Circuit Court for Washington County
Case No. C-21-CR-17-000119

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 973

September Term, 2019

CLARENCE WARREN BROUSSARD, III

v.

STATE OF MARYLAND

Berger,
Gould,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Gould, J.

Filed: July 26, 2021

On September 24, 2017, Anthony Mazingo was shot twice in the head on Salem Avenue in Hagerstown, Maryland. The State charged Clarence Warren Broussard, III, appellant, with his murder. A jury in the Circuit Court for Washington County acquitted Mr. Broussard of first- and second-degree murder, but convicted him of first-degree assault. He was sentenced to the maximum term of 25 years. *See* Md. Code Ann., Crim. Law § 3-202(c) (2002, 2021 Repl. Vol.).

In this timely appeal, Mr. Broussard raises the following issues:

1. Did the motions court err by denying [his] motion to suppress his statements to police?
2. Did the trial court abuse its discretion by excluding the surveillance videos recovered by Detective Brashears?
3. Did the trial court commit plain error by propounding an outdated jury instruction on the presumption of innocence and reasonable doubt?
4. Did the trial court commit plain error by permitting improper prosecutorial closing argument?
5. Did the trial court abuse its discretion by denying [his] request to continue sentencing after a four-day trial?

We conclude that there was no error warranting reversal of the conviction, but agree with Mr. Broussard that, in violation of Maryland Rule 4-342(e), he was denied the right to present evidence and argument in mitigation of his punishment. Because we cannot conclude beyond a reasonable doubt that the court's error was harmless, we shall affirm Mr. Broussard's conviction, vacate his sentence, and remand this case for resentencing.

BACKGROUND

Mr. Broussard does not challenge the sufficiency of the evidence supporting his conviction. For that reason, our summary of the record provides context for our discussion of the issues he raises in this appeal. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

The State's theory at trial was that on September 24, 2017, Mr. Broussard avenged the murder of his cousin by shooting Mr. Mazingo, execution-style. The State presented evidence from witnesses in the area of the shooting, investigating officers, Mr. Broussard's former girlfriend and her daughter, as well as Mr. Broussard's recorded statement to police, surveillance camera images, cell phone evidence, and DNA results. According to the State, Mr. Broussard was the shooter, but another cousin, Jonathan Ardoin, known as "J-Mac," was also "having issues" with Mr. Mazingo and became integrally involved in the events leading up to the shooting.

Mr. Broussard's defense maintained that someone else – perhaps Mr. Ardoin, who had been arguing with Mr. Mazingo earlier that evening – could have killed Mr. Mazingo. Defense counsel argued that there was reasonable doubt about Mr. Broussard's involvement in the crime because there were different accounts of the shooting and other conflicting evidence.

At 9:53 p.m. and 9:54 p.m. on September 24, 2017, on overlapping 911 calls, two different residents of Mitchell Avenue complained about an escalating altercation on their street, involving threats to shoot. The callers described a white male arguing with one or more black males, one of whom was wearing a hoodie.

At 10:08 p.m., less than ten minutes later and about "two blocks and a street over" from that altercation, another 911 caller reported that there was a "male shot in the head" at the intersection of Salem Avenue and McDowell Avenue. Amanda K. Trimmer, who observed "a black male and a white male arguing" when the shooting occurred, also called 911 to request medical aid for Mr. Mazingo. She told the 911 dispatcher that from "across the street," she "watched" the assailant "jump out of the car, shoot [the victim] twice and run down McDowell Avenue." The shooter "jumped out of a four door Ford Explorer, dark car, tinted windows[.]"

At trial, Brandon Burnett testified that he and a friend were standing on the sidewalk at the intersection of Salem Avenue and McDowell Avenue when the shooting occurred. After observing a gold vehicle, "maybe a 03, 04 gold Dodge Stratus[,]" "pull up on the opposite side of McDowell. . . . on the 7 Eleven side of Norway" and then stop, Mr. Burnett saw someone get "out of the passenger side in a dark sweat suit and cross[] over the street[.]" He "turn[ed] the corner where Tony Mazingo was standing in an argument with Gerald Ingram[,]" apparently because "Tony had robbed Gerald's dad[] or something." Mr. Burnett recounted that:

> the guy walked up, it was [a] black gentleman, about 6 foot tall walked up. I couldn't see because the hoodie was pulled tight around his, his head and face. So, couldn't see who it was. But [he] put a gun point blank to the back of Tony's head, pulled the trigger. He fell to the ground. Then he leaned over top of him, shot him again in the back of the head and walked away. Headed northbound on McDowell Avenue.

According to Mr. Burnett, the shooter was wearing a "[d]ark colored hoodie" and sweatpants. Shortly after the shooting, however, Mr. Burnett told a police officer that "his back was turned when he heard the first" gunshot.

