for the first time at trial, without the necessity of having to defend his version of the facts against the rigors of cross-examination.

Id. at 377. Moreover, we noted that the prosecutor's arguments to the jury were directed at the circumstances of Robeson's flight and his credibility and were permissible. *Id.* at 380. *See also Jenkins*, 447 U.S. at 235-38 (holding that Jenkins, in testifying, opened himself to cross-examination as to his pre-arrest silence and conduct following Jenkins's stabbing and killing of a man who robbed his sister). These cases do not control the issue of impeachment, however, because unlike the case before us, evidence was used to impeach a testifying defendant. "Of course, if the accused does not elect to testify, his pre-arrest silence may not be used against him in any manner." *Abdullah v. State*, 49 Md. App. 141, 145 (1981), *vacated on other grounds*, 292 Md. 637 (1982).

The case before us concerns closing arguments, not the use of pre-arrest silence as either substantive or impeachment evidence of guilt. *See Lawson v. State*, 389 Md. 570, 601

(2005) ("'Opening statements and closing arguments of lawyers are not evidence' in this case." (quoting Md. Crim. Pattern Jury Instructions (MPJI-Cr) § 3:00)). The State did not cite any case – and we are not aware of any – in which a lawyer was permitted to "impeach" a non-testifying witness in closing argument. We are not persuaded by the State's arguments.

Flight

In this case, the State's comments were not directed at appellant's right to remain silent. Rather, the State was questioning appellant's claim of self-defense and commenting on appellant's conduct in leaving the apartment building. The court gave a flight instruction to the jury. In closing argument, defense counsel argued that appellant, who had no obligation to speak to police, spoke to them a week after the assault, was very "forthcoming," and volunteered what actually happened, *i.e.*, he acted in self defense. In rebuttal, the prosecutor questioned how forthcoming appellant had been, arguing that "who is the one who fled." The comment on not calling the police and not waiting around was a comment on flight.

Consequently, we are not persuaded that the prosecutor's comments, questioning appellant's pre-arrest conduct, misled the jury to the prejudice of the accused. *See Whack*, 433 Md. at 742. The prosecutor's remarks were a permissible rebuttal to appellant's argument and fit within the "great leeway" permitted counsel in summation arguments. *See id.*

To the extent that appellant contends that the prosecutor's comments "shifted the burden" to him by implying that he had a duty to speak with the police, we reject this argument. The prosecutor's comments implied no such duty. We see no reason to reverse appellant's conviction for second-degree assault.

II. Sufficiency of the Evidence

Appellant contends that there was insufficient evidence to sustain his conviction for openly carrying a dangerous weapon, pursuant to Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("C.L."), § 4-101(c)(2).[6] He points out the statute defines a "weapon" as "a dirk knife, bowie knife, switchblade knife, star knife, sandclub, metal knuckles, razor, and nunchaku[,]" but specifically excepts "a penknife without a switchblade" from the definition. *See* C.L. § 4-101(a)(5). He argues that the State failed to produce evidence of the size, shape, or type of knife, meaning that the State had failed to carry its burden of showing that the knife was not a penknife. The State agrees with appellant.

The Court of Appeals has noted that in reviewing "'a question regarding the sufficiency of the evidence in a jury trial[,]'" we ask "'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.'" *Grimm v. State*, 447 Md. 482,

[6] This statute provides: "A person may not wear or carry a dangerous weapon, chemical mace, pepper mace, or a tear gas device openly with the intent or purpose of injuring an individual in an unlawful manner."

494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)). "'Our concern is not with whether the trial court's verdict is in accord with what appears to us to be the weight of the evidence, but rather is only with whether the verdicts were supported with sufficient evidence[.]'" *Riley v. State*, 227 Md. App. 249, 255-56 (2016) (quoting *State v. Albrecht*, 336 Md. 475, 478 (1994)).

We agree with the parties that there was insufficient evidence to sustain appellant's conviction for openly carrying a dangerous weapon with intent to injure. In order to sustain this conviction, the State was required to introduce evidence demonstrating that the knife was not a penknife. *See Biggus v. State*, 323 Md. 339, 353 n.6 (1991) ("In order to obtain a conviction under [the dangerous weapon statute], the State must establish that the dangerous or deadly weapon did not fall within the exception for penknives without switchblades or handguns."); *Johnson v. State*, 90 Md. App. 638, 648-49 (1992) (holding that State carries burden to show that knife does not fall into penknife exception in the dangerous weapon statute).

In this case, the evidence as to the nature of the knife used to stab Ms. Canales included the testimony of Ms. Andrews, who agreed with appellant's counsel's characterization of the knife as a "black handled folding knife." Again, the State agrees with appellant's argument. We are persuaded, therefore, that the State failed to produce evidence demonstrating that the knife was not a penknife. Accordingly, the State failed to produce

sufficient evidence necessary to sustain appellant's conviction for openly carrying a dangerous weapon. We reverse appellant's conviction for that offense.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AS TO CONVICTION FOR SECOND-DEGREE ASSAULT AFFIRMED. JUDGMENT AS TO CONVICTION FOR OPENLY CARRYING A DANGEROUS WEAPON REVERSED. COSTS TO BE PAID 1/2 BY APPELLANT AND 1/2 BY PRINCE GEORGE'S COUNTY.