UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1629

September Term, 2014

DEVANTE R. McNEIL

v.

STATE OF MARYLAND

Krauser, C.J.,
Graeff,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: January 15, 2016

Appellant Devante R. McNeil was convicted of first-degree assault and attempted second-degree murder by a jury in the Circuit Court for Montgomery County. The jury acquitted McNeil of attempted first-degree murder and attempted voluntary manslaughter, based on imperfect self-defense. The trial court sentenced him to 20 years imprisonment. McNeil filed a timely notice of appeal.

McNeil presents the following questions for our consideration:

1. Did the circuit court (1) commit reversible error by denying defense counsel's request for an evidentiary hearing on the State's motion to continue and (2) did it ultimately abuse its discretion in finding good cause to postpone [the] trial past the *Hicks* date?

2. Did the circuit court err in permitting improper closing argument?

3. Did the circuit court err in imposing separate sentences for attempted second-degree murder and first-degree assault?

For the reasons that follow, we reject McNeil's first claim that he was entitled to an evidentiary hearing on the State's motion to postpone his trial date and reject the contention that the postponement violated McNeil's rights. On his second claim, we conclude that the trial court erred in permitting the State, during rebuttal closing argument, to make comments that were susceptible of the inference by the jurors that they were to consider McNeil's failure to testify at trial as an indication of his guilt. Finally, we provide some comment on McNeil's third claim should the question of the merger of his sentences arise in the future.

BACKGROUND

McNeil was convicted of assaulting Andrew Morina. At trial, Morina testified that McNeil attacked him while Morina was hanging out with Jameasha Budden—Morina's

classmate and McNeil's friend and ex-girlfriend. Morina testified that McNeil knocked on the door of the room in which Morina and Budden were sitting. When Morina opened the door, McNeil punched him in the face. McNeil then entered the room and stabbed Morina approximately 12 times with a pocket knife. At some point, Morina grabbed the knife from McNeil, which resulted in a deep cut to McNeil's hand. Morina then fled and, after a passerby called 911, was transported to a hospital with life-threatening injuries.

Morina testified to his relationship with McNeil, and the reason for the attack. Morina knew McNeil through Budden and another classmate, Chanell Hedgepeth—who was McNeil's girlfriend. Before the fight, McNeil had learned that Hedgepeth was also romantically involved with Morina. A few days before the attack, McNeil had told Hedgepeth that if she did not choose him, he would "end the lives that made me lose my heart by interfering with me and you." Approximately one hour before the attack, McNeil sent Hedgepeth a text message stating that he had "Andrew in my [sights]," and stating McNeil's belief that Morina was "feeling like he [is a] god[,] so he will die."

At trial, McNeil did not testify or present any evidence, but, during closing argument, defense counsel asserted that Morina was the aggressor in the fight and that McNeil had wounded Morina in self-defense. If Morina was a victim, defense counsel asserted, "he's a victim of his own doing." In support of that theory, defense counsel reminded the jury that Hedgepeth had testified that Morina had a reputation for violence and that she had known him to bring a knife to school.

During rebuttal closing argument, the prosecutor, in an attempt to refute McNeil's claim of self-defense, stated:

> *You have no evidence before you whether the defendant thought Andrew [Morina] was violent, or whether Devante [McNeil] knew Andrew [Morina] carried a knife, possibly had a knife*. He doesn't go to school with them. *There's no testimony, no evidence before you*. Then why are you to base your decision on---

(emphasis added). At that point, defense counsel raised an objection that he said he intended to "address later."

As the jury was dismissed to deliberate, defense counsel made the following argument:

> [DEFENSE COUNSEL]: My objection during the closing was I believe there was sort of a reference to the defendant invited and inferred that, but [McNeil] didn't provide testimony as to a certain piece of evidence. I think that's a comment on the silence and burden of proof, so I'd ask the Court to tell the jury to disregard that. That is in conflict.
>
> THE COURT: Okay, well, I---I think that she made a comment that there was no evidence produced on a particular point. Not saying that---
>
> [DEFENSE COUNSEL]: No, but it was more at the end when I made my objection. I was trying to just remember exactly what it was.
>
> THE COURT: Right, it was during the rebuttal. There was no, there was no evidence produced about a particular topic. I don't recall---
>
> [DEFENSE COUNSEL]: It was about what he would have said, it was.

