

COURT OF APPEALS OF MARYLAND

Atkins v. State

421 Md. 434 (2011) · Decided August 18, 2011

SUMMARY

The Maryland Court of Appeals held that, under the particular facts of the case, the trial court improperly instructed the jury that the State was not required to use specific investigative or scientific techniques. The instruction constituted non-neutral commentary on the evidence and effectively undermined the State’s burden to prove guilt beyond a reasonable doubt. The court reversed the judgment of the Court of Special Appeals and Atkins’s convictions.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                        |
|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Court of Appeals of Maryland                                                                                                                                                                                                                                           |
| WRITING FOR THE COURT | Greene, J.; Harrell, J.; Battaglia, J.; Murphy, J.                                                                                                                                                                                                                     |
| JURISDICTION          | Maryland                                                                                                                                                                                                                                                               |
| DECIDED               | August 18, 2011                                                                                                                                                                                                                                                        |
| DISPOSITION           | reversed_and_remanded                                                                                                                                                                                                                                                  |
| PROCEDURAL POSTURE    | Atkins was convicted in the Circuit Court for Montgomery County of three counts of second-degree assault. The Court of Special Appeals affirmed in an unreported opinion. The Court of Appeals of Maryland granted certiorari and reversed, remanding for a new trial. |
| STANDARD OF REVIEW    | A trial court's ruling on whether to give a proposed jury instruction is reviewed for abuse of discretion, including whether the instruction was legally correct, applicable to the facts, and fairly covered by the instructions actually given.                      |
| PRECEDENTIAL VALUE    | published precedential opinion                                                                                                                                                                                                                                         |
| PARTIES               | Armardo Annier Atkins v. State                                                                                                                                                                                                                                         |

TOPICS

- jury instructions
- burden of proof instructions
- due process
- evidence
- criminal procedure

PRACTICE AREAS

- criminal procedure
- constitutional law
- evidence

## QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by instructing the jury that the State was not required to use any specific investigative technique or scientific test to prove its case.
2. Whether the instruction improperly commented on the evidence, invaded the jury's fact-finding province, undermined Atkins's defense based on the absence of forensic evidence, and effectively relieved the State of its burden to prove guilt beyond a reasonable doubt.

## HOLDINGS

1. The trial court abused its discretion by giving the instruction because, in the context of this case, it was not proper under the facts, was fairly covered by the instructions already given, and unfairly prejudiced Atkins.
2. The instruction was an improper non-neutral commentary on the admitted evidence and the absence of evidence because it directed the jury's consideration of whether the knife was connected to the crimes, a factual issue reserved for the jury.
3. As worded and applied in this case, the instruction effectively relieved the State of its burden to prove Atkins's guilt beyond a reasonable doubt, violating his constitutional rights to due process and a fair trial.
4. The Court did not hold that an investigative- or scientific-techniques instruction is always improper; such an instruction may be valid if it remains neutral, preserves the State's burden of proof, and properly relates the absence of particular evidence to the reasonable-doubt standard.

## KEY QUOTATIONS

*"We hold that the trial judge's instruction to the jury on what the State was required to prove, in effect, relieved the State of its burden to prove guilt beyond a reasonable doubt." (438)*

*"Basically, the instruction directed the jury to ignore the fact that the State had not presented evidence connecting the knife to the crime, implying that the lack of such evidence is not necessary or relevant to the determination of guilt, and to disregard any argument by defense to the contrary." (453)*

*"The instruction given in the present case, however, effectively relieved the State of its burden because the instruction did not clearly explain to the jury the relation between the fact that the State was not required to produce specific evidence on the one hand, with the continuing obligation of the State to prove the defendant's guilt beyond a reasonable doubt on the other hand." (455)*

## FACTUAL BACKGROUND

During a physical altercation, Atkins stabbed Michael Holland and cut Tiara Barrett's companions, Alexis and Dominique Davis. Atkins claimed self-defense and testified that he used a foldable pocketknife, which he discarded after the fight. Police later found a large, non-folding black knife in a box in Atkins's bedroom, but performed no forensic testing and presented no testimonial evidence connecting that knife to the assaults. The State relied heavily on the knife to refute Atkins's self-defense account, and the trial court instructed the jury that the State need not use any specific investigative technique or scientific test.

## PROCEDURAL HISTORY

After the trial court admitted a knife found in Atkins's bedroom, despite the absence of forensic testing or evidence linking that knife to the assaults, the court instructed the jury that the State was not legally required to use any specific investigative technique or scientific test. The jury convicted Atkins on all three assault counts. The Court of Special Appeals affirmed, relying on *Evans v. State*, and the Court of Appeals granted certiorari, reversed the intermediate appellate judgment, and directed reversal of the trial-court judgments and a new trial.

## DISPOSITION

reversed\_and\_remanded

## REMAND INSTRUCTIONS

Reverse the judgment of the Court of Special Appeals; direct that court to reverse the judgments of the Circuit Court for Montgomery County and remand the case to the circuit court for a new trial.

