Circuit Court for Harford County
Case No. C-12-CR-19-001264

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 652

September Term, 2021

GARRY LEONARD PARKER, JR.

v.

STATE OF MARYLAND

Kehoe,
Beachley,
Zic,

JJ.

Opinion by Zic, J.

Filed: December 7, 2022

Garry Leonard Parker, Jr., appellant, was charged in the Circuit Court for Harford County with four counts relating to illegal possession of a firearm and one count of illegal possession of ammunition. Mr. Parker was convicted only of one count of illegal possession of ammunition after a jury trial, and he now appeals on several bases. He appeals the circuit court's denial of his motion to suppress; he appeals on the basis of the violation of his statutory and constitutional rights to a speedy trial; and he appeals on the basis of impermissible burden-shifting within the State's closing argument.

QUESTIONS PRESENTED

Mr. Parker presents three questions,[1] which we have rephrased:

1. Did the circuit court err in denying Mr. Parker's motion to suppress the ammunition?

2. Did the circuit court err in failing to grant or rule on Mr. Parker's motion to dismiss for violation of his statutory and constitutional rights to a speedy trial?

[1] Mr. Parker phrases the issues as follows:

1. Whether the trial court erred in denying appellant's motion to suppress evidence based on holding that a police officer may lawfully arrest an individual on a proclaimed recollection of a months-old warrant, without first confirming the fact of a warrant and whether that warrant remains active.

2. Whether the trial court erred in failing to grant (or otherwise rule on) appellant's motions to dismiss for violation of his statutory and constitutional rights to a speedy trial.

3. Whether the trial court abused its discretion in permitting the State to argue, at closing, over defense objection, that the defendant had an obligation to "substantiate his testimony" or "give" the jury witnesses "to corroborate this" testimony.

3. Did the circuit court abuse its discretion by permitting the State to argue at closing that Mr. Parker had an obligation to "substantiate his testimony" or "give" witnesses "to corroborate" his testimony?

We hold that the court did not err or abuse its discretion as to any of these issues. Accordingly, we affirm the judgment of the circuit court.

BACKGROUND

On November 12, 2019, Mr. Parker was arrested on an open warrant for failure to appear in a nonviolent misdemeanor case. He was arrested at a residence that was not his home, and one of the arresting officers found a handgun in a nearby jacket that the officer picked up to bring with Mr. Parker. They also discovered a loaded handgun magazine when they searched Mr. Parker's person. On November 26, 2019, a grand jury indicted Mr. Parker for four counts relating to illegal possession of a firearm and one count of illegal possession of ammunition. Defense counsel entered his appearance on December 4, 2019.

On December 19, 2019, Mr. Parker moved to suppress the handgun and any other evidence that was not in plain view when he was arrested. On February 19, 2020, the court held a suppression hearing. Deputy Gittings, the only witness, explained that he worked for the Warrant Fugitive Apprehension Unit,[2] which "track[s] down people with warrants, anything from minor traffic warrants to felony warrants." He testified that, on November 12, 2019, he and several other officers reported to a residence to execute a

[2] There are seven deputies, two supervisors, two corporals, and one sergeant in this Unit.

warrant for Jophurius Dominique. They knocked on the door, and a resident, Mr. Spencer, answered the door and allowed the officers into the apartment. Two other individuals were in that room at the time. Deputy Gittings stated that Mr. Parker, a fourth individual, was "coming from the back" of the apartment and was "a couple feet from the bathroom door" when they entered. Deputy Gittings then stated that he "immediately recognized [Mr. Parker] from prior encounters and . . . knew he had a warrant." Deputy Gittings further testified that an arrest warrant issued on September 3, 2019—about 10 weeks earlier—was the "active warrant" authorizing Mr. Parker's arrest. He stated that "[officers] confirm everything before [they] actually take [suspects] into custody." He also testified that he "confirmed that the warrant was active" before "tak[ing] [Mr. Parker] into custody." The warrant was admitted into evidence without objection.

During this first suppression hearing, Deputy Gittings also testified that he noticed a jacket on the toilet in the bathroom and asked the three other individuals—not Mr. Parker—if it belonged to Mr. Parker. They "confirmed" that it belonged to Mr. Parker, and Deputy Gittings picked it up to bring it to the station with Mr. Parker but noticed that the "light jacket" was heavier than he expected. Deputy Gittings then looked inside the jacket and found a handgun.

