UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0604

September Term, 2014

MARVIN REYES-MENDOZA

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Reed,

JJ.

Opinion by Graeff, J.

Filed: September 29, 2015

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On January 31, 2014, a jury in the Circuit Court for Prince George's County convicted Marvin Reyes-Mendoza of attempted first degree murder and related crimes in connection with his participation in a drive-by shooting. The court sentenced appellant to life, all but 45 years suspended, on the conviction for attempted murder, and it imposed a five-year consecutive sentence on the conviction for use of a handgun in the commission of a crime of violence.[1]

On appeal, appellant raises five issues for our review, which we have reworded and rephrased slightly, as follows:

1. Did the circuit court abuse its discretion in admitting text messages found on a co-conspirator's cell phone?

2. Did the circuit court err in denying appellant's motion for a mistrial and overruling his objections regarding the prosecutor's statements during closing argument?

3. Did the circuit court abuse its discretion in admitting appellant's written statement?

4. Did the circuit court err in refusing to strike the Department of Juvenile Services report?

5. Did the circuit court err in denying appellant's motion to dismiss on speedy trial grounds?

[1] The court's sentence, in total, was as follows: life, all but 45 years suspended, for attempted murder; first degree assault merged; 10 years concurrent for participation in a criminal gang; 45 years concurrent for conspiracy to commit murder; conspiracy to commit first degree assault merged; 5 years consecutive for use of a handgun in the commission of a crime of violence; 3 years concurrent for unlawfully wearing, carrying or transporting a handgun; 1 year concurrent for fleeing and eluding in a vehicle; and 5 years concurrent for intimidating a witness. Appellant was found not guilty of possession of a firearm by a person under 21.

For the reasons set forth below, we find no error or abuse of discretion on the first four grounds raised, but we agree that the court erred in addressing the speedy trial claim. Accordingly, we remand to the circuit court for further proceedings on this claim.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2011, Wilmer Argueta ("Chango"), a member of the Mara Salvatrucha ("MS-13") gang, assaulted Gustavo Marquez ("Monster"), a member of the Adelphi Park Crew gang ("ADP") and the victim in this case.[2] Mr. Marquez provided the Prince George's County Police a statement and identified Mr. Argueta as the assailant. Mr. Argueta subsequently was arrested and charged with assault.

On November 14, 2011, Mr. Marquez informed Detective William Lee, a member of the Prince George's Police Department's Gang Unit, that people were driving a distinctive 4Runner SUV through his neighborhood and threatening him. Detective Lee assigned several officers to watch Mr. Marquez's home.

Efrain Ramirez ("Potter"), another MS-13 gang member, testified that Mr. Carlos Beltran-Flores ("Joker") wanted to kill Mr. Marquez because he was a member of the rival ADP gang and because he was cooperating with police regarding the September assault. Mr. Ramirez noted that Mr. Beltran-Flores had driven by Mr. Marquez's house a couple times looking for him.

On November 15, 2011, Mr. Ramirez, appellant, and Mr. Beltran-Flores agreed to commit a robbery. The three collected a revolver from Mr. Ramirez's apartment,

[2] According to testimony at trial, ADP is part of the Bloods gang, which is a rival of MS-13.

purchased a black mask from a local mall, and drove to Adelphi, Maryland, to find a victim. Appellant was driving through a neighborhood when he spotted Mr. Marquez in front of his home. Appellant asked Mr. Beltran-Flores what he "wanted to do." Mr. Beltran-Flores suggested they do a "drive-by," and he moved to the back seat with the revolver. Appellant agreed, put on the black mask they had purchased earlier, circled around the block, and turned onto Mr. Marquez's street. Mr. Beltran-Flores instructed appellant to drive slowly. Mr. Beltran-Flores then rolled down the rear passenger side window and fired several shots at Mr. Marquez, hitting him once in the chest.[3]

The officers surveilling Mr. Marquez's home quickly pulled up behind appellant's vehicle and activated their lights. Mr. Ramirez testified that appellant drove away, attempting to avoid the police by driving at a high rate of speed. The officers pursued the vehicle, and Mr. Beltran-Flores threw the revolver into the rear of the SUV. Mr. Ramirez objected, concerned that the officers would inevitably catch them and discover the fingerprints on the gun. At that point, Mr. Beltran-Flores retrieved the gun from the rear of the vehicle and threw it out the window. Appellant stopped the vehicle and the three men in the vehicle were arrested.

During a post-arrest search, officers seized a cell phone from Mr. Beltran-Flores. Detective Steven Huie obtained a search warrant, and the data recovered from Mr. Beltran-

[3] In exchange for a reduced sentence of 10-25 years of incarceration, Mr. Ramirez entered into a plea agreement with the State. The agreement required that Mr. Ramirez plead guilty in two criminal cases pending against him (one related to this case) and testify against appellant.

Flores' cell phone included a number of text messages addressed to and from a contact named "Chino."[4] Police also recovered a black mask from the SUV that tested positive for appellant's DNA.

Appellant was taken to the police station, where he signed an Advice of Rights and Waiver Form and provided a statement. In the beginning of his statement, appellant admitted that he, Mr. Beltran-Flores, and Mr. Ramirez were driving through Adelphi, but he suggested that he had no idea what was about to occur when Mr. Beltran-Flores moved to the back seat of the vehicle and told him to drive down Mr. Marquez's street. After appellant's initial narration, Detective Samantha Milligan wrote 41 questions on the statement, which appellant answered. Appellant then provided a second narration, in which he confessed that (1) he had a "beef" with Mr. Argueta; (2) he knew that Mr. Beltran-Flores "planned to get" Mr. Marquez; (3) they had traveled to Adelphi several times to look for Mr. Marquez; (4) he knew that Mr. Beltran-Flores had a gun when he picked him up on the day of the shooting; and (5) he knew what Mr. Beltran-Flores would do if they found Mr. Marquez. Following the second narrative, Detective Milligan wrote an additional five questions, which appellant answered. These questions revealed, *inter alia*, that appellant lied about the gun in the initial part of his statement because he did not want Mr. Beltran-Flores or Mr. Ramirez to know he was the one telling the police about the gun, and Mr. Beltran-Flores "wanted to get back at [Mr. Marquez] for landing [Mr. Argueta] in court."

[4] Detective William Lee and appellant's co-conspirator, Mr. Ramirez, testified at trial that appellant's nickname was "Chino." Detective Huie also testified that he searched Mr. Beltran-Flores' cell phone and found a picture of appellant attached to a text message conversation with "Chino."

Additional facts will be discussed as necessary in the discussion that follows.

DISCUSSION

I.

Admissibility of the Cell Phone Evidence

Appellant contends that the circuit court erred in admitting the cell phone recovered from Mr. Beltran-Flores. He makes several arguments in this regard. First, he contends that the State did not lay a proper foundation to authenticate the text messages displayed to the jury because: (1) Detective Huie "never testified that the text-messages he displayed to the jury are the same text-messages, and in the same condition (unaltered), as when he originally discovered the text-messages on the cell phone"; and (2) "Detective Huie never testified that 'Chino' was the Appellant or the phone number attached to Chino's alleged text message was the appellant's" phone number. Second, he argues that the cell phone contained "a lot of irrelevant and prejudicial material."[5] Finally, he asserts that it was error to admit the cell phone because, under *Carpenter v. State*, 196 Md. App 212 (2010), and *Griffin v. State*, 419 Md. 242 (2011), the State failed to produce a witness to testify how the text messages introduced at trial came to be stored on the phone.

The State contends that the only issue that appellant preserved for this Court's review is the argument that there was not a sufficient showing that the text messages were

[5] Appellant claims that these materials include "photographs of tattoos, drawings of skeletal jokers, selfie photographs of co-defendant making potential gang hand gestures, photographs of teenage females in seductive poses, text message conversations with unrelated individuals, possible video clips, etc."

"to or from" appellant. With respect to this issue, the State argues that the "text messages were properly authenticated as text messages to and from" appellant.

A.

