Circuit Court for Prince George's County
Case No. CT160238X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2673

September Term, 2016

MARKENA SHANAY TOWNSEND

v.

STATE OF MARYLAND

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*Eyler, Deborah S.,
Shaw Geter,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: September 24, 2018

*Deborah S. Eyler, J., participated in the hearing and conference of this case while an active member of this Court; she participated in the adoption of this opinion as a specially assigned member of this Court.

On February 2, 2016, Markena Townsend, appellant, was interviewed by two detectives from the Prince George's County Police Department in connection with the murder of Gilbert Hall. During the interview, appellant said that she could not remember where she was the day of the shooting, and she denied knowing Hall.

Appellant's trial began on September 7, 2016. During her case-in-chief, she took the witness stand. Unlike her previous statements to the detectives, appellant told the jury that she knew Gilbert Hall and that she, in fact, was the one who had shot Hall—but she claimed it was in self-defense. The prosecutor, on cross-examination and in closing argument, sought to highlight the inconsistencies between appellant's February 2 interview and trial testimony. At the conclusion of his closing argument, the prosecutor also asked the jury "to give the family justice. Due justice." Appellant objected to the remarks, but her objections were overruled. She was subsequently convicted of first-degree murder and use of a handgun in a crime of violence. Appellant timely appealed and raises the following issues for our review:

> I. Whether the trial court erred under the United States Constitution and the Maryland Declaration of Rights, by allowing the prosecutor to introduce and emphasize evidence of Townsend's post-*Miranda* silence, and whether the errors were harmless beyond a reasonable doubt?
>
> II. Whether the trial court erred by allowing the prosecutor to ask the jury to give the victim's family "justice" by convicting Townsend of murder and whether that error was harmless beyond a reasonable doubt?

For the reasons to follow, we affirm the judgments of the circuit court.

BACKGROUND

Around 3:00 p.m. on January 30, 2016, a silver sedan pulled up to Dawn Place, a road in Prince George's County, Maryland. Appellant stepped out of the vehicle and asked Chris Hall where his uncle, Gilbert Hall, was. Chris said he did not know but would call after his phone was charged. This statement, however, was not true: Chris had spoken to his uncle between 2:00 and 3:00 p.m. and then saw him walk to a white fence on Dawn Place where there was a "cut" or a pathway. Appellant responded that Gilbert owed her money, and that she would wait until he arrived.

Shortly thereafter, some of Chris' friends arrived, and the group walked through the pathway to the back of a vacant house to shoot dice. On his way, Chris saw his uncle, who was bagging up marijuana. Chris told his uncle about his conversation with appellant then proceeded to the vacant house.

In the meantime, Anthony Dyson, another one of Gilbert's nephews, walked to the pathway where Gilbert was sitting. Dyson and Gilbert spoke for a few minutes before appellant approached and asked where the "bread" was, referring to money. Gilbert stated "I don't have it right now." Appellant responded that "she needed her bread" and that "her people needed the bread." Gilbert continued to deny having any money, although he offered her a portion of the proceeds from the marijuana he planned to sell. Appellant said that she would not wait, asserting: "I got to get back to my people. I need my money. I'm not going nowhere."

There was silence for a moment. Dyson then heard a click and observed appellant with a gun in her left hand. Gilbert told Dyson to get the money from Chris; Dyson turned and ran. Dyson made it three or four steps towards the abandoned house before hearing a gunshot. When he glanced back, he saw Gilbert grabbing his chest and scrambling for the ground. Fearing for his own safety, Dyson ran past the vacant house and waived down a police officer. When the two returned, appellant had fled the scene. The officer then attempted, unsuccessfully, to perform CPR. A medical examiner later found that Gilbert died from a bullet wound that entered his lower back, pierced his lung and heart, and exited the mid-chest of his body.

Three days after the shooting, on February 2, 2016, appellant was interviewed by Detective Tyler and Detective Flores of the Prince George's County Police Department. When Detective Flores advised appellant of her *Miranda* rights, appellant initially made an indiscernible comment then stated she did not understand those rights. Detective Flores asked for clarification and appellant said, "I mean I want a lawyer once -- I don't even know what I'm here for, before I can ask if I want a lawyer." Detective Flores again asked if she understood her rights and appellant said that she did.