Mr. Parker argued that the jacket and gun must be excluded because they were the fruits of an unlawful, warrantless search. He contended that, because the officers only had an arrest warrant for Mr. Parker, not a search warrant for the residence, they were limited to searching Mr. Parker's person and immediate area as a search incident to

arrest. Deputy Gittings testified that Mr. Parker was immediately placed in handcuffs, arrested, and removed from the apartment. Mr. Parker argued, therefore, that the search of the jacket recovered from the bathroom was improper because "there is no justification for routinely searching any room other than that in which an arrest occurs." Mr. Parker was not arrested in the bathroom, and he was not present in the bathroom when Deputy Gittings recovered the jacket.

The State argued that Mr. Parker lacked standing to object to the search—picking up and looking inside the jacket—because Mr. Parker had no possessory interest, therefore no reasonable expectation of privacy, in that residence. The State noted that Mr. Parker had the burden to prove standing and he failed to present facts to do so. Citing cases from the United States Supreme Court, the State further argued, "the fact that a person is a target of an arrest warrant . . . does not give him standing to challenge a search." Mr. Parker countered that he had standing to protest "[a]nything that is done beyond the scope of the arrest warrant."

The State then argued that exclusion of these items would be improper because recovery of the jacket and looking inside the jacket was not a search at all, but rather Deputy Gittings was engaged in a caretaking function. The State argued that Deputy Gittings was merely concerned for Mr. Parker's well-being upon his likely release from the detention center during the middle of November. The State then argued in the alternative, that, as a piece of Mr. Parker's clothing, the search of the jacket was a proper search incident to arrest.

On February 24, 2020, the court issued a memorandum opinion and accompanying order denying the motion "to exclude the jacket and the gun" because Mr. Parker lacked standing to contest the seizure of those items. The court did not rule upon the validity of the arrest but stated, "Deputy Gittings was aware that there was an active arrest warrant for [Mr. Parker,] which he confirmed," and Mr. Parker "was taken into custody pursuant to the warrant." Mr. Parker subsequently filed a motion to reconsider the denial of his motion to suppress, arguing, in part, that the handgun magazine should be suppressed because the arrest was unlawful.[3] On April 19, 2021, the court denied the motion to reconsider in a one-line order.

Mr. Parker's trial was initially scheduled for April 15, 2020, but due to the coronavirus pandemic, jury trials were suspended.[4] Between April 2020 and April 2021, Mr. Parker requested and was denied bail nine times.

On April 6, 2021, Mr. Parker filed a one-page motion to dismiss for violating his statutory and constitutional rights to a speedy trial. The State filed a response to the motion to dismiss, stating that "145 days have passed since defense counsel entered [an

[3] Mr. Parker asserted in this motion, filed on April 5, 2021, "according to the written & audio CAD reports, . . . no such warrant confirmation ever occurred prior to [Mr. Parker] being taken into custody."

[4] *See, e.g.*, "Statewide Suspension of Jury Trials" (March 12, 2020), at https://mdcourts.gov/sites/default/files/admin-orders-archive/20200312suspensionofjurytrials.pdf (last visited Nov. 14, 2022); Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines (April 3, 2020), at https://mdcourts.gov/sites/default/files/admin-orders-archive/20200403emergencytollingorsuspensionofstatutesoflimitationsetc.pdf (last visited Nov. 14, 2022).

appearance]" and that it believed the "180th day will be approximately June 30, 2021." The court marked the motion "set for hearing," which the court scheduled for May 24, 2021. At that hearing, the State noted that it saw "no merit to the speedy trial motion," but Mr. Parker did not address—and the court did not discuss—his constitutional claim for a speedy trial at the hearing. The court scheduled a pre-trial conference for June 24, 2021 and set a trial date for June 25, 2021.

After the jury was selected on June 25, 2021, Mr. Parker asked the court to reconsider the one-line order denying his motion for reconsideration relating to the suppression of the ammunition. The court agreed to consider the issue on the morning of trial.