* * *

THE COURT:	All right. Well, I don't recall there being any statement by the State that the defendant failed to do something, or the defendant didn't say something.
[DEFENSE COUNSEL]:	He was indicted, inferred, etc. Well, that's my objection.
THE COURT:	Okay. I will overruled [sic] the objection.

On October, 25 2013, the State filed a motion to continue the trial date to secure the presence of Jameasha Budden, who, it had only recently learned, moved to Austin, Texas. A hearing on the State's request was held that day before the trial judge. McNeil objected to the continuance and asked the court to conduct a "factual inquiry" to determine whether the State had exercised due diligence in securing the presence of the witness. Declining to hold an evidentiary hearing, the trial court heard oral argument from both parties on the continuance. The trial court ruled that good faith was present, but that the County Administrative Judge would need "to decide whether the requisite level of need exists to waive the *Hicks* date." The parties then appeared before the County Administrative Judge and again made their arguments for and against continuance. Before the County Administrative Judge, McNeil did not renew his request for a "factual inquiry."

DISCUSSION

I. *Hicks*

McNeil's claim that the trial court committed error by failing to hold an evidentiary hearing on the State's motion to continue the trial date is not preserved for our review.

McNeil failed to make that request to the County Administrative Judge, the only judge with the power to grant a continuance. Md. Rule 4-271; *see Marshall v. State*, 85 Md. App. 320, 325 (1991) (concluding that a party's failure to request a hearing on relevance of evidence waives issue of court's omission to conduct hearing on the matter).

Even if preserved, the trial court did not abuse its discretion when it concluded: (1) that no evidentiary hearing was necessary to determine the State's diligence in efforts made to secure the presence of a material witness; and (2) that there was good cause to grant the State's request to postpone the case beyond the 180-day deadline set forth in Rule 4-271. Whether to hold an evidentiary hearing to determine the State's diligence is a discretionary decision for the County Administrative Judge. Failure to hold such a hearing is not error. "[P]ostponements that cause the scheduling of a criminal trial beyond the 180 day period must be granted by the county administrative judge or his designee and must be supported by good cause." *Dorsey v. State*, 349 Md. 688, 701 (1998). Maryland Rule 4-271 commits the good cause determination to the judge's discretion, and his determination carries a "heavy presumption of validity." *Dalton v. State*, 87 Md. App. 673, 682 (1991). This determination is reviewed for abuse of discretion. *Reimsnider v. State*, 60 Md. App. 589, 599 (1984). McNeil failed to meet his burden to demonstrate that the County Administrative Judge's decision to postpone this case represented a clear abuse of discretion. The absence of a material witness constitutes good cause to postpone a trial date under Rule 4-271(a) and section 6-103(b) of the Criminal Procedure Article of the Maryland Code. *Marks v. State*, 84 Md. App. 269, 278-79 (1990) ("good cause exists to extend a trial when a witness is unavailable."). Therefore, we hold that the County

Administrative Judge's failure to hold an evidentiary hearing and grant postponement for good cause was not a clear abuse of discretion.

II. Prosecutor's Comments

McNeil next contends that the prosecutor's statements during rebuttal closing argument, emphasized above, amounted to improper commentary on his decision not to testify or present evidence. The State's rebuttal closing argument, he continues, denied him a fair trial and impermissibly shifted the burden of proof to him.

The State counters that the prosecutor's comments properly rebutted McNeil's claims of reasonable behavior and self-defense, without asking the jury to draw a negative inference from his silence or to shift the burden of proof onto him. Because the State bore the burden of proving that McNeil had not acted in self-defense, the State concludes, it was proper for the prosecutor to argue that no evidence had been presented that McNeil believed Morina was violent or carried a knife.

The privilege against self-incrimination is protected by the Fifth Amendment of the United States Constitution, Article 22 of the Maryland Declaration of Rights, and Maryland Code § 9–107 of the Courts and Judicial Proceedings Article.[1] *Simpson v. State*, 442 Md.