The detectives proceeded to ask appellant where she was on Saturday (the day of the shooting). Appellant said that she was either in Baltimore or Philadelphia but added "I don't know, it's all running together. Let me think because I was drinking either Friday or Saturday I can't remember." After working backwards from where appellant was on Tuesday (the day of the interview) to Saturday, Detective Tyler said, "I really need you to

kind of think back to the weekend where you were because right now your name has come up in a serious incident." Appellant responded that she did not remember. When further pressed about where she was on Saturday, appellant said "I'm being real with you when I tell you I can't remember."

The detectives then shifted gears, asking specific questions about the shooting. They asked if appellant knew a guy named "Butter," "Mike," or "Gilbert"; appellant stated that she did not. However, once Detective Flores asked if she knew where Addison Road was (the road by the vacant house where Chris and others went to shoot dice), appellant said "I am going to ask for a lawyer." The detectives asked, "so you don't want to know why you're here?" Appellant replied "[n]o." Detective Tyler asserted "[y]ou know Mike, you know Butter, and you know where you were on Saturday." Appellant responded "[d]on't know Mike, I don't know Butter, I just want a lawyer." At that point, Detective Tyler told appellant that she was being charged with first-degree murder. The detectives continued to speak with appellant, however, saying that it was up to her to make everything clear. Appellant finally asked, "at what point do I get a lawyer?" After a few more minutes of conversation, the detectives left the room. Detective Flores and another officer returned to take photos of appellant and her tattoos. Appellant was alone in the room until the end of the video.

Appellant's trial began on September 7, 2016. During the trial, the State called a number of witnesses, including Chris Hall and Anthony Dyson, who testified consistent with the facts recited above.

During appellant's case-in-chief, she took the witness stand. Unlike her previous interview with Detectives Flores and Tyler, however, she provided a detailed account of the events that transpired the day of the shooting. Appellant told the jury that she did, in fact, know a man named Mike Butter, who was actually Gilbert Hall. Appellant testified that she owned a record company, and that Gilbert had previously given her a deposit to make a music video. According to her, the deposit was not enough, so she took an Uber to meet with Gilbert. Appellant stated that after she confronted Gilbert, he became very angry, raised his voice, and pulled out a gun. Appellant also observed another man leave to get others, and she feared that they would come back to rape or kill her. As a result, she rushed Gilbert, knocked him over, and struggled for the gun. Once appellant was able to get possession of the gun, she fired one shot and ran.

During cross-examination, the State sought to contrast appellant's previous statements claiming not to remember anything about the day of the shooting with her trial testimony in which she raised the issue of self-defense. The following is an example of one exchange:

> [Q]: At some point, the police arrested you; is that right?
>
> [A]: Yes.
>
> [Q]: Was that February 2, 2016?
>
> [A]: Yes.
>
> [Q]: And you did not tell them that you were even at Zelma and Dawn Place, did you?
>
> [A]: You want to know what I told them or just --

[Q]: I'm asking, you didn't even tell them that you were at Dawn Place and Zelma Avenue, did you?

Defense counsel objected, arguing the prosecutor's questions implied that appellant had given a statement about the events to the police, when all she said was she did not remember and then invoked her right to counsel. The prosecutor maintained that his questions were fair game because appellant's statements in her February 2 interview contradicted her in-court testimony. The court overruled the objection. The prosecutor continued:

[Q]: Okay. When you met with the police on February 2, 2016, you didn't tell them that you were at Zelma Place -- Dawn Place and Zelma Avenue, did you?

[A]: No.

[Q]: You didn't tell them that Mike Butter came at you, did you?

[A]: No, I didn't give a statement.

[Q]: You didn't tell them that Mike had a gun?

[A]: No, I didn't give a statement.

[Q]: You didn't tell them that he pointed a gun at you?

[A]: No, I didn't give a statement.

Defense counsel objected on similar grounds and made a motion for a mistrial. The court asked the prosecutor whether his questions referred to appellant's statements before or after invoking. The prosecutor said it was the former, and the court permitted cross-examination to continue:

[Q]: And while you were meeting with the police, you didn't tell them that you struggled over a gun, did you?

[A]: No.

[Q]: You didn't tell them that you got the gun away from Mike, right?

