Circuit Court for Montgomery County
Case No. C-15-CR-21-000040

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 550

September Term, 2023

JEFFERSON DANIEL DELGADO

v.

STATE OF MARYLAND

Arthur,
Reed,
Friedman,

JJ.

Opinion by Arthur, J.

Filed: August 19, 2025

* This is an unreported opinion. It may not be cited as precedent within the rule of stare decisis. It may be cited as persuasive authority only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

A jury in the Circuit Court for Montgomery County convicted Jefferson Daniel Delgado of attempted first-degree murder and use of a firearm during the commission of a crime of violence. The court sentenced Delgado to life in prison, with all but thirty years suspended, for the attempted murder. For the firearm offense, the court sentenced him to an additional, but concurrent, ten years, followed by five years of supervised probation.

Delgado filed this timely appeal. He argues that the prosecutor improperly commented on his exercise of his right not to testify, that the evidence was insufficient to support the convictions, and that the court erred in declining to give a missing witness instruction.

For the reasons set forth in this opinion, we vacate both convictions and remand the case for a new trial.

BACKGROUND

I. Facts and Evidence

At approximately 1:22 a.m. on April 18, 2021, someone shot Franklin Guerrero outside of Antojitos—a restaurant, bar, and night club in Montgomery County. The State charged Delgado with the attempted murder of Guerrero, conspiracy to commit murder, and using a firearm during the commission of a crime of violence. Delgado was tried along with a co-defendant, Anthony Ariel Chavez.

The victim, Guerrero, survived his injuries, but did not testify at trial. The State relied on testimony from eight witnesses.

Inger Chicas, a security guard at Antojitos, testified that, in the early morning

hours of April 18, 2021, he intervened in a fight and removed the participants from the establishment. Sometime shortly thereafter, another fight broke out in the parking lot and on the street in front of Antojitos. At one point, while Chicas was outside, a man wearing a medical face mask and khaki pants approached him and "ask[ed] [him] to intervene in the fight" and to "call the police." Chicas testified that he refused to get involved because his "job is inside, and [the fight] was in the street." Chicas explained, however, that he went inside Antojitos and asked the manager "to call the police or else something much bigger was going to happen."

While inside with the manager, Chicas heard, but did not see, a shooting. He testified that, after hearing the shots, he saw "one of the guy[s] . . . coming to [him while] grabbing his stomach area." He testified further that "when [he] saw [an]other man coming to [him]," he locked the door and got down on the floor.

Chicas testified that he had previously seen Delgado at Antojitos and that Delgado was there on the night of the shooting. Chicas said that he did not see Delgado arguing, throwing any punches, or getting punched. Chicas also said that he did not notice where Delgado was at the time of the shooting. Chicas added, however, that only one person was left at the bar at the time of the shooting. That person, who was paying a bill, was not Delgado.

Steve Lopez, another security guard, testified that he was not working on the night of the shooting, but that the police interviewed him during their investigation. During the interview, Lopez reviewed surveillance footage that had captured the inside of Antojitos, the patio, and part of the parking lot in front of Antojitos on the night of the shooting.

When the State played one of these videos, Lopez testified that he "immediately recognized" Delgado's co-defendant, Chavez, and that Chavez drove a white Jeep Wrangler. In another video that he viewed moments later, Lopez identified Chavez's Jeep in the parking lot in front of Antojitos.

The State had Lopez review surveillance footage that captured a larger portion of the parking lot in front of the strip of establishments where Antojitos was located. This footage showed a man wearing khaki pants and a black hooded sweatshirt, but no medical face mask, retrieving a long-muzzled firearm from Chavez's white Jeep Wrangler and shooting Guerrero. Lopez testified that he was unable to identify the shooter from that video.

Lopez testified further that the police had shown him other videos during his interview. Lopez explained that, in two of those other videos, he saw a person's maskless face and chest, but could not see the person's pants. Lopez testified that he had "seen [that man] at the establishment" and that he knew that Delgado had a similar "bulky" frame. Lopez identified Delgado as the maskless person in those other videos.