## CASES CITED

- *Atkins v. State*, 417 Md. 384, 10 A.3d 199 (2010)
- *Evans v. State*, 174 Md. App. 549, 922 A.2d 620 (2007)
- *Stokes v. State*, 379 Md. 618, 626, 843 A.2d 64, 68 (2004)
- *Gore v. State*, 309 Md. 203, 210, 213-14, 522 A.2d 1338, 1341, 1343 (1987)
- *Chambers v. State*, 337 Md. 44, 48, 650 A.2d 727, 729 (1994)
- *State v. Hutchinson*, 287 Md. 198, 205, 411 A.2d 1035, 1039 (1980)
- *State v. Evans*, 278 Md. 197, 207, 362 A.2d 629, 635 (1976)
- *Thompson v. State*, 393 Md. 291, 302-03, 901 A.2d 208, 214 (2006)
- *Ware v. State*, 348 Md. 19, 58, 702 A.2d 699, 718 (1997)
- *General v. State*, 367 Md. 475, 485, 789 A.2d 102, 108 (2002)
- *Cruz v. State*, 407 Md. 202, 212, 222, 963 A.2d 1184, 1190, 1196
- *Dempsey v. State*, 277 Md. 134, 148-49, 355 A.2d 455, 463 (1976)
- *Patterson v. State*, 356 Md. 677, 684-85, 741 A.2d 1119, 1122-23 (1999)
- *David v. State*, 333 Md. 27, 52, 633 A.2d 867, 879 (1993)
- *Cost v. State*, 417 Md. 360, 368-69, 381, 10 A.3d 184, 189, 196-97 (2010)
- *Hardison v. State*, 226 Md. 53, 62, 172 A.2d 407, 411 (1961)
- *Gunning v. State*, 347 Md. 332, 348, 351-52, 701 A.2d 374, 381, 383-84 (1997)
- *Grandison v. State*, 341 Md. 175, 211, 670 A.2d 398, 415 (1995), cert. denied, 519 U.S. 1027 (1996)
- *In re Don Mc.*, 344 Md. 194, 201, 686 A.2d 269, 272 (1996)
- *Sample v. State*, 314 Md. 202, 207, 209, 550 A.2d 661, 663-64 (1988)
- *Eley v. State*, 288 Md. 548, 551, 555, 419 A.2d 384, 385, 387 (1980)
- *United States v. Saldarriaga*, 204 F.3d 50, 52 (2d Cir. 2000)

## OPINION

Atkins v. State

421 Md. 434

GREENE, J.

GREENE, J. Petitioner, Armardo Annier Atkins (Atkins), was convicted, in the Circuit Court for Montgomery County, of three counts of Second Degree Assault. Before this Court, Petitioner argues that the trial judge abused her discretion by instructing the jury that the State was not required to shoulder its burden of persuasion by the use of certain categories of demonstrative, i.e. forensic, evidence. Specifically, Petitioner presented one question for our review: Whether an instruction that the State need not use certain investigative and scientific techniques violated the Sixth and Fourteenth Amendments and the Maryland Declaration of Rights by undermining the defense's legitimate strategy and bolstering the State's case? On this record, we shall answer the question in the affirmative. We hold that the trial judge's instruction to the jury on what the State was required to prove, in effect, relieved the State of its burden to prove guilt beyond a reasonable doubt. The investigative or scientific techniques instruction, as framed, was improper because it resulted in a non-neutral commentary on the evidence, or the absence of evidence, actually admitted, and invaded the province of the jury, thus violating Atkins's constitutional rights to due process and a fair trial. This conclusion, however, is based on the particular \*438 facts in this case, and we do not hold that an investigative or scientific techniques instruction would be improper under different circumstances,<sup>1</sup> so long as the State is properly held to its burden, and the instruction regarding what the State must introduce in proving its case is properly related to the reasonable doubt standard.

## FACTS AND PROCEDURE

On November 24, 2007, Petitioner's neighbor, Wesley Waterton, was entertaining a group of people in the basement of his home in Silver Spring. The group included Tiara Barrett and Alexis and Dominique Davis, twin sisters. Atkins and Ms. Barrett had a verbal disagreement, and Barrett phoned her ex-boyfriend, Michael Holland, to come pick her up from the party. The following sequence of events after Mr. Holland arrived is unclear because the witnesses gave inconsistent testimony during trial. What is clear, however, is that after Mr. Holland arrived, a physical altercation erupted involving the Davis sisters, Holland and Atkins. The victims, in varied stories, claimed that Atkins began shoving the women, and then Alexis Davis punched Atkins in the nose, breaking it. Then, Holland tried to break up the fight and Atkins stabbed Holland, and cut both Davis sisters. A witness, Adrian Nightingale, testified that he saw Atkins reach into his pocket and apparently remove something, which Nightingale was unable to describe. Although Nightingale did not see a knife, Nightingale testified that after he saw Atkins reach into his pocket, Holland held his side and fell to the ground. Atkins, however, testified that once he was outside the Waterton home, Holland yelled at him and pushed him, and then Holland held Atkins from behind while the sisters \*439 punched and kicked him. Atkins testified that he then removed his

