UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 882

September Term, 2016

RODRICK DWAYNE CANNON

v.

STATE OF MARYLAND

Graeff,
Berger,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: April 17, 2017

On September 14, 2010, a jury in the Circuit Court for Prince George's County convicted Rodrick Dwayne Cannon, appellant, of attempted second degree murder, first and second degree assault, and reckless endangerment. The court sentenced appellant to 30 years, 25 without the possibility of parole, for the conviction of attempted second degree murder, and 5 years, consecutive, for the reckless endangerment conviction. The assault convictions merged for sentencing purposes.

On appeal, appellant presents the following question for this Court's review:

> Does the invited response doctrine permit a prosecutor to rebut and refute defense counsel's statement to the jury that a plea of not guilty is an assertion of innocence?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On January 14, 2010, at approximately 9:30 p.m., Charles Kirby began his shift as a tow truck driver for Laurel Adjustment Bureau. Part of his job was to perform vehicle repossessions. At the beginning of each shift, he would receive paperwork detailing all the jobs that he needed to perform during that shift. The repossession paperwork, which was provided by banks or financial institutions, typically included a description of the car to be repossessed and the owner's information, among other information.

That night, Mr. Kirby was instructed to go to an apartment complex in Prince George's County and repossess a black 2007 Chevy Tahoe that was owned by appellant. At approximately 11:00 p.m., he went to the apartment complex and spotted the vehicle, but he did not tow it at that time because there were people around, and he did not want

anyone interfering. He explained that people often would "heckle" him or try to "intervene, get in the way, or just anything that may conflict with what [he was] doing."

Mr. Kirby returned to the apartment complex shortly before 4:00 a.m. on the morning of January 15, 2010. The black Tahoe was still there. As he was backing his tow truck up to the black Tahoe, he observed "a figure coming down the steps . . . . with a firearm." The person came out of the front door of an apartment building, ran behind the Tahoe, and then up to the front door of the Tahoe. Although the person appeared to be "trying to stay concealed in the dark," Mr. Kirby could still see him in his truck mirror because the area was brightly lit at the time.[1]

At that point, Mr. Kirby, who was still sitting in his tow truck, called out the Tahoe owner's name, stating: "Roger, I see you popping out, I see your firearm."[2] The person asked: "[W]hat you doing with the truck." Mr. Kirby turned around, looked at the person "dead in his face" and observed that he was standing no more than 10 or 11 feet away. In an attempt to defuse the situation, Mr. Kirby stated: "[K]eep your truck, . . . I don't want it." The person then stated: "Tell me what you doing to my truck." Mr. Kirby told the person to relax and that he was on the phone with the police, hoping that, by referencing the police, "[w]hatever he's going to do, maybe he won't do."

[1] Charles Kirby testified that there were "[l]ights around the whole complex," including two in front of the apartment building. Additionally, he had two sets of flood lights on the back of his tow truck, which further increased the visibility of the area.

[2] Although appellant's name is "Roderick," he was repeatedly referred to as "Roger" at trial without complaint from the defense.

At that point, Mr. Kirby turned back around and "hit the gas." As he attempted to drive away, he "started hearing the gun go off," and he was struck with a bullet in his lower back. He attempted to duck down, but he was shot a second time in his right shoulder. He recalled that the shooter fired "[q]uite a few times."

Mr. Kirby drove to the entrance of the apartment complex and stopped when he no longer heard gunshots and believed that he was at a safe distance. He looked over his shoulder and observed the shooter get into the Tahoe and turn on the headlights. As the police arrived, Mr. Kirby observed the shooter exit the Tahoe and walk toward one of the apartment buildings.

Detective Latasha Young, the lead detective on the case, received a call about the shooting shortly after 4:00 a.m. She recalled receiving a broadcast on her radio while on her way to the apartment complex, which provided the following description: "B, slash, M, six, dash, 02, 240, gold teeth, light sweater, black [slacks]."