The State presented testimony and circumstantial evidence that although Mr. Ardoin remained in the area after arguing with Mr. Mazingo in the minutes leading up to the shooting, Mr. Broussard was the shooter. Both Mr. Broussard and Mr. Ardoin suspected Mr. Mazingo was involved in their cousin's death.

Following the viewing for his cousin earlier that evening, Mr. Broussard and his girlfriend Barbara Malott returned home. According to Ms. Malott, after Mr. Broussard went to bed, he got an extremely upsetting call. He changed into a black hoodie and jeans. He then told her to take him to Salem Avenue in her tan Dodge Stratus.

Ms. Malott's 13-year-old daughter rode with them. Mr. Broussard got out of the car on Salem Avenue, telling Ms. Malott to answer her phone when he called. Ms. Malott and her daughter later picked up Mr. Broussard near the alley next to the Goodwill store. At that time, he was no longer wearing the black hoodie. City surveillance camera images showed a male on a phone, wearing a white shirt and jeans, in the alley next to the Goodwill store where Ms. Malott picked up Mr. Broussard. Driving home, he said that he "just shot Tony" and "that he threw the gun."

That night, Jade Parson was with Mariah Butts, Ms. Butts's boyfriend Mr. Ardoin, and Devauntay Provitt, in Ms. Butts's Ford Explorer. According to Ms. Parson, after meeting Ms. Butts the previous day, she called her to go on "a smoke ride." While she bought a cigarillo for rolling, they were parked at the 7 Eleven, which is about 500 feet

from where Mr. Mazingo was shot within the next ten minutes. When they left the store, Mr. Ardoin was "frustrated with something that had happened before." Both he and Mr. Provitt got out of the car, but neither was out of her sight. While they were "pulled over," she heard "a startling noise" that could have been a gunshot. Both men got back in the car, and she went home.

Mariah Butts confirmed the four occupants were with her for that "smoke ride" in her tan Ford Explorer after the "funeral." She testified that Mr. Ardoin, who was wearing a white t-shirt and jeans, had argued with Mr. Mazingo earlier that evening, but that she and Mr. Ardoin left after that altercation.

Circumstantial evidence corroborated the presence of Mr. Broussard and Mr. Ardoin in the area before, during, and after the shooting. Police reviewed surveillance footage from the neighborhood, finding images of Ms. Butts's vehicle outside the 7 Eleven at 9:59 p.m., and of Ms. Malott's vehicle on Mitchell Avenue at 10:08 p.m. Cell phone records showed that, beginning at 10:08 p.m. and continuing through 10:16 p.m., Mr. Broussard's phone made a series of alternating calls to Ms. Malott's number and to the number Mr. Ardoin shared with Ms. Butts.

Police also recovered a black hoodie sweatshirt from the alley where Ms. Malott picked Mr. Broussard up, which was about one block away from the shooting. The sweatshirt was linked to Mr. Broussard through DNA testing, and established the combined presence of four profiles. Mr. Broussard could not be ruled out as the major male DNA contributor. Although the chance that the sample from inside the hood came from two other African American males was one in 1.2 sextillion, the forensic analyst explained that

those "numbers would change" if someone related to Mr. Broussard was the major male contributor.

Mr. Broussard was arrested on October 25 and made a recorded statement to police, admitting he went to the area to "buy weed" but insisting that he did not shoot Mr. Mazingo. He also denied wearing a black hoodie, claiming he had been wearing a white t-shirt and jeans.

In closing, the State argued that Mr. Broussard, Mr. Ardoin, and Ms. Butts worked together to locate Mr. Mazingo, but that Mr. Broussard was the person who shot him, as established by his cell phone records, his DNA on the black hoodie, and his confession to Ms. Malott and her daughter.

Pointing out that no eyewitness identified Mr. Broussard as the shooter or otherwise saw him with a gun, the defense argued that the evidence established reasonable doubt in several ways. Defense counsel cited the inconsistent eyewitness accounts as to whether the shooter got out of a Dodge Stratus like the one Mr. Broussard was in, or a Ford Explorer like the one Mr. Ardoin was in. Defense counsel maintained that the State's timeline of events for Mr. Broussard to get from his home to the scene was highly improbable; that the cell phone evidence contradicted testimony by Ms. Malott that Mr. Broussard made no calls before she dropped him off; that Mr. Burnett's initial statement that he did not see the first shot was inconsistent with his trial testimony; that the black hoodie was not tested for gunshot residue or bodily fluids; and that just before he was shot, Mr. Mazingo had been arguing with others, including Mr. Ardoin, who threatened to shoot him and had motive and opportunity to do so. Counsel also argued that Ms. Malott and her daughter were not

credible, pointing to Ms. Malott's continuing correspondence with and financial support for Mr. Broussard, as well as her fear of being charged or getting in trouble and losing custody of her child. Defense counsel concluded by telling the jury, "You have the person who shot Mr. Mazingo . . . and it is not Mr. Broussard."