Proceedings Below

The State initially sought to introduce the text messages found on the cell phone through testimony from Detective Huie regarding a printout (State's Exhibit 49), which was derived from a "forensic image" generated from Mr. Beltran-Flores' cell phone.[6] Appellant objected, arguing that "we're completely void of any testimony from anybody who can state as to how that information has been pulled from that phone." Counsel explained that "our objection is that the State has not produced a witness to explain how that information came to be stored on the cell phone, which we do believe is a requirement for chain of custody and authentication of the text messages."

The State argued that the printout of the text messages was admissible, stating as follows:

> The detective testified that he reviewed the record, he reviewed the phone and those records came from that phone. And so the matter of extraction, if he is not the one that personally extracted it, this is not a chain-of-custody issue.
>
> What is an authentication issue that he can attest to the fact that the records came from that phone. He doesn't have -- he doesn't have to personally extract everything in order to say that those records, example that I would give the Court, is a search warrant.

[6] This forensic image, a collection of data recovered from the cell phone, was burned onto a CD (marked as State's Exhibit 50) and referenced at trial. Neither party, however, attempted to have it entered into evidence.

> The person that -- when the search warrant is done, somebody takes a photograph of those photos. The person that comes in to authenticate the photos doesn't necessarily have to be the person that took the photos.
>
> The person that takes the pictures doesn't have to come to court and say, I took these pictures. But someone that says, yes, these pictures fairly and accurately reflect the way the scene was that day was enough to authenticate the pictures.
>
> ***
>
> And I would bring the court's attention towards that's what the authentication process is, somebody looking at it saying this is what I know to be -- I looked at it and this is an accurate representation of what is on there. And I'm not seeking to move the CD, obviously, because there's a lot more on there, but that he reviewed the CD and those text messages are from what was on that phone.

Appellant disagreed, arguing that Detective Huie did not personally extract the information from the phone, and the State needed "to produce [an] outside party" to authenticate the printout:

> We have heard testimony that this evidence was recovered and submitted into the Evidence Control Unit and, therefore, we are arguing that the chain of custody does apply. Detective Huie is not a worker or an employee, whatever company was hired to extract the text messages that Detective Huie later reviewed.
>
> Without that witness to testify whatever employee or custodian of records from whatever company that was used by the State to extract those records, without that person here to testify as to how that extraction occurred and that these are true and accurate representations as to what they pulled off the phone, certainly Detective Huie cannot articulate that these records that are voluminous is a true and accurate representation of what was pulled off the phone.
>
> Detective Huie did not personally do it. It was an outside party. The State needs to produce that outside party if they intend to introduce these records into evidence through a chain of custody, which is a proper argument, and also through being able to authenticate that these are documents that were

> stored in the cell phone and retrieved off the cell phone and in the same condition that it was when he originally recovered the cell phone.

The court agreed with appellant, stating that the prosecutor could not authenticate the evidence by having the officer testify that

> these text messages were recovered from the cell phone unless he personally went through and looked at every single text message that was on that phone and then personally went through every single document in that packet and can say, I looked at this on the cell phone and this is the same one I saw on the cell phone there.

The court concluded that the State "would need whoever extracted those records from that cell phone." The court asked appellant if there were any other objections to the text messages, and appellant stated that the text messages were hearsay.

Given the court's ruling, the State pursued a different method to introduce the text messages. The prosecutor asked the court to allow the Detective to "turn on the cell phone and go through it." The court responded: "I do think you need somebody to authenticate that and I did not hear that, but I'm going to sustain their objection right now." At this point, Detective Huie temporarily stepped down so another witness could testify.

When Detective Huie was recalled to the stand, the court advised that it was "going to sustain the defense's objection to the admittance of the paper documents of the cell phone." The State then sought to have the detective "publish what he found on that cell phone through the projector," and the following colloquy occurred:

> [PROSECUTOR'S CO-COUNSEL]: I didn't know if you wanted us to bring it up to the bench to show you the text messages we're talking about rather than talk about them hypothetically.
>
> THE COURT: No, it's not necessarily me. Their objection was to the fact that a third party extracted information from the cell phone and that third

> party is not here to explain how it was extracted, whether what was extracted was exactly on the cell phone.
>
> Now, the State is not going to introduce the [text message printout] document, but we're going to have the detective -- and the cell phone was secured pursuant to a search warrant -- go through and, I guess, testify about specific text messages; is that correct?
>
> [PROSECUTOR]: Yes.
>
> THE COURT: Okay. So I'll sustain their objection. After that, I'm just calling the balls and strikes.
>
> [PROSECUTOR]: Fair Enough. Thank you.

The State then produced Mr. Beltran-Flores' cell phone (State's Exhibit 48) and questioned Detective Huie about whether he had looked through the phone and seen any text messages communicated between appellant and Mr. Beltran-Flores. Counsel for appellant objected, arguing that the text messages were hearsay and no foundation had been laid to show that the phone number or the text messages were tied to appellant. Counsel argued that, without a proper foundation, the hearsay within the text messages could not be admitted under the party-opponent exception. The court sustained the objection, explaining that the State must first make the connection between appellant and the phone contact before questioning the detective about the substance of what he found on the phone.

After objections were sustained to questioning of Detective Huie regarding appellant's nickname, the State sought to make the connection by having Detective Huie testify that he had examined the phone and seen appellant's picture attached to the cell phone contact. Following a bench conference, this colloquy occurred:

> [DEFENSE COUNSEL]: Just so we don't keep coming up, there is going to be a continuing objection in regards to the text messages. There is a piece of

> document that I think you're intending to introduce which speaks about all -
> - how the text messages we redacted.
>
> [PROSECUTOR]: No, we're going to introduce two or three text messages from the phone.
>
> [DEFENSE COUNSEL]: We believe that the appropriate method would've been [to] introduce that as a business record with that proper authentication of that employee extracting the phone and not through a witness. So it's just a continuous objection to the final questioning to the text messages.
>
> THE COURT: Okay. I think the continuing objection -- I hope the continuing objection sticks. You can always just object and I'll just rule on it then, but I know what your rationale is for the objection.

The State subsequently elicited testimony from Detective Huie that he had found a text message conversation between a contact with a picture of appellant and Mr. Beltran-Flores. The State then moved to enter the cell phone into evidence. Appellant objected, and without further discussion, the court admitted the cell phone (State's Exhibit 48).

At this point, several text messages were displayed on a projector and read by Detective Huie. Detective Huie testified to the contents of the text messages, as follows:

> The first text message is from Kerho . . . . I just wanted to see what was good for today. And then Chino replies . . . (In Spanish) what's good later? What's up (in Spanish). I'm going to have the car until 1 or 2 . . . . That's Chino replying . . . . Then Kerho replies, you tell me, Nika (phonetic). Chino replies to Kerho, you trying to do -- . . . . Kerho replies, naw. Chino: Then what you trying to do?[7]

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[7] Detective Huie testified that "Kerho" was the nickname of appellant's "co-defendant." It is unclear to which co-defendant Detective Huie was referring, but the State argues that "there is a reasonable inference that Kerho was Beltran-Flores' nickname because the phone was seized from Beltran-Flores . . . whose nickname was 'Joker' . . . and 'Kerho' is the word 'Joker' with the syllables reversed and "Jo" pronounced as it would be in Spanish."

The record suggests, and the parties agree, that an additional text message was displayed to the jury on the projector, which purportedly read: "Do you want to do algo to Monster tonaka." Before Detective Huie read the message, the prosecutor asked, "who's Monster?"[8] Appellant's counsel objected, and during a bench conference, the court stated the following:

> You haven't established through this witness what their nicknames are. He can read, because the phone is subject to the search warrant, what's on the phone, but you through your questions and he through his answers are making these links. There's no evidence and it's hearsay to link those nicknames to those people.

Detective Huie then read the phone number associated with the contact information for "Chino." No additional text messages were read to the jury by Detective Huie.

B.

Preservation

We begin our analysis by addressing the State's preservation argument. This Court generally will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a).