[A]: No.

[Q]: You didn't tell them that you fired a shot, did you?

[A]: No.

[Q]: You didn't tell them that they threatened to drag you into a vacant house, did you?

[A]: No.

[Q]: You didn't tell them that you were so afraid in fear of your life that you had fired the shot?

[A]: No.

[Q]: You didn't tell them where the gun was?

[A]: No, I asked for a lawyer.

Defense counsel again objected to the line of questioning, and the court noted a continuing objection. The prosecutor continued:

[Q]: You didn't tell them that you ran away, did you?

[A]: No.

[Q]: You didn't tell them that -- in fact, you never told them any of what you said today on the stand, did you?

[A]: Yes.

Defense counsel asked to approach, arguing, "from the time [appellant] walked into the room, to the time she invoked, they talked about things that were unrelated to this incident.

They talked about her being raped as a child, they talked about her being homeless and things like that. As soon as they ask her one question about Addison Road on January 30th, she said I want a lawyer." The prosecutor reiterated that appellant gave a statement prior to invoking, and that the statement could be used to impeach her in-court testimony. The court asked the prosecutor to move on. Yet the prosecutor continued:

> [Q]: In fact, when you were talking with the police, you told them you didn't know where you were on January 30, 2016, didn't you?
>
> [A]: I told them I couldn't remember, yes.
>
> [Q]: And you told them you didn't even know a Mike; isn't that right?
>
> [A]: I didn't know a Mike. Correct.
>
> [Q]: And you didn't know a Butter?
>
> [A]: Not by name.

After appellant finished her testimony, the court asked counsel to approach and informed the parties that it was denying appellant's motion for a mistrial.

During closing argument, the prosecutor sought to highlight inconsistencies in appellant's trial testimony, stating "there's not any evidence that supports her version of the events. Her own testimony doesn't support her version of the events." The prosecutor added, "[t]hey asked her what happened on the 30th. Where were you? I don't remember. I don't remember? That would be the time to say these people pointed a gun at me." At the conclusion of his argument, the prosecutor said "I am going to ask you at the end of this case to give the family justice. Due justice." The jury subsequently convicted appellant of first-degree murder and use of a handgun in a crime of violence. The court

sentenced appellant to life for the murder conviction and twenty years consecutive for the use of a handgun conviction. This appeal followed.

DISCUSSION

I. Appellant's Prior Statements

Appellant argues that the circuit court erred under the United States Constitution and the Maryland Declaration of Rights by allowing the prosecutor to introduce evidence of her prior statements to Detectives Tyler and Flores. Specifically, appellant argues that she was improperly impeached based on her post-arrest silence, and that the alleged inconsistencies referenced by the prosecutor were directly attributable to the exercise of her *Miranda* rights. The State responds that there is a fundamental distinction between the improper use of post-arrest silence and the proper use of a defendant's prior inconsistent statement to the police to impeach credibility. This case, the State maintains, involves the latter. Our review of this issue is *de novo*. *See State v. Cates*, 417 Md. 678, 691 (2011) (explaining that "issues of law, involving questions of constitutional rights and statutory interpretation" are reviewed *de novo*).

The starting point when evaluating whether the Due Process Clause of the Fifth or Fourteenth Amendment prohibits impeachment on the basis of a defendant's prior statement is *Doyle v. Ohio*, 426 U.S. 610 (1976). In that case, two defendants were arrested for selling marijuana to a narcotics bureau informant. *Id.* at 611. They were placed under arrest and received *Miranda* warnings but neither made a post-arrest statement about their involvement in the crime. *Id.* at 614 n.5. During their trials, however, they testified, for

the first time, that they had been framed. *Id.* at 612–13. On cross-examination, the prosecutor asked the defendants why they had not told the frameup story to the police upon arrest. *Id.* at 613–14. The Supreme Court held that "while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." *Id.* at 618. In those situations, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* As a result, the Court reversed both convictions. *Id.* at 619–20.