On the first day of trial, June 28, 2021, Mr. Parker moved to suppress the ammunition recovered from a search of his person upon arrest, arguing that because "there was no confirmation of the warrant, his arrest was illegal and the subsequent search was illegal." Mr. Parker argued that, contrary to Deputy Gittings' testimony at the first suppression hearing, "there was never any dispatch log entry indicating that there was ever a warrant check done for Mr. Parker." The State took the position that the search was incident to a lawful arrest.

Deputy Gittings testified at this second suppression hearing, again as the only witness. He testified that he "immediately recognized" Mr. Parker from "[p]rior encounters" and knew that Mr. Parker had a warrant. Deputy Gittings stated that he had seen the warrant "[p]robably in September 2019," about two months prior to this

encounter. He testified that "once [Mr. Parker] was detained or placed under arrest," someone from the Warrant Fugitive Apprehension Unit "called our records unit via telephone and confirmed the warrant." Deputy Gittings further testified that he did not know who made the call but that the Unit "work[s] as a team, so somebody took care of it." He explained that they did not use police radios, which would have created a dispatch log, to confirm warrants because it was more efficient to call the records unit than "t[y]ing up the radio." The warrant for Mr. Parker's arrest was admitted as evidence.

The court credited Deputy Gittings' testimony and denied the motion to suppress:

> Deputy Gittings was part of the Warrant Unit. That's part of his duties, knowing who to arrest. He knew that there was a warrant. There had been a warrant that was issued in September. He had looked at and seen the warrant, couldn't place exactly when, but knew it. And upon seeing Mr. Parker coming out, no hesitation that that was Mr. Parker. He's arrested. And subsequently that arrest the [c]ourt finds is a legal arrest.
>
> It was not a situation where the officer needed to confirm a little bit more to make sure. There's no doubt. There was no hesitancy. And subsequently there is a confirmation.
>
> So, whether the search occurs after the officer, Deputy Gittings placed him under arrest, or after the confirmation, the [c]ourt finds that as soon as the officer saw Parker and he knew from prior dealings with him of who he was and also knew because of his work with the Warrant Unit that there was an outstanding warrant that that was enough for the arrest.
>
> The fact that a confirmation did happen, it just simply confirmed it, but in the facts of this particular case, when I'm looking at the totality of the circumstances to determine whether or not there was probable cause to arrest him and

> then subsequently search him, I find that he did have that, and therefore, your motion is denied.

On the same day, the case proceeded to trial, during which the State called six witnesses: Deputy Gittings, Deputy Kenneth Norris, Corporal Matthew Wright, Deputy Hildt, Deputy Shawn O'Brien, and Corporal Ghaner. At the close of the State's case-in-chief, Mr. Parker moved for a judgment of acquittal, and the State entered *nolle prosequi* on three of the counts for firearm possession (Counts 2, 3, and 4). The remaining two counts were illegal possession of a regulated firearm having a prior felony conviction, and illegal possession of ammunition. The court denied Mr. Parker's motion as to these remaining counts. Mr. Parker testified in his own defense, and then the defense rested.

Before closing arguments began on the second day of trial, June 29, 2021, the court notified the parties that it had received a jury note, asking: "Can we take into consideration that no one from [the] apartment was called in to corroborate defendant's testimony?" The court responded to the note, writing: "You will receive legal instructions this morning." The court then instructed the jury on the law, and counsel delivered closing arguments. In the State's closing argument, counsel stated the following: "The defendant must have known this was his story, right? What did he have to substantiate his testimony? Who did he give you to corroborate this --." Mr. Parker's counsel then objected on the basis that this statement shifted the burden to Mr. Parker to present evidence to rebut the State's case. The court overruled this objection, finding that the State could ask jurors to consider the absence of corroborating evidence as to Mr. Parker's story when Mr. Parker had taken the stand.

On June 29, 2021, the jury found Mr. Parker not guilty of possession of a regulated firearm after being convicted of a disqualifying crime (Count 1) but guilty of one count of illegal possession of ammunition (Count 5). The court immediately proceeded to sentencing, imposing time served because Mr. Parker had already served more than the statutory maximum for Count 5, which is one year. Mr. Parker timely noted this appeal.