pocketknife from his pocket and opened it, and started swinging the knife in self defense, cutting Holland and the Davis sisters.<sup>2</sup> Atkins testified that after the fight, he left the Waterton home and threw his pocketknife in the pond behind the building. Atkins then returned to his own home, and his father took him to the hospital to have his injuries treated. After treatment, Atkins's father took him to the police station where Atkins gave a voluntary statement. Three days later, police executed a search warrant for Atkins's home. Police removed a knife from Atkins's bedroom, which was contained in a box on top of a bed side table. The knife was a non-foldable black knife, approximately 12 inches in length overall with a 6 inch blade.<sup>3</sup> Police, however, did not perform any scientific or forensic testing on the knife and there was no testimonial evidence from witnesses linking the particular knife found in Atkins's home to the crime. At trial, the State argued that the knife found in Atkins's home was the knife used to inflict the injuries on Holland and the Davis sisters.<sup>4</sup> In contrast, defense counsel argued that the knife found was not the knife used in the incident, but instead maintained that Atkins used a foldable pocketknife to protect himself. Although defense counsel objected to the admission of the large black knife at trial, the trial judge allowed the State to present the knife as evidence of the crime. On cross-examination of the police officer who found the knife at issue in Atkins's home, defense counsel questioned whether forensic testing could have been done on the knife introduced into evidence, highlighting the lack of evidence connecting the knife to the crime: Defense Counsel: Detective, is there any blood on the knife? Detective Parzych: Can I see it again? Defense Counsel: You can tell by looking? Detective Parzych: Well, you asked me a question. State's Counsel: Objection. Is that a question or a rhetorical— Defense Counsel: Yes, it is a question. Didn't you look at it before today? Detective Parzych: Yes, I did. Defense Counsel: Okay. You didn't see any blood on it back then, right? Detective Parzych: No, I did not. Defense Counsel: Or anything that appeared to be blood? Detective Parzych: No. Defense Counsel: All right. Is there any ... [a]re there any skin cells on there that might be invisible to the naked eye? Detective Parzych: I'm not qualified to answer if there are skin cells on there. Defense Counsel: Okay. All right. But there are people in the police department who are capable of looking for that kind of evidence, right? Detective Parzych: Correct. Defense Counsel: Okay. And, so, who looked for that? Detective Parzych: I don't know. Defense Counsel: Okay. You asked people in the police department to look for trace evidence before, right? Detective Parzych: Correct. Defense Counsel: And you do that by filling out a form and submitting it to the Montgomery County Crime Lab, right? Detective Parzych: Correct. Defense Counsel: Okay. Did you do that with respect to any evidence? Detective Parzych: No, I did not. Defense Counsel: Do you know if anyone else did? Detective Parzych: I don't. Defense Counsel: Okay. But you're aware, aren't you, based on your experience, that the crime lab sometimes can detect fluids such as blood, or saliva, or things like that, skin cells, even when they're invisible to the naked eye, right? Detective Parzych: Correct. After the close of evidence but before closing arguments, the State requested the following instruction, which the trial judge gave over defense counsel's objection<sup>5</sup>: During this trial, you have heard testimony of witnesses

and may hear argument of counsel that the State did not utilize a specific investigative technique or scientific test. You may consider these facts in deciding whether the State has met its burden of proof. You should consider all of the evidence or lack of evidence in deciding whether the defendant is guilty. However, I instruct you that there is no legal \*442 requirement that the State utilize any specific investigative technique or scientific test to prove its case. Your responsibility as jurors is to determine whether the State has proven based upon the evidence the defendant's guilt beyond a reasonable doubt. (Emphasis added.) Finally, in its closing, the State argued, "[This case is] about a knife and deadly force. This case is not about young people out there pushing and shoving each other. This is about a knife." Counsel for the State then sought to discredit the Defense's version of events, demonstrating that "[Atkins] is on the ground and he is reaching for his pocket knife, not that knife, a little pocket knife. And the reason why, ladies and gentleman, it's a pocket knife is because a pocket knife doesn't sound that scary." The State then called the defendant's testimony "absurd" and stated again that a pocket knife, "doesn't sound very alarming, it doesn't sound very scary. But this [the large black knife], the one that he said he bought from a friend, now that's a different story, okay?" The State emphasized the knife repeatedly, arguing that "all of us agree here that it is the knife that makes this case serious." After deliberation, the jury found Atkins guilty on all three counts of assault. Atkins appealed to the Court of Special Appeals, arguing that the trial judge abused his discretion in giving the above jury instruction. Atkins claimed that the judge "improperly commented on the evidence [and] directly contradicted] an appropriate defense argument." In an unreported opinion, the Court of Special Appeals affirmed the convictions, relying on its prior decision in *Evans v. State*, 174 Md.App. 549, 922 A.2d 620 (2007), which upheld a similar instruction. The intermediate appellate court, in the present case, stated that the instruction "was a correct statement of the law, applicable to the facts, and not fairly covered by the other instructions given." Atkins filed for certiorari and we granted the petition. *Atkins v. State*, 417 Md. 384, 10 A.3d 199 (2010). For reasons stated in this opinion, we shall reverse the judgment of the Court of Special Appeals.

