UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0323

September Term, 2014

EDDIE LEE SAVAGE, JR.

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: September 30, 2016

After a three day jury trial in the Circuit Court for Wicomico County, Eddie Lee Savage, Jr., was convicted of the second degree murder of Kenneth Sparks, the attempted second degree murder of Joshua Sparks, as well as related charges. Appellant appeals his convictions and presents the following issues, which we have reworded:

1. Did the court err in subjecting the methodology of appellant's expert neuropsychologist to a *Frye-Reed* hearing?

2. Did the court err in concluding that the methodology of appellant's expert neuropsychologist did not satisfy *Frye-Reed*?

3. Did the court abuse its discretion in limiting the trial testimony of appellant's expert witness?

4. Did the court properly regulate the State's closing argument?

5. Was the evidence legally sufficient to support appellant's convictions for reckless endangerment?

We agree with appellant only as to the sufficiency of the evidence to support his conviction for the reckless endangerment of Belinda Sparks, and will reverse that conviction. Appellant's other contentions provide no basis for appellate relief and we will affirm the remainder of his convictions.

Statement of Facts

Because appellant presents a challenge to the sufficiency of the evidence, we provide the following factual summary in the light most favorable to the State, as the prevailing party. *See, e.g.*, *Allen v. State*, 158 Md. App. 194, 248 (2004).

On July 7, 2013, at approximately 6:30 p.m., Tynise Sparks arrived at the home of appellant, along with Joshua Sparks, her husband, and Kenneth and Belinda Sparks,

Joshua Sparks's parents. (Because many of the participants share the same surnames, we will refer to them by their first names.) Tynise intended to pick up her three children, two of whom were fathered by appellant. Tynise and appellant did not have a formal custody arrangement, but, prior to the events of July 7, 2013, Tynise allowed appellant access to the children at his convenience. On July 7, Tynise had arranged to pick up the children with Heather Morton, appellant's fiancé.

Upon arriving at the residence, Tynise parked at the end of the driveway, and remained in the vehicle, along with Joshua, Kenneth, and Belinda. Appellant was standing in the driveway repairing Heather's vehicle with Joel Hills. The Sparkses sat in the car for several minutes before the children exited the house. Appellant then approached the passenger side of the Sparks's vehicle, where Joshua was sitting, and initiated the altercation that culminated in Kenneth's death.

Appellant began by shouting at Joshua, informing him that he was not welcome on his property, and eventually reached into the vehicle and struck him. Joshua proceeded to exit the vehicle, followed closely by Belinda, who was seated in the rear passenger seat. Appellant and Joshua proceeded to argue, and Belinda threw beer on appellant. By this time, Heather had come to the front yard, and, with Joel Hills, was attempting to restrain appellant. Simultaneously, Tynise and Kenneth exited the vehicle, and attempted to get Joshua and Belinda to return to the car. As Heather and Hills pulled him back towards the garage, appellant brandished a knife.

As appellant briefly disappeared into the house, Joshua, Belinda and Kenneth were standing in the road in front of appellant's house. Tynise was in the driver's seat, ready to depart, and the children were in the backseat. Appellant emerged from his house, carrying a gun. Appellant walked down the steps of his home and began to run across the yard while firing shots at Joshua. As appellant was firing, Joshua ran to take cover behind his vehicle.

In total, appellant fired three shots, one of which struck Kenneth in the head, inflicting mortal injuries. Kenneth fell to the ground at the end of the driveway behind the Sparks vehicle. Joshua got back into the passenger seat of the vehicle and Tynise drove away from the scene with Joshua and the children, exiting through a neighbor's front yard.

Appellant then fled the scene, and surrendered himself to police on the following day. Before fleeing, he gave the handgun to Hills. There was evidence from which the jury could have concluded that Hills wiped the weapon to remove fingerprints before it was recovered by the police.

The jury returned verdicts of guilty for the second degree murder of Kenneth Sparks, the attempted second degree murder of Joshua Sparks, the second degree assault of Joshua Sparks, six counts of reckless endangerment, use of a firearm in a crime of violence, and illegal possession of a firearm. The convictions and ultimate sentences are set out below.