Here, as set forth, *supra*, two separate evidentiary rulings were rendered, one for the text message *printouts*, and the other for the admission of the cell phone and Detective Huie's *testimony* about the text messages that he personally witnessed. A careful review

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[8] The inference that the prosecutor displayed this last text message on the projector is supported by the prosecutor's question about "Monster" and his later closing argument, in which he asked the jury the rhetorical question, "[r]emember the text message on September 22, 2011, the defendant sent a text message to Joker? You trying to go do something to Monster tonight? That's what that means."

of the record leads us to conclude that appellant did not object to the Detective's testimony or the admission of the cell phone on the grounds that he argues here, with the exception of the argument regarding the appellant's connection to the nickname and phone number, and accordingly, these other arguments were not preserved. We explain.

Appellant argued below that the text message printout (State's Exhibit 49) was not authenticated by the computer forensic agent who extracted the phone messages, and therefore, the printouts were inadmissible. The trial court agreed, so the State attempted to get the text messages to the jury by having Detective Huie testify about the text messages that he personally had observed on the cell phone. Appellant objected to the State's questioning on the grounds that no evidence had yet been produced that demonstrated a connection between appellant and the messages. After Detective Huie confirmed that he had personally examined the cell phone and witnessed text messages from a contact containing appellant's picture, appellant made a continuing objection to the cell phone text messages, arguing as he did with respect to the text message printouts, that there was no testimony from the forensic agent who extracted the phone's data to authenticate the text messages. In making this continuing objection, appellant's counsel referenced a "piece of document," authentication as a business record, and "authentication of that employee extracting the phone." As the State notes, the objection was "beside the point because the physical exhibits obtained from the extraction – the printout and the CD – had already been excluded, and Det. Huie's testimony and the texts on the screen were not business records." The trial court responded that it hoped that the continuing objection would "stick," and if the defense made another objection, the court would know the rationale for the objection.

When the State ultimately moved to admit the cell phone into evidence, appellant objected, without stating any new grounds, implicitly relying on his earlier continuing objection. On appeal, however, appellant now raises errors that were not addressed at trial, i.e., the lack of testimony that the text messages presented were in an unaltered condition, the cell phone contained irrelevant material, and the lack of testimony regarding how the text messages came to be stored on the phone. Because these arguments were not raised below, they are not preserved for this Court's review, and we decline to review them.

C.

Remaining Preserved Authentication Issue

Appellant contends that the State failed to properly authenticate the text message stating: "Do you want to do algo to Monster tonaka." In support, he argues that "Detective Huie never testified that 'Chino' was the Appellant or the phone number attached to Chino's alleged text message was the Appellant's."

The State contends that this evidence was established through earlier testimony, i.e., Mr. Ramirez testified that appellant's nickname was Chino and his phone number was 240-704-4355. Moreover, the State argues, there was sufficient circumstantial evidence presented at trial for a reasonable jury to find that the text messages were sent to and from appellant, noting that appellant's "picture accompanied each of the text messages from Chino at 240-704-4355," and the "internal contents of the messages further authenticated them" as messages from appellant.

This Court recently explained the standard of review of a trial court's decision regarding the admission of evidence as follows:

> "Determinations regarding the admissibility of evidence are generally left to the sound discretion of the trial court. *Hajireen v. State*, 203 Md. App. 537, 552, *cert. denied*, 429 Md. 306 (2012). This Court reviews a trial court's evidentiary rulings for abuse of discretion. *State v. Simms*, 420 Md. 705, 724-25 (2011). A trial court abuses its discretion only when 'no reasonable person would take the view adopted by the [trial] court,' or 'when the court acts "without reference to any guiding rules or principles."' *King v. State*, 407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1, 13 (1994))."

Baker v. State, 223 Md. App. 750, 759 (2015) (quoting *Donati v. State*, 215 Md. App. 686, 708-09).

"Maryland Rule 5-901 addresses the requirements to authenticate evidence, including electronically stored evidence." *Donati*, 215 Md. App. at 709. It provides as follows: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Md. Rule 5-901(a). The Court of Appeals recently addressed authentication in the context of social media evidence, holding that, "to authenticate evidence derived from a social networking website, the trial judge must determine that there is proof from which a reasonable juror could find that the evidence is what the proponent claims it to be." *Sublet v. State*, 442 Md. 632, 678 (2015).

Subsection (b) of Rule 5-901 provides examples of how to authenticate evidence. It states, in pertinent part, as follows:

> (b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:
>
> (1) Testimony of witness with knowledge. Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.

* * *

> (4) Circumstantial evidence. Circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be.
>
> * * *
>
> (10) Methods provided by statute or rule. Any method of authentication or identification provided by statute or by these rules.

"Rule 5-901(b), by its express language, which is derived from Federal Rule of Evidence 901, makes clear that the authentication methods listed in this Rule are not exhaustive." *Donati*, 215 Md. App. at 710. *See Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 544 (D. Md. 2007) ("the methods identified by Rule 901(b) are non-exclusive")."

In *Dickens v. State*, 175 Md. App. 231 (2007), this Court addressed the authentication of text messages. In that case, Mr. Dickens fatally shot his wife; the only dispute was whether the killing was premeditated murder or a lesser degree of culpable homicide. *Id.* at 234-35. The State's theory was that Mr. Dickens had been planning for several weeks to murder his wife because she was seeing another man. *Id.* at 236. Mr. Dickens, however, told the police that he went to his wife's mother's house with a gun planning to commit suicide in front of his wife, but after he told his wife of his plan, and she told him to "go ahead," Mr. Dickens "lost it" and shot his wife. *Id.* at 235.

The State introduced several text messages, the content of which showed "veiled threats to kill" the victim. *Id.* at 238-39, 241. This Court held that the evidence presented was properly authenticated. *Id.* at 238-39. In so holding, we noted that one of the texts was sent from a telephone number associated with a cell phone that was possessed by the

defendant until he discarded it shortly after the murder. *Id.* Another set of text messages was properly authenticated through circumstantial evidence; the nickname used, "'Doll/M," "was an obvious reference to the famous movie (1954) and television remake (1981) 'Dial M for Murder,'" and one of the messages made a reference to wedding vows. *Id.* at 239-40.

Here, the State adduced sufficient direct and circumstantial evidence to permit a reasonable juror to find that appellant was the sender and recipient of the text messages in question. The texts were from "Chino," appellant's nickname,[9] Mr. Ramirez testified that the phone number associated with the contact "Chino" was appellant's phone number, and Detective Huie testified that one of the texts displayed a picture of appellant. Finally, the text messages were authenticated by circumstantial evidence given the context of the messages, which included that appellant had access to a car, appellant's reference to the victim's nickname "Monster," and the indication that Chino was aware that there was animosity between Mr. Marquez and members of MS-13.

Under these circumstances, the text messages were sufficiently authenticated. *Cf. Sublet*, 442 Md. at 674-76 (twitter messages authenticated where: (1) witness testified that "TheyLovingTc" was Harris, and that "OMGitsLOCO" was Harris' friend Foulke; (2) Harris' picture accompanied messages from TheyLovingTC; and (3) content of messages demonstrated that they were written by someone with knowledge of and involvement in

[9] Detective William Lee and Mr. Ramirez testified at trial that appellant's nickname was "Chino."

the situation). Accordingly, the circuit court did not abuse its discretion in admitting the cell phone text messages.

D.

Harmless Error

Finally, even if the admission of the texts was error, it would not require reversal of appellant's convictions. Harmless error exists when "'there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict.'" *Dove v. State*, 415 Md. 727, 743 (2010) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

Here, text messages added minimally to the State's case. They merely permitted a finding that appellant had a car and knew before the shooting that Mr. Beltran-Flores intended to harm Mr. Marquez.[10] The evidence, however, was merely cumulative to appellant's own statement, in which appellant admitted, *inter alia*, that Mr. Beltran-Flores had "planned to get" Mr. Marquez for assisting the police in the case against Mr. Argueta, that appellant knew Mr. Beltran-Flores had a gun with him when they drove to Adelphi on the day of the shooting, and he "had an idea" of what Mr. Beltran-Flores intended to do when they got there.