We shall add material from the record in our discussion of the issues raised by Mr. Broussard.

DISCUSSION

I.

DELAY IN PRESENTMENT

Mr. Broussard contends that that the suppression court erred in denying his motion to exclude his recorded statement because police failed to promptly present him to a commissioner, in violation of Maryland Rule 4-212(e). In pertinent part, that rule provides:

> The defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest or, if the warrant so specifies, before a judicial officer of the circuit court without unnecessary delay and in no event later than the next session of court after the date of arrest.

Based on our independent examination of the hearing record discussed below, including Mr. Broussard's written waiver of his right to prompt presentment, we hold that the motion court did not err in declining to suppress his recorded statement.

A.

STANDARDS GOVERNING SUPPRESSION BASED ON DELAY IN PRESENTMENT

When reviewing the denial of a motion to suppress, we are limited to the facts developed at the hearing, *Hill v. State*, 418 Md. 62, 67 n.1 (2011), and consider the evidence in the light most favorable to the prevailing party on the motion. *Gonzalez v. State*, 429 Md. 632, 647 (2012). We evaluate the motion court's factual findings for clear error, but make our independent constitutional appraisal of admissibility, applying the relevant law to the totality of the circumstances. *Id.* at 647-48.

In Maryland, a statement made while in police custody may be admitted as evidence only if the statement was voluntary. *See Hoey v. State*, 311 Md. 473, 480 (1988). Whether a statement is voluntary is a mixed question of law and fact, subject to *de novo* review, but with deference given to the suppression court's factual findings. *Smith v. State*, 220 Md. App. 256, 272 (2014).

A statement is voluntary when "it is 'freely and voluntarily made' and the defendant making the confession 'knew and understood what he was saying' at the time he or she said it." *Bellard v. State*, 229 Md. App. 312, 349 (2016), *aff'd*, 452 Md. 467 (2017) (quoting *Hoey*, 311 Md. at 480-81). To be considered voluntary, a confession "must satisfy the requirements of the U.S. Constitution, the Maryland Constitution and Declaration of Rights, Maryland non-constitutional law, and the United States Supreme Court's decision in [*Miranda v. Arizona*, 384 U.S. 436 (1966)]." *Id.* at 349-50. A confession is involuntary, however, if "it is the product of certain improper threats, promises, or inducements by the

police." *Id.* at 350 (quoting *Lee v. State*, 418 Md. 136 (2011)). Courts consider the totality of the circumstances when assessing voluntariness, including:

> where 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; *when the defendant was taken before a court commissioner following arrest*; and whether the defendant was physically mistreated, or physically intimated or psychologically pressured. . . . The State has the burden to prove, by a preponderance of the evidence, that the confession was voluntary.

Id. at 350 (emphasis added) (internal citations omitted).

A delay in presentment, by itself, is not dispositive of voluntariness. Under Section 10-912 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code ("C&JP") (1974, 2020 Repl. Vol.):

> (a) A confession may not be excluded from evidence solely because the defendant was not taken before a judicial officer after arrest within any time period specified by Title 4 of the Maryland Rules.
>
> (b) Failure to strictly comply with the provisions of Title 4 of the Maryland Rules pertaining to taking a defendant before a judicial officer after arrest is only one factor, among others, to be considered by the court in deciding the voluntariness and admissibility of a confession.

The Court of Appeals has explained that a delay is not "coercive as a matter of law," and therefore, that a delay alone doesn't require suppression. *Williams v. State*, 375 Md. 404, 430 (2003). Nevertheless, "the deliberate and unnecessary violation of an accused's right to prompt presentment" must "be given special weight[.]" *Id.* This right is "designed to provide the defendant with a clear explanation of more basic Constitutional and statutory rights" and "when the right it is designed to protect is transgressed, there may be no practical way of calculating the actual effect of the transgression." *Id.* Moreover, "the

longer any unlawful delay, the greater is the weight that must be given to the prospect of coercion." *Id.* at 433.