#### \*443DISCUSSION

"The right to trial by jury is guaranteed by the Maryland Declaration of Rights and the Maryland Rules, as well as the United States Constitution." *Stokes v. State*, 379 Md. 618, 626, 843 A.2d 64, 68 (2004) (referencing Articles 5, 21, 23, and 24 of the Maryland Declaration of Rights and Constitution of the United States, Amendments VI and XIV). Further, a defendant has the right to be tried by a fair and impartial jury, Md. Dec. of Rts. Art. 21, and the "jury is the exclusive judge of the fact[s]" in a case. *Gore v. State*, 309 Md. 203, 210, 522 A.2d 1338, 1341 (1987) (citing Md. Dec. of Rts. Art. 23). In order to aid the jury in its deliberations, a trial judge will instruct the jury as to the relevant law in a case. *Chambers v. State*, 337 Md. 44, 48, 650 A.2d 727, 729 (1994). Importantly, "the appellate courts of this State have often recognized error in the trial judge's instructions ... if the error was likely to unduly influence the jury and thereby deprive the defendant of a fair trial." *State v. Hutchinson*, 287 Md. 198, 205, 411 A.2d 1035, 1039 (1980).

Thus, it is improper for a trial judge to “comment on a question of fact which the jury is to pass-on” because such commentary invades the province of the jury. *Gore*, 309 Md. at 213, 522 A.2d at 1343 (quoting *Coffin v. Brown*, 94 Md. 190, 202-203, 50 A. 567, 572 (1901)). Further, we preclude any instruction “when [it] operate[s], ultimately, to relieve the State of its burden of persuasion in a criminal case, i.e., its burden of proving beyond a reasonable doubt all the facts necessary to constitute the offense.” *State v. Evans*, 278 Md. 197, 207, 362 A.2d 629, 635 (1976). Maryland Rule 4-325 governs the procedure a court must follow when giving instructions to the jury. Rule 4-325(c) states: How given. The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not \*444grant a requested instruction if the matter is fairly covered by instructions actually given. Rule 4-325(c) “requir[es] the trial court to give a requested instruction under the following circumstances: (1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given.” *Thompson v. State*, 393 Md. 291, 302-303, 901 A.2d 208, 214 (2006) (quoting *Ware v. State*, 348 Md. 19, 58, 702 A.2d 699, 718 (1997)). The rule reflects our view that the “main purpose of a jury instruction is to aid the jury in clearly understanding the case, to provide guidance for the jury’s deliberations, and to help the jury arrive at a correct verdict.” *Chambers*, 337 Md. at 48, 650 A.2d at 729 (1994); see also *General v. State*, 367 Md. 475, 485, 789 A.2d 102, 108 (2002) (“Jury instructions direct the jury’s attention to the legal principles that apply to the facts of the case.”). We have discussed at length guidelines that a trial judge must follow in giving jury instructions. See generally, *Cruz v. State*, 407 Md. 202, 212, 222, 963 A.2d 1184, 1190, 1196 (surveying federal cases, which hold that “reversal is warranted when the defendant was prejudiced because the instruction undermined the closing argument already given by the defense,” and holding that the supplemental instruction given prejudiced the defendant, despite being generated by the facts of the case). In *Dempsey v. State*, 277 Md. 134, 355 A.2d 455 (1976), we stated that the “decisions of this Court dealing with trial judges’ comments to juries regarding evidence clearly support the principle that the judge should not reveal to the jury his opinion.” *Dempsey*, 277 Md. at 148-49, 355 A.2d at 463; see also *Gore*, 309 Md. at 214, 522 A.2d at 1343 (1987) (holding that the judge’s instruction regarding sufficiency of the evidence was “an indirect comment on the general weight of the evidence as to each count and outside the permissible scope of argument”). We emphasized the “high and authoritative position” of the judge, and cautioned that a trial judge should be “ ‘exceedingly careful in any remarks made by him \*445during the progress of a trial ... and should carefully refrain, either directly or indirectly, from giving expression to an opinion upon the existence or not of any fact, which should be left to the finding of the jury.’ ” *Dempsey*, 277 Md. at 149, 355 A.2d at 463 (quoting *Elmer v. State*, 239 Md. 1, 10-11, 209 A.2d 776 (1965)). Further, it is important to note that the intent of the trial judge in giving a particular instruction is irrelevant. See *Gore v.*