[1] The Fifth Amendment of the Constitution states, in pertinent part, that "[n]o person shall … be compelled in any criminal case to be a witness against himself[.]" The language of Article 22 of Maryland's Declaration of Rights is similar: "That no man ought to be compelled to give evidence against himself in a criminal case." The current version of Courts & Judicial Proceedings Article, § 9-107, provides that "[a] person may not be compelled to testify in violation of his privilege against self-incrimination. The failure of a defendant to testify in a criminal proceeding on this basis does not create any presumption against him." McNeil relies on both Fifth Amendment and Maryland self-incrimination law, but as we have often done, we rest our decision solely upon the (continued…)

446, 455-56 (2015). As such, a criminal defendant need not testify. *Id.* Furthermore, prosecutorial comment upon a criminal defendant's failure to testify is prohibited as a violation of the privilege. *Id.* (holding that the State constitutional right against compelled self-incrimination prohibits prosecutorial comments on the accused's silence or failure to testify); *Griffin v. California*, 380 U.S. 609 (1965) (same as to federal constitutional privilege). On the other hand, it is proper for a prosecutor to "summarize the evidence and comment on its qualitative and quantitative significance" and "[i]n closing argument, lawyers have wide latitude to draw reasonable inferences from the evidence, and discuss the nature, extent, and character of the evidence." *Smith v. State*, 367 Md. 348, 354 (2001). In 2015, the Court of Appeals reaffirmed that the test for determining whether a prosecutor's argument violates a defendant's right against self-incrimination is "whether the prosecutor's remarks were reasonably susceptible of the inference that the [defendant's] failure to testify would be indicative of his guilt." *Simpson*, 442 Md. at 460. The test is "'highly protective of a defendant's ability to exercise his Fifth Amendment right to remain silent.'" *Id.* at 461 (quoting *Smith*, 367 Md. at 355-56).

Here, the prosecutor commented, "You have no evidence before you whether the defendant ***thought*** Andrew [Morina] was violent, or whether Devante [McNeil] ***knew*** Andrew [Morina] carried a knife, possibly had a knife. … There's no testimony, no evidence before you." (emphasis added). The prosecutor did not explicitly refer to

Maryland provisions. *Marshall v. State*, 415 Md. 248, 260 (2010); *see also Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

McNeil's failure to testify or specifically suggest that *he* had failed personally to offer such evidence, as the State did in *Smith* and *Simpson*.[2] The prosecutor's first statement is functionally equivalent, however, to one of the two statements held to be improper in *Marshall v. State*, 415 Md. 248 (2010). In *Marshall* "[t]he prosecutor's statements to the jury that 'Mr. Marshall did not take the stand' and '[w]e don't have Mr. Marshall's thoughts' were used to highlight the fact that the defendant did not testify in an effort to rebut the State's evidence." *Marshall*, 415 Md. at 263. The Court in *Marshall* found these statements to be "direct comments upon the defendant's decision not to testify." *Id.* Given the factual similarity between our facts and those of *Marshall*, we accordingly apply the Court of Appeals' analysis in *Marshall* to the prosecutor's comments about McNeil, and determine that the prosecutor's comments impinged on McNeil's rights.

Although the State may discuss a general lack of evidence in closing argument, it is prohibited from commenting on that lack of evidence when "the only person who could have contradicted, denied, rebutted or disputed the evidence was the defendant himself." *Smith,* 367 Md. at 359-60 (footnote omitted). Here, even if the defense could have established through other witnesses what McNeil "knew," only McNeil himself could have testified about what he "thought" about Morina's reputation for violence and tendency to bring a knife to school. We, therefore, must conclude that the prosecutor went beyond the

[2]In *Smith*, the prosecutor queried, "What explanation has been to us by the defendant. … Zero, none." 367 Md. at 352. In *Simpson*, which involved an improper statement made during an opening statement, the prosecutor advised the jury that "the Defendant himself will tell you, number one, that he burned down that garage." 442 Md. at 451.

boundary of permissible comment on the absence of evidence to comment impermissibly, albeit indirectly, on McNeil's failure to testify.[3]

[3] The State argues that the prosecutor's comments were not improper because they were "proper rebuttal" to defense counsel's closing argument. Though not specifically mentioned by name, the State attempts to invoke what is known as the "invited response doctrine." As the Court of Appeals stated, a "defendant's Fifth Amendment right to be free of prosecutorial comment upon a defendant's decision not to testify can be lost because of defense counsel's closing argument." *Marshall*, 415 Md. at 264-65 (citing *United States v. Robinson*, 485 U.S. 25, 26 (1988)). The Court of Appeals in *Lee v. State* explained both the doctrine and its limitations.