DISCUSSION

I. THE CIRCUIT COURT DID NOT ERR IN DENYING MR. PARKER'S MOTION TO SUPPRESS THE AMMUNITION.

Mr. Parker first argues the trial court erred in denying his motion to suppress the ammunition. He contends that his arrest was unlawful because Deputy Gittings' reliance "on a memory of a months-old warrant, without calling to confirm that the warrant remains valid and active, [was] inherently unreasonable." The State argues that the Fourth Amendment was satisfied here because an arresting officer need only have "a good faith belief . . . that the warrants for . . . arrest [are] current and valid."

An appellate court's review of the denial of a motion to suppress "is limited to the information contained in the record of the suppression hearing." *Trott v. State*, 473 Md. 245, 253-54 (2021). "We review the facts found by the circuit court in the light most favorable to the prevailing party, in this case, the State." *Id.* at 254. Furthermore, we "accept the circuit court's findings of fact 'unless they are clearly erroneous, but we review de novo the court's application of the law to its findings of fact.'" *Id.* (quoting *Pacheco v. State*, 465 Md. 311, 319 (2019)). Also, "[w]hen a party raises a constitutional

challenge to a search or seizure, we undertake an 'independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case.'" *Trott*, 473 Md. at 254 (quoting *Grant v. State*, 449 Md. 1, 14-15 (2016)).

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const., amend. IV. A warrantless seizure is "per se unreasonable under the Fourth Amendment, subject to a few exceptions." *Belote v. State*, 411 Md. 104, 112 (2009) (quoting *Cherry v. State*, 86 Md. App. 234, 240 (1991)). All arrests must be supported by probable cause, and when an officer makes an arrest in reliance upon an existing warrant, the officer must have a good-faith belief that the warrant is "current and valid." *Darling v. State*, 232 Md. App. 430, 450-51 (2017); *Elliott v. State*, 417 Md. 413, 428 (2010). In *Darling*, this Court found that an officer had a good-faith belief that the warrants were valid when "he called the day before and the day of the stop and confirmed that the warrants were still active" before stopping and arresting the defendant. 232 Md. App. at 450. In *Ott v. State*, 325 Md. 206 (1992), the Court of Appeals stated that an officer acts "in subjective good faith" when he has "no actual knowledge that the warrant on which he arrested petitioner was no longer outstanding." *Id.* at 219. In *Ott*, the officer ran a warrant check through the police computer system, which certified to him that an active warrant existed, but he later discovered that this was incorrect, and that the defendant's warrant was no longer outstanding. *Id.* at 210-11. The court still found, though, that the officer acted reasonably and with a good-faith belief that the warrant was active when he relied on the computer search. *Id.* at 215.

Here, a warrant for Mr. Parker's arrest was issued on September 3, 2019, about 10 weeks prior to Deputy Gittings' encounter with Mr. Parker. Deputy Gittings is one of seven deputies working in the Warrant Fugitive Apprehension Unit, and he testified that he had seen Mr. Parker's warrant at or about the time it was issued in September. He further testified that he had no knowledge of the warrant being executed by another deputy. Additionally, Deputy Gittings testified at the first suppression hearing, "[officers] confirm everything before we actually take [suspects] into custody" and that he "confirmed the warrant was active" before "tak[ing] [Mr. Parker] into custody." At the second suppression hearing, this testimony changed slightly, but Deputy Gittings still testified that someone from the Warrant Fugitive Apprehension Unit "called [the] records unit via telephone and confirmed the warrant" and that the Unit "work[s] as a team, so somebody took care of [confirming the warrant]." In *Darling*, the officer called to confirm that the warrant was outstanding when he planned to arrest the defendant. 232 Md. App. at 450. Here, Deputy Gittings was seeking to execute a warrant on a different individual and happened to encounter Mr. Parker—he did not plan to arrest Mr. Parker. Deputy Gittings also testified to the warrant having been confirmed by a deputy in the Unit, and Mr. Parker did, in fact, have an outstanding warrant, unlike in *Ott*, where the court still found that the arrest was lawful. 325 Md. at 215. Mr. Parker's arrest was similarly lawful. The circuit court did not err when it denied Mr. Parker's motion to suppress on the basis of unlawful arrest.