Detective Robert Scire testified that on July 23, 2021, about three months after the shooting, three Antojitos employees reached out to see if "the shooter from the April incident was arrested yet" because, they said, "the person that was involved . . . [and] responsible was actually in the bar that night." One of the employees was Lopez, who testified; the other two employees did not testify.

Detective Scire explained that he sent officers to Antojitos, that those officers took photographs of the patron whom the staff believed to be the shooter from "the April

incident," and that he identified the patron as Delgado. Detective Scire admitted that he could not identify Delgado as the shooter from the surveillance videos alone, including the footage that captured the shooting and footage from a parking garage that captured an unmasked man who was wearing khaki pants and a dark hooded sweatshirt and carrying a firearm about 20 minutes after the shooting. But, after securing a positive identification of the shooter from the Antojitos employees, Detective Scire concluded that Delgado was the shooter.[1]

The State introduced a video that was taken on Delgado's cell phone at 7:44 p.m. on April 17, 2021, a few hours before the shooting. This video captures a pair of khaki pants worn by the person who recorded the video, the person's voice, and a white Jeep Wrangler. The Jeep Wrangler in the cell phone video resembles the one that Lopez identified as Chavez's in the surveillance footage that shows the khaki-clad shooter retrieving the gun.

Pursuant to a search warrant, the police searched Delgado's home and recovered a pair of khaki pants from his bedroom. The pants had no unique characteristics, and there was no indication that they were tested for, or still contained, gunshot residue months after the shooting.

Delgado's home is approximately one or two miles away from Antojitos, and, at the time of the shooting, Delgado's phone "connected with a cell tower located near the

[1] On appeal, Delgado does not assert that Detective Scire's account of what the employees said was inadmissible hearsay. Presumably, Delgado recognizes that the statements were admissible for the non-hearsay purpose of explaining why the detective did what he did as a result of what the employees told him.

crime scene[.]" The investigators recovered two shotgun shells from the parking lot, but did not find the long-muzzled firearm seen on the surveillance video. The State presented no ballistic, fingerprint, or DNA evidence.

Delgado moved for judgment of acquittal at the end of the State's case-in-chief, arguing that there was "insufficient evidence of identification that he did this." The court denied his motion.

II. Jury Instructions

While discussing jury instructions, Delgado's attorney said that he would "argue strenuously" in closing that the jury should consider "the non-appearance of an alleged . . . victim[.]" After Delgado's attorney brought up the victim's absence from trial, Chavez's attorney remarked that he "may ask for a missing witness instruction."

The next day, Chavez's attorney indicated that he would ask for a missing witness instruction not just for Guerrero, but for other witnesses as well. During this discussion, Delgado's attorney agreed that such an instruction should be about multiple "witnesses."

The court asked counsel whether it had already "discuss[ed] . . . and denied" the request for a missing witness instruction, and the State answered affirmatively. The court advised both defense attorneys that they would "get . . . an opportunity at the end [of its provision of jury instructions] to come up . . . and make any amendments or whatever [they] want to do[.]"

The court did not give a missing witness instruction. After the court delivered the instructions, Delgado's attorney did not object to the absence of a missing witness instruction. To the contrary, he told the court that he was "satisfied" with the

instructions.

III. Closing Argument

During closing argument, Delgado's attorney told the jury that there was "a lot of evidence that was not before [it;] . . . [n]o witness, no fingerprints, no residue." He asked, "What's the evidence? A pair of khaki pants." He continued: "[N]ot one police officer had evidence that [Delgado] did it. You didn't hear [that Delgado] made any statement." The State objected, and the court sustained the objection.

In its rebuttal closing argument, the State made the following remarks:

> Every single witness was brought in here, made to take the stand, made to take an oath and was cross-examined very ably by both counsel. So, when counsel gets up here and asks you to speculate about things that were not in evidence, I submit to you he's asking for a pass. You took an oath to be bound by the evidence. **No one came in here and said, oh, I was, happened to be at the club that night, but that's not me**. That was an argument. **No one came in here and said, oh, I was just supposed to be meeting up with a girl that night.**

(Emphasis added.)