State, 309 Md. 203, 522 A.2d 1338 (1987). In *Gore*, we stated that although we thought “it [was] clear that the trial judge below was attempting to communicate [proper legal principles] to the jury in order to cure what the trial judge perceived as an improper statement in defense counsel’s closing argument[,]” we agreed with the defendant that the instruction may have improperly influenced the jury. *Gore*, 309 Md. at 212, 522 A.2d at 1342. In *Patterson v. State*, 356 Md. 677, 741 A.2d 1119 (1999), we clarified that while Rule 4-325(e) requires instructions to be given on the applicable law, the same does not apply to facts and inferences. *Patterson*, 356 Md. at 684, 741 A.2d at 1122. Discussing the many inferences that may be drawn regarding a missing piece of evidence, we stated that the emphasis of one possible inference out of all the rest by a trial judge can be devastatingly influential upon a jury although unintentionally so. As this Court has stated in the past in regard to missing witness instructions, when the inference is communicated to the jury as part of the judge’s binding jury instructions, it creates the danger that the jury may give the inference undue weight. At the very least, a trial judge’s jury instruction may have the effect of overemphasizing just one of the many ‘proper inferences that a jury may draw. *Id.* (emphasis added) (internal citations and quotations omitted); see also *David v. State*, 333 Md. 27, 52, 633 A.2d 867, 879 (1993) (stating that “a trial judge’s jury instruction on the missing witness inference may have the effect of overemphasizing just one of the many proper inferences that a jury may draw.”). Further, it is important to note that “ ‘[t]he failure to grant an affirmative instruction does not remove the availability of the inference....Possibly for that reason, judges hesitate to grant [such instructions]; they do not wish to emphasize one legitimate inference over all others which the jurors have been told are solely within their judgment.’ ” *Patterson*, 356 Md. at 685, 741 A.2d at 1123 (quoting *Bailey v. State*, 63 Md.App. 594, 611-12, 493 A.2d 396, 404 (1985)). Additionally, in discussing the influence of the trial judge in comparison to that of counsel when commenting on inferences to be drawn, we have stated that the “argument by counsel to the jury will naturally be imbued with a greater gravitas when it is supported by a[n] instruction on the same point issued from the bench.” *Cost v. State*, 417 Md. 360, 381, 10 A.3d 184, 196-7 (2010) (pointing out that an instruction issued from the bench has more “ ‘force and effect than if merely presented by counsel,’ ”) *Cost*, 417 Md. at 381, 10 A.3d at 197 (quoting *Hardison v. State*, 226 Md. 53, 62, 172 A.2d 407, 411 (1961), but cautioning that an instruction from the bench “runs the risk of ‘creating the danger that the jury may give the inference undue weight,’ ”) *Cost*, 417 Md. at 381, 10 A.3d at 197 (quoting *Davis v. State*, 333 Md. 27, 52, 633 A.2d 867, 879 (1993)). When we review a trial court’s ruling to grant or decline a proposed jury instruction, “we must determine whether the requested instruction was a correct statement of the law; whether it was applicable under the facts of the case; and whether it was fairly covered in the instructions actually given.” *Gunning v. State*, 347 Md. 332, 348, 701 A.2d 374, 381 (1997) (quoting *Grandison v. State*, 341 Md. 175, 211, 670 A.2d 398, 415 (1995), cert. denied, 519 U.S. 1027, 117 S.Ct. 581, 136 L.Ed.2d 512 (1996)). We review the trial court’s decision under an abuse of discretion standard, and “[t]he court’s failure to fulfill this function can amount to error, that ordinarily requires reversal.”



Gunning v. State, 347 Md. at 351, 701 A.2d at 383 (internal quotation omitted); see also Cost, 417 Md. at 368-69, 10 A.3d at 189 (“we will reverse the decision if we find that the defendant’s rights were not adequately protected”). We have said: \*447Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of the trial court is a matter of discretion it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Gunning, 347 Md. at 351, 701 A.2d at 383 (quoting In Re Don Mc., 344 Md. 194, 201, 686 A.2d 269, 272 (1996)). Moreover, “a proper exercise of discretion involves consideration of the particular circumstances of each case,” and, “[t]he [exercise of] discretion being for the solution of the problem arising from the circumstances of each case as it is presented.” Gunning, 347 Md. at 352, 701 A.2d at 383-84 (internal citations omitted). In the present matter, considering the particular facts of the case, the trial judge abused her discretion by giving the requested jury instruction. The instruction was not proper under the facts of the case, was fairly covered in the instructions actually given, and, rather than solving a problem arising from the circumstances of the case, created a problem that unfairly prejudiced the defendant’s case. Petitioner argues that the trial judge abused her discretion when she instructed the jury that “there is no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case.” (Emphasis added.) Atkins acknowledges that the instruction was a correct statement of the law, but argues that the instruction violated his rights to confront the evidence against him and to due process of law for three reasons: “(1) it usurps the province of the jury; (2) it is improper commentary on the evidence; and (3) it suggests that a defense [of] lack of scientific evidence strategy is improper.” Regarding the first reason, Atkins argues that the instruction “indirectly tells the jury that the absence of scientific evidence is not relevant to the determination of guilt, thus usurping the jury’s role.” Relying on Dempsey v. State, Atkins argues that the instruction constitut\*448ed improper commentary on the evidence because it “was an indirect comment on the weight of the absence of scientific evidence,” which is a factual issue for the jury to determine. Petitioner asserts that the instruction “suggests the absence-of-scientific-evidence defense is improper, requiring a curative instruction by the judge [despite the fact that] this is an appropriate defense not warranting a curative instruction.” The State contends that the instruction was properly given, stating that the instruction was a “correct statement of the law, ... applicable to the facts in this case, and it was not fairly covered by the other instructions.” According to the State, the investigative techniques instruction is justified in order to ensure that the government is not prejudiced by advances in technology, and because there is no duty to employ a specific procedure when other “evidence is proof beyond a reasonable doubt that a crime was committed.” Further, the State argues that the trial court, “in giving the investigative technique instruction, did not comment on the sufficiency or weight of the evidence.” The State maintains that the instruction was neutral on its face, and “expressly [told]