II. NEITHER CLAIM REGARDING MR. PARKER'S RIGHT TO A SPEEDY TRIAL IS PRESERVED, AND WE DECLINE TO ADDRESS THE ISSUES.

Mr. Parker next argues that the trial court erred by not ruling on his motion to dismiss on speedy trial grounds. Specifically, Mr. Parker asserts that his "trial was delayed well past his *Hicks*[5] date" without an individualized finding of "good cause," and that the Chief Judge's COVID-19 Administrative Orders invalidly altered the *Hicks* rule. Mr. Parker further argues that his constitutional right to a speedy trial under the Sixth Amendment and Maryland Declaration of Rights was violated.

The State argues that Mr. Parker failed to produce a sufficient factual record to establish that the circuit court committed error by failing to rule on his motion to dismiss. The State further argues that, even if the circuit court did not rule on his motion to dismiss, he waived this claim by failing to bring the motion to the court's attention. Similarly, the State argues that Mr. Parker did not raise in the circuit court and therefore waived the argument that Chief Judge Barbera "lacked the power to amend the statute" that codified the *Hicks* rule.

A. The *Hicks* Issue Was Not Preserved, and We Decline to Address the Issue.

In his Reply brief on appeal, Mr. Parker "concedes that his *Hicks* claim was not preserved." At the motions and scheduling hearing held on May 24, 2021, defense

[5] Under *State v. Hicks*, 285 Md. 310 (1979), the *Hicks* date is the last day that a criminal trial can occur, which "must begin no later than 180 days after the earlier of (1) the entry of appearance of the defendant's counsel or (2) the first appearance of the defendant before the circuit court." *State v. Huntley*, 411 Md. 288, 209 (2009) (citing Md. Rule 4-271(a)(1); Md. Code Ann., Crim. Proc. § 6-103(a)).

counsel stated that the Criminal Assignment Office had calculated the *Hicks* date to be July 5, 2021. Defense counsel further stated at that time that advancing the trial date to June 24, 2021 "would essentially go to resolving any *Hicks* issue" and that that date was "acceptable." *See Tunnell v. State*, 466 Md. 565, 588 (2020) ("[A] defendant may consent to a trial beyond the *Hicks* date."). Nevertheless, Mr. Parker urges this Court to exercise our discretion to consider the merits pursuant to Rule 8-131. We decline to do so.[6]

B. The Issue of Mr. Parker's Constitutional Right to a Speedy Trial Was Not Preserved, and We Decline to Address the Issue.

Mr. Parker asserts that the court erred by failing to rule on his motion to dismiss based on a violation of his constitutional right to a speedy trial. The State, however, contends that, if the court did not rule on a pending matter, it was incumbent on Mr. Parker to bring it to the court's attention; otherwise, the claim is waived. Mr. Parker responds that such a "failure to rule on the motion does not render the motion unpreserved," and counsel is required only to direct the court's attention to an issue on which it must rule. He further states that his constitutional claim was effectively denied. The State additionally argues that, even if the issue is preserved, Mr. Parker's constitutional right to a speedy trial was not violated.

[6] Moreover, the Court of Appeals concluded, in response to a certified question from the United States District Court for the District of Maryland, that Chief Judge Barbera did, in fact, have the authority to issue administrative orders temporarily tolling statutes of limitations under Maryland law. *Murphy v. Liberty Mutual Ins. Co.*, 478 Md. 333, 385-86 (2022).

The Court of Appeals has stated, "[e]ven errors of Constitutional dimension may be waived by failure to interpose a timely objection at trial." *Taylor v. State*, 381 Md. 602, 614 (2004). A party must bring a pending motion "to the attention of the trial court" to preserve the issue for appeal. *White v. State*, 23 Md. App. 151, 156 (1974).