Delgado's attorney objected. The court overruled the objection.

IV. Verdict and Appeal

The jury convicted Delgado of attempted first-degree murder and use of a firearm during the commission of a crime of violence; it acquitted him of conspiracy to commit murder. The jury acquitted his co-defendant, Chavez, of all charges.

This timely appeal followed.

QUESTIONS PRESENTED

Delgado presents three questions, which we quote:

I. Did the trial court err in allowing the prosecutor's remarks in rebuttal closing argument which impinged on Mr. Delgado's privilege against self-incrimination?

II. Is the evidence insufficient to sustain the convictions?

III. Did the trial court err by failing to give a missing witness instruction?

We conclude that the court committed reversible error in overruling Delgado's objection to the prosecutor's remarks in the State's rebuttal closing argument. Accordingly, we vacate Delgado's convictions. We also conclude that the evidence was sufficient to sustain the convictions, so the State may try Delgado again. Assuming, for the sake of argument, that the final issue is even before us, we reject the contention that the court abused its discretion in declining to give a missing witness instruction.

DISCUSSION

I.

"In closing argument, lawyers have wide latitude 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) ("*Smith II*"). Thus, "a prosecutor may summarize the evidence and comment on its qualitative and quantitative significance." *Id.*

Nonetheless, the federal "constitutional right against compelled self-incrimination forbids prosecutorial comment on a defendant's failure to testify at a criminal trial." *Woodson v. State*, 325 Md. 251, 265 (1992) (citing *Griffin v. California*, 380 U.S. 609 (1965)). Similarly, under Article 22 of the Maryland Declaration of Rights, a prosecutor may not "[c]omment upon a defendant's failure to testify." *Smith II*, 367 Md. at 353. In addition, under § 9-107 of the Courts and Judicial Proceedings Article of the Maryland

Code (1974, 2020 Repl. Vol.) ("CJP"), "[a] person may not be compelled to testify in violation of [the] privilege against self-incrimination[,]" and "[t]he failure of a defendant to testify in a criminal proceeding on this basis does not create any presumption against [the defendant]."

In this case, Delgado contends that the prosecutor violated his State and federal rights against self-incrimination by arguing that "No one came in here and said, oh, I was, happened to be at the club that night, but that's not me," and that "No one came in here and said, oh, I was just supposed to be meeting up with a girl that night." Thus, he contends that the circuit court erred in overruling his objection to those arguments. We review the circuit court's decision without deference. *Molina v. State*, 244 Md. App. 67, 174 (2019).

Delgado relies on the Fifth Amendment to the United States Constitution, as well as Article 22 of the Maryland Declaration of Rights and CJP § 9-107. However, "we shall rest our decision, as we have often done in the past, solely upon the Maryland provisions[,]" as they provide both independent and adequate grounds for this opinion. *Marshall v. State*, 415 Md. 248, 260 (2010). Accordingly, "our citation and quotation of federal law is 'for guidance only[,]' and our decision is based entirely on Maryland law." *Id.* (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)). Notably, Maryland's privilege against self-incrimination is "'more comprehensive than that of the federal government[,]'" *Id.* at 259 (quoting *Crosby v. State*, 366 Md. 518, 527 n.8 (1989) (Battaglia, J.)), offering Maryland defendants "'greater protections than the Fifth Amendment[.]'" *Id.* (quoting *Crosby v. State*, 366 Md. at 534 (Harrell, J., concurring)).

In evaluating whether a prosecutor has improperly commented upon a defendant's failure to testify, Maryland courts ask whether the remark is "'*susceptible of the inference* by the jury that they were to consider the silence of the [defendant] in the face of the accusation of the prosecuting witness as an indication of his guilt.'" *Smith II*, 367 Md. at 354 (quoting *Smith v. State*, 169 Md. 474, 476 (1936) ("*Smith I*")) (emphasis in original). The Maryland courts have explored this issue in a number of cases.