Charge	Sentence	
Second degree murder of Kenneth Sparks	30 years	Consecutive
Attempted second degree murder of Joshua Sparks	30 years	Consecutive
Reckless endangerment Belinda Sparks	1 year[1]	Consecutive
Reckless endangerment Tynise Sparks	1 year	Consecutive
Reckless endangerment I.S.	1 year	Consecutive
Reckless endangerment E'D.S.	1 year	Consecutive
Reckless endangerment E.S.	1 year	Consecutive
Use of firearm in a crime of violence	5 years	Consecutive
Illegal possession of a firearm	5 years	Consecutive
Total:	75 years	

Appellant's convictions for the reckless endangerment and second degree assault of Joshua Sparks were merged with his conviction for attempted second degree murder for sentencing purposes.

[1] While the appeal was pending, a three judge sentence review panel changed the five one-year consecutive reckless endangerment sentences to five five-year sentences to be served concurrently. The total time to be served remained the same.

Analysis

I. and II. The *Frye-Reed* Hearing

At trial, appellant presented defenses of perfect and imperfect self-defense. In discovery, he identified William Garmoe, Ph. D., a neuropsychologist, who had performed an assessment of appellant and had examined appellant's medical records pertaining to an incident in 2003 when he was shot several times in the head. Dr. Garmoe prepared a written report describing his findings in detail and concluded that appellant had suffered a traumatic brain injury ("TBI") as a result of the 2003 shooting and that:

> (1) Given the residual cognitive and psychological effects of his TBI, under such conditions of chaos and stress Mr. Savage would be more likely to perceive himself to be facing an imminent threat and have greater difficulty controlling his reactions; and
>
> (2) Mr. Savage views the world through an untrusting and suspicious perspective, and often is hyper-vigilant to possible threats.

In response, the State filed a motion asking the trial court to conduct a *Frye/Reed* hearing to determine whether Dr. Garmoe's methodology was generally accepted in the relevant scientific community. *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Reed v. State*, 283 Md. 374 (1978). The court granted the motion and conducted a hearing on January 30, 2014. Dr. Garmoe was the only witness at the hearing. He testified that he was a board-certified neuropsychologist who had been co-director of the brain injury program at the National Rehabilitation Hospital in Washington, D.C., but, as of the date of the hearing, oversaw all neuropsychology services offered by that institution. In addition, Dr. Garmoe was an assistant professor of clinical neurology at Georgetown

University Medical School. He was accepted by the court as an expert in neuropsychology.

Dr. Garmoe explained that he began his evaluation of appellant by reviewing his medical records, which contained evidence that appellant had sustained a brain trauma after being shot in the face in 2003. Dr. Garmoe then went on to describe the series of tests that he gave to appellant. Dr. Garmoe testified that each of the tests he conducted on appellant "have scientific acceptance and approval within the community of neuropsychologists" and that "[n]one of [the] measures that [were] used [were] novel new tests or . . . used outside of the way in which they would be typically used in the neuropsychological assessment." Dr. Garmoe also testified that he conducted a clinical interview of appellant. Dr. Garmoe testified that, although there was no specific diagnostic code in the Diagnostic and Statistical Manual of Mental Disorders (4th Ed.) (DSM-IV) for TBI, physicians and psychologists categorized traumatic brain injuries as "cognitive disorders NOS [(not otherwise specified)]" due to traumatic brain injury. He explained that throughout the testing and interview, appellant exhibited symptoms consistent with those of a person that had suffered a traumatic brain injury. However, Dr. Garmoe presented no scholarly sources supporting, for example, his conclusion that TBI could result in Mr. Savage's perceiving himself in imminent danger in a situation of chaos and stress. He did testify that his methods and techniques were widely and routinely used by neuropsychologists. On cross-examination, the State challenged some of the conclusions Dr. Garmoe drew from appellant's medical records. The State did not

present any affirmative evidence that Dr. Garmoe's methodology was scientifically unsound.

After the hearing, the court issued a written opinion. The court did not preclude Dr. Garmoe testifying, but stated:

> Dr. Garmoe has reviewed Defendant's medical records; he has interviewed Defendant; he has submitted Defendant to a battery of psychological tests from which he has derived extensive data. All of this, plus his underlying assumption that Defendant suffered a TBI in 2003, leads him to conclude how Defendant will react in a time of "chaos and stress."
>
> Neither Dr. Garmoe nor Defendant, through counsel, offers any peer review studies or other literature from the neuropsychological community to substantiate the validity of this bipodal approach. Neither Dr. Garmoe nor defense counsel has identified any circuit court in Maryland or, for that matter, any state court in the country which has accepted such a methodology to show how someone reacts in a situation of "chaos and stress." The Frye-Reed test has not been met.
>
> The fact that the above-mentioned opinions[2] of Dr. Garmoe will be excluded at trial does not mean that he cannot testify. Counsel keep in mind that Dr. Garmoe is not competent to reconstruct Defendant's emotions at a specific time and therefore he may not express an opinion as to what belief or intent Defendant harbored at the time of his alleged crime. *Hartless v. State*, 327 Md. 558 (1992). The Court is aware that a psychological profile of Defendant *under certain circumstances* may be admissible into evidence, but declines to rule on that issue until it is presented. *Simmons v. State*, 313 Md. 33 (1998).

(Emphasis in original.)

Before turning to appellant's specific contentions, we will provide some background.

Maryland Rule 5-702 states (emphasis added):

[2] The context of the opinion makes it clear that the court was also referring to Dr. Garmoe's opinion that appellant views the world through an untrusting and suspicious perspective, and often is hyper-vigilant to possible threats.

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) *whether a sufficient factual basis exists to support the expert testimony*.

As the State points out in its brief, the third factor includes "two sub-issues: factual basis and employed methodology." In *Montgomery Mut. Ins. Co. v. Chesson*, 399 Md. 314, 327 (2007) ("*Chesson I*"), the Court of Appeals explained:

> Maryland adheres to the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir.1923), for determining the admissibility of scientific evidence and expert scientific testimony. *Reed* [*v. State*, 283 Md. 374, 389 (1978)] (adopting the *Frye* standard). Under the *Frye-Reed* test, a party must establish first that any novel scientific method is reliable and accepted generally in the scientific community before the court will admit expert testimony based upon the application of the questioned scientific technique. A trial court may take judicial notice of the reliability of scientific techniques and methodologies that are widely accepted within the scientific community . . . . However, when it is unclear whether the scientific community accepts the validity of a novel scientific theory or methodology, we have noted that before testimony based on the questioned technique may be admitted into evidence, the reliability must be demonstrated. While the most common practice will include witness testimony, a court may take judicial notice of journal articles from reliable sources and other publications which may shed light on the degree of acceptance vel non by recognized experts of a particular process or view. The opinion of an expert witness should be admitted only if the court finds that the basis of the opinion is generally accepted as reliable within the expert's particular scientific field.

(Some citations and quotation marks omitted.)

As the Court noted in *Chesson I*, the *Frye-Reed* rule "was deliberately intended to interpose a substantial obstacle to the unrestrained admission of evidence based upon new scientific principles." *Chesson I*, 399 Md. at 328. Maryland's adherence to the *Frye-Reed*

rule has been repeatedly emphasized by the Court of Appeals. *See*, *e,g*, *Chesson v. Montgomery Mut. Ins. Co.*, 434 Md. 346, 350 (2013) (*"Chesson II*"); *Blackwell v. Wyeth*, 408 Md. 357, 587 (2009). This is not to say that Maryland's approach to the introduction of expert scientific testimony has remained static; indeed, in *Blackwell*, the Court adopted, for use in appropriate cases, the "analytical gap" concept articulated by the Supreme Court in *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997). When a court engages in an analytical gap analysis, it explores the possibility of a disconnect between the techniques used by a proposed expert to gather information and the substance of the expert's conclusions. *Blackwell*, 408 Md. at 608 ("Generally accepted methodology, therefore, must be coupled with generally accepted analysis in order to avoid the pitfalls of an 'analytical gap.'").

As an appellate court,

> we . . . review the record and independently apply the *Frye/Reed* test *de novo*. A review of testimony admitted by the court is not limited to review on the record, but rather can and should take notice of law journal articles and articles from reliable sources, as well as judicial opinions which have considered the question, and the available legal and scientific commentaries.

Addison v. State, 188 Md. App. 165, 180 (2009) (quotation marks, brackets and citations omitted). We turn now to appellant's contentions.

Appellant asserts two reasons why the trial court erred in resolving the *Frye-Reed* issue.