the jury that it may consider the fact that the State did not utilize certain investigative techniques or scientific tests in deciding whether the State met its burden of proof.” Although we have not dealt previously with the particular issue in this case, whether a trial judge may instruct the jury that the State is not required to produce certain evidence, the Court of Special Appeals dealt with the same jury instruction at issue before us in *Evans*, 174 Md.App. 549, 922 A.2d 620 (2007). In *Evans*, police engaged in an under-cover narcotics purchase, in which the defendant provided police with illegal drugs. *Evans*, 174 Md.App. at 554, 922 A.2d at 623. During both cross-examination and later during closing argument, defense counsel emphasized the fact that neither video nor audio equipment was employed to record the transaction. *Evans*, 174 Md.App. at 562-63, 922 A.2d at 628. Over defense objection, the trial judge in *Evans* instructed the jury that there was “no legal requirement that the State utilize any \*449specific investigative technique or scientific test to prove its case.” *Evans*, 174 Md.App. at 562, 922 A.2d at 628. The trial judge stated that the “issue [was] generated specifically in this case, based on the cross-examination.” *Evans*, 174 Md.App. at 565, 922 A.2d at 629. On appeal, the defendant argued that the instruction “relieved the State, in the minds of the jurors, of the burden to establish guilt beyond a reasonable doubt.” *Evans*, 174 Md. App. at 562, 922 A.2d at 627. The Court of Special Appeals affirmed the conviction and the use of the instruction, stating that the instruction was “a correct statement of the law, was applicable to the facts in the case and was not fairly covered by other instructions given.” *Evans*, 174 Md.App. at 570, 922 A.2d at 632. Further, the intermediate appellate court stated that the “robust and vehement closing arguments of counsel ... warranted giving the instruction,” and that “contrary to counsel’s argument, there is no requirement on the part of the State to produce other types of evidence.” *Id.* *Evans*, however, is distinguishable from the present case for multiple reasons. First and foremost, in *Evans*, the relevant legal reasoning regarding the instruction is dicta. As the court stated, “[t]he record clearly demonstrates that [defendant’s] counsel failed to object to the instruction at issue during the proceedings,” and further that “the [defendant’s] failure to raise such issue in the trial court precludes us from such consideration on appeal.” *Evans*, 174 Md.App. at 566, 922 A.2d at 630. Despite holding that the issue was waived, the intermediate appellate court engaged in a legal analysis of the issue, which was therefore not authoritative or essential in the determination of the case. Further, unlike the case at hand, the missing evidence in *Evans*, i.e., photographic or video evidence of the drug transaction, was not of critical importance to the case. Instead, the State relied on the eye witness testimony and identification of two detectives directly involved in the transaction. *Evans*, 174 Md.App. at 553-56, 922 A.2d at 622-624. The failure of police to provide additional evidence was therefore not a crucial issue, despite the defense argument that such evidence could possibly have \*450served to bolster the State’s case in order to establish guilt beyond a reasonable doubt. *Evans*, 174 Md.App. at 562-63, 922 A.2d at 628. By contrast, in the case sub judice, the only issue before the jury was whether Atkins acted in self defense, and the main piece of physical evidence upon which the jury could base that determination was the particular knife found in Atkins’s home. In its closing argument, the State

relied heavily on the large black knife found at Atkins's home, arguing that "it is the knife that makes this case serious," in order to refute the claim of self defense. Conversely, the defense claimed that Atkins was attacked by Holland and the Davis sisters, and Atkins used a pocket knife to defend himself from his attackers. Thus, the knife used was of critical importance in the case, considering its size and character, and the defense sought to discredit the alleged connection between the knife found at Atkins's home and the crime. Unlike in Evans where the non-existent evidence, pictures or video of the transaction, were supplemental evidence which would have supported the eye witness accounts, the evidence lacking here could have been direct evidence to affirmatively linking the knife introduced to the alleged assaults. In order to find Atkins guilty, the jury would have to believe the State's argument connecting the knife to the crimes. The instruction here, unlike in Evans, addressed directly the State's demonstrative evidence introduced against Atkins. Finally, in Evans, defense counsel gave "robust and vehement closing argument" in addition to extensive cross-examination on the issue of the failure of police to record the transaction. Evans, 174 Md.App. at 570, 922 A.2d at 632. The trial court stated explicitly that the cross-examination warranted the instruction, and the Court of Special Appeals also relied on the closing argument to justify the use of the instruction. Evans, 174 Md.App. at 570, 565, 922 A.2d at 632, 629. Thus, the intermediate appellate court viewed the instruction as necessary to correct defense counsel's argument that the State was required to produce certain evidence. Evans, 174 Md.App. at 570, 922 A.2d at 632. In the present \*451 case, defense counsel briefly cross-examined on the issue, but did not argue lack of evidence in closing. Unlike in Evans, where counsel distorted the law, thus requiring a curative instruction, counsel in the present case merely pointed out on cross-examination what procedures were available but did not incorrectly state the law or the State's burden. Having distinguished the legal reasoning of Evans from the case at hand, we shall determine whether the instruction given was appropriate in the present case. As discussed above, the foot long, non-folding black knife was the centerpiece of the State's case and thus the instruction was of critical importance. The primary concern when evaluating whether a trial judge abused his or her discretion in giving this type of instruction is the risk that "such an instruction will run afoul of the prohibition against relieving the State of its burden where the ... relation [of the instruction] to the reasonable doubt standard [is] unclear." Evans, 174 Md.App. at 571, 922 A.2d at 633. This case exemplifies that risk; the instruction as worded effectively undermined the defense theory of self defense, and relieved the State of its burden to prove guilt beyond a reasonable doubt. There was an insufficient basis in this case generating a need for a curative or cautionary jury instruction clarifying the State's burden in regards to specific investigative techniques. Further, the issue regarding lack of forensic evidence was generated when the State sought to have the knife admitted as evidence with no corroborating evidence linking it to the crime, save speculation that the wounds inflicted on the victims were consistent with the particular knife found in Atkins's bedroom. Defense counsel, outside the presence of the jury, objected to the admissibility of the knife, stating that "[f]it's just total speculation that this knife had any