In the leading case of *Smith II*, 367 Md. at 351, the State's witnesses testified that Smith had tried to sell them the leather goods that he was accused of having stolen. In closing argument, the prosecutor said: "*What explanation* has been given to us *by the defendant* for having the leather goods? Zero, none." *Id.* at 352 (emphasis in original). This statement, the Court held, "referred to the defendant's decision to exercise his constitutionally afforded right to remain silent." *Id.* at 358. The Court explained:

> The prosecutor did not suggest that his comments were directed towards the defense's failure to present witnesses or evidence; rather, the prosecutor referred to the failure of the defendant alone to provide an explanation. The prosecutor's comments were therefore susceptible of the inference by the jury that it was to consider the silence of the defendant as an indication of his guilt, and, as such, the comments clearly constituted error.

Id.

The Court rejected the contention that the prosecutor's statement "merely addressed the lack of evidence to explain Smith's possession of the leather goods[,]" which he was permitted to do. *Id.* at 359. "To so conclude," the Court reasoned, "would ignore the prosecutor's explicit reference to the defendant and the insinuated duty of the defendant personally to offer an explanation for his possession of the property." *Id.*

In the Court's assessment, "[t]he prosecutor's comment went beyond any qualitative assessment of the evidence[.]" *Id.* It reasoned that, by asking, "'what explanation has been given to us by the *defendant*,' [the prosecutor] effectively suggested that the defendant had an obligation to testify at trial." *Id.* (emphasis in original); *see id.* at 360 (stating that "the prosecutor went beyond the permissible comment on the absence of the evidence, and impermissibly commented directly on the defendant's failure to testify"). Accordingly, the Court held that "the prosecutor's comments were impermissible." *Id.* at 360.

In reaching its decision, the *Smith II* Court relied on its earlier decision in *Smith I*. In that case, a prosecution for the antique crime of bastardy, the prosecutor told the jury, "[T]his defendant has sat here all during the trial and has not denied his fatherhood." *Smith I*, 169 Md. at 476. In reversing the defendant's conviction, the Court stated: "There can be no question of the impropriety of this remark, as it was susceptible of the inference by the jury that they were to consider the silence of the [defendant] in the face of the accusation of the prosecuting witness as an indication of his guilt." *Id.* In addition, the Court cited Maryland's statutory privilege against self-incrimination, which provided at the time that a criminal defendant's "'neglect or refusal . . . to testify shall not create any presumption against him.'" *Id.* (quoting Md. Code (1924), art. 35, § 4).[2]

In *Woodson v. State*, 325 Md. at 264-67, the Court criticized a prosecutor for

[2] The statutory privilege, now codified at CJP § 9-107, currently provides, in pertinent part, that "[t]he failure of a defendant to testify in a criminal proceeding on this basis does not create any presumption against him."

improperly commenting on the defendant's failure to testify. In that case, the prosecutor had pounded on the witness stand, pointed to the defense table, and declared: "'they have sat there for 6 days, not here.'" *Id.* at 265. After an objection by the defense and an apology from the prosecutor, the prosecutor went on to say: "'[T]hey have tried to baffle you with bologna from that trial table and from in front of here today and . . . that is not evidence[.]'" *Id.* He added: "'[W]e gave you evidence and we kept our promise.'" *Id.*

In explaining why the prosecutor's comments were improper, the Court stated:

> [I]t is plain that the only person at the defense trial table who could have sat in the witness stand was [the defendant] himself, and that the prosecutorial comment therefore invited attention to the fact that [the defendant] did not testify. By pointing out to the jury that the prosecution 'gave you evidence,' and that [the defendant] did not, the jury may well have gleaned from that sharp contrast that it might infer guilt from [the defendant's] silence.

Id. at 267.