(1)

Appellant contends that the court erred in subjecting Dr. Garmoe's methodology to a *Frye-Reed* hearing in the first place because the *Frye-Reed* rule is limited to cases involving expert testimony based upon novel scientific techniques, and is not applicable to cases involving medical diagnoses and opinion. In support of this contention, he points to *State v. Allewalt*, 308 Md. 89, 101 (1986)*, CSX Transp., Inc. v. Miller*, 159 Md. App. 123, 186 (2004), and *Myers v. Celotex Corp*., 88 Md. App. 442, 458-59 (1991), all of which stated, in one context or another, that the *Frye-Reed* rule did not apply to the sort of medical opinion evidence at issue in the particular case.

We do not find this contention to be persuasive. Although there is certainly language in earlier decisions that a *Frye-Reed* analysis is inappropriate in cases involving medical opinion evidence, the Court of Appeals reached different results in *Chesson II* and *Blackwell*. In each of the cases, the Court held that medical opinion evidence was inadmissible after a *Frye-Reed* hearing. In *Chesson II*, the Court concluded that the expert's methodology and theory of causation were "not shown to be generally accepted in the relevant scientific community[.]" 434 Md. at 380. In *Blackwell*, the Court held that there was an analytical gap between the methodology employed by the expert to formulate his or her opinion and the actual opinion itself. 408 Md. at 617–18. The notion that medical opinion testimony is categorically immune from a *Frye-Reed* challenge is no longer the law in Maryland, if, indeed, it ever was.

Certainly, we do not believe that the trial court abused its discretion in holding a separate *Frye-Reed* hearing prior to trial. As the *Chesson II* Court explained:

> Where evidence is subject to challenge under *Frye-Reed*, it is the better practice for a court to address the issue pre-trial and out of the presence of the jury. *Frye-Reed* hearings are best held before trial in order to preclude jury members from considering irrelevant evidence and to ensure that the verdict is derived from evidence which is before the jury properly.

399 Md. 328.

The trial court did not err in holding a hearing on the State's motion.

(2)

Appellant argues that the court erred in concluding that Dr. Garmoe's methodology did not satisfy *Frye-Reed*. Appellant identifies several sources of error.

He points out that Dr. Garmoe was the only witness at the hearing, and that he testified, without refutation that:

> (1) his methodology was generally accepted in the neuropsychological community;
>
> (2) none of the tests he used were novel or used " outside of the way in which they would be typically used in the neuropsychological assessment";
>
> (3) he diagnosed appellant with Cognitive Disorder NOS, a diagnosis from the DSM-IV, and his diagnosis was generally accepted because it is recognized under the DSM-IV; and
>
> (4) Dr. Garmoe, as a neuropsychologist, was qualified to testify about the existence and cause of Mr. Savage's brain injury.

Appellant asserts that "[t]he admissibility of a neuropsychologist's testimony as to the existence of a brain injury is generally accepted in most jurisdictions." He concludes:

> In sum, the unrefuted evidence presented at the Frye-Reed hearing established Dr. Garmoe's methodologies were generally accepted in the neuropsychological community. Moreover, Dr. Garmoe diagnosed Mr.

> Savage under the DSM-IV with Cognitive Disorder NOS, which was based on Mr. Savage's traumatic brain injury. The generally accepted methodology coupled with a DSM-IV based diagnosis satisfied the Frye-Reed criteria.

We believe these contentions miss the point. The basis of the trial court's concerns was not whether Dr. Garmoe's methodology was sound, but whether his conclusions—that a person who suffered a traumatic brain injury would (1) be more likely to perceive himself to be facing an imminent threat and have greater difficulty controlling his reactions in conditions of chaos and stress, and (2) view the world through a suspicious and hyper-vigilant perspective—were generally accepted in the scientific community.

As to that, and in response to a question from the court, Dr. Garmoe testified that the issue was "debated endlessly" at conferences of psychologists. Dr. Garmoe did not testify that the connection between traumatic brain injury on the one hand, and hyper-vigilance and similar behavioral traits on the other, was generally accepted by the practitioners of his field. To be sure, he did testify that that he personally believed that the cause and effect relationship was valid but the "'ipse dixit of the expert'" is not a basis for admitting opinion evidence. *Blackwell*, 408 Md. at 606 (quoting *Joiner*, 522 U.S. at 146).

As we observed in *Addison*, our review of a trial court's ruling on a *Frye-Reed* motion is *de novo* and our analysis "should take notice of law journal articles and articles from reliable sources, as well as judicial opinions which have considered the question, and the available legal and scientific commentaries." 188 Md. App. at 180. Appellant has not cited a single article from a law review or a professional journal article supporting his

position nor has he called our attention to a single appellate opinion indicating an opinion similar to Dr. Garmoe's was admissible.