connection to this incident,” and further that “from my understanding there’s not going to be any testimony of any forensic evidence, such as that there might be blood on [the knife], or any human skin cells, or anything like that.” Regarding possible testimony for the State from Holland’s treating physician that it was “possible [that] this knife could cause the injuries,” defense \*452counsel argued that such testimony was a “broad statement, because virtually any sharp object could probably, could possibly cause, you know, cutting-type injuries.” Despite these concerns, the trial judge overruled defense counsel’s objection, and allowed the evidence to be admitted.<sup>6</sup> Once overruled by the trial judge, defense counsel had every right to inquire about steps the State undertook to connect the defendant and the particular knife found in Atkins’s home to the crime. As we have held previously, a defendant has the right to raise a defense based on the lack of evidence presented by the State. *Sample v. State*, 314 Md. 202, 207, 209, 550 A.2d 661, 663, 664 (1988). We stated in *Sample* that when “the State has failed to utilize a well-known, readily available, and superior method of proof to link the defendant with the criminal activity, the defendant ought to be able to comment on the absence of such evidence.” *Sample*, 314 Md. at 207, 550 A.2d at 663 (1988) (interpreting *Eley v. State*, 288 Md. 548, 419 A.2d 384 (1980) (which held that the trial court erred “in precluding counsel from arguing the logical inferences from the facts and gaps in [the] evidence,” *Eley*, 288 Md. at 551, 419 A.2d at 385, and that under the circumstances, “it is not unreasonable to allow the defendant to call attention to [the State’s failure to produce fingerprint evidence],” *Eley*, 288 Md. at 555, 419 A.2d at 387)). In order to probe into the utility of scientific testing to connect the knife introduced by the State to the crimes charged, defense counsel engaged in cross-examination of the detective, asking whether the police department was capable of looking for skin cells or blood on the knife, and whether such testing was performed in this case.<sup>7</sup> The examination was a legitimate, brief, and reason\*453able inquiry into the connection between the knife and the crime. At oral argument before this Court, however, the State argued that defense counsel opened the door to the cautionary instruction by cross-examining the detective regarding investigative techniques. Even assuming, without deciding, that the cross-examination, in and of itself, opened the door to an investigative techniques instruction, we fail to see how the instruction employed did anything other than nullify or undermine the proper defense that the knife relied on by the State could not be connected to the crime. The instruction did not adequately protect Atkins’s right to a fair trial because the instruction invaded the province of the jury and constituted commentary on the weight of the evidence, which comment was improper. As stated by Atkins, “[i]t was the jury’s function to determine what inferences were to be drawn from the police [officer’s] failure to test the knife for DNA evidence. But the trial judge usurped this role.” Basically, the instruction directed the jury to ignore the fact that the State had not presented evidence connecting the knife to the crime, implying that the lack of such evidence is not necessary or relevant to the determination of guilt, and to disregard any argument by defense to the contrary. In the words of Petitioner’s counsel at oral argument before this court, “the instruction effectively plugged a hole in the State’s case.” Even if the instruction