The Court of Appeals has recognized that some delays in presentment may be reasonably necessary. *See id.* at 420. For example, a delay may be reasonably necessary to conduct "reasonable routine administrative procedures[,]" to obtain information in order to avert harm to persons, loss of property, or destruction of evidence, or to discover the identity or location of other persons involved. *Id.* (quoting *Johnson v. State*, 282 Md. 314, 329 (1978)); *see also Odum v. State*, 156 Md. App. 184, 202 (2004). Moreover, "a delay that can have no effect on the voluntariness of a statement is immaterial to suppression." *Odum*, 156 Md. App. at 202. Such delays do not violate Rule 4-212 or weigh against voluntariness. *Id.*

Whereas delays that are "not for the sole purpose of custodial interrogation" do not carry significant weight in the voluntariness analysis, *id.* at 202-03, delays in presentment to obtain an incriminating statement do carry "very heavy weight in determining whether a resulting [statement] is voluntary[.]" *Williams*, 375 Md. at 434; *see also, Odum*, 156 Md. App. at 203 (stating that delays that are "deliberately for the sole purpose of custodial interrogation" weigh "very heavily against voluntariness").

B.

THE SUPPRESSION RECORD

At the suppression hearing, Hagerstown City Police Detective Tony Fleegal testified that he was the lead investigator assigned to the murder of Mr. Mazingo. A month after

that shooting, on October 25, 2017, at 4:31 p.m., the detective obtained an arrest warrant charging Mr. Broussard with first-degree murder and related offenses.

Mr. Broussard was arrested by other officers, during a traffic stop, at 5:13 p.m. He was then "transported back to the Hagerstown Police Department to a second-floor interview room[,]" where a video recording began at 5:19 p.m. At 5:27 p.m., using "a standard form," the detective began reading Mr. Broussard both his *Miranda* rights and his right to prompt presentment. He signed both waivers at 5:28 p.m.

The 74-minute recording of the interview was played and transcribed at the suppression hearing. At the outset, Mr. Broussard was alone in the room, talking to himself, saying, among other things, "I don't know about the goddamn murder." When Detective Fleegal entered, he explained that the interview was being video-recorded and advised Mr. Broussard "that, obviously, technically you're under arrest. Okay? So in order to talk to you, I have to advise you of your *Miranda* rights. Okay?"

The following ensued:

MR. BROUSSARD: So I'm going to jail?

DETECTIVE FLEEGAL: Yes.

MR. BROUSSARD: For what?

DETECTIVE FLEEGAL: Well I can't really get into that until you -- until we go over *Miranda* and all that good stuff. Okay? So you want to talk about this? I'll give -- I'll go over these rights with ya and then we can talk. And at any point when we're talking after this, if you don't want to talk anymore, we're done, and you can go out there to the county and deal with it from there. Okay? But I'm sure you're anxious about finding out what's going on, and I'll get into that once we do this, get the formalities out of the way, and go from there. So to begin with, if you want, just print your full name there for me first. And I'll go over each one of these rights with you.

As Mr. Broussard wrote down his birth date, age, and address, he stated that Ms. Malott "said she came down here" and asked the detective whether she did. Detective Fleegal again responded that he could not "answer any of your questions till we get through these formalities. I got to read each one of these to you. Okay?" The detective then asked him to "initial it" if he understood.

After advising Mr. Broussard of his *Miranda* rights, the detective continued:

> At any point when we're talking, if you don't want to talk to me anymore, all you got to say is, "Detective, I'm done talking," and we're done. Okay? So, "I understand each of these rights, which -- which have been explained to me and voluntarily waive them in order that I may talk to you," which is me, "concerning this investigation." If you want to talk to me, just sign that right there. And today is 10/25/17 and it is, uh, 5:27 p.m. Right here, sir. And the location, just put "HPD."
>
> Now being that you do have pending charges, I have to advise you of one more paperwork. It's the Notice to Prompt Presentment. What that basically means is technically you have a right now to go to the commissioner's office and be informed of what your charges are and then they'll do whatever they're gonna do with ya. I'm delaying that because I'm gonna talk to you about what you're charged with. So since I'm delaying you, I got to go over this with you as well. So, it says, "You have a right to be taken promptly before a District Court Commissioner. A commissioner is a judicial officer not connected with the police. A commissioner will do the following – inform you of each offense you are charged with and the penalties for each offense, provide you with a written copy of the charges against you, advise you of your right to counsel, make a pretrial release determination, advise you whether you have a right to a preliminary hearing before a judge at a later time. I have been advised of and understand my right to have -- to be taken promptly before a District Court Commissioner. I freely and voluntarily waive this right and agree to talk with the police. I understand I can stop talking to the police at any time and be taken before a District Court Commissioner." So at any point, once again, if you want me to take you out immediately, uh, all you can do is say "Stop," and I'll take you out there. Okay? So if you understand that, just sign right there for me, sir. Um, also, date and time there for me again, sir. I'm sorry. And today is the 25th and it is, uh, 5:28 p.m. All right, thank you, sir.