Appellant was arrested at approximately 8:45 a.m.[3] After receiving permission from appellant's wife to search their apartment, Detective Young recovered a pair of size 42 black pants in their bathtub with 28 rounds of 9mm ammunition in one of the pockets. The police also recovered approximately eleven 9mm shell casings from the parking lot around the black Tahoe. No gun was ever recovered.

Upon returning to the police station, Detective Young ran the license plate number from the black Tahoe through the Maryland Vehicle Administration database and

[3] The details of appellant's apprehension were not discussed at trial.

confirmed that the vehicle was registered to "Roger Cannon" and "Shannon Denise Cannon." Various parts of the Tahoe's interior were swabbed, but none of the swabs tested positive for gunshot residue.

Several hours after the shooting, Mr. Kirby identified appellant as the shooter from a photo array. The detective who conducted the photo line-up testified that he attempted to lay out six photographs for Mr. Kirby to view. Mr. Kirby, however, identified appellant's photograph while it was still in the detective's hand, before the detective had the opportunity to place it onto the table. Mr. Kirby also identified appellant as the shooter at trial.

During cross-examination of Mr. Kirby, defense counsel asked him about the written statement that he gave to the police. Mr. Kirby acknowledged that he failed to mention in his statement that he had called out the Tahoe owner's name when the shooter ran up to the Tahoe. He also agreed that he wrote in his statement that the shooter was approximately 20 feet away during the incident, stating: "Yeah, I might have said that having two bullets in me. I might not have been real --." Additionally, Mr. Kirby confirmed that he described the shooter in his statement as being approximately 6 feet, 2 or 3 inches tall, lighted-skinned, and weighing about 220 pounds.

During cross-examination of Detective Young, defense counsel had appellant show his teeth to the detective. Detective Young stated that she did not see any gold in his mouth. She also testified that she did not see any gold teeth in appellant's mouth on the day of the shooting. She noted, however, that there are "pop-up" gold teeth "that you can buy at the

store and take out and put in." Defense counsel asked her if she found any gold teeth in appellant's apartment during her search, and she replied that she had not. Detective Young also stated that she had recorded in appellant's arrest record that he was 6 foot 4 inches tall and weighed 240 pounds.

DISCUSSION

The sole dispute in this case concerns whether the prosecutor made impermissible remarks during closing argument in response to defense counsel's earlier statements. During opening statement, defense counsel made the following remarks:

> Now, the reason we're having a trial is that Roderick Cannon has pled not guilty. That's [sic] mean, "I didn't do this? I didn't shoot anyone." That's what he's saying today. That's what he was saying from day one in this case, I did not shoot anyone, I did not shoot at anyone eleven times or ten or nine or eight or seven, I didn't take one shot at anybody, I didn't do this, I am not guilty of this.

Appellant did not testify or offer any evidence at trial.

During closing argument, the following occurred:

> [PROSECUTOR:] There is no question at all [defense counsel] started out by stating the defendant has maintained his innocence since the beginning. We've heard no testimony about that. That's not true. We've never . . . heard anybody, testimony or evidence. What we heard is hearsay. Hearsay is not evidence.
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> [DEFENSE COUNSEL:] Objection.
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> [THE COURT:] Overruled.
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> [PROSECUTOR:] What we lawyers say is not evidence. Unless you heard it from the mouth of someone else, that is not true. That's not true.

Appellant argues that the circuit court abused its discretion in permitting the prosecutor to comment on "the defense's lack of proof that [a]ppellant had maintained his

innocence." He contends, correctly, that prosecutors generally are not permitted to comment on the defendant's silence or failure to present evidence. Although he acknowledges that the "invited response" or "opened door" doctrine permits prosecutors to fairly comment on typically forbidden topics when the defense invites a response by making comments to the jury about the subject, he asserts that these exceptions do not apply in this case because defense counsel's initial comments were "perfectly consistent with the presumption of innocence."

