UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 985

September Term, 2016

CHARLES BRICE, JR.

v.

STATE OF MARYLAND

Berger,
Nazarian,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: July 5, 2017

Following a jury trial in the Circuit Court for Prince George's County, Charles Brice Jr., appellant, was convicted of third-degree sex offense, second-degree sex offense, and second-degree assault. On appeal, Brice claims that the circuit court abused its discretion in restricting defense counsel's closing argument. Finding no abuse of discretion, we affirm.

In addition to the sex offense and assault charges, Brice had also been charged with, and was acquitted by the jury of, first- and second-degree rape. In urging acquittal in closing argument, defense counsel highlighted portions of the report of the forensic nurse who had examined the victim, that noted that there was no evidence of injury or trauma to the victim's vaginal or anal area. Defense counsel then suggested to the jury that in the absence of such evidence, it was necessary for the State to produce DNA evidence in order to prove its case, eliciting an objection from the prosecutor that the court sustained:

> [DEFENSE COUNSEL]: What is probably most telling is that the State gets this report from the forensic nurse. . . . It's so damming [sic] to say there [are] no cuts, no tearing, no abrasion, you would think they would have to make a step further to get some kind of DNA testing.
>
> [PROSECUTOR]: Objection.
>
> THE COURT: I'm going to have to sustain that.

(Emphasis added). It is from that ruling that Brice now appeals.

"[R]egulation of closing arguments falls within the sound discretion of the trial court." *Frazier v. State*, 197 Md. App. 264, 283, *cert. denied*, 419 Md. 647 (2011) (citation omitted). "An appellate court generally will not reverse the trial court 'unless that court

clearly abused the exercise of its discretion and prejudiced the accused.'" *Sivells v. State*, 196 Md. App. 254, 271 (2010) (citation omitted) *cert. dismissed*, 421 Md. 659 (2011).

"[A]n attorney has great leeway in presenting closing arguments to a jury." *Green v. State*, 231 Md. App. 53, 77 (2016) (citations and internal quotation marks omitted), *cert. granted*, 452 Md. 4 (2017). Generally, it falls "within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn" therefrom. *Sivells*, 196 Md. App. at 270. "Counsel is free to use the testimony most favorable to [their] side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in [their] own way." *Id.* (citation omitted).

As the State agreed, "a defendant has the right to raise a defense based on the lack of evidence presented by the State[,]" and may comment in closing argument on the State's failure to "utilize a well-known, readily available, and superior method of proof to link the defendant with the criminal activity[.]" *Atkins v. State*, 421 Md. 434, 452 (2011) (citation omitted). It is improper, however, for the defense to "suggest[ ] to the jury that the State was obligated to conduct scientific tests or that the 'missing evidence' from such tests would be favorable to the defendant[.]" *Samba v. State*, 206 Md. App. 508, 530-31 (2012) (emphasis added). *See also Evans v. State*, 174 Md. App. 549, 562, 570-71 (holding that jury instruction that "there is no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case" was warranted after defense counsel commented on the lack of investigative or scientific evidence in closing argument) *cert. denied*, 400 Md. 648 (2007).

In this case, defense counsel went beyond pointing to a lack of DNA evidence, and misstated the law by suggesting that the State "would have to . . . get some kind of DNA testing." We conclude that the circuit court did not abuse its discretion in sustaining the prosecutor's objection to defense counsel's comment.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.