Subsequently, the detective asked Mr. Broussard whether he was under the influence of alcohol or medication and whether there was "anything that we've gone over so far that [he] did not understand[.]" Detective Fleegal then asked Mr. Broussard whether he was "willing to answer a couple questions and have me explain to you what's going on[,]" and Mr. Broussard indicated that he was and proceeded to respond to the detective's inquiries about his involvement in the shooting of Mr. Mazingo.

At no time did Mr. Broussard ask to stop the interview, decline to answer the detective's questions, or indicate that he wanted to be taken to the commissioner. Instead, throughout the interview, Mr. Broussard insisted that he did not shoot Mr. Mazingo. He stated that on the night of the murder, he and Ms. Malott went to the viewing for his cousin, who had been shot and found "in a river" after last being seen with Mr. Mazingo. He said that he went "back to the house" and "passed out drunk" around 9 p.m.

Mr. Broussard initially denied going out again or being in the area where Mr. Mazingo was shot. When the detective pointed to video surveillance images showing Ms. Malott's gold car on Mitchell Avenue in the area where the shooting occurred and cell phone records showing his cell phone was in that area around 10:08 p.m. that night, he admitted that he went out to buy marijuana. Detective Fleegal then pointed out that a series of calls between Mr. Broussard's and Ms. Malott's cell phones beginning at 10:08 p.m. hit off cell towers on the streets where Mr. Mazingo had just been shot. According to Mr. Broussard, he "had to go to the dude[']s] house," so he called Ms. Malott several times because "she couldn't find" him.

Detective Fleegal also informed Mr. Broussard that Ms. Malott and her 13-year-old daughter both told Detective Fleegal that after Mr. Broussard received a call that upset him that night, he told Ms. Malott that "need[ed] a ride down to Salem Avenue." Ms. Malott and her daughter dropped Mr. Broussard off "somewhere on Salem" Avenue, which is where Mr. Mazingo was shot at 10:08pm. Although Mr. Broussard claimed that he was wearing a "white tee and . . . light blue jeans[,]" they both reported that he was wearing a black-hooded sweatshirt. When he called them for a ride, they picked him up "by Goodwill in the alley[,]" near where police later recovered a black hoodie matching the description of the person who shot Mr. Mazingo. According to the detective, Mr. Broussard told Ms. Malott and her daughter that he "shot Tony twice in the head."

Detective Fleegal recounted his theory that "just before he got shot[,]" Tony had "got in an altercation with J-Mac" on Mitchell Avenue. Mr. Ardoin then called Mr. Broussard, who "came back down to Salem Avenue[,] . . . walked right up to Tony[,] and . . . put two rounds in his head."

Mr. Broussard responded to the detective's accusation by repeatedly saying, "I didn't do it," and that he "barely even knew" Mr. Mazingo. Mr. Broussard claimed that even though he believed Mr. Mazingo had had "something" to do with his cousin's shooting, he did not see him that night. According to Mr. Broussard, he heard gunshots but "thought it was somebody like some gangs shooting at each other." He suggested that Ms. Malott and her daughter, who were moving out of the area, lied about what he wore and said that night, perhaps because they were afraid when police threatened to charge Ms. Malott and remove her daughter from her custody.

After Mr. Broussard finished his statement, he was taken to the commissioner and processed at the jail at 7:29 p.m.

On cross-examination, defense counsel asked the detective whether, "when someone is arrested, via an arrest warrant, are they usually taken to HPD or are they taken before a commissioner?" Detective Fleegal answered that "if we have a warrant, we usually ask them if they want to talk[,]" but noted that he was not there when Mr. Broussard was arrested. The detective explained the standard procedure: to "bring them back. Um, when we get them back there, we always ask them, 'Are you willing to make a statement?' If they don't, then we take them immediately to the county detention center." When defense counsel asked, "[w]hen was the decision made to take him to the police department as opposed to a commissioner[,]" the detective testified:

> Because he had a warrant, we -- we always attempt to get a statement from somebody, um, if we -- Once, you know, we always try to get a statement from them, but if they get back to the police department, [and they] don't want to make one, then we immediately take them out to the detention -- He did not indicate that he didn't want to go back. Um, our normal practice is if we make an arrest and we want to get a statement, we'll take them back. If he says, once we get back there, we made our effort to get a statement, and then we honor their wishes and take them immediately . . . out to the commissioner's office.

In addition to other voluntariness challenges, defense counsel argued that the delay in presentment violated Rule 4-212(e) because it was "unnecessary and deliberate, . . . solely for the purpose of obtaining an incriminating statement." Citing *Williams*, defense counsel acknowledged that the "heavy weight" of this violation was not dispositive. Nevertheless, she argued, the "hour and a half delay in between [Mr. Broussard's] arrest

and when he was . . . brought before a commissioner . . . resulted in him . . . making a statement to the officer, a recorded statement."