The State argues that the circuit court did not abuse its discretion in overruling appellant's objection to the prosecutor's comments for two reasons. First, it contends that the prosecutor's response to defense counsel's opening statement was justified because defense counsel "opened the door" to the comments by "presenting a factual narrative that never came into evidence—i.e., [appellant] supposedly [was] 'saying from day one'" that he 'did not shoot anyone.'" Second, it contends that the prosecutor's comment was an invited response to "defense counsel's mischaracterization of [appellant's] not-guilty plea." The State further argues that, even if the prosecutor's comments were not justified, and it was an abuse of discretion to overrule appellant's objection to them, the error was harmless because the remark was isolated, the jury was properly instructed, and the evidence against appellant was overwhelming.

In *Sivells v. State*, 196 Md. App. 254, 270 (2010), *cert. dis'd as improv. granted*, 421 Md. 659 (2011), we noted that, although an attorney has "great leeway in presenting closing arguments to the jury," a "defendant's right to a fair trial must be protected."

Although a prosecutor is entitled to "'strike hard blows, he is not at liberty to strike foul ones.'" *Id.* at 270-71 (quoting *United States v. Young*, 470 U.S. 1, 7 (1985)).

The determination "whether counsel's 'remarks in closing were improper and prejudicial'" is a matter "'within the sound discretion of the trial court.'" *Id.* at 271 (quoting *Jones-Harris v. State*, 179 Md. App. 72, 105, *cert. denied*, 405 Md. 64 (2008)). "An appellate court generally will not reverse the trial court 'unless that court clearly abused the exercise of its discretion and prejudiced the accused.'" *Id.* (quoting *Degren v. State*, 352 Md. 400, 431 (1999)).

In *Sivells*, we addressed a similar situation, where a prosecutor made a comment in response to defense counsel's comment. We stated:

> [A]nalysis of appellant's contention requires several steps. Initially, we must assess whether the prosecutor's comments, standing alone, were improper. If so, we assess whether, in light of the argument made by defense counsel, the prosecutor's comments were a reasonable response pursuant to the "opened door" doctrine or the invited response doctrine. If not, we must determine whether reversal is required because, under the totality of the circumstances, the comments were likely to have improperly influenced the verdict.

Id.

Applying that analysis, we look first to whether the prosecutor's comments, standing alone, were improper. It is well-established that prosecutors generally are prohibited from commenting on a defendant's failure to testify. *See Griffin v. California*, 380 U.S. 609, 613-15 (1965) (argument about accused's silence improper); *Simpson v. State*, 442 Md. 446, 448 (2015) ("[T]he federal and Maryland constitutions prohibit the prosecutor in a criminal case from making an adverse comment upon the defendant's

failure to testify."). *See also Eley v. State*, 288 Md. 548, 555 n.2 (1980) (comment on defendant's failure to produce evidence might constitute "an impermissible reference to the defendant's failure to take the stand" or "an improper shifting of the burden of proof to the defendant"); *Jones-Harris*, 179 Md. App. at 107 ("A prosecutor may not comment upon the defendant's failure to produce evidence to refute the State's evidence.") (citation and quotation marks omitted).

Here, the prosecutor's comments regarding appellant's failure to produce evidence, by itself, would be improper. Moreover, the prosecutor stated that defense counsel's assertion, that appellant had maintained his innocence from the time he was charged, was "not true." To the extent that this suggested knowledge of evidence not presented, that comment was improper. *See Paige v. State*, 222 Md. App. 190, 210 (2015) ("[C]ounsel is not permitted to 'comment [up]on facts not in evidence or . . . state what he or she would have proven.'") (quoting *Mitchell v. State*, 408 Md. 368, 381 (2009)); *Sivells*, 196 Md. App. at 280 ("Because the comments were not tied to the evidence presented, the comments violated the rule against vouching and were improper. *See also United States v. Molina-Guevara*, 96 F.3d 698, 704-05 (1996) (prosecutor's statement assuring the jury that its witness "'did not lie to you'" suggested that the prosecutor "knew more than the jury had heard and that it should be willing to trust the government's judgment," and therefore, "violated our rule against vouching").").

