Circuit Court for Caroline County
Case No. C-05-CR-19-000161

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2379

September Term, 2019

MICHAEL NEFF

v.

STATE OF MARYLAND

Fader, C.J.,
Reed,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: July 29, 2021

A jury, in the Circuit Court for Caroline County, convicted Michael Neff, appellant, of theft. The Court sentenced appellant to a term of three years' imprisonment. In this appeal, appellant presents a single question for our review:

> Did the trial court err in permitting the State, during closing argument, to comment on appellant's failure to present certain evidence at trial?

For reasons to follow, we hold that the trial court did not err. We therefore affirm the circuit court's judgment.

BACKGROUND

At trial, Michael Little, a firearms manufacturer, testified that, in May 2018, he discovered an online advertisement in which an individual, later identified as appellant, was selling parts for "1911 type pistols." Mr. Little contacted appellant and arranged to purchase the gun parts. Mr. Little paid appellant $3,100.00 for the gun parts and asked that they be shipped to him. Sometime later, Mr. Little received a package from appellant. Upon opening the package, Mr. Little discovered that the package contained a sweatshirt and a sledgehammer head, but no gun parts. Mr. Little then contacted appellant, who insisted that he had sent the gun parts. When Mr. Little asked for his money back, appellant refused. Mr. Little subsequently filed a theft complaint with the police.

Following Mr. Little's testimony, the State played for the jury a recording of an interview appellant had with the police following the filing of the theft complaint. In that recording, appellant insisted that he had personally mailed the gun parts to Mr. Little via the United States Postal Service and that he had a receipt for the transaction. Appellant also stated that he had pictures of all the parts he sent and that he had witnesses who were

with him at the post office when he mailed the parts to Mr. Little. Appellant added that he had purchased the gun parts wholesale and that he had "invoices for everything."

The defense called two witnesses. Officer Justin Reibly, who investigated Mr. Little's complaint, testified that he did not conduct a search of Mr. Little's home or run a background check on Mr. Little. Chase Dean, who assisted appellant with his business, testified that appellant "did good business" and "never had a problem until now."

During closing argument, defense counsel argued that Mr. Little's credibility was questionable and that the jury could reasonably infer that Mr. Little had instigated the criminal complaint as retaliation for his dissatisfaction with an otherwise legitimate business deal. Defense counsel also argued that the lack of physical evidence and the police's failure to properly investigate Mr. Little raised reasonable doubt as to appellant's guilt.

During rebuttal argument, the prosecutor made the following comments over defense counsel's objection:

> [Defense counsel] is completely right that it is the State's entire burden to prove beyond a reasonable doubt that in this case [appellant] is guilty. But, when [appellant] puts forward his own theory of why he's not guilty, then you are allowed to look at what evidence exists or does not exist to back up [appellant's] theory of the case. In [appellant's] theory of the case, he tells you in the interview, he said he had a picture of everything he shipped the victim. Where's the picture? He said he had witnesses who saw him … take the package to the store. Where's the witness? He said he had invoices for all these parts he bought that he then later sent to Mr. Little. Where are the invoices?

Appellant was ultimately convicted. This timely appeal followed.

DISCUSSION

Appellant contends that the trial court erred in permitting the prosecutor to comment on appellant's failure to present evidence and call witnesses. Appellant argues that the prosecutor's comments improperly shifted the burden of proof from the State to appellant.

The State counters that the prosecutor's comments were not improper because they were made in response to the defense's theory that appellant was an honest businessman and that Mr. Little was lying about not receiving the gun parts. The State further argues that, even if the prosecutor's comments were improper, reversal is not required because the comments did not mislead or influence the jury to appellant's prejudice.

"The State is prohibited under the Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights from commenting on a defendant's decision to not testify at trial." *Molina v. State*, 244 Md. App. 67, 174 (2019). A defendant's constitutional right not to testify may also "be implicated by a prosecutor's attacks on a lack of evidence provided by the defense[.]" *Harriston v. State*, 246 Md. App. 367, 372-73 (2020), *cert. denied*, 471 Md. 77. "Indeed, the Court of Appeals has observed that a prosecutor's comment on a 'defendant's failure to produce evidence to refute the State's evidence … might well amount to an impermissible reference to the defendant's failure to take the stand.'" *Molina*, 244 Md. App. at 174 (2019) (citing *Eley v. State*, 288 Md. 548, 556 n. 2 (1980)).