In a written opinion and order, the suppression court found that Mr. Broussard "displayed no confusion or concerning behavior while reviewing and signing the waiver." Moreover, "the recording establishes that [his] actions were neither under threat nor coercion." The suppression court concluded:

> [Mr. Broussard's] waiver of prompt presentment rights was made knowingly and voluntarily. The recording clearly shows that the right was explained to him and that he elected to sign without any threat or promise. [*Williams*, 375 Md. 404]. Moreover, the Court does not find any improper motive by police to delay presentment. Among the several legitimate reasons for delay recognized is the desire to discover the identity of the co-conspirators in the crime. *Odum v. State*, 156 Md. [App.] 184 (2004). In this case, the police were within reason to interview [Mr. Broussard] to determine whether there were other participants, if any.

C.

WAIVER OF THE RIGHT TO PROMPT PRESENTMENT

Citing Detective Fleegal's admission that "we always attempt to get a statement from somebody" who has just been arrested on a warrant, Mr. Broussard contends that the delay in presentment was deliberate and done for the sole purpose of interrogation. He argues that "the motions court did not give any weight – much less the requisite 'very heavy weight' – to the violation of [his] right to prompt presentment." As a result, according to Mr. Brossard, the court erred in failing to suppress his statement.

The State counters that the suppression court did not err in denying the motion because Mr. Broussard "waived his right to prompt presentment just fifteen minutes after

his arrest" and was taken for processing after an interview of only an hour and fourteen minutes.

Although we disagree with Mr. Broussard's contention that the suppression court erred in denying his motion, we agree with Mr. Broussard that there was a deliberate delay in presentment for the purpose of obtaining an incriminating statement rather than to investigate the identity of co-conspirators.

The motion court concluded that the reason for the delay was "to determine whether there were other participants, if any" in the murder. We disagree. Nothing in the suppression hearing record supports the motion court's conclusion. In fact, during the interview, Detective Fleegal did not even ask Mr. Broussard whether anyone else was involved.

Nevertheless, in *Williams*, the Court of Appeals recognized that when a suspect has been properly advised of his right to prompt presentment and waives it, "the police [may] proceed with a reasonable interrogation without violating Rule 4-212(e)[.]" 375 Md. at 433. That is what happened here. We set forth above the full waiver colloquy that shows that Detective Fleegal correctly and immediately advised Mr. Broussard of both his *Miranda* rights and that he had the right to go directly to the commissioner. This written and oral advisement included specific information about what Mr. Broussard would learn when he was presented to the commissioner. *Cf. Perez v. State*, 168 Md. App. 248, 282, 284 (2006) (reversing denial of motion to suppress because there was no oral advisement of appellant's prompt presentment right, and "the only written explanation of the prompt

presentment right given" during 24 hours of pre-presentment delay "was not sufficient to advise the appellant of all of his rights with regard to prompt presentment").

To be sure, any "delay in presentment, even with a waiver, must be reasonable." *Williams*, 375 Md. at 433 n.4. Here, at 5:28 p.m., just 15 minutes after his arrest, Mr. Broussard initialed his agreement to continue with the interview. Despite being advised, both in writing and orally, that he could stop the interview at any time and proceed to a commissioner, Mr. Broussard never withdrew his consent to continue talking with the detective. Nor was there any dialogue that improperly prolonged the interview or coerced a confession; to the contrary, Mr. Broussard repeatedly made statements, which later supported his trial defense, that he did not shoot Mr. Mazingo. After 74 minutes, the interview concluded, and Mr. Broussard was taken to the commissioner. By 7:29 p.m., he was being processed. Given the brief timeline between arrest and processing, this delay in presentment was patently reasonable.

In our view, the transcript shows a proper and timely advisement of the right to prompt presentment, followed by a valid waiver and no unreasonable delay in presentment. *See Williams*, 375 Md. at 433 (clarifying that there will be no violation of Rule 4-212(e) "if this kind of advice is properly given and a proper waiver of the right to presentment in conformance with the Rule is obtained, subject to honoring any later request of the defendant to terminate the interrogation and be taken promptly before a Commissioner"). The interval between Mr. Broussard's arrest and the detective giving both the *Miranda* and prompt presentment advisements was less than ten minutes, and he was taken for presentment within 47 minutes after that voluntary interview ended. This is at the opposite

end of the spectrum from the 24-hour presentment benchmark set by Maryland Rule 4-212(e). Under these circumstances, the court did not err or abuse its discretion in denying Mr. Broussard's motion to suppress his recorded statement.

II.

THE TWO HOME SURVEILLANCE VIDEOS

Mr. Broussard next argues that the trial court abused its discretion by excluding two home surveillance videos recovered by Detective Brashears during his canvass of the neighborhood where the shooting occurred, arguing that "[t]he proffer made by defense counsel was sufficient to authenticate" those videos. We disagree, for reasons explained below.