We conclude that the trial court did not err in limiting the scope of Dr. Garmoe's opinion.

III. Dr. Garmoe's Trial Testimony

At trial, Dr. Garmoe testified extensively about the battery of tests to which he subjected appellant as well as appellant's performance on them. One of the tests was the Personality Assessment Inventory. Dr. Garmoe explained the Personality Assessment Inventory as follows:

> The personality assessment inventory . . . is an objective personality measure. . . . [A]nd the test is there to get an assessment of the personality style, to look at their ways of coping, and it also has validity scales in there to look at whether somebody is trying to make themselves look psychiatrically ill when they may not in fact be."

The following colloquy then occurred (emphasis added):

> [Defense Counsel]: When you conducted that test with Mr. Savage, what were the results?
>
> . . .
>
> [DR. GARMOE]: Sure. What the personality assessment inventory showed is that – well, one thing it showed is that [appellant] is an individual who has a higher than – he has a higher level of concern for physical functioning, higher level of focus on physical symptoms than most people would. It's not unusual to see that in an individual who has had some type of a major medical condition or a major neurological insult. There's a greater focus on the way his body is working, the physical symptoms that he's reporting than most people would have.
>
> . . .
>
> *What it also showed when you look at the other scales is that he is somebody who has experienced a lot of anxiety and tension on a regular basis, and that he tends to view the world in untrusting –*

> [PROSECUTOR]: *Objection.*
>
> THE COURT: Well, the basis for the objection is what?
>
> [PROSECUTOR]: Is that the opinion that was excluded by Your Honor's order of February 3, 2013?
>
> THE COURT: I think it was.
>
> [DEFENSE COUNSEL]: No, it wasn't, Your Honor.
>
> [PROSECUTOR]: I have a copy of the order.
>
> THE COURT: Well, it was, so sustained. Ask another question.

Appellant contends that the court erred in sustaining the State's objection. He states:

> In a confusing decision, while Dr. Garmoe was permitted to testify about the Personality Assessment Inventory ("PA[I]"), the court erroneously prevented him from testifying about his analysis of the actual test results.

We see things differently. We do not agree with appellant's characterization of Dr. Garmoe's testimony. After the court sustained the State's objection, Dr. Garmoe continued to testify about appellant's performance on the PAI tests and the conclusions that he drew from them. For example, Dr. Garmoe testified that appellant was "mildly impaired" in terms of "the speed and efficiency with which somebody can process information," and that he "is troubled by memories of what . . . he subjectively experienced as a horrible experience in that he sometimes has difficulty in managing his temper." Moreover, Dr. Garmoe testified that appellant's score on the paranoia scale was "clinically elevated," his scores for anxiety were "a significant factor," and that he "is an individual who has had a very short temper throughout his life and that is a form of impulse regulation [and that] he has difficulties with impulsivity," which "got worse [after] his injury."

In summary, it is clear that the trial court did not restrict Dr. Garmoe from testifying about the results of the PAI tests. Instead, the court sustained the States' objection when Dr. Garmoe attempted to testify, through clear implication, that he concluded *from the tests results alone* that appellant "tends to view the world in untrusting [terms]," when in the *Frye-Reed* hearing, he had testified that this conclusion was based on the *combination* of appellant's medical history of a traumatic brain injury *and* the test results. The trial court did not abuse its discretion when it declined to permit Dr. Garmoe to recast his opinion as based solely on test results. To permit Dr. Garmoe to do so would have rendered the *Frye-Reed* hearing a meaningless exercise.

IV. The State's Closing Argument

Joel Hills testified as an adverse witness on behalf of the State. During direct examination, Hills testified that he gave a statement to a police officer shortly after the shooting. He testified that, during the altercation on the day of the murder, he saw Joshua Sparks go to the back of his SUV "and I realized that he . . . had a gun." He further testified that he saw Kenneth Sparks advancing on appellant "as if they wanted to fight some more" and that appellant then shot him. This testimony was more or less consistent with appellant's testimony at trial but was not consistent with Hills's statement to the police officer on the day of the shooting.