The next step is to determine whether the prosecutor's comments, although improper in isolation, were a reasonable response under the "opened door" and/or "invited response" doctrines. We have explained the "opened door" doctrine as follows:

> "The 'opened door' doctrine is based on principles of fairness and permits a party to introduce evidence that otherwise might not be admissible in order to respond to certain evidence put forth by opposing counsel." *Mitchell*, 408 Md. at 388. *Accord Donaldson*[*v. State*, 416 Md. 467, 492-93 (2010)]. Both this Court and the Court of Appeals have applied this doctrine to closing argument. *See, e.g.*, *Mitchell*, 408 Md. at 388; *Booze v. State*, 111 Md. App. 208, 224 (1996), *rev'd on other grounds*, 347 Md. 51 (1997).
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> The opened door doctrine permits the admission of otherwise irrelevant evidence that has become relevant in response to the presentation of the other side's case. As the Court of Appeals has explained:
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> > "Opening the door" is a rule of expanded relevancy; it allows the admission of evidence that is competent, but otherwise irrelevant, in order to respond to evidence introduced by the opposing party during its direct examination. Whether the opponent's evidence was admissible evidence that injected an issue into the case or inadmissible evidence that the court admitted over objection, once the "door has been opened" a party must, in fairness, be allowed to respond to that evidence.
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> *Conyers v. State*, 345 Md. 525, 545 (1997) (citations omitted). *Accord Mitchell*, 408 Md. at 388. *See also* 5 LYNN MCLAIN, MARYLAND EVIDENCE § 103:13(c)(i) (describing the opened door doctrine as permitting evidence "that previously would have been irrelevant, but has become relevant").

Sivells, 196 Md. App. at 282.

The invited response doctrine, involves "'a prosecutorial argument . . . made in reasonable response to improper attacks by defense counsel.'" *Id.* at 283 (quoting *Lee v. State*, 405 Md. 148, 163 (2008)). We have explained:

> There are two important points to remember about the invited response doctrine. First, analysis pursuant to this doctrine is appropriate "only when defense counsel first makes an improper argument." *Mitchell*,

> 408 Md. at 382. *Accord Lee*, 405 Md. at 169; *James v. State*, 191 Md. App. 233, 259, cert. denied, 415 Md. 338 (2010). *See also Marshall v. State*, 415 Md. 248, 267 (2010) (defense counsel's argument was "not improper, or, at the very least, not sufficiently improper to justify the prosecutor's comments" under the invited response doctrine).
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> Second, the invited response doctrine does not condone an improper argument by the prosecutor when it is in response to an improper argument by the defense. Rather, it merely provides that, in the context of the arguments as a whole, reversal is not required.
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> The United States Supreme Court has made clear that the invited response doctrine "should not be read as suggesting judicial approval or—encouragement—of response-in-kind that inevitably exacerbates the tensions inherent in the adversary process." *Young*, 470 U.S. at 12. *Accord Lee*, 405 Md. at 169. The Court noted that "two improper arguments—two apparent wrongs—do not make for a right result." *Young*, 470 U.S at 11. The "invited response" doctrine does not give the prosecutor "license to make otherwise improper arguments," but rather, it looks to "whether the prosecutor's 'invited response,' taken in context, unfairly prejudiced the defendant." *Id.* at 12. "[I]f the prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction." *Id.* at 12-13. *Accord Mitchell*, 408 Md. at 382. The "'unfair prejudice flowing from the two arguments may balance each other out, thus obviating the need for a new trial.'" *Lee*, 405 Md. at 163-64 (quoting *Spain*, 386 Md. at 157 n.7).