was an accurate statement of the law, the “high and authoritative” position of the trial judge necessitates that the judge be more vigilant and careful in refraining from commenting on inferences to be drawn by the jury. The State was permitted to present the large black knife to the jury that the defendant challenged as not being connected to the alleged crime. The defense therefore had the right to challenge the State’s case as to the quality of the evidence presented. Hence, it was well within the province of the jury to infer, or not to infer, as a matter of fact, that the knife introduced by the State was the knife used to commit the crimes alleged. Through the instruction, however, the judge commented on that inference, thus invading the province of the jury. Similar to *Cost*, the instruction in this case had more “force and effect than if merely presented by counsel,” and certainly created the danger that the jury would give the judge’s comments on the inference to be made from the lack of evidence undue weight. *Cost*, 417 Md. at 381, 10 A.3d at 197. We can envision a scenario in which a jury, discussing the evidence presented and the lack of scientific testing, would remember the trial judge telling them that the State need not present such evidence, and conclude that the State does not have to connect affirmatively the defendant to the knife and the crimes. This would, and did, infringe on Atkins’s right to have the jury, rather than the judge, determine the facts and for the State to prove guilt beyond a reasonable doubt. It was therefore error for the trial judge to give the instruction. Finally, we emphasize that our conclusion that the instruction as given was invalid is based on the particular facts in this case, and we do not hold that an investigative techniques instruction would never be proper.<sup>8</sup> As pointed out in *Evans*, the key to producing a valid jury instruction is ensuring that the State is properly held to its burden, and any instruction regarding what the State must produce in proving its case must be properly related to the reasonable doubt standard. For example, *United States v. Saldarriaga*, 204 F.3d 50 (2nd Cir.2000), on which the Court of Special Appeals relied in *Evans*, provides guidance in determining when such an instruction would be valid. The instruction in *Saldarriaga* was much more detailed than the present instruction, and went to great lengths to fully explain that, although the government was not obligated to use particular techniques, the jury could consider the lack of such evidence in determining whether the government could meet its burden. *Saldarriaga*, 204 F.3d at 52. Specifically, the trial court in *Saldarriaga* instructed the jury that: The law is clear that the government has no obligation to use any particular techniques. The government’s techniques [are] not on trial here.... The government’s function is to give enough evidence to satisfy you beyond a reasonable doubt that the charges are true ... However, if suggesting things they could have done leads you to think, well maybe I have a reasonable doubt because I didn’t have any evidence on that subject, if that happens, why, then, of course, that is a reasonable doubt like anything else. *Id.* The court went on to provide the jury with an example to illustrate when not having the evidence could create a reasonable doubt as to whether the government could prove its case. *Id.* In this way, the court in *Saldarriaga* much more clearly, and in a neutral way, related the government’s burden to prove its case beyond a reasonable doubt to the correct statement of the law, that the government was not obligated to perform specific

techniques. The instruction given in the present case, however, effectively relieved the State of its burden because the instruction did not clearly explain to the jury the relation between the fact that the State was not required to produce specific evidence on the one hand, with the continuing obligation of the State to prove the defendant's guilt beyond a reasonable doubt on the other hand. Instead, rather than aiding the jury in understanding the case and providing guidance for deliberations, the instruction resulted in commentary on specific evidence, or lack thereof, and invaded the province of the jury. Therefore, we shall reverse the judgment of the Court of Special Appeals and hold that the trial court erred in giving the instruction as written, based on the facts of this case. JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED; CASE REMANDED TO THAT COURT WITH DIRECTIONS TO REVERSE THE JUDGMENTS \*456 OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AND REMAND THE CASE TO THAT COURT FOR A NEW TRIAL. COSTS IN THIS COURT AND THE COURT OF SPECIAL APPEALS TO BE PAID BY MONTGOMERY COUNTY. HARRELL, BATTAGLIA, and MURPHY, JJ., Concur. . We defer to the Maryland Criminal Pattern Jury Instruction Committee to draft a model jury instruction regarding this Point. In crafting the pattern instruction, the Committee should take into consideration the need for the instruction to be neutral in light of the State's burden to prove its case beyond a reasonable doubt, and consistent with the rules of evidence, to allow the State the discretion to pick and choose the evidence to introduce in establishing its case in chief. . Both Davis sisters sustained minor injuries and Holland was treated for severe stab wounds. . At oral argument before this Court, Petitioner's counsel described the knife removed from Atkins's room as a "Rambo-type" knife, and the State did not object to that characterization of the knife placed into evidence. . In opening statement, the State told the jury that "you're going to hear testimony that the police executed a search warrant at Amardo Atkins's house, and they located the knife that he used to stab the three unarmed individuals. They located that knife hidden in his bedroom." When defense counsel objected to the admission of the knife, counsel for both parties approached the bench. Outside the hearing of the jury, the State argued to the judge that the knife was "the only knife found in the room. He 1'led the scene. A surgeon will testify these were deep wounds" and further, "if [the defense] wants to argue that this isn't the knife, that it was some other knife, they can argue it, but this is the evidence." The State concluded that the injuries sustained were "consistent with the knife that was used." . Defense counsel objected to the court giving the investigative and scientific techniques instruction on the basis that the knife introduced into evidence was not used in the affray and that the "pattern jury instructions significantly cover[ed] this when they say that, the State is not required to prove [guilt] to a mathematic certainty or beyond all doubt. So I think it's sufficiently covered by a pattern jury instruction and we would object to that instruction being given." The State countered that the issue was raised on cross-examination and that the pattern jury instructions did not adequately cover the issue. After reviewing *Evans v. State*, 174 Md.App. 549, 922 A.2d 620 (2007), cert. denied, *Evans v. State*, 400 Md. 648, 929 A.2d 890 (2007), the trial judge overruled the objection, stating that the

"question could [] bear in the mind of the jurors." . The State argued that the knife was relevant because the knife was found in Atkins's bedroom, in a box, and the trial judge seemed persuaded by this reasoning in overruling defense counsel's objection to the admission of the knife. . During the cross-examination, the officer acknowledged that "it was possible that trace evidence could have been found on the knife had it been tested." . The better practice, however, is for a trial judge to refrain from commenting on inferences to be drawn by the jury. While it would be proper to tell the jury that the State may prove its case by whatever means it chooses, we caution against commenting in the negative, i.e., what the State does not have to do, as this practice, considering the context in which the instruction is given, runs the risk of relieving the State of its burden.