Similarly, in *Marshall v. State*, 415 Md. at 257, the Court held that a prosecutor's comments infringed upon the defendant's rights under Article 22 of the Maryland Declaration of Rights and the statutory privilege against self-incrimination in CJP § 9-107. In that case, the defendant was charged with possession of cocaine and possession of cocaine with the intent to distribute it. *Id.* at 251. An issue was whether the defendant worked at the place where the cocaine was being sold or whether he was, as his counsel argued in closing, a "cocaine addict" who had simply gone there to buy cocaine. *See id.* at 254-55. In rebuttal, the prosecutor challenged that assertion, pointing out that "'*Mr. Marshall did not take the stand*[.]'" *Id.* at 255 (emphasis in original). A few moments later, the prosecutor remarked, "*We don't have Mr. Marshall's thoughts*[.]" *Id.* at 256

(emphasis in original).

After surveying the decisions in its prior cases, the Court held that "the two statements by the prosecuting attorney were more direct comments upon the defendant's decision not to testify than the prosecuting attorneys' comments in the *Smith* cases and *Woodson*." *Id.* at 263. The Court explained:

> The prosecutor's statements to the jury that "Mr. Marshall did not take the stand" and "[w]e don't have Mr. Marshall's thoughts" were used to highlight the fact that the defendant did not testify in an effort to rebut the State's evidence. The prosecuting attorney clearly was using the defendant's silence as support for the State's case. These comments impinged on the defendant's rights under Article 22 of the Maryland Declaration of Rights and § 9-107 of the Courts and Judicial Proceedings Article.

Id. at 263-64.[3]

On the other hand, in *Molina v. State*, 244 Md. App. at 176, a case involving a prosecution for financial exploitation of a vulnerable adult, this Court held that the trial court did not err in overruling an objection to the prosecutor's argument that, in the course of a two-hour closing argument, the defense attorney had failed to explain where the missing money went and why it was spent in the victim's best interests. We reasoned that the prosecutor had "directed her comments to the defense attorney's recitation of the evidence[,]" rather than to the defendant's failure to testify. *Id.* We read the comments to "highlight[] the lack of any evidence explaining the defendants' possession of recently

[3] The Court went on to reject the State's contention that the prosecutor's comments were permissible as an "invited response" or "fair response" to the defense attorney's argument that the defendant was a cocaine addict, not a cocaine distributor. *Id.* at 265-68.

stolen goods[,]" which "is a permissible inference on which the State may comment." *Id.*

In this case, as in the *Smith* cases, *Woodson*, and *Marshall*, the prosecutor clearly commented on the defendant's failure to take the stand in his defense and to offer an explanation. Here, the prosecutor argued: "No one came in here and said, oh, *I* was, happened to be at the club that night, but that's not *me*[.]" (Emphasis added.) The prosecutor also argued: "No one came in here and said, oh, *I* was just supposed to be meeting up with a girl that night." (Emphasis added.) In these comments, the words "I" and "me" could have denoted only one person: Delgado. Only Delgado could have "come in" and testified that he was at Antojitos on the night of the shooting, but that he is not the khaki-clad person depicted in the video. Only Delgado could have "come in" and testified that he was at Antojitos that night, but that he was just "meeting up with a girl" and had nothing to do with the fights and the shooting.

In short, in arguing that "no one" had said that "I" was at the club but the person in the video is not "me," and that "no one" said that "I" was there but "I" was just "meeting up with a girl[,]" the prosecutor referred to Delgado and insinuated that he had a duty to explain that he was not the assailant. *See Smith II*, 367 Md. at 359. And by arguing that "no one" had said what Delgado alone could have said, the prosecutor effectively suggested that Delgado had an obligation to testify at trial. *Id.* The comments were susceptible of the inference that the jury was to consider Delgado's silence as an indication of his guilt; therefore, the comments were improper. *Id.* at 354.

This case is different from *Molina*, where the challenged comments related solely to defense counsel's argument, and not to testimony that only the defendant could have

given. Here, the prosecutor improperly commented on Delgado's failure to testify, in violation of his right against self-incrimination under Article 22 of the Maryland Declaration of Rights and CJP § 9-107. The circuit court erred in overruling the objection to those improper comments.