The prosecutor addressed the discrepancy between Hills's trial testimony and his earlier statement to the police officer in closing argument:

> [PROSECUTOR]: Joel Hills, the man that wants you to believe that Josh and Kenny Sparks were aggressive or advanced on the Defendant,

> remember he's the same man, ladies and gentlemen, that not once tried to take the knife or the gun or calm the Defendant. He did take him into the house, but he did nothing beyond that. Joel Hills is the same man that not once called 911, not once had anyone else call 911. He not once aided Kenneth Sparks or the Spark's family, and he didn't aid Heather getting those children into the truck.
>
> Joel Hills is the same man who aided the Defendant's escape, led the Defendant out the back, over the fence, and we know for the first time yesterday how the gun got wiped clean. The Defendant said he gave the gun to Joel Hills. Joel Hills is the one that dropped it, after he wiped it.
>
> *Take your common sense back there, ladies and gentlemen. I'm going to give you a hypothetical. Diane, your Bailiff, is at her house. Debbie, the Court Reporter, is at Diane's house. They are drinking hot tea and watching soap operas. I break and enter their house. Diane shoots and kills me because I break and enter. The first time that the police hear about my breaking and entering, the first time that the police hear about Diane's defense, the defense of herself and her property and her friend Debbie, will not be at her murder trial. Why? Because that defies all logic. Because at least Debbie would have told them initially.*
>
> * * *
>
> Because Debbie would have told the police Diane did it in self-defense. Diane did what she had to do, and Diane would have stayed. We don't have that here because that's not how it went down.
>
> The Defendant and Joel Hills have concocted details to aid in this theory, which is only a theory and not the reality of self-defense. *You didn't hear them until yesterday*.

(emphasis added).

Defense counsel promptly objected on the basis that the prosecutor was "questioning the [appellant's] Fifth Amendment right to remain silent." The objection was overruled, and the prosecutor continued with her closing argument. Several lines later the prosecutor made a second statement with which appellant takes issue: "[Appellant] and Joel Hills have concocted details to aid in this theory, which is only a theory and not the reality of self-defense. You didn't hear them until yesterday."

Appellant asserts that the trial court erred in allowing the State to use his pre-trial silence against him. While appellant recognizes that the prosecutor's statements were intended to impeach the testimony of Joel Hills, he also contends that the prosecutor was improperly permitted to comment on the fact that he had not asserted that he was acting in self-defense prior to taking the stand at his trial. The State counters that there was nothing improper about the prosecutor's closing argument.

We review a trial court's determinations with regard to the propriety of the statements made in the prosecution's closing argument for abuse of discretion. *Lawson v. State*, 389 Md. 570, 592 (2005) (quoting *Spain v. State*, 386 Md. 145, 158-59 (2005)). Reversal is only appropriate where the statements were likely to have misled the jury or have been prejudicial to the accused. *Id*. In *Lee v. State*, the Court of Appeals explained that in determining whether reversible or harmless error occurred appellate courts review a number of factors, "including 'the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused.'" *Lee v. State*, 405 Md. 148, 165 (2008) (quoting *Lawson v. State*, 389 Md. 570, 592 (2005)). Because we conclude that no error occurred, our analysis need not address the factors set forth in *Lee*.

The appellate courts of this State have frequently recognized the latitude given to counsel in making closing arguments. *See Spain v. State*, 386 Md. 145, 152 (2005); *Lawson v. State*, 389 Md. 570, 591 (2005); *Lee v. State*, 405 Md. 148, 162 (2008). The Court of Appeals has said that counsels' arguments are "required to be confined to the

issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel." *Spain*, 386 Md. at 153 (citation and internal quotation marks omitted). The Court has also said, however, that "[counsel] may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses." *Id*.

The transcript plainly reveals that the prosecutor sought to impeach Joel Hills testimony. The hypothetical and the statement with which appellant takes issue are made within the prosecutor's discussion of Hills's testimony, and impugning of Hills's conduct. Moreover, a review of the hypothetical, and the conclusion that the prosecutor draws therefrom, establishes that the prosecutor's comments were directed at Hills. The prosecutor sought to establish, through her hypothetical, in which Diane was the defendant and Debbie the witness, that, ordinarily, a witness to an act of self-defense would explain such action on the part of the criminal defendant well before trial. In concluding her observation, the prosecutor stated, not once but twice, that the reason Diane's defense would not have been raised for the first time at trial was because Debbie would have explained Diane's conduct from the beginning. After considering the statement in context, it is evident that the prosecutor's hypothetical and associated comments were directed solely at Hills.