Other courts, including the cases cited by appellant, have ruled along similar grounds. In *United States v. Caruto*, for example, the defendant was convicted of one count of importation of cocaine and one count of possession with intent to distribute cocaine. 532 F.3d 822, 824 (9th Cir. 2008). "After the agents read Caruto her *Miranda* rights, she signed a waiver and agreed to make a statement. Five to seven minutes later, Caruto invoked her right to counsel, and the interview ended." *Id.* During the interview, Caruto told the agents "that she had lent the truck to unknown individuals in Mexicali [a town in Mexico], three to four weeks prior to her arrest. She said she received the vehicle on that date and that she was going to drive the vehicle to Los Angeles." *Id.* At trial, however, Caruto testified that she had met with Jose Jimenez, a friend's brother-in-law, in Mexico the day of her arrest. *Id.* at 825. Caruto said that Jimenez was interested in purchasing the truck but wanted to first "try it" and take it to a mechanic. *Id.* Caruto agreed and allowed him to do so. *Id.*

When Jimenez returned that afternoon, he offered to pay $1,000 up front and the remainder in Los Angeles. *Id.* Caruto testified that she did not take the $1,000, and that she was not planning to drive to Los Angeles. *Id.* Further, nothing seemed out of the ordinary about the truck so she proceeded to the border. *Id.* Caruto testified that, following her arrest, she attempted to get in touch with Jimenez and her friend but was never able to reach them again. *Id.* During closing argument, the prosecutor urged the jurors to question why the government did not have a more detailed statement from Caruto and why she did not provide the contact information for Jimenez, whom she claimed to have met earlier that day. *Id.* at 826–27.

After citing the background law from *Doyle*, the appellate court determined that the central question was "whether the prosecution impermissibly highlighted omissions from Caruto's post-arrest statement resulting from her decision to invoke her *Miranda* rights." *Id.* at 829. The court then noted that the alleged inconsistencies between Caruto's trial testimony and statement to police were "clearly attributable" to the exercise of her *Miranda* rights:

> [T]he trial court asked the prosecutor whether Caruto had ever been asked about selling the truck. The prosecution responded, "I don't know that the [customs] agent necessarily had a chance to. She did invoke your Honor. But that is a pretty critical detail." When the district court noted that "there was no follow-up question, no clarification at all" about Caruto's statement that she was helping a friend, the prosecution explained, "Well, your honor, I guess the problem there is, the defendant didn't provide any clarification. She invoked." Further, on cross-examination, defense counsel asked [the agent] if the identity of the individuals who borrowed the truck was "unknown" because Caruto wasn't asked who they were. [The agent] responded, "That's possible."

Id. at 829–30. As a result, the court held "that the prosecutor's argument, emphasizing omissions from Caruto's post-arrest statement that exist only because she invoked her right to counsel under *Miranda,* constitutes a violation of Caruto's right to due process." *Id.* at 824.

The other case relied upon by appellant is *United States v. Ramirez-Estrada*, 749 F.3d 1129 (9th Cir. 2014). The defendant in that case was an alien who had been deported from the United States on previous occasions. *Id.* at 1131. During one of the prior incarcerations, the defendant sustained a serious jaw injury that the trial judge recommended be treated while he was in custody. *Id.* The defendant never did so and was later deported to Mexico. *Id.* During the incident in question, he attempted to reenter the United States without obtaining permission. *Id.* at 1131–32. When a customs officer asked about his citizenship, the defendant responded that he was a U.S. citizen born in Las Vegas but claimed to have no paperwork because it had been stolen. *Id.* at 1132. The officer ran a search on the defendant, discovered the prior deportations, and arrested him for illegal reentry and for making a false claim to U.S. citizenship. *Id.*

Another customs officer interviewed the defendant after his arrest. *Id.* Unlike this case, the defendant invoked his *Miranda* rights at the outset of the interview. *Id.* As part of a routine booking question, the officer asked the defendant "if he had any health problems," and the defendant responded "[n]o." *Id.* at 1133. During his trial, however, the defendant testified that he only attempted to reenter the United States to seek help for his jaw injury. *Id.* at 1132. The prosecutor, through the customs officer's testimony and

in closing argument, pointed out the difference between the defendant's trial testimony and the answer he gave in his interview. *Id.* at 1132–33.