A.

STANDARDS GOVERNING AUTHENTICATION OF VIDEO EVIDENCE

Maryland Rule 5-901 provides in pertinent part:

> **(a) General Provision.** 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.
>
> **(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.

* * *

> (9) *Process or System.* Evidence describing a process or system used to produce the proffered exhibit or testimony and showing that the process or system produces an accurate result.

To authenticate evidence proffered under this rule, a "[c]ourt need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so." *Jackson v. State*, 460 Md. 107, 116 (2018) (quoting *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006)). Evidence is sufficient to support a factual finding when it proves that fact by a preponderance of the evidence. *State v. Sample*, 468 Md. 560, 598 (2020). We review a trial court's decision that video evidence is properly authenticated for abuse of discretion. *Darling v. State*, 232 Md. App. 430, 456 (2017).

"[F]or purposes of admissibility, a videotape is subject to the same authentication requirements as a photograph." *Jackson*, 460 Md. at 116. Because videos and photographs can be "easily manipulated," authentication is conducted "as a preliminary fact determination, requiring the presentation of evidence sufficient to show that the evidence sought to be admitted is genuine." *Washington v. State*, 406 Md. 642, 651-52 (2008).

In *Washington*, the Court of Appeals approved two methods for authenticating photos and videos. Under the "pictorial testimony theory," videos "are admissible to illustrate testimony of a witness when that witness testifies from first-hand knowledge that the [video] fairly and accurately represents the scene or object it purports to depict as it existed at the relevant time." *Id*. at 652 (cleaned up). Under "[t]he 'silent witness' theory of admissibility[,]" a video may be authenticated "as a 'mute' or 'silent' independent

photographic witness because the photograph speaks with its own probative effect." *Id*. (cleaned up).

Whereas "the pictorial testimony theory of authentication allows photographic evidence to be authenticated through the testimony of a witness with personal knowledge, . . . the silent witness method of authentication allows for authentication by the presentation of evidence describing a process or system that produces an accurate result." *Id.*

> Courts have admitted surveillance tapes and photographs made by surveillance equipment that operates automatically when "a witness testifies to the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system."

Id. at 633 (quoting *United States v. Stephens*, 202 F. Supp. 2d 1361, 1368 (N.D. Ga. 2002)).

There are no "rigid, fixed foundational requirements" for authenticating evidence under the silent witness method. *Jackson*, 460 Md. at 117 (quoting *Dep't of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. 12, 26 (1996)). Instead, "[t]he facts and circumstances surrounding the making of the photographic evidence and its intended use at trial will vary greatly from case to case, and the trial judge must be given some discretion in determining what is an adequate foundation." *Cole*, 342 Md. at 26.

B.

MR. BROUSSARD'S PROFFER

Citing the following colloquy, Mr. Broussard argues that the two home surveillance videos were adequately authenticated under the silent witness method:

> [DEFENSE COUNSEL]: So, our next witness that we're calling is Detective Brashears. He recovered surveillance videos from -- two surveillance videos from homeowners on his canvassing of the area. I'm going to attempt to get

those in or at least have him testify to what he saw. Of course, over -- State's going to object. We do have it queued and ready to go on your televisions if the Court allows it in. But, we may be arguing back and forth as to whether or not it's going to come in or not. Or, whether or not he's going to be able -- allowed to testify to what he observed.

THE COURT: What's the State's objection to these homeowner surveillance videos?

[PROSECUTOR]: Well, first of all, there's no foundation, Your Honor. There are no homeowners here to testify about their surveillance system, about their surveillance camera, how it works, whether it was complete, and anything was left out. Just, just like when the State wants to get video surveillance in from a store on a second degree burglary, you just can't go, oh the officer recovered surveillance from 7 Eleven and put it in. You have to develop foundation. You -- there is case law to this. You know, you have to have the foundation purports -- that it is what it purports to be. And the fact that if you can't lay that down then I don't know how in the world anyone can testify to what they saw on a video that wouldn't be in evidence to begin with.

THE COURT: I assume, Detective Brashears then isn't going to be able to lay the foundation that you're objecting is not there?

[PROSECUTOR]: I -- correct.

[DEFENSE COUNSEL]: But --

THE COURT: Well he could -- he's going to say he went and knocked on the door. Someone said, here's my video?

[DEFENSE COUNSEL]: He recovered, he recovered the video and lay the foundation that he didn't alter the video. He just viewed the video and what he saw in the video.

THE COURT: But we don't know when the video was taken or what --

[DEFENSE COUNSEL]: Well, he, he -- I believe he testified before that he canvassed the area on that evening and knocked on the doors.

THE COURT: He, he knocked on doors.