The error was not harmless, and the State does not argue otherwise. This was not an easy case. The victim did not testify. The State had no witnesses to the shooting. Nor did the State have any forensic evidence of Delgado's guilt. At most, the State could show that Delgado was at Antojitos on the night of the shooting; that the khaki-clad assailant had a physique similar to his; that Delgado (like many people) owns a pair of khaki pants and that he was wearing them on the night of the shooting; and that Detective Scire had determined that Delgado was the assailant, based, in part, on out-of-court statements by three employees, two of whom did not testify at trial. In overruling Delgado's objection to the prosecutor's comment, the circuit court "gave its imprimatur to the prosecutor's insinuation that the jury should penalize [Delgado] for not testifying." *Smith II*, 367 Md. at 360. In these circumstances, we cannot say, beyond a reasonable doubt, that the prosecutor's improper comment had no effect on the jury's decision. *Id.* at 360-61.

The State argues that, even if the court erred in overruling the objection to the prosecutor's comments, "reversal is not required." Quoting *Degren v. State*, 352 Md. 400, 431 (1999), and *Spain v. State*, 386 Md. 145, 158 (2005), the State argues that "[r]eversal is required only '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.'"

The State fails to appreciate that *Degren* and *Spain* apply only when a prosecutor has allegedly gone beyond the "outer realm" of legitimate advocacy,[4] by for example, asserting that "'nobody in this country has more reason to lie than a defendant in a criminal trial[,]'"[5] by "invit[ing] the jury to draw inferences from information that was not admitted at trial[,]"[6] or by vouching for a witness. *Spain v. State*, 386 Md. at 157. By contrast, when a prosecutor has improperly commented on the defendant's assertion of the constitutional and statutory right not to testify, the Maryland courts do not ask whether the comments misled the jury or were likely to mislead the jury to the defendant's prejudice; they ask whether the comment was harmless beyond a reasonable doubt. *See, e.g.*, *Smith II*, 367 Md. at 360. We have already determined that the error in this case was not harmless.

Finally, citing *Mitchell v. State*, 408 Md. 368, 388 (2009), the State argues that, when defense counsel reminded the jurors that they "didn't hear [that Delgado] made any statement" to the police, Delgado "opened the door" to the prosecutor's comments about his failure to testify in his defense. The opened-door doctrine does not apply in this case.

"[T]he 'opened door' doctrine . . . permits a party to introduce evidence that otherwise might not be admissible in order to respond to certain evidence put forth by

[4] *See Spain v. State*, 386 Md. at 158.

[5] *Degren v. State*, 352 Md. at 431.

[6] *Spain v. State*, 386 Md. at 156.

opposing counsel." *Id.* In *Mitchell*, the Court extended the doctrine to closing arguments, holding that the State could inform the jury of the defendant's right to subpoena witnesses after defense counsel had, permissibly, drawn the jury's attention to the State's failure to call several witnesses. *Id.*

In this case, the circuit court sustained the State's objection to the comment that, the State says, opened the door. As a consequence of the court's ruling in the State's favor, the jury was prohibited from considering defense counsel's comment. As Delgado argues, because the jury was not allowed to consider defense counsel's remark, the defense did not inject an issue into the case, so as to justify a defensive response by the prosecution.

In summary, the prosecutor impermissibly commented on Delgado's assertion of his State rights against self-incrimination when she argued that "[n]o one came in here and said, oh, *I* was, happened to be at the club that night, but that's not *me*[,]" and that "[n]o one came in here and said, oh, *I* was just supposed to be meeting up with a girl that night." (Emphasis added.) Thus, the court erred in overruling Delgado's objection to those comments. We cannot say that the error was harmless beyond a reasonable doubt. And Delgado did not open the door to the impermissible comment when his attorney made a statement that the court prohibited the jury from considering.

II.

Delgado argues that the evidence was insufficient to support his convictions. Under the highly deferential standard employed in evaluating the sufficiency of the evidence to support a criminal conviction, we reject his contention.

In assessing the sufficiency of the evidence supporting a criminal conviction, we ask "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original); *accord Stanley v. State*, 248 Md. App. 539, 564 (2020). "In applying that standard, we give 'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *McClurkin v. State*, 222 Md. App. at 486 (quoting *Harrison v. State*, 382 Md. 477, 488 (2004)); *accord Stanley v. State*, 248 Md. App. at 564.