The overwhelming evidence against appellant, including his own statement, Mr. Ramirez's testimony that appellant drove past the victim slowly after Mr. Beltran-Flores

[10] The record reflects that the text asking if Mr. Beltran-Flores wanted to "do algo to Monster tonaka" was sent on September 22, 2011, and the shooting at issue here was on November 14, 2011.

suggested they do a "drive by," and DNA evidence recovered from the black mask, was overwhelming. Accordingly, even if the court erred in admitting the text messages, any error was harmless error that does not require reversal of appellant's convictions.

II.

Closing Arguments

Appellant next contends that the trial court erred in overruling his objections and his motion for a mistrial after the prosecutor made two sets of allegedly improper remarks during closing argument. We will address each of these claims in turn.

A.

Standard of Review

It is well established that "attorneys are afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999). *Accord Jones v. State*, 217 Md. App. 676, 691-92, *cert. denied*, 440 Md. 227 (2014). As the Court of Appeals has explained:

> While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined -- no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

Wilhelm v. State, 272 Md. 404, 413 (1974).

Nevertheless, there are limitations upon the scope of a proper closing argument. Although the State "may strike hard blows, he [or she] is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). In this regard, the State may not vouch for the credibility of a witness, *Spain v. State*, 386 Md. 145, 153-54 (2005), appeal to the prejudice or passions of the jurors, *Mitchell v. State*, 408 Md. 368, 381 (2009), or argue facts not in evidence or materially misrepresent the evidence introduced at trial, *Whack v. State*, 433 Md. 728, 748-49 (2013).

Even if a prosecutor's argument was improper, however, reversal is not automatically required. "'[R]eversal 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.'" *Lee State*, 405 Md. 148, 164 (2008) (quoting *Lawson v. State*, 389 Md. 570, 592 (2005)). The "determination of whether the prosecutor's comments were prejudicial or simply rhetorical flourish lies within the sound discretion of the trial court. . . . On review, an appellate court should not reverse the trial court unless that court clearly abused the exercise of its discretion and prejudiced the accused." *Degren*, 352 Md. at 431.

B.

Interpreted Text Message

Appellant's first claim regarding closing argument is based on the prosecutor displaying on a projector during rebuttal closing argument that a text message purportedly said: "do you want to do algo (something) to monsters tonaka (tonight)." Appellant contends that the words in parenthesis were the prosecutor's speculative interpretation of

the meaning of the text that appellant sent to Mr. Beltran-Flores, and he asserts that adding the words to the text was error because it invited "the jury to draw inferences from information that was not admitted at trial." Appellant argues that the court erred in denying his motion for a mistrial in response to this alleged impropriety.

The State responds in two ways. First, it argues that appellant did not preserve this issue because he did not move to make the disputed text message slide part of the record, and therefore, "the record does not reveal the exact content and format of the slide shown to the jury" for the court to review. In any event, the State argues, the court did not abuse its discretion in deciding that a mistrial was not warranted because the State did not influence the jury to the prejudice of appellant, and the court cured any potential prejudice.

The Court of Appeals has noted that "'the declaration of a mistrial is an extraordinary act which should only be granted if necessary to serve the ends of justice.'" *Cooley v. State*, 385 Md. 165, 173 (2005) (quoting *Jones v. State*, 310 Md. 569, 587 (1987)). "The determination whether a prosecutor's comments were sufficiently prejudicial to warrant a mistrial lies within the sound discretion of the trial court." *Washington v. State*, 191 Md. App. 48, 108, *cert. denied*, 415 Md. 43 (2010). As this Court has explained:

> "The fundamental rationale in leaving the matter of prejudice vel non to the sound discretion of the trial judge is that the judge is in the best position to evaluate it. The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able to ascertain the demeanor of the witnesses and to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has his finger on the pulse of the trial."

Id. at 103 (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)). Accordingly, "the trial judge's decision denying a mistrial will not be disturbed on appeal unless there has been a clear showing of prejudice to defendant." *Vandergrift v. State*, 82 Md. App. 617, 635, *cert. denied*, 320 Md. 801 (1990).

"Mistrials are required for improper remarks in closing argument only when '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." *Washington*, 191 Md. App. at 108 (quoting *Lee v. State*, 405 Md. at 164). "[I]n determining whether a trial court abused its discretion in denying a motion for mistrial based upon an improper closing argument," we look to three factors: "the severity of the improper remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Id.* at 118-119.

Initially, we agree with the State that, generally, a challenge to a court ruling is not preserved for this Court's review if the disputed material is not included in the record on appeal. *See White v. State*, 23 Md. App. 151, 167 (1974) ("Having failed to make the closing argument or the in chambers discussions a part of the record, appellant has not preserved for review his objections to alleged court imposed restraints on the scope of his jury argument."), *cert. denied*, 273 Md. 723 (1975). The record in the case, however, is sufficient for us to review the claim, and we will exercise our discretion to do so.[11]

[11] The prosecutor read the revised version of the text message during closing argument: "Remember the text message on September 22, 2011, the defendant sent a text message to Joker? You trying to go do something to Monster tonight? That's what that means." Appellant objected, making clear that the added words were in parenthesis: "The State has altered the text message. It's not in evidence -- the words in parentheses are not in evidence nor have they been testified to."

Addressing the factors involved in determining whether the trial court abused its discretion in denying a motion for mistrial, we turn first to the "severity" factor. We agree with the State that the prosecutor's remarks were not "severe." The plain meaning of the disputed text message, that appellant was inquiring whether Mr. Beltran-Flores wanted to do some action to Mr. Marquez, is clear. The interpreted word "something," whether a correct Spanish translation or simply a placeholder for a word that is undefined, is easily inferred from the basic sentence structure. Likewise, the jury reasonably could infer the general meaning of the text message, even without the interpretation of the word "tonaka".[12] The prosecutor's alterations provided little or no help to the jury in understanding the gist of the message. Accordingly, the additions to the text, which the State does not dispute were improper, was not severe, but rather, they were of negligible effect.

Addressing next the "measures taken to cure" the impropriety, the court here sustained appellant's objection, had the prosecutor remove the slide from the projector, and advised the jury that closing arguments are not evidence. This response adequately indicated to the jury that the altered text message was not evidence for them to consider.

Finally, considering the "weight of the evidence against the accused," the substantial amount of evidence adduced at trial against appellant rendered insignificant any prejudice

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[12] E.g., "do you want to do ____ to monsters ____." The message may not be clear as to *what* appellant was suggesting they do or *when* he was suggesting they do it, but the general meaning of the message, that appellant was inquiring whether Mr. Beltran-Flores wanted to do some action to Mr. Marquez, could be inferred even without the prosecutor's alterations.

created by the altered text message. As indicated, Mr. Ramirez gave a full account at trial regarding appellant's involvement with the November 15, 2011, shooting, describing how appellant spotted Mr. Marquez, how he donned a mask and drove slowly past Mr. Marquez so that his friend could shoot Mr. Marquez, how they threw the gun out the window, and how appellant attempted to elude police by driving away at high speed. The State also presented evidence that appellant's DNA was found on the black mask he purportedly wore during the shooting. Finally, appellant, in his statement to the police, admitted that he "had a beef" with Mr. Marquez, knew that Mr. Beltran-Flores "had already planned to get him," picked up Mr. Beltran-Flores knowing he had a gun, and drove to Adelphi with Mr. Beltran-Flores, with "an idea of what [he] was going to do".

Given that the severity of the alterations to the text message was negligible, the judge took reasonable steps to cure any prejudice, and the weight of the evidence against appellant was considerable, we hold that the trial court did not abuse its discretion in denying appellant's motion for a mistrial.

C.

"Golden Rule" Arguments

Appellant's next claim is that the prosecutor made improper "golden rule" arguments.[13] Appellant takes issue with the following statements made by the prosecutor:[14]

- On November 15th, 2011 around 1:30-ish, most people were either at work -- as you heard there was a bunch of elementary schools there in Adelphi -- kids were at school trying to learn. There were parents going about their life, different people doing what they do during a regular Tuesday afternoon.

- You have to accept violence because that's what this is about, violence. You have to be prepared to do violence at the drop of a hat any moment. You have to be prepared to kill, prepared to rob because MS-13 gang life, that's what this is about.