On appeal, the court cited *Doyle* and *Caruto*. *Id.* at 1134–35. It explained that the defendant's "statements, by themselves, are not directly inconsistent with his testimony. It is only what he omitted from his statements—in other words, his silence—that was relevant to impeach him." *Id.* at 1135. The court noted that had the defendant "never invoked his *Miranda* rights, this kind of impeachment would have been permissible. His invocation of his *Miranda* rights, however, brings this case within the purview of *Doyle*." *Id.* As a result, the court reversed the defendant's convictions. *Id.* at 1135–37.

Ramirez-Estrada makes clear that a prosecutor may not use a defendant's silence to impeach his trial testimony when *Miranda* has been invoked. *Ramirez-Estrada* also highlights the limitations of that rule: a prosecutor is free to impeach a defendant's trial testimony by introducing prior statements—omissions or inconsistencies—after *Miranda* has been waived. *See also Jenkins v. Anderson*, 447 U.S. 231, 289 (1980) (explaining that "impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial," and holding that "the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility"); *Harris v. New York*, 401 U.S. 222, 226 (1971) ("The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.").

In August 2018, the Court of Appeals decided *Reynolds v. State*, wherein the court held the State properly cross-examined Reynolds about the inconsistent statements he made to police officers after invoking *Miranda*. *Reynolds v. State*, No. 84, Sept. Term, 2017, 2018 WL 4055545 at *11 (Md. Ct. App. Aug. 27, 2018). Reynolds was arrested for the murder of Wesley King and taken to a police precinct for questioning. *Id.* at *1. Prior to being read his *Miranda* rights, a detective asked Reynolds for his name, and he replied, "Dennis Graham." *Id.* at *2. He was then advised of his *Miranda* rights and stated he understood his rights. *Id.* During the interview, Reynolds continually denied his real name and stated he had only "been through Maryland." *Id.* Once the detective told Reynolds "[t]here's overwhelming evidence that you murdered somebody back in November of 2012 [sic]," Reynolds replied, "[t]here's nothing I have to say."[1] *Id.* The police interrogation continued although Reynolds had invoked his right to remain silent. *Id.* Reynolds then stated he was probably in the Virgin Islands in November of 2002, he resided in New Jersey with his girlfriend Rose Lopez, and he sold cars there with a man named Byron Matamora. *Id.*

During trial, Reynolds testified he knew the victim and they had previously dealt drugs together. *Id.* at *3–4. He also testified that he was in Brooklyn, New York on the day of King's murder and two witnesses, Karlene Gill and Caroline George, could support his alibi as to his whereabouts that evening. *Id.* at *4. Reynolds stated once he learned he was a suspect, he created the alias, Dennis Graham, and left for Jamaica. *Id.*

[1] The suppression court found this statement was a clear and unambiguous invocation of Reynolds' right to remain silent.

On cross-examination, the State highlighted the inconsistencies between the statements Reynolds made during the police interview and his testimony at trial.

Reynolds argued the State's line of questioning was an admission of his post-*Miranda* silence and an impermissible infringement on his constitutional right to due process. *Id.* at *8. The Court of Appeals, however, found the State's cross-examination of Reynolds about his failure to disclose to the police the same information he testified to during trial was not the use of post-arrest silence. Rather the State properly questioned him regarding his inconsistent statements.

In this case, appellant made two statements in her interview with Detectives Tyler and Flores that are relevant to this appeal. First, appellant said that she could not remember where she was the day of the shooting. Second, she denied knowing Gilbert Hall. The existence and timing of these statements distinguishes this case from *Doyle, Caruto, Ramirez-Estrada,* and *Reynolds*. Moreover, it cannot be said that appellant's silence with respect to the omissions or inconsistencies in her trial testimony is attributable to the exercise of her *Miranda* rights because 1) she proceeded with the interview after providing these statements and 2) the prosecutor's questions and subsequent closing argument related to a period in time *after* appellant had waived her *Miranda* rights and *before* she asked for a lawyer (which did not occur until the end of the interview). Accordingly, we find no error in the circuit court's rulings permitting the prosecutor to impeach appellant's trial testimony with her prior statements to Detectives Tyler and Flores.