We turn now to the prosecutor's statement that: "[appellant] and Joel Hills have concocted details to aid in this theory, which is only a theory and not the reality of self-defense. You didn't hear them until yesterday." In the context of the prosecutor's

extended dialogue concerning Hills's failure to explain that appellant was acting in self-defense prior to trial, we fail to see how "[y]ou didn't hear them until yesterday" implicated appellant's right to silence.

While we agree with appellant that a criminal defendant's post-arrest, post-*Miranda* silence is not admissible against him, *Grier v. State*, 351 Md. 241, 258 (1998), those facts are not present here. On the basis of the record before us, the trial court did not abuse its discretion in overruling defense counsel's objection.

V. Sufficiency of the Evidence

Appellant's final contention on appeal is the sufficiency of the evidence supporting his convictions for reckless endangerment of Belinda Sparks, Tynise Sparks, and the three children. Appellant argues that the State failed to present any evidence as to Belinda's location at the time of the shooting. With regard to Tynise and the children, appellant asserts that there is conflicting testimony about the location of the children at the time he started shooting, and that even if this Court accepts the testimony that the children were in the vehicle with Tynise, there is no evidence to establish that the vehicle was in the "line of fire." We are not persuaded.

In reviewing the sufficiency of the evidence to support a criminal conviction, we must determine, after viewing the evidence in the light most favorable to the State, whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) (emphasis in original).

Reckless endangerment is proscribed by Md. Code Ann. § 3-402 of the Criminal Law (Crim. Law) Article. Crim. Law § 3-204(a)(1) provides that "[a] person may not recklessly engage in conduct that creates a substantial risk of death or serious physical injury to another[.]" No harm need actually result from a person's conduct for reckless endangerment to have occurred. *State v. Albrecht*, 336 Md. 475, 500 (1994). "[T]he standard against which a defendant's conduct must be assessed is typically the conduct of an ordinarily prudent citizen similarly situated." *Id*. at 501.

In *Albrecht v. State*, 105 Md. App. 45, 72-95 (1995), this Court considered the sufficiency of the evidence supporting several convictions for reckless endangerment. In *Albrecht*, a police officer was convicted of involuntary manslaughter and reckless endangerment, after he accidentally discharged his shotgun, while in pursuit of several fleeing suspects. The confrontation between the officer, the victim, and at least one of the suspects, occurred in the parking lot of a townhouse complex. *Id*. at 53. Directly behind the parking lot was a community playground. *Id*. Although no one aside from the victim was injured, the officer was charged with the reckless endangerment of a number of bystanders in the vicinity. *Id*. at 76-87. In determining whether the evidence was sufficient to support the convictions for reckless endangerment, this Court considered the relationship of the bystanders to the officer's line of fire. *Id*. at 77-78, 79.

We begin with the reckless endangerment of Tynise and the children. Joshua testified that when appellant walked out of the house with the gun, he and Kenneth were standing in the street in front of the residence. Joshua then testified that when appellant reached

the bottom of the steps leading up to the front door, appellant raised the gun, and began to run toward him, discharging the weapon. Once appellant began shooting, Joshua testified that he ran to take cover behind his vehicle. Tynise testified that when appellant emerged from the house with the gun, and throughout the time that he fired the shots, she was in the driver's seat of the vehicle and the children were in the backseat. Further, Joshua testified that after appellant shot Kenneth, Joshua returned to the passenger seat of the vehicle, and appellant spoke to Kenneth, who had fallen to the ground behind the vehicle. Appellant then began to walk around to the passenger side of the vehicle, aiming at Joshua. The jury could reasonably conclude from this evidence that Tynise and the children—sitting in a vehicle located between Joshua and appellant while appellant was shooting at Joshua—were in the line of fire. This evidence is sufficient to sustain the convictions of reckless endangerment as to Tynise and the children.

On the other hand, we could not find, nor does the State direct us to, any evidence as to the location of Belinda during the period in which appellant was shooting. Because there was no evidence that she was in or near the line of fire, there was not evidence that appellant recklessly endangered her. That conviction must be reversed.

THE CONVICTION FOR THE RECKLESS ENDANGERMENT OF BELINDA SPARKS IS REVERSED. THE JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY ARE OTHERWISE AFFIRMED. COSTS TO BE ALLOCATED: 90% TO APPELLANT AND 10% TO WICOMICO COUNTY.