Here, Mr. Parker filed a motion to dismiss on April 6, 2021, in which he requested that the court dismiss the case due to a violation of his "right to a speedy trial and his right to a prompt trial under Rule 4-271." The motion was set for hearing on May 24, 2021, at which point the court addressed the *Hicks* issue, but it did not explicitly address Mr. Parker's constitutional claim. The circuit court did not explicitly grant or deny Mr. Parker's motion, but, as a result of this hearing, the trial date was moved from August 2021 to June 2021. Mr. Parker agreed that this change would resolve any *Hicks* issue. He did not bring the court's attention to his constitutional claim at the May 24, 2021 hearing or any subsequent court proceeding. When a court fails to address or decide a motion, it operates as a denial of that motion. *See Malarkey v. State*, 188 Md. App. 126, 160-62 (2009) (concluding that trial court's failure to render a verdict with respect to all counts operates as an acquittal and decision to reserve ruling on a motion for judgment of acquittal operates as a denial of the motion). In the face of such an omission, a party has the responsibility to call the trial court's attention to the matter to be decided. *White*, 23 Md. App. at 156. Here, the circuit court held a motion hearing specifically to address Mr. Parker's *Hicks* claim and his claim under the constitutional right to a speedy trial. The circuit court moved the trial date to resolve the *Hicks* issue, and Mr. Parker accepted this

solution, failed to raise the constitutional issue during that hearing, and failed to raise the issue during subsequent proceedings. This amounts to waiver of the issue. We also decline to address the issue as a discretionary matter.

III. THE CIRCUIT COURT DID NOT ERR WHEN REGULATING THE STATE'S CLOSING ARGUMENT.

Mr. Parker lastly contends that "the prosecutor's closing argument improperly shifted the burden of proof to the defense," and that such error was not harmless error. He contends that the court erred by permitting the State to comment on his failure to produce evidence.

The State argues that the circuit court did not abuse its discretion regarding regulation of closing argument because the State's comments made during closing argument were a "tailored response to [Mr.] Parker's own presentation of evidence and whether there was corroboration of it." The State further argues that an abuse of discretion regarding regulation of closing argument is harmless error "if the trial judge gave counsel ample latitude in which to make the contested argument."

At trial, Mr. Parker chose to testify. On cross examination, the State elicited the following testimony:

> [THE STATE]: Okay. [The deputies are] wrong about the location [where you were searched]?
>
> [MR. PARKER]: No. I'm saying they're lying about where they seen me at. That's what I said. They're lying about seeing me standing by the bathroom and coming out the hall. I can't be doing both.
>
> * * *

[THE STATE]: Okay. And do you remember Deputy Hildt saying that he searched you at the car not at the landing?

[MR. PARKER]: Yes, sir, I remember that.

[THE STATE]: Okay. You remember Deputy O'Brien saying the same thing?

[MR. PARKER]: Yes, sir.

[THE STATE]: And they're both confused about [the location] is my question. . . .

[MR. PARKER]: Yeah, they're lying.

* * *

[THE STATE]: This is State's [Exhibit] 3, this is identified as a handgun magazine. Which pocket did you have it in?

[MR. PARKER]: I never had a handgun magazine on me at all, sir.

[THE STATE]: You never had a handgun magazine on you at all?

[MR. PARKER]: No. They said I had one on me in order to connect me to the gun allegedly found in the apartment. That's why they made it up. Facts. I never had a handgun magazine on my person.

[THE STATE]: Sir, this doesn't exist?

[MR. PARKER]: It exists, but I never had it on my person.

[THE STATE]: So they didn't make it up, it exists?

[MR. PARKER]: No, I'm saying they lied and said they found it on my person in order to connect me to the gun found in Mr. Spencer's apartment. That's why they lied and said that.

> [THE STATE]: That's why they lied because they wanted to connect you to the gun?
>
> [MR. PARKER]: Exactly, and not the person who[se] house it was found in. . . .
>
> [THE STATE]: . . . Which deputy wanted to connect you to the gun?
>
> [MR. PARKER]: I guess, I mean, whoever did the report. I didn't know I was being charged with the gun until I seen the commissioner. How ever [sic] -- when they wrote the report up, how they wrote the report up, that's the proof in the pudding that they wanted to connect me to the gun either brought with them or found in the apartment. That's it. I mean, why else would they lie and say they found a handgun magazine on me, and why would I -- if I knew I have a warrant, why would I take a handgun clip out the gun just to hide the gun and not the clip?
>
> I know the police is at the door. I'm about to be arrested on a warrant. I hear them knocking. Why would I remove the clip just to hide the gun and not the clip. It makes no sense.
>
> * * *
>
> [THE STATE]: What about the deputies who didn't write a report but who testified consistent with another deputy's report?
>
> [MR. PARKER]: You act like they don't talk to each other. It's easy to sit there and coach each other how to lie.
>
> [THE STATE]: And that's what they did?
>
> [MR. PARKER]: Exactly.