II. Closing Argument

Appellant argues that the trial court erred by permitting the State to ask the jury "to give the family justice. Due justice" by "find[ing] Markena Townsend guilty of first degree murder and use of a handgun." In doing so, the prosecutor improperly appealed to the jury's sense of outrage as to what happened to Gilbert Hall, and the court gave its stamp of approval by allowing the jury to consider this impropriety. The State, by contrast, argues that the "justice" comment should be considered in the context of the jury instructions, where the court told the jury not to be swayed by sympathy, prejudice, or public opinion, and to decide the case impartially, without bias to any party. Next, the State argues that immediately before the comment, the prosecutor explained how the evidence did not support appellant's self-defense claim, and immediately afterwards, the prosecutor asked the jury to find appellant guilty. In context, the prosecutor's reference to justice was a way of saying that the law and evidence supported a guilty verdict.

It is well settled that attorneys have wide latitude in closing argument "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). The prosecuting attorney is free to "comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the prosecution produces." *State v. Gutierrez*, 446 Md. 221, 242 (2016) (quoting *Donaldson v. State*, 416 Md. 467, 488–89 (2010)); *see also Degren v. State*, 352 Md. 400, 430 (1999) (citations omitted)

(noting that a prosecutor "may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses").

Closing argument is not boundless territory, however, "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." *Sivells v. State*, 196 Md. App. 254, 288 (2010). In making this determination, we apply the two-part test from *Sivells*. First, we assess "the severity of the remarks, cumulatively, the weight of the evidence against the accused and the measures taken to cure any potential prejudice." *Id.* at 289 (quoting *Lee v. State*, 405 Md. 148, 174 (2008)). In evaluating the potential prejudice, an important factor 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." *Id.* Second, we consider "the nature of the prosecutor's remarks. In assessing this factor, we consider whether there was one isolated comment, as opposed to multiple improper comments, and whether the comments related to an issue that was central to a determination of the case or a peripheral issue." *Id.* at 290.

"What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Smith v. State*, 388 Md. 468, 488 (2005). As a result, the propriety of prosecutorial argument must be decided "contextually, on a case-by-case basis." *Mitchell v. State*, 408 Md. 368, 381 (2009). Because a trial court is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced

in a case, "his ruling will not be overturned absent an abuse of discretion." *Grandison v. State*, 341 Md. 175, 208 (1995).

Appellant cites a number of Maryland cases in support of her argument that the prosecutor's comment was improper. In *Brown v. State*, the prosecutor told the jury to find the defendant guilty and "recommend to the Court that the Court have mercy" if they had concerns about what may happen to the defendant. 339 Md. 385, 389 (2011). In *Beads v. State*, the prosecutor said in opening that "it's time for someone to say, 'Enough. Enough.'" 422 Md. 1, 6 (2011). Furthermore, in *Anderson v. State*, defense counsel asked the jurors in closing "[w]ould you feel as if justice were done i[f] your family member or you were in that chair based on this evidence?" 227 Md. App. 584, 587 (2016). However, we do not find any of those cases controlling here. The first two did not involve a request for justice. As for *Anderson*, it is distinguishable because the prosecutor did not invite the jurors to place themselves in the family members' shoes. We will, therefore, turn to caselaw from other jurisdictions for guidance.

In analyzing whether a prosecutor may refer to justice in his closing argument, two themes emerge. On the one hand, courts have found a prosecutor's comments improper where he seeks to divert the jury from their fundamental task of weighing the evidence. This includes inflaming the minds and passions of jurors. *See Cardona v. State*, 185 So.3d 514, 521 (Fla. 2016) ("The first and most egregious category of clearly improper closing argument comments involves the State's repeated and erroneous statements that the case was about seeking 'justice for [the victim].' These arguments improperly inflamed the

minds and passions of the jurors."). It includes instances where the prosecutor encourages the jury to base their verdict on sympathy for the victim. *See Commonwealth v. Baran*, 74 Mass. App. Ct. 256, 283 (2009) (citations omitted) ("Not only did the prosecutor improperly encourage the jury to determine the verdict on the basis of sympathy for the complainants . . . but he also indicated that the jury would be answerable to the public should they elect to return a not guilty verdict, a result that the prosecutor implied would amount to a 'thwart[ing]' of justice."). It also includes cases where the prosecutor asks the jury to convict the defendant to give the victim justice. *See State v. Reynolds*, 196 Vt. 113, 126 (2014) (citations omitted) ("[A]n appeal to the jurors to do justice on behalf of the victim or the local community is generally viewed as unprofessional and improper. . . . Since the prosecutor speaks with great authority on behalf of the state as a whole, he or she should not suggest to the jury that their role is to take sides with the victim."); *State v. Schumacher*, 298 Kan. 1059, 1073 (2014) ("[W]e reiterate that a prosecutor cannot ask the jury to convict a defendant in order to give the victim justice. . . . Further, we have often noted that we cannot condone any act or statement by the prosecutor which draws jurors' attention away from their fundamental task of weighing the evidence and instead invites them to rely on underlying emotions to convict the defendant.").