- MS-13 gang life, let's talk about it. We all use our real names. We abide by laws. We work hard to make a living. They go by gang names. They don't use their real names. You heard about it. We talked about it; Chino for the defendant, and Joker and Potter. Then when you get jumped in and you're beaten by your friends and they think you're worthy of violence all the time, anytime, what do they do? They give you another nickname. They have a different organization. They have rules. They have structure.

- They're out there committing robberies or trying to find victims to commit robberies. Good, innocent people who are working, walking around, they didn't find any, but instead they found Marquez and they tried to kill him.

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[13] "A 'golden rule' argument is one in which a litigant asks the jury to place themselves in the shoes of the victim, *Lawson v. State*, 389 Md. 570, 593 n.11 (2005), or in which an attorney appeals to the jury's own interests, *Hill v. State*, 355 Md. 206, 214-15 (1999)." *Lee v. State*, 405 Md. 148, 160 n.6 (2008) (parallel citations omitted).

[14] The following excerpts are expanded somewhat beyond the parties' arguments for context and completeness.

Appellant cites *Lee v. State*, 405 Md. at 173, and *Hill v. State*, 355 Md. 206 at 255, for the proposition that a prosecutor may not encourage a jury to convict for the purpose of "clean[ing] up the streets to protect the safety of their community" because such arguments improperly call upon the jury to "indulge itself in a form of *vigilante justice* rather than engage in a deliberative process of evaluating the evidence." Appellant claims that the prosecutor's arguments, reproduced above, were made for those improper purposes. His theory is that the prosecutor was attempting to appeal to the jurors' own interests by "distinguishing the 'evil' Appellant from the 'good' jurors" and "implor[ing] that they must convict or they would fail to protect themselves and their families and their community."

The State disagrees. It contends that the prosecutor did not appeal to the jury's own interests or inflame their passions. Rather, the prosecutor merely was setting the scene, highlighting the peculiarities of gang life, and summarizing the evidence introduced at trial. The State asserts that "the characterizations to which [appellant] objects were directed at gang members generally, not [appellant] in particular."

The arguments in the case did not constitute improper "golden rule" argument. The first remark merely set the scene to highlight the dangerousness of a daytime shooting near a residential neighborhood. It did not, in any way, encourage the jurors to abandon their objectivity.

The second and third comments were not about appellant in particular, but rather, they described the violent nature of the MS-13 gang in general, which was relevant to the

charge of "knowing participation in a gang." *See* Md. Code (2012) § 9-804 of the Criminal Law Article. They were not unduly inflammatory.

With respect to the final remark, appellant did not object to it, and therefore, it is not preserved for review. *See* Maryland Rule 8-131(a); *Shelton v. State*, 207 Md. App. 363, 385 (2012) ("We have repeatedly held that pursuant to Rule 8-131(a), a defendant must object during closing argument to a prosecutor's improper statements to preserve the issue for appeal.").[15] In any event, even if the issue was preserved, we would find that the argument was not improper. The prosecutor was merely summarizing facts that were proven at trial: appellant and his two co-conspirators went looking for an innocent victim to rob, they came upon Mr. Marquez, and they decided to shoot him.

In sum, we hold that the comments made by the prosecutor were not "golden rule arguments" and did not prejudice appellant. Accordingly, the circuit court did not abuse its discretion in overruling appellant's objections.

III.

Admissibility of Appellant's Statement

Appellant contends that the circuit court "erred in overruling [his] objection to the admission of his alleged statement." He makes two arguments in this regard. First, he

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[15] At oral argument, appellant stated that the issue was preserved because he made a continuing objection to closing argument. That objection, however, was on the ground that "the State is required to argue evidence that's in the record and reasonable inferences therefrom," and the prosecutor's discussion and projection of slides regarding MS-13 gang life was not "proper argument or evidence that's been introduced in this trial." This continuing objection did not cure the objection raised on appeal, that the State improperly distinguished "the 'evil' appellant from the 'good' jurors."

asserts that the court erred in denying his motion to suppress the statement because it was not voluntarily given. Second, he argues that the court erred in admitting the statement into evidence because the detective who interrogated him wrote questions on the statement form. He contends that those questions were hearsay, and admitting them at trial violated his Sixth Amendment right to confrontation.

A.

The Statement

Appellant's statement consists of 13 pages. As indicated, in the beginning of his statement, appellant admitted that he, Mr. Beltran-Flores, and Mr. Ramirez were driving through Adelphi, but he suggested that he had no idea what was about to occur when Mr. Beltran-Flores moved to the back seat of the vehicle and told him to drive down Mr. Marquez's street. After appellant's initial narration, Detective Milligan wrote 41 questions on the statement, which appellant answered. Appellant then provided a second narration, in which he confessed that (1) he had a "beef" with Mr. Argueta; (2) he knew that Mr. Beltran-Flores "planned to get" Mr. Marquez; (3) they had traveled to Adelphi several times to look for Mr. Marquez; (4) he knew that Mr. Beltran-Flores had a gun when he picked him up on the day of the shooting; and (5) he knew what Mr. Beltran-Flores would do if they found Mr. Marquez. Following the second narrative, Detective Milligan wrote an additional five questions, which appellant answered. These questions revealed, *inter alia*, that appellant lied about the gun in the initial part of his statement because he did not want Mr. Beltran-Flores or Mr. Ramirez to know he was the one telling the police about

the gun, and Mr. Beltran-Flores "wanted to get back at [Mr. Marquez] for landing [Mr. Argueta] in court."

Appellant argues that, under the totality of the circumstances, his statement was not voluntary. In support, he states as follows: (1) he was a juvenile (17 years, 4 months old) at the time he gave his statement; (2) he was in the interrogation room for approximately nine hours; (3) he was not given an opportunity to call his parents; (4) there was no log of who entered or exited the interrogation room; (5) he was advised of his *Miranda* rights after he provided a statement; (6) he wrote an exculpatory statement prior to writing an inculpatory statement; (7) a detective stated that his charges might be dropped if he cooperated; (8) he was not advised of his right to presentment until six hours after his arrest; and (9) police disregarded sections of the *Prince George's County General Orders* regarding treatment of a juvenile, prompt presentment to a judicial officer, and video/audio recording the interview.[16]

The State contends that, under the totality of the circumstances viewed in the light most favorable to the State, the circuit court properly determined that appellant's statement was voluntary. It asserts that, because the trial court made no factual findings, we must view the evidence in the light most favorable to the State, and we cannot credit appellant's factual assertions "that he incriminated himself only after a police officer told him that if he cooperated, the charges would be dropped."

[16] Appellant cites no authority suggesting that the failure to abide by the *Prince George's County General Orders* has any bearing on the analysis relating to the voluntariness of a statement. Accordingly, we will not discuss any such failure in our analysis.

In reviewing the circuit court's decision on a motion to suppress, we are limited to the facts developed at the hearing, *Hill v. State*, 418 Md. 62, 67 n.1 (2011), viewing the evidence in the light most favorable to the prevailing party on the motion. *Robinson v. State*, 419 Md. 602, 611-12 (2011). The issue whether a confession is voluntary presents a mixed question of law and fact, subject to *de novo* review. *Jones v. State*, 173 Md. App. 430, 441-42 (2007).

The Court of Appeals has explained what the prosecution must establish to introduce a defendant's custodial statements into evidence:

> Only voluntary confessions are admissible as evidence under Maryland law. A confession is voluntary if it is "freely and voluntarily made" and the defendant making the confession "knew and understood what he [or she] was saying" at the time he or she said it. *Hoey v. State*, 311 Md. 473, 480-81, 536 A.2d 622, 625-26 (1998). In order to be deemed voluntary, a confession must satisfy the mandates of the U.S. Constitution, the Maryland Constitution and Declaration of Rights, the United States Supreme Court's decision in *Miranda*, and Maryland non-constitutional law. *See Ball v. State*, 347 Md. 156, 173-74, 699 A.2d 1170, 1178 (1997).

Knight v. State, 381 Md. 517, 531-32 (2004).[17] *Accord Hill*, 418 Md. at 75.