On appellate review of evidentiary sufficiency, a court will not "retry the case" or "re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010); *accord Stanley v. State*, 248 Md. App. at 564. The relevant question is not "whether the evidence *should have* or *probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Fraidin v. State*, 85 Md. App. 231, 241 (1991) (emphasis in original); *accord Stanley v. State*, 248 Md. App. at 564-65.

Applying these standards, we conclude that the evidence, though less than overwhelming, was sufficient to persuade a reasonable jury to find Delgado guilty beyond a reasonable doubt of attempted first-degree murder and use of a firearm during the commission of a crime of violence.

Chicas, the security guard, testified that Delgado was at Antojitos on the night of the shooting and was not inside the establishment when the shooting occurred. Chicas also testified that, before the shooting, a man wearing a mask and khaki pants asked him to intervene in a fight. At some point after Chicas's encounter with the masked, khaki-clad man, the surveillance footage shows a maskless man wearing khaki pants and a black hooded sweatshirt retrieving a gun from a white Jeep Wrangler that looks much like Chavez's Jeep and firing the gun at the victim; the State introduced a video from Delgado's phone, taken earlier that evening, which shows Delgado wearing khaki pants while in the vicinity of a similar white Jeep Wrangler. Lopez, an Antojitos employee, identified Delgado as the "bulky," maskless man shown in another piece of surveillance footage from the night of the shooting. The jurors could compare the image of the bulky man in the various videos to Delgado, who was sitting in front of them, and conclude that Delgado was the shooter. *See State v. Greene*, 240 Md. App. 119, 154-55 (2019). And, for what it is worth, a search of Delgado's residence established that he owned a pair of khaki pants.

On the basis of this collage of evidence, the jury could reasonably conclude that Delgado was the bulky man in the khaki pants who retrieved the weapon from the white Jeep Wrangler and shot another man.

In arguing that the evidence was insufficient, Delgado stresses the absence of any eyewitness testimony, the absence of any forensic evidence tying him to the shooting, and the ubiquitousness of khaki pants. The short answer to Delgado's contention is that these factors solely go to the weight of the evidence against him. Had the jury credited

Delgado's arguments, it could have found that the State had failed to prove him guilty beyond a reasonable doubt of all of the charges against him. The jury, however, was not required to reach that conclusion. Thus, the court did not err in submitting the case to the jury.

III.

Delgado argues that the court erred in declining to give a missing witness instruction. Assuming for the sake of argument that Delgado adequately preserved this objection, we see no error. We address this issue solely to provide guidance on remand, because it is likely to recur.

In general, "[Maryland] Rule 4-325(c) requires a trial court to give a requested [jury] instruction when (1) it 'is a correct statement of the law'; (2) it 'is applicable under the facts of the case'; and (3) its 'content . . . was not fairly covered elsewhere in the jury instruction[s] actually given.'" *See, e.g.*, *Hayes v. State*, 247 Md. App. 252, 288 (2020) (quoting *Thompson v. State*, 393 Md. 291, 302 (2006)). "Unless the trial court has made an error of law, we review its decision to give a jury instruction for abuse of discretion." *Id.*

As a preliminary matter, the State contends that Delgado failed to preserve his objection to the court's decision not to give the requested instruction. The State points out that Delgado never actually requested a missing witness instruction—instead, his co-defendant did. Moreover, Delgado did not formally join in the co-defendant's request, as he is required to do in order to preserve his point. *See id.* at 276. At most, Delgado mentioned the victim's absence and discussed the potential scope of the instruction that

his co-defendant had mentioned. We cannot fault the circuit court for failing to give an instruction that Delgado did not request.

Even if Delgado had requested the missing witness instruction, he arguably failed to preserve his objection to the court's failure to give it. Maryland Rule 4-325(f) provides, in pertinent part, that "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." After the court instructed the jury in this case, however, Delgado did not object to the court's failure to give a missing witness instruction. And although a party may substantially comply with Rule 4-325(f) as long as "the record reflects that the trial court understands the objection and, upon understanding the objection, rejects it,"[7] Delgado expressly told the court that he was "satisfied" with the instructions. In these circumstances, it is difficult to comprehend how Delgado complied, or even substantially complied, with Rule 4-325(f).