Id. at 283-84 (parallel citations omitted).

In *Wise v. State*, 132 Md. App. 127, 145, *cert. denied*, 360 Md. 276 (2000), this Court explained that "[o]ne justification for a prosecutor going beyond the evidence in closing argument is for what has been characterized as the 'invited response.'" We noted that this "Court has approved of prosecutors calling attention to the failure of defendants to come forward with evidence that they promised to produce in opening statements." *Id.* at 146. Thus, although, generally, a prosecutor "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," we explained that "a defense attorney's promising in opening statement that the defendant will produce evidence and thereafter failing to do so does open the door to the fair comment upon that failure, even to the extent of incidentally drawing attention to the defendant's exercising a constitutional right not to testify." *Id.* at 148.

In *Eastman v. State*, 47 Md. App. 162, 165 (1980), defense counsel made the following remarks during opening statements:

> "We expect the evidence to show that [the defendant] was not arrested for these robberies until August of this year. In other words, it was a time lag of 17 months between the time of the robbery and the time that [the defendant] was arrested. For that reason, ladies and gentlemen, we cannot present any evidence as to the content of these crimes. Frankly, my client, when he was arrested in August of this year, could not recall what he was doing on two obscure dates in March of 1978. By the same token, ladies and gentlemen, we will not present an alibi defense, because my client, again simply lacks the knowledge and the ability to recall as to what he was doing 17 months from the day he was arrested."

During closing argument, the prosecutor made the following remarks:

> "I submit that when you take the testimony of those six honest people, and you balance it against what this individual has told you, and there has been no testimony, ladies and gentlemen, other than his, I submit to you that counsel in his opening statement to you does not present evidence in the case, and when [defense counsel] told you that [the defendant] did not know where he was, that is what [defense counsel] told you. No evidence has come from the stand on that."

Id. at 166.

Although we agreed with Eastman that, generally, "there can be no comment on a defendant's failure to testify," we noted that, "when placed in context, the prosecutor did nothing more than point out that [Eastman] had failed to produce evidence of his lack of knowledge, as had been pronounced by counsel's opening statement." *Id.* at 164-65. We

explained that "[o]pening statements are to preview what is to come in the way of evidence, not to argue what may be inferred from facts not in evidence." *Id.* at 165. We held that the prosecutor's comments were not unreasonable under the circumstances, explaining as follows:

> If it is not unreasonable to permit the defense to comment upon the State's shortcomings in producing prosecutorial evidence, we can hardly preclude a reciprocal right for the State "to call attention" to the failure of a defendant to come forward with that which he promised to produce.
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> Although [Eastman's] failure to take the stand may have been inferable, in light of the context, such inference would have been strained indeed. A more likely inference was available in [Eastman's] opening statement that he would testify to why he had no alibi. There is not the slightest indication that the State was merely grasping for an opportunity to emphasize the failure to testify. To the contrary, the State carefully avoided any emphasis even by implication.

Id. at 167.

Here, defense counsel attempted to use appellant's not guilty plea as evidence of his innocence, which it was not. *See State v. Larson*, 358 N.W.2d 668, 671-72 (Minn. 1984) (defense counsel's argument that not guilty plea was a statement by defendant that he was not guilty "opened the door" to a jury instruction because a "plea of not guilty is not testimony or the equivalent of testimony" and counsel was "trying to use defendant's not guilty plea as an equivalent of or substitute for defendant's testifying"), *overruled on other grounds by State v. Colvin*, 645 N.W.2d 449 (Minn. 2002); *Wood v. United States*, 128 F.2d 265, 273 (D.C. Cir. 1942) ("[A] plea is not evidence. Nor is it testimonial. . . . When it is 'not guilty,' it has no effect as testimony or as evidence [on] behalf of the accused. If he wishes his denial to be effective as evidence, he must make it as such from the witness

stand."). Moreover, counsel did not just state that his client had pleaded not guilty, but rather, that appellant had, "from day one," been professing his innocence and consistently denying that he shot at Mr. Kirby. The defense then failed to produce any evidence supporting that statement. Defense counsel was essentially testifying on behalf of his client, saying what appellant could not say without subjecting himself to cross-examination.