Moreover, "Maryland prosecutors, in closing argument, may not routinely draw the jury's attention to the failure of the defendant to call witnesses, because the argument shifts

the burden of proof." *Wise v. State*, 132 Md. App. 127, 148 (2000). "[B]urden-shifting claims, made in response to prosecutorial comments on a lack of evidence supporting the defense, are borne out of the defendant's constitutional right to refrain from testifying." *Harriston*, 246 Md. App. at 372. "Since a burden-shifting claim is an allegation of a violated constitutional right, our review is without deference to the circuit court." *Id*.

That said, a prosecutor's comment on a defendant's failure to produce evidence will not always constitute improper burden-shifting or an improper attack on the defendant's constitutional right not to testify. *See, e.g.*, *Molina*, 244 Md. App. at 174; *Wise*, 132 Md. App. at 142-43. In *Wise*, we recognized a distinction between "comments by prosecutors about the failure to offer evidence regarding matters for which the defendant is the only witness and those for which the evidence is available from other defense witnesses as well." *Wise*, 132 Md. App. at 143. The former, we suggested, were generally improper, whereas the latter were generally permissible. *Id; see also Molina*, 244 Md. App. at 175 ("But the State may not exceed the bounds of permissibly commenting on the absence of evidence by commenting, instead, directly on the defendant's failure to testify.") (citations and quotations omitted).

The Court of Appeals, in *Smith v. State*, 367 Md. 348 (2001), recognized a similar distinction. There, the defendant was charged with various offenses related to his involvement in the sale of stolen goods. *Id.* at 351-52. At trial, the defendant did not testify or present evidence, and the prosecutor, during closing argument, later commented: "What explanation has been given to us by the defendant for having the [stolen] goods? Zero,

none." *Id.* at 352. The Court ultimately held that the prosecutor's comment improperly referenced the defendant's right not to testify. *Id.* at 358. In so holding, the Court explained that the prosecutor's comment was improper because it referred directly to the defendant's failure to explain by testifying:

> In the instant case, 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; rather, the prosecutor referred to the failure of the defendant *alone* to provide an explanation.

Id. at 358 (emphasis added).

Against that backdrop, we hold that the prosecutor's comments in the instant case were not improper. Those comments, which highlighted appellant's failure to present certain evidence that he had claimed existed, did not implicate appellant's right not to testify or shift the State's burden of proof. The comments came during the State's rebuttal argument and were clearly made in response to defense counsel's closing argument, in which defense counsel suggested that appellant was an honest businessman and that Mr. Little was lying. The prosecutor thereafter noted that, despite those claims, appellant had not put forth any of the evidence that he allegedly possessed to show that he had mailed the gun parts to Mr. Little. By commenting on that lack of evidence, the prosecutor was merely suggesting that, if the defense's theory were to be believed regarding appellant's honesty and Mr. Little's deceit, then the defense would likely have put forth the evidence that appellant had claimed existed. *See Simms v. State*, 194 Md. App. 285, 320-21 (2010) ("Where a defendant testifies to an alibi and calls no additional witnesses to support it, the

prosecution, by commenting on the nonproduction of corroborating alibi witnesses, is merely pointing out the weakness in defendant's case.") (citations omitted).

Moreover, the prosecutor, just before making the comments, expressly recognized that the State had the "entire burden to prove beyond a reasonable doubt" that appellant was guilty. The prosecutor also expressly instructed the jury to consider appellant's lack of evidence in the context of the defense's theory of the case. The prosecutor's comments were therefore not improper, and the trial court did not err in permitting them.

Assuming, *arguendo*, that the comments were somehow improper, reversal is unwarranted. *See generally Jones-Harris v. State*, 179 Md. App. 72, 107 (2008) ("[N]ot every improper remark by a prosecutor in closing argument requires reversal of the conviction."). Prior to closing arguments, the trial court instructed the jury on the presumption of innocence and the State's burden of proving the charge beyond a reasonable doubt. Those instructions were later reiterated by the State during its rebuttal argument. Given those facts, we have difficulty imagining how the jury could have been misled into thinking that appellant needed to prove his innocence. *See id.* at 107-08.

Furthermore, we do not read the prosecutor's comments in such a way that they could reasonably be construed as implicating appellant's right not to testify or as shifting the State's burden of proof. Although the comments did highlight appellant's failure to produce certain evidence, they did not explicitly or implicitly reference appellant's decision not to testify. To the contrary, the prosecutor made clear that the jury was to consider appellant's lack of evidence in the context of evaluating the defense's theory of

the case. And, as noted, the prosecutor prefaced those comments by expressly reminding the jury that the *State* carried the burden of proof.

JUDGMENT OF THE CIRCUIT COURT FOR CAROLINE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.