> The "invited response doctrine" suggests that where a prosecutorial argument has been made in reasonable response to improper attacks by defense counsel, the unfair prejudice flowing from the two arguments may balance each other out, thus obviating the need for a new trial. The doctrine does not grant a prosecutor unbridled discretion to respond to an inappropriate defense argument with improper conduct, but rather, permits the prosecution to respond to improper conduct … to equalize the positions of both sides and remedy any unfair prejudice. …
>
> [B]ecause the "invited response doctrine" calls for the prosecutor's invited response to be considered in context with the defense counsel's own impropriety, it is not applicable when defense counsel has made no improper argument.

405 Md. 148, 168-69 (2008) (internal citations, quotations, and footnotes omitted). *Marshall* reiterates "that the 'invited response' doctrine applies only when defense counsel first makes an improper argument." *Marshall*, 415 Md. at 267 (quoting *Mitchell v. State*, 408 Md. 368, 382 (2009)). "An improper argument by defense counsel sufficient to invoke the 'invited response' doctrine is one that goes outside the scope of permissible closing argument and invite[s] the jury to draw inferences from information that was not admitted at trial." *Mitchell v. State*, 408 Md. 368, 382 (2009) (internal quotation and citation omitted). Holding that it is within the scope of permissible closing for counsel to draw inferences from the evidence admitted at trial, the court in *Marshall* found that the argument by defense counsel was not sufficiently improper "to warrant the prosecutor's comments." 415 Md. at 268. *Marshall* also left for another day the ultimate question – whether defense counsel's misstatements could *ever* warrant prosecutorial comment on the defendant's failure to testify.

(continued…)

A finding of error does not end our inquiry. We must also determine, as the State urges us to do, whether the error is harmless because not every impermissible comment by a prosecutor constitutes reversible error. *Simpson,* 442 Md. at 458. It is, however, the State that bears the "heavy burden" of proving that the error is harmless, that is, that it did not contribute to the verdict. *Id*. at 462.

By overruling McNeil's objection to the State's comments, the trial court obviously took no action to cure the State's improper argument. And, although the evidence was undisputed that McNeil produced the knife and stabbed Morina, we cannot say that the evidence overwhelmingly defeated a claim of self-defense, given the testimony that McNeil was the much smaller man and that Morina may have had a reputation for violence and been known to carry a knife to school. Morina, on cross-examination acknowledged, that prior to this incident he had previously challenged McNeil to a fight. Budden, Morina, and McNeil conflict in their account of exactly who threw the first punch. Nevertheless, everybody agrees that Morina escalated the fight when he grabbed McNeil and threw him against the wall. Morina confirmed on cross-examination that during the fight he blocked McNeil's exit from the bathroom. Given this evidence, the fact that the jury acquitted

Here, the State argues that its argument was proper rebuttal to defense counsel's effort to bolster McNeil's claim of self-defense, when the defense argued in closing that Hedgepeth (McNeil's girlfriend) "said [the victim] had a reputation for being violent" and that the victim had previously brought a knife to school. Only then, the State argues, did it comment on McNeil's self-defense claim – not McNeil's failure to testify or call witnesses. This argument, however, is unavailing because defense counsel's closing argument did not reach beyond evidence offered at trial. Because we hold defense counsel's closing argument to have been proper, the "invited response" doctrine simply does not apply, and we need not attempt to answer the open question remaining from *Marshall*.

appellant of attempted first-degree murder and attempted voluntary manslaughter, based on imperfect self-defense is also instructive. We, therefore, cannot say the error was harmless beyond a reasonable doubt.

III. Merger

Because we reverse his conviction, the question of the merger of McNeil's various sentences is no longer before us. In case the issue should arise again upon retrial, however, we state our view that a conviction of first-degree assault necessarily merges into a conviction of attempted second-degree murder for sentencing purposes. We find persuasive the Court of Appeals' reasoning in *Dixon v. State*, wherein it determined that first-degree assault merged into attempted voluntary manslaughter because, under the required evidence test, there was no element of the crime of first-degree assault that was not also required to prove the crime of attempted voluntary manslaughter. 364 Md. 209, 240 (2001). In other words, "the evidence required to show an attempt to kill would demonstrate causing, or attempting to cause, a serious physical injury." *Id*. In our view, the same reasoning would apply to the crimes of first-degree assault and attempted second-degree murder. We note that the State does not disagree with this conclusion.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED; CASE REMANDED TO THAT COURT FOR A NEW TRIAL; COSTS TO BE PAID BY MONTGOMERY COUNTY.