After the defense rested its case but before the jury was instructed, the jury submitted a note that read, "Can we take into consideration that no one from [the]

apartment was called in to corroborate defendant's testimony?" The court informed the jury that it would "receive legal instructions" before closing arguments. The court subsequently instructed the jury on the law, stating, in part, that "[t]he defendant is presumed innocent of the charges" and "[t]he State has the burden of proving the guilt of the defendant beyond a reasonable doubt," which "remains on the State throughout the trial." The court also instructed that "[t]he defendant is not required to prove his innocence."

In its closing argument, the State argued the following, in pertinent part:

> [THE STATE]: Start with the defendant's testimony.
>
> Everyone but me is lying. And if they wrote a report, they're lying, and if they didn't write a report, then they're lying because they were coached to lie, and they all want to connect me to the gun that was found in someone else's apartment. The police weren't there for Mr. Parker. The police weren't looking for Mr. Parker. They happened upon him, and they did what they had to do because of the existing warrant.
>
> It's an impressive conspiracy that he's alleging here for some unstated reason. I wonder, do conspiracy theories make sense to people as they're saying them? Beyond that, does the defendant's theory made [sic] sense based on his other testimony? Think about it. He says he knew he had the warrant. And then he went outside and told Brian Spencer, hey, open up the door for the police. And then after encouraging Mr. Spencer to open the door to the police and knowing that he had a warrant, the defendant went back to his video game, closed the door, didn't lock it, but maybe it was important to try to finish out quarter. . . .
>
> And he said he wasn't listening once the police came in, but he did hear as they did warrant checks. They said, do you have warrants and they said no. And then he heard them

> say open the bathroom door and went in there for 20 seconds and that conversation, that 20 seconds added up to 5 to 10 minutes, and then they came in and everything that they said, everything that the officers testified to, everything the deputies testified to was a lie.
>
> *The defendant must have known that this was his story, right? What did he have to substantiate his testimony? Who did he give you to corroborate this --.*

(emphasis added).

Defense counsel then objected. At the bench, defense counsel argued that the State improperly shifted the burden. The State responded that "the defense has subpoena powers just as the State does. The defendant chose to testify. . . . [G]iven that the defendant did testify, it's fair to comment on his testimony versus the testimony of the officers." The court overruled the objection, explaining: "Mr. Parker chose to testify. The State can question and ask the jurors to consider that. . . . [It is not] shifting the burden [but] it is going to omission, so a jury can consider it." The State resumed its closing argument and further stressed that the deputies' testimony was consistent with one another.

Given "the broad scope of permissible closing argument, . . . '[w]hat exceeds the limits of permissible comment or argument by counsel depends on the facts of each case.'" *Mitchell v. State*, 408 Md. 368, 380 (2009) (alteration in original) (quoting *Smith v. State*, 388 Md. 468, 488 (2005)). "Because the trial judge is in the best position to gauge the propriety of argument in light of such facts," *Mitchell*, 408 Md. at 380, "[t]he permissible scope of closing argument is a matter left to the sound discretion of the trial

court." *Cagle v. State*, 462 Md. 67, 74 (2018) (quoting *Ware v. State*, 360 Md. 650, 682 (2000)). "An abuse of discretion exists '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.'" *Cagle*, 462 Md. at 75 (quoting *Alexis v. State*, 437 Md. 457, 478 (2014)). We review burden-shifting claims, however, without deference to the trial court because it is an allegation of a violation of the defendant's constitutional right to refrain from testifying. *Harriston v. State*, 246 Md. App. 367, 372 (2020) (citing *Molina v. State*, 244 Md. App. 67, 174 (2019)). Also, even when a prosecutor's remark is improper, it will typically merit reversal only "where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Lawson v. State*, 389 Md. 570, 592 (2005).

"Generally, a party holds great leeway when presenting . . . closing remarks." *Cagle*, 462 Md. at 75. "The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom" and is "free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments." *Pietruszewski v. State*, 245 Md. App. 292, 319 (2020) (quoting *Winston v. State*, 235 Md. App. 540, 572-73 (2018)).

There are, however, certain boundaries that counsel may not cross during closing argument. For example, "prosecutors, in closing argument, may not routinely draw the jury's attention to the failure of the defendant to call witnesses, because the argument

shifts the burden of proof." *Pietruszewski*, 245 Md. App. at 320 (quoting *Wise v. State*, 132 Md. App. 127, 148 (2000)). The prosecutor is also prohibited from commenting "directly on the defendant's failure to testify." *Molina*, 244 Md. App. at 175 (quoting *Smith v. State*, 367 Md. 348, 360 (2001)). For instance, in *Smith*, the Court of Appeals held that the prosecutor engaged in burden-shifting by commenting in closing argument, "What explanation has been given to us by the defendant for having the leather goods? Zero, none," because it referred to the defendant's decision to exercise his constitutional right to refrain from testifying. 367 Md. at 351-52, 358.

Nevertheless, this Court has explained that "[c]ommentary on the lack of corroborating witnesses is permissible when a defendant elects to testify." *Marshall v. State*, 213 Md. App. 532, 540 (2013), *cert. denied*, 436 Md. 329 (2013). And although it is "axiomatic that the prosecutor cannot comment on a defendant's failure to testify, once a defendant has taken the stand in [his] own defense, the prosecutor is not precluded from impugning the defendant's credibility by commenting on [his] failure to produce any corroborating evidence." *Mines v. State*, 208 Md. App. 280, 300 (2012) (quoting *United States v. Boulerice*, 325 F.3d 75, 86-87 (1st Cir. 2003) (internal citations omitted)). In other words, "a prosecutor may properly comment on the defendant's failure to present exculpatory evidence which would substantiate the defendant's story as long as it does not constitute a comment on the defendant's silence." *Mines*, 208 Md. App. at 301 (quoting 75 Am. Jur. 2d Trial § 506 (2012)). In *Simms v. State*, 194 Md. App. 285 (2010), this Court distinguished identifying weaknesses in a defendant's case from

commenting on the defendant's choice not to testify, which would improperly shift the burden. *Id.* at 320. "Where a defendant testifies to an alibi and calls no additional witnesses to support it, the prosecution, by commenting on the nonproduction of corroborating alibi witnesses, is merely pointing out the weakness in [the] defendant's case." *Id.* (quoting *People v. Shannon*, 276 N.W.2d 546, 549 (1979)). Where the defendant elects not to testify, however, "the prosecutor, by commenting on the nonproduction of corroborating alibi witnesses, is not exposing a weakness in defendant's case, but is rather improperly shifting the burden of proof to the defendant." *Id.*

Here, Mr. Parker elected to testify at trial. During his testimony, he asserted that the State's witnesses lied about where they saw him in the apartment, where the search took place, and that the handgun magazine was found on his person. He maintained that the officers "made it up" to connect him "to the gun allegedly found in the apartment." He also asserted that the officer who wrote the police report lied and that the deputies who testified but did not write reports, "talk[ed] to each other" and "coach[ed] each other how to lie."

The prosecutor's comments, viewed in the context of the case, were a permissible comment on Mr. Parker's testimony and credibility. The prosecutor's comments did not reference Mr. Parker's right to not testify but rather addressed why Mr. Parker's testimony—that all of the State's witnesses were lying—lacked support. By arguing, "The defendant must have known that this was his story, right? What did he have to substantiate his testimony? Who did he give you to corroborate this[?]," the prosecutor

identified weaknesses in Mr. Parker's case and questioned Mr. Parker's credibility as a witness. Because Mr. Parker took the stand and testified contrary to the State's witnesses, the State was permitted to comment on the lack of evidence or witnesses corroborating Mr. Parker's version of events. *See Marshall*, 213 Md. App. at 540; *Mines*, 208 Md. App. at 300. The State's comments did not amount to burden-shifting, and the court did not err or abuse its discretion in permitting the State's comments in closing argument.

CONCLUSION

First, the circuit court did not err when it denied Mr. Parker's motion to suppress the ammunition found during a search incident to his arrest. Second, neither claim regarding Mr. Parker's right to a speedy trial is preserved, and we decline to address the issues. Finally, the circuit court did not abuse its discretion when it regulated the State's closing argument. Accordingly, we affirm the circuit court's judgment.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.