On the other hand, courts have noted that there is nothing inherently erroneous in calling for justice. *See State v. Nguyen*, 285 Kan. 418, 425 (2007) ("[I]t is permissible, if not expected, for a prosecutor to argue for justice in general, *i.e.*, justice for the citizenry of the State of Kansas. . . . As a practical matter, a criminal case cannot be completely

divorced from the victim. Perhaps the touchstone is whether the argument seeks to divert the jury from the evidence so as to obtain a conviction based upon sympathy for the victim."); *State v. Evans*, 63 Ohio St.3d 231, 240 (1992) ("There is nothing inherently erroneous in calling for justice and, thus, the argument was proper."). Accordingly, a prosecutor may refer to justice in his closing remarks so long as the remark is based on the evidence at trial. *See State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996) ("By the phrase 'unspeakable injustice,' the prosecutor was not urging the jury to convict [the defendant] in order to teach him a lesson, to 'send a message' to society or otherwise seek justice beyond the parameters of the case, purposes for which we have not hesitated to chastise prosecutors in the past. . . . Rather, we conclude that the prosecutor was merely expressing the view that justice could only be achieved by convicting [the defendant] of first-degree murder, due to the overwhelming evidence establishing his guilt."); *State v. McCray*, 91 N.E.3d 288, 303–04 (Ohio 2017) ("The prosecutor's remark was based upon the evidence presented at trial. . . . Moreover, a prosecutor's isolated remark calling for justice for a murder victim is not inherently improper and may well fall 'within the creative latitude afforded both parties in closing arguments.'").

In this case, the relevant portion of the prosecutor's closing argument referring to justice is reproduced below:

> [A]s you listen to [the] defense, I want you to keep remembering, every time they say something that [appellant] said, in the testimony that there's nothing to support that. There's nothing to support that. And earlier in her testimony, she probably contradicted it.

> So I'm asking you to keep that in mind as you listen to the defense make their argument now. All the evidence supports the testimony of Chris Hall and Anthony Dyson, because Gilbert Hall is not here to testify.
>
> Gilbert Hall lost his life January 30, 2016, at 3:34 p.m. *I am going to ask you at the end of this case to give the family justice. Due justice.*

(Emphasis added). When appellant objected, the circuit court concluded that the remark was proper because it 1) did not constitute a "golden rule" argument and 2) was based on the evidence at trial:

> [T[he golden-rule argument is where a prosecutor asked the jury to place your feet in the shoes of the victim or of the family or of the mom. And specifically that was in Lawson. In Lawson, it was a case where a child was molested on two different occasions and basically asked that jury to place themselves in the shoes of the mom and the child, and the court found that inappropriate because it is, as counsel quoted, taking away their unbiased and unemotional fact-finding ability by saying here, place your feet in the shoes.
>
> But I don't believe that that occurred in this case. What occurred was [the prosecutor] arguing that here are the facts of the case and based on the facts and evidence that was represented, give this family justice. I don't think there was anything alluded to saying don't pay attention to the evidence, just give them justice. It was during the course of the argument of the facts of the case. And so based on that, I am going to deny your motion for a new trial.

We agree with the circuit court. The prosecutor's isolated remark was based on Chris Hall and Anthony Dyson's trial testimony, and was a suggestion to the jurors to assess appellant's credibility, given her inconsistent statements. The prosecutor did not, as appellant maintains, seek to divert the jury from the evidence or obtain a conviction by appealing to the jury's sense of outrage as to what happened to the victim. As such, the prosecutor's comment did not mislead the jury nor was it likely to have misled or

influenced the jury to the prejudice of appellant. We find the circuit court did not err in ruling that the remark was proper.

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