Even if Delgado had preserved his objection, the court would not have been required to give a missing witness instruction. Because a missing witness instruction involves inferences that a jury may draw from the facts and does not involve the law itself, a trial court has discretion not to give such an instruction even if a party requests the instruction and establishes the necessary predicate for it. *Harris v. State*, 458 Md. 370, 405-06 (2018). The record here contains nothing to indicate that the court somehow

[7] *Watts v. State*, 457 Md. 419, 428 (2018).

abused its discretion by not giving an instruction that it had the discretion to decide not to give.

Furthermore, a court has the discretion to give a missing witness instruction only when the witness is (among other things) "peculiarly available" to a party. *See, e.g.*, *Woodland v. State*, 62 Md. App. 503, 510 (1985). A witness is "peculiarly available" to a party if the witness was "peculiarly within the adversary's power to produce"—e.g., because the witness is available only to the adversary or because the witness has the type of relationship with the adversary that, as a practical matter, renders the witness's testimony unavailable to the other party. *Dansbury v. State*, 193 Md. App. 718, 746 (2010) (internal citation omitted).

The type of relationship that makes a witness "unavailable" to an opposing party may be a family relationship, an employer-employee relationship, or a professional relationship. *See Christensen v. State*, 274 Md. 133, 134-35 (1975); *accord Pinkney v. State*, 200 Md. App. 563, 579 (2011), *aff'd*, 427 Md. 77 (2012). "Underlying this principle is the realization that despite a party's theoretical ability to subpoena the witness's testimony, there is a practical concern that certain relationships may engender a very strong bias which would undermine the utility of that witness's testimony." *Davis v. State*, 333 Md. 27, 50 (1993); *accord Pinkney v. State*, 200 Md. App. at 579. Thus, "the rule looks toward addressing the bias engendered by feelings of love, friendship, or loyalty." *Pinkney v. State*, 200 Md. App. at 579.

The record refutes any argument that Guerrero was peculiarly available only to the State, and not to the defense. Instead, it appears that Guerrero had gone missing and was

equally unavailable to both the State and the defense: the State could not secure Guerrero's appearance at trial even though Detective Scire had attempted to communicate with him and even though Guerrero was subject to an arrest warrant.

Nor did the State have the kind of "relationship" with Guerrero that would make him peculiarly available to the State. Detective Scire had interviewed Guerrero after the shooting and gotten his telephone number, but appears to have had no further contact with him. When a law enforcement officer takes a witness's name and has no further contact with the witness, the officer and the witness do not have the type of relationship that makes the witness peculiarly available to the State. *Pinkney v. State*, 200 Md. App. at 579.

Finally, "a witness [is] not peculiarly available to the State where there was no showing that the defendant had exhausted the avenues available to produce the witness." *Pinkney v. State*, 200 Md. App. at 579. Yet, Delgado did nothing to secure Guerrero's appearance. In fact, Delgado's counsel told the circuit court: "We don't have to do anything. We can sit here and twiddle our thumbs."

In short, the circuit court did not abuse its discretion in declining to give a missing witness instruction.

CONCLUSION

The trial court erred by allowing statements during the State's rebuttal closing argument that violated Delgado's privilege against self-incrimination. The statements clearly referred to Delgado's decision not to testify, and we are unable to conclude, beyond a reasonable doubt, that these statements had no impact on the jury's verdicts.

That decision, however, does not affect our holdings that there was sufficient evidence from which a jury could find Delgado guilty beyond a reasonable doubt and that the court did not abuse its discretion in declining to give a missing witness instruction. Accordingly, Delgado's convictions for attempted first-degree murder and use of a firearm during the commission of a crime of violence are vacated, and this case is remanded for a new trial.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED. CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY MONTGOMERY COUNTY.