In response, it was reasonable for the prosecutor to advise the jury that defense counsel's statements in opening statement were not evidence. Here, however, the prosecutor went further and proclaimed that defense counsel's representations were "not true." The prosecutor's comments in this regard were not a reasonable response to counsel's opening statement.

That, however, is not the end of the inquiry. As we explained in *Sivells*, 196 Md. App. at 288-89:

> "'reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.'" *Spain*, 386 Md. at 158 (quoting *Degren*, 352 Md. at 430-31). *Accord Donaldson*, *supra*, 416 Md. at 496-97. "In determining whether an error prejudiced the defendant, that is, whether the error was harmless, 'the determinative factor . . . has been whether or not the [error], in relation to the totality of the evidence, played a significant role in influencing the rendition of the verdict, to the prejudice of the [defendant].'" *Degren*, 352 Md. at 432 (quoting *Dorsey v. State*, 276 Md. 638, 653 (1976)). To find harmless error, we must be "'able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.'" *Lee*, 405 Md. at 164 (quoting *Dorsey*, 276 Md. at 659).
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> To assess whether a prosecutor's improper statements constitute reversible error, we consider various factors, including "the severity of the remarks, cumulatively, the weight of the evidence against the accused and

> the measures taken to cure any potential prejudice." *Lee*, 405 Md. at 174. *Accord Henry v. State*, 324 Md. 204, 232 (1991) (court must assess: "'1) the closeness of the case, 2) the centrality of the issue affected by the error, and 3) the steps taken to mitigate the effects of the error'") (quoting *Collins v. State*, 318 Md. 269, 280 (1990)), *cert. denied*, 503 U.S. 972 (1992).
>
> An important factor in assessing the prejudicial effect of improper statements is the strength of the State's case against the defendant. If the State has a strong case, the likelihood that an improper comment will influence the jury's verdict is reduced. *See Young*, 470 U.S. at 19-20 (although prosecutor's comments during rebuttal closing argument expressing his personal opinion about the credibility of a witness was improper, it did not prejudice the defendant because overwhelming evidence of guilt "eliminates any lingering doubt that the prosecutor's remarks unfairly prejudiced the jury's deliberations"); *Wilhelm*, 272 Md. at 427 ("Another 'important and significant factor' where prejudicial remarks might have been made is whether or not the judgment of conviction was 'substantially swayed by the error,' or where the evidence of the defendant's guilt was 'overwhelming.'").

(parallel citations omitted).

Here, appellant argues that reversal is required because it cannot be said that the prosecutor's comments in no way influenced the verdict. We are not persuaded.

Mr. Kirby testified that he looked at the shooter "dead in his face." Several hours later, he identified that man as appellant, without hesitation. The shooter stated that the Tahoe, which police determined was owned by appellant, was "my truck," and Mr. Kirby testified that the shooter entered the Tahoe immediately after the shooting and turned on the headlights. In the pocket of a pair of pants found in appellant's home, the police found 28 rounds of 9mm ammunition, and they recovered several 9mm shell casings near the Tahoe.

To be sure, there were some minor discrepancies between the description of appellant provided by Mr. Kirby in his statement and appellant's actual appearance.[4] Given Mr. Kirby's positive identification, and the other evidence against appellant, we are persuaded that the prosecutor's brief remarks did not influence the verdict.

The error in the prosecutor's brief comments was harmless error that does not require reversal of appellant's conviction.

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

[4] For example, there was a difference of twenty pounds in weight, and one or two inches of height, a relatively insignificant difference given appellant's large physique.