[DEFENSE COUNSEL]: Correct.

THE COURT: He canvassed the area.

[DEFENSE COUNSEL]: Then --

THE COURT: But he's -- but whether this video actually depicts time or --

[DEFENSE COUNSEL #2]: He did test it against real time.

[DEFENSE COUNSEL]: He did --

[PROSECUTOR]: But, still, Your Honor, that -- we don't know if it's complete. We don't know if something was left out.

THE COURT: What's in, what's in the video that you want to proffer that's so important to Mr. Broussard's defense?

[DEFENSE COUNSEL]: Oh, there's a video of the altercation or the argument between --

THE COURT: With the other guy.

[DEFENSE COUNSEL]: Yeah, with J-Mac and --

THE COURT: J-Mac.

[DEFENSE COUNSEL]: J-Mac and Mr. Mazingo. There's some video of that altercation and argument. And then there's also a video of an individual coming out of an alleyway that was wearing a white t-shirt and jeans. That's all.

[PROSECUTOR]: Your Honor, the --

THE COURT: Why is that relevant?

[DEFENSE COUNSEL #2]: Why?

[PROSECUTOR]: It's --

[DEFENSE COUNSEL]: Co-counsel --

THE COURT: Yeah, Ms. [Defense Counsel #2] why is that relevant?

[DEFENSE COUNSEL #2]: Yeah, so the disturbance video is relevant because you can see J-Mac is wearing a black long sleeve top which would be consistent with a black hoodie which is consistent with the 9-1-1 tape that

the individual at the disturbance is wearing a hoodie which is consistent with the suspect that allegedly did the shooting.

And then the alleyway video --

THE COURT: Mm-hm.

[DEFENSE COUNSEL #2]: -- is taken specifically at the next street entrance or exit from where the black hoodie was recovered. And it's the only person coming out of that alleyway is wearing a white t-shirt and jeans which is not the description that Barbara Malott and [her daughter] give of Mr. Clarence – of Mr. Broussard. They said he's wearing a black t-shirt when they pick him back up.

THE COURT: Everybody agree that's what it depicts? I haven't seen it.

[PROSECUTOR]: Roughly, Your Honor. But --

THE COURT: Okay.

[PROSECUTOR]: -- this is --

THE COURT: No that's, that's -- let me ask again, why didn't the defense when getting its discovery locate the homeowners?

[DEFENSE COUNSEL]: That's the million dollar question, because we're having issues locating people. We had issues locating people.

THE COURT: Okay. And the State has issues locating people and it just doesn't come in.

[PROSECUTOR]: And mine don't. A lot of my witnesses were non est. I mean I, I would have liked to have Tanya Colson --

[DEFENSE COUNSEL]: I know.

[PROSECUTOR]: -- who would have said that (unintelligible) that (unintelligible) Barbara Malott's probable character.

[DEFENSE COUNSEL]: I know. Yeah, that was good to know.

[PROSECUTOR]: So, you know.

THE COURT: Let, let me allow you, [Defense Counsel], to make any proffer you want to. But from what I'm hearing, this evidence can't be established

> as a reliably authenticated without the foundation that [the Prosecutor's] objecting to. Is there anything else you want to put on the record to persuade me or at least create a record that might [be] for appellate purposes?
>
> [DEFENSE COUNSEL]: We just -- no, we would just create the record for appellate purposes if the Court isn't going to allow. I mean we were going to put Detective Brashears on to testify to what he saw after recovering the video and viewing the videos. Would the Court allow him to testify to that without entering the tape?
>
> THE COURT: I would allow Detective Brashears to testify as to what he saw if it wasn't on a video that may or may not be authentic. But the video may or may not be authentic without the foundation. Objection sustained.

Citing *Washington*, Mr. Broussard contends that the trial court abused its discretion in ruling that the surveillance videos could not be properly authenticated through the proffered testimony of Detective Brashear using the silent witness method.

Detective Brashear testified that he canvassed the area around the shooting for surveillance video and eventually obtained videos captured by two home surveillance systems and images from those videos. Mr. Broussard argues that Detective Brashear "could testify as to how he obtained and compiled the videos[,]" describing "precisely what footage he downloaded and how he downloaded it," and confirming "that he had not altered" it and "that the footage entered into evidence and played for the jury fairly and accurately portrayed the video he had viewed at the residents' homes." Mr. Broussard contends that "[w]here the videos depicted an alternate suspect in the shooting, exclusion of the videos constituted reversible error."

The State contends that the trial court acted within its discretion in excluding the videos because the defense did not proffer enough to establish "that the surveillance systems were reliable."

We agree with the trial court that Mr. Broussard's attempt at authenticating the two home surveillance videos fell short of describing "a process or system that produces an accurate result." *Washington*