Here, appellant challenges the voluntariness of his statement. Under federal and Maryland constitutional law, the test for voluntariness is "whether the confession was 'the

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[17] Both the Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights protect an accused against self-incrimination. The Fifth Amendment provides, in relevant part, that: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Fifth Amendment is made applicable to the States through the Fourteenth Amendment. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1219 (2010); *Owens v. State*, 399 Md. 388, 427 (2007), *cert. denied*, 552 U.S. 1144 (2008). Article 22 of the Maryland Declaration of Rights similarly reads that "No man ought to be compelled to give evidence against himself in a criminal case." MD. DECL. RIGHTS, art. 22. "Article 22 is deemed to be in *pari materia* with the Fifth Amendment." *Hoey v. State*, 311 Md. 473, 480 n.2 (1988).

product of an essentially free and unconstrained choice by its maker' or whether the defendant's will was 'overborne' by coercive police conduct." *State v. Tolbert*, 381 Md. 539, 558, *cert. denied*, 543 U.S. 852 (2004). In assessing the voluntariness of the statement, courts look to "the totality of the circumstances." *Winder v. State*, 362 Md. 275, 307 (2001). The Maryland appellate courts have "explicated the factors relevant to the 'totality of the circumstances' standard" as including:

> [W]here the interrogation was conducted; its length; who was present; how it was conducted; its content; whether the defendant was given Miranda warnings; the mental and physical condition of the defendant; the age, background, experience, education, character, and intelligence of the defendant; when the defendant was taken before a court commissioner following arrest; and whether the defendant was physically mistreated, [or] physically intimidated or psychologically pressured.

Perez v. State, 168 Md. App. 248, 268 (2006) (quoting *Hof v. State*, 337 Md. 581, 596-97 (1995)). *Accord Hill*, 418 Md. at 75.

"Under Maryland common law, a confession is involuntary if it is the product of certain improper threats, promises, or inducements by the police." *Lee v. State*, 418 Md. 136, 161 (2011). Under both standards, the State has the burden to prove that the confession was voluntary. *Id.*

Viewing the evidence in the light most favorable to the prevailing party,[18] we assess the voluntariness of appellant's statement in light of the following facts:

- Appellant was 17 years and four months old at the time of his statement, and he had a GED.

[18] In deciding the motion to suppress, the court stated: "Based on my reading and my understanding of the facts in this case; having been considered each and every one of those items, I'm going to deny Defendant's Motion to Suppress the Statements."

- Appellant arrived at the police station at 2:15 p.m.

- The police transported six individuals (witnesses and suspects) to the police station in connection with this case. During the time appellant was brought to the police station, the Investigative Section of the police department was described as "[v]ery busy. Lots of investigators, lots of officers, lots of supervisors, a little chaotic, but typical of that type of case, just very busy."

- Detective Samantha Milligan's initial contact with appellant began at approximately 4:15 p.m., lasted about 15 minutes, and involved getting basic information from appellant.

- After collecting the basic information from appellant, Detective Milligan left the interview room to perform other "investigative duties," which included using "search engines, on-line meters, NCIC Links" and other resources to "get basic information, criminal history" and other information in preparation for interviewing suspects. Detective Milligan conducted this research for appellant and his two co-conspirators.

- At some point before appellant's final interview, someone brought him some food.

- Detective Milligan (along with Detective William Lee) returned to the interview room at approximately 8:35 p.m. Appellant signed a waiver of rights form and a waiver of prompt presentment form (signed at 8:35 p.m.), and Detective Milligan resumed the interview at approximately 9:10 p.m.[19]

- The interview ended at approximately 11:35 p.m.

[19] During the suppression hearing, there was a disagreement over what time the Advice of Rights form was signed. The form included a handwritten notation, "11/15/11 2035 hrs," with the zero in "2035" superimposed over a three. Appellant suggested that the time really was "2335" (11:35 p.m.) and that he signed the form *after* he gave his statement. Detective Milligan testified, however, that the time was "2035" (8:35 p.m.), and the alteration was merely a correction. We note that the Advice of Rights form included a second, unaltered, handwritten time that read "2035 hrs." Moreover, a second form, a waiver of prompt presentment, also bore the same handwritten time: "2035." This evidence supports a conclusion that appellant signed the waiver at "2035," or 8:35 p.m. In any event, we accept the facts in the light most favorable to the State, which leads to the same result.

- While appellant was in the interview room, his demeanor was relaxed, responsive, and cooperative.

- None of the detectives who interviewed appellant carried weapons or made any threats.

- None of the detectives promised appellant anything or made any inducements.[20]
- Appellant had experience with the criminal justice system and was aware that he had a right to an attorney, but, he never asked for an attorney or to speak with his parents.

- Appellant was brought before a court commissioner at approximately midnight, directly after the conclusion of his interview with Detective Milligan.

Appellant relies heavily on the fact that he was a juvenile at the time he gave his statement. Legal status as a juvenile, however, does not automatically "render a confession involuntary; rather, we have applied the totality of the circumstances test in determining the validity of a juvenile's waiver of constitutional rights and the traditional voluntariness of a juvenile's confession." *See Jones v. State*, 311 Md. 398, 407 (1988).

To be sure, as appellant asserts, the Court of Appeals held that a 16-year-old juvenile's confession was not voluntary in *Moore v. State*, 422 Md. 516 (2011). In that case, however, the police deliberately and unreasonably delayed bringing the defendant before a judicial officer for five hours (to obtain a search warrant) after the defendant

[20] Appellant claims that, while he was waiting to be interviewed, he wrote an exculpatory statement (pages 1-3 of State's Exhibit 34), and he made an inculpatory statement only after Detective Milligan stated that his charges might be dropped if he cooperated (pages 12-13 of State's Exhibit 34). This assertion directly contradicts the testimony of Detective Milligan, who testified that she did not promise appellant anything or suggest that his charges would be dropped if he cooperated. This Court must resolve this discrepancy by "fully credit[ing] the prevailing party's witnesses and discredit[ing] the losing party's witnesses." *See Morris v. State*, 153 Md. App. 480, 489-90 (2003), *cert. denied*, 380 Md. 618 (2004).

repeatedly professed his innocence, and the police denied 13 requests by the defendant to speak to his mother. *Id.* at 526-27, 531.

Here, by contrast, the totality of the circumstances show that appellant's statement was voluntary. Although appellant was a juvenile, he was only eight months shy of his 18th birthday, he had a GED, he had prior experience with the criminal justice system, and he never asked to speak to his parents. Unlike in *Moore*, where the police deliberately delayed bringing Moore before a judicial officer that they could obtain a warrant, the delay here was caused by the "busy" and "chaotic" police unit and the necessity for Detective Milligan had to conduct research on three suspects in a gang-related shooting. *See Williams v. State*, 375 Md. 404, 420 (2003) (presentment delays within 24 hours may be necessary under certain circumstances, including delays caused by "'carry[ing] out reasonable routine administrative procedures . . . determin[ing] whether a charging document should be issued accusing the arrestee of a crime [and] verify[ing] the commission of the crimes specified in the charging document'") (quoting *Johnson v. State*, 282 Md. 314, 329 (1978)). Moreover, as the State notes, appellant was not physically or psychologically pressured. Under the totality of the circumstances, the circuit court properly found that appellant's statement was given voluntarily, and it properly denied his motion to suppress the statement.

B.

Admission of Statement and Advice of Rights Form at Trial

Appellant's next argument is that his statement and Advice of Rights waiver form should not have been admitted at trial. With respect to his statement, he argues that it

contained questions written by Detective Milligan, who did not testify, and these written questions constituted inadmissible testimonial hearsay. With respect to the Advice of Rights waiver form, appellant contends that it was improperly admitted because Detective Lee's testimony was insufficient to authenticate the form, and therefore, the time on the advice of rights form was inadmissible hearsay.

The State argues that appellant's arguments are not preserved for this Court's review because appellant did not specify which of Detective Milligan's questions were hearsay, and appellant did not argue below that the time reported on the Advice of Rights form was hearsay.[21] In any event, the State contends that the trial court properly exercised its discretion in admitting appellant's statement because "most of [Detective] Milligan's questions were not implied assertions, and were thus not hearsay," and to the extent they were, the implied assertions were in response to appellant's prior statements and therefore, they were harmless. Finally, it asserts that both the statement and the Advice of Rights form, which was signed by appellant, were admissible as an adoptive admission.

1.

Statement

We are not persuaded by appellant's argument that the court abused its discretion in admitting appellant's statement because Detective Milligan's questions, contained within his statement, were inadmissible testimonial hearsay given that Detective Milligan did not testify at trial. To be sure, the Supreme Court has held that the Sixth Amendment right to

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[21] Appellant provided more detail in his reply brief regarding which of Detective Milligan's questions constituted hearsay, and we will treat that issue as preserved.

confrontation prohibits "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Admission of appellant's statement, which included Detective Milligan's questions, however, did not violate appellant's right to confrontation.

As this Court held in *Cox v. State*, 194 Md. App. 629, 652-53 (2010), *aff'd on other grounds*, 421 Md. 630 (2011), adoptive admissions do not implicate the Confrontation Clause:

> A statement admitted as a tacit admission is a statement that the defendant has adopted as his or her own. When such a statement is admitted into evidence, the "witness" against the defendant, therefore, is the defendant. Thus, there is no violation of the right to confront "the witnesses against him." U.S. CONST. amend. VI. As the Court of Appeals has noted, a party "cannot be prejudiced by an inability to cross-examine him or herself." *Briggeman v. Albert*, 322 Md. 133, 135 (1991).

See also Md. Rule 5-803(a)(2) ("[a] statement of which the party has manifested an adoption or belief in its truth . . ." is not excluded under the hearsay rule).

Here, to the extent that Detective Milligan's questions could be characterized as implied assertions, they are part of appellant's statement, adopted by him as indicated by his signature at the bottom of each page. *See Wilson v. State*, 148 Md. App. 601, 669 (2002) (where defendant responded to questions without argument refuting the questions, the statement was admissible as a tacit admission), *cert. denied*, 374 Md. 84 (2003). Appellant responded to each of Detective Milligan's questions without any objections or dispute. For example, in response to the question "about what time did you pick [up] Carlos on 38th St?," appellant could have objected to the question as implying something that was

false, refused to sign that page because it was inaccurate, or simply responded "I did not pick up Carlos." Instead, appellant confirmed the accuracy of the implied assertion by specifying "11 am" as the time, adding that he picked up "(Carlos + Poter [sic])." He then expressly adopted the combined statements (the implied assertion in the detective's question and his answer) by signing his name at the bottom of the page.

Accordingly, we hold that appellant's statement did not implicate the Confrontation Clause because the assertions within it were either made or adopted by appellant. The trial court, therefore, did not err in admitting the statement into evidence.

2.

Admission of Rights Form

The State argues that, although appellant objected to his statement being admitted on the ground that it contained testimonial hearsay in violation of the Confrontation Clause, appellant never made that argument for the Advice of Rights form. We agree. Accordingly, appellant's appellate argument that the Advice of Rights form was inadmissible because the time reported on the form was hearsay is not preserved and we will not address it.

Appellant asserts that the court improperly admitted the Advice of Rights form at trial because Detective Lee could not authenticate it. We disagree. Pursuant to Maryland Rule 5-901(b)(1), evidence may be authenticated by "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be." Detective Lee was present when Detective Milligan read the form to appellant and when appellant initialed and signed

the form. Detective Lee's personal knowledge and firsthand observations were sufficient to authenticate the document.

IV.

Department of Juvenile Services Report

Appellant contends that the judge presiding over his juvenile waiver hearing erred in not striking the Department of Juvenile Services reverse waiver study. In support, he asserts that the caseworker erroneously assumed that the statements in the police report and statement of probable cause were true. Appellant cites *Whaley v. State*, 186 Md. App 429 (2009) for the proposition that "assumption of guilt is a legal error."

The State disagrees. It contends that, "in ruling on the reverse waiver motion, the circuit court properly exercised its discretion not to strike the Department of Juvenile Services report." It asserts that *Whaley* does not apply to a Department of Juvenile Services employee, noting that, under the reverse waiver statute, Md. Code (2014 Supp.) § 4-202 of the Criminal Procedure Article, the *court* may not presume the defendant is guilty in making its determination. *See Whaley*, 186 Md. App. at 449 ("The *circuit court* believed it was required to assume that Whaley was guilty of those offenses. This was not authorized by § 4-202 of Crim. Proc. and the assumption of guilt was a legal error.") (emphasis added). We agree.

In any event, even if the court erred in failing to strike the report, any error was harmless. The court considered appellant's age, his mental and physical condition, his amenability to treatment in a juvenile court, his prior criminal history, and his continuing associations with troublesome individuals while on probation. It stated that it did not "even

have to look at the nature of the offense to make a determination as to the fact that [appellant is] clearly a danger to the public safety." Appellant states no claim for relief in this regard.

V.

Hicks and Constitutional Speedy Trial Claims

Finally, appellant contends that there was improper delay in proceeding with his trial. He makes two arguments in that regard. First, he contends that the circuit court "abused its discretion and erred in granting the State's continuance to reschedule trial past the *Hicks* date because the State's request . . . lacked good cause."[22] Second, he asserts that the court erred in denying his motion to dismiss on the ground that he was denied the right to a speedy trial. As indicated, we agree with appellant on the speedy trial claim, but not on the *Hicks* claim.

A.

Hicks

On June 1, 2012, the court held a hearing on the State's motion for a continuance. The prosecutor gave three reasons in support: (1) the scheduled trial date of June 7, 2012, which was set by "Calendar Management," no longer was viable because there was a judicial conference scheduled for June 8, 2012; (2) the Department of Homeland Security recently had decided not to file its own charges for the November 15, 2011, shooting, and the State wanted time to obtain discovery from the Department; and (3) the results of a

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[22] *State v. Hicks*, 285 Md. 310 (1979).

DNA analysis on the black mask recovered in appellant's vehicle were still pending. The court granted the motion, stating that it "found good cause to continue this matter beyond the current *Hicks* date."

Appellant argues that the court abused its discretion in so ruling. He asserts that the "postponement request for documentation from homeland security and DNA results could have been obtained by due diligence prior to the *Hicks* date," and "scheduling/calendar conflict does not relieve the burden of the State to bring the Appellant to trial within *Hicks*."

The Court of Appeals has made clear that, pursuant to C.P. § 6-103(a) and Maryland Rule 4-271(a)(1), "the trial in a circuit court criminal prosecution must begin no later than 180 days after the earlier of (1) the entry of the appearance of the defendant's counsel or (2) the first appearance of the defendant before the circuit court." *State v. Huntley*, 411 Md. 288, 290 (2009).[23] The last day that the trial date can occur pursuant to Rule 4-271(a)

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[23] Md. Code (2012 Supp.) § 6-103(a) of the Criminal Procedure Article provides as follows:

> (a) *Requirements for setting date.* – (1) The date for trial of a criminal matter in the circuit court shall be set within 30 days after the earlier of:
> (i) the appearance of counsel; or
> (ii) the first appearance of the defendant before the circuit court, as provided in the Maryland Rules.
> (2) The trial date may not be later than 180 days after the earlier of those events.

Maryland Rule 4-271(a)(1) provides, in pertinent part:

> The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events.

"is commonly referred to as [the] *Hicks* date." *Ashton v. State*, 185 Md. App. 607, 619, *cert. denied*, 410 Md. 165 (2009). C.P. § 6-103 and Maryland Rule 4-271 "codify and implement the chief legislative objective that 'there should be a prompt disposition of criminal charges in the circuit courts.'" *Dorsey v. State*, 349 Md. 688, 700 (1998) (quoting *State v. Hicks*, 285 Md. 310, 334 (1979)). "[T]he mechanism of the *Hicks* Rule serves as a means of protecting society's interest in the efficient administration of justice." *Id.* at 701.[24]

There is, however, an exception to this requirement. "On motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date." Md. Rule 4-271(a)(1) *Dorsey*, 349 Md. at 701 ("In the event that a defendant cannot be brought to trial within 180 days, the county administrative judge or his designee must make a finding of good cause justifying the postponement of the trial date beyond the prescribed time limit."). "[A] determination of what constitutes good cause is dependent upon the facts and circumstances of each case as the administrative judge, in the exercise of his discretion, finds them to be." *State v. Toney*, 315 Md. 122, 132 (1989). Abuse of discretion has been described as

> "where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles. It has also been said to exist when the ruling under consideration appears to have been made on untenable grounds, when the ruling is clearly against the logic and effect of facts and inferences before the court, when the ruling is

[24] Here, the *Hicks* date was June 11, 2012, which was 180 days from the date the grand jury indicted appellant. There is no dispute that the court's ruling postponing the case from June 7, 2012 to September, 4, 2012, resulted in a trial past the *Hicks* date.

> clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result, when the ruling is violative of fact and logic, or when it constitutes an untenable judicial act that defies reason and works an injustice."

Nash v. State, 439 Md. 53, 67 (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994)), *cert. denied*, 135 S. Ct. 284 (2014), (some quotations omitted).

In this case, the trial court did not abuse its discretion in postponing the trial past the *Hicks* date to allow the State to complete its DNA analysis. Appellant cites *Wheeler v. State*, 165 Md. App. 210 (2005), and *Ross v. State*, 117 Md. App 357 (1997), *cert. denied*, 348 Md. 334 (1998), for the proposition that "courts have held that a State's failure to have the DNA results at [the] time of trial was not good cause to grant continuances past the *Hicks* date." As the State notes, however, the issue raised in those cases involved the use of a nolle pros to circumvent the *Hicks* rule, not whether the circuit court properly found good cause to postpone. In those cases, this Court merely accepted the trial courts' findings that the unavailability of DNA results did not constitute good cause to postpone their respective trials past *Hicks*. Other cases, however, suggest that postponing a trial due to the unavailability of DNA results can constitute good cause. *See Peters v.* State, ___ Md. App. ___, No. 1800, Sept. Term, 2013, slip op. at 46 (filed Aug. 26, 2015) ("[The administrative court] rationally could find that awaiting the results of DNA testing in this attempted murder case amounted to good cause."). *Accord State v. Kanneh*, 403 Md. 678, 690 (2008) ("Where, as here, a postponement is the result of the unavailability of DNA evidence, and there is no evidence that the State failed to act in a diligent manner, the grounds for postponement are essentially neutral and justified."); *Glover v. State*, 368 Md.

211, 226 (2002) ("the unavailability of the DNA test results" was "a valid justification" for postponing the trial); *Moody v. State*, 209 Md. App. 366, 374 (2013) (upholding the lower court's finding of good cause to postpone trial past the *Hicks* date on grounds that DNA test results were not yet available and where the defense never objected to the postponement). Appellant's *Hicks* argument states no viable claim for relief.

B.

Speedy Trial

Appellant also claims that the delays in this case violated his constitutional right to a speedy trial. *See* U.S. CONST. amend. VI; MD. CONST. DECL. RIGHTS art. 21. For the reasons set forth below, we agree with appellant that the circuit erred in failing to engage in the proper speedy trial analysis. Accordingly, we remand to the circuit court for further proceedings in this regard.

Speedy trial claims are analyzed pursuant to the four-factor test set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Prior to conducting this four-factor analysis, however, a court must determine whether the length of delay is of such constitutional dimension as to trigger the more in-depth analysis. *Kanneh*, 403 Md. at 687-88; *Glover*, 368 Md. at 222-23. The length of the delay is measured from the date of the defendant's arrest until the date of the ultimate trial. *Epps v. State*, 276 Md. 96, 109 (1975); *Divver v. State*, 356 Md. 379, 388-89 (1999). Although "no specific duration of delay constitutes a *per se* delay of constitutional dimension . . . we have employed the proposition that a pre-trial delay greater than one year and fourteen days was 'presumptively prejudicial' on several occasions." *Glover*, 368 Md. at 223.

Once it has been determined that the delay is of constitutional dimension, the court weighs the following four factors of a balancing test to determine if an accused was denied a speedy trial: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *Barker*, 407 U.S. at 530. "None of the four factors [is] either a necessary or sufficient condition to finding a denial of speedy trial rights . . . . Rather they are related factors and must be considered together with such other circumstances as may be relevant." *Divver*, 356 Md. at 394 (quotations and citations omitted).

1.

Proceedings Below

Here, counsel for appellant argued that there was more than a year delay, with 16 months attributable to the State, so the four-factor *Barker* analysis was implicated. With respect to the reasons for the delays, appellant argued that the State's requests for postponement (to obtain DNA evidence and procure a witness) did not constitute good cause for such a lengthy delay. With respect to the "assertion of his right" factor, appellant argued that he had demanded a speedy trial "numerous times," asserted multiple objections to continuances, and had never waived his right to a speedy trial. Finally, with respect to the prejudice prong of the *Barker* analysis, appellant stated:

> [C]ase law has provided that prejudice can be shown in forms of a pressing pretrial incarceration, anxiety concern, impairment of defense. I've had numerous conversations with Mr. Reyes Mendoza. I can tell you that with him and his family coming to court every time every three to four months and having yet another postponement has caused a lot of anxiety for him and his family. He has lost members of his family on the outside that he was not

> able to -- because he's in isolation, kept away from his family, not able to partake in special events such as funerals and other matters.
>
> . . . He tells me that in 2011, prior to being brought to the jail, he was going to apply to college. His educational goals, his financial abilities greatly hindered for being incarcerated for the past two years.

Appellant's counsel further stated that,

> since [appellant's] arrest, since being in the jail he has significantly -- his mental stability has deteriorated to the point where he himself has requested and sought help in the jail. And part of that help is seeing a doctor, a therapist specifically that the jail provides and he sees the therapist about once a week. And this is not something that he was doing prior to this incident or incarceration.

The State argued that the court should deny the motion to dismiss. It addressed each factor of the analysis and concluded that the court should "find that delay caused by the State was not of constitutional dimension. If it was, you find that length of delay and cause of delay along with any actual prejudice does not rise to a level that dismissal is appropriate."

The court initially found that the delay was of constitutional proportions. It then addressed the reasons for the delay. After finding that 10 months of the delay was attributable to the State, the court "reversed" itself, finding that the length of the delay was not of constitutional dimension, and therefore, "the court need not go any further in determining the other aspects of the speedy trial analysis." The court stated that, "for those reasons, the court is going to deny the defendant's motion for speedy trial."

Both parties agree that the trial court miscalculated the length of delay in determining if a *Barker* analysis was required, considering only the ten-month delay that it found attributable to the State, as opposed to the approximately two-year delay between

appellant's arrest and his ultimate trial. Appellant contends that the court's erroneous determination that the delay did not reach constitutional dimension, and its subsequent failure to perform the *Barker* analysis, requires a remand for the circuit court to conduct its analysis.

The State contends that the court's error does not require a remand. It asserts that there are "sufficient agreed-upon and judicially-determined facts for this Court to make its own independent constitutional appraisal and conclude that there was no speedy trial violation." We agree with appellant.

As the State notes, this Court, in assessing a speedy trial claim, makes its own independent examination of the record as a whole. *Khalifa v. State*, 382 Md. 400, 417 (2004). In conducting that assessment, however, we defer to the motion court's findings of fact. *Glover*, 368 Md. at 221. Here, the circuit court did not conduct the *Barker* analysis, and therefore, it failed to make factual findings on each of the prongs of the requisite four-factor analysis. Accordingly, we agree that a remand to the circuit court for it to conduct the requisite *Barker* analysis and make specific findings in that regard.[25] *See State v.*

[25] Maryland Rule 8-604(d) provides that, "[i]f the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court." On "remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court." *Id.*

Holley, 82 Md. App. 381, 390 (1990) (because a factual determination by the motions judge with respect to the speedy trial issue was omitted, we remanded for further consideration).

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED IN PART. CASE REMANDED, WITHOUT AFFIRMANCE OR REVERSAL TO THE CIRCUIT COURT ON THE SPEEDY TRIAL CLAIM FOR THE PURPOSE OF CONDUCTING A *BARKER* ANALYSIS. COSTS TO BE PAID 20% BY PRINCE GEORGE'S COUNTY AND 80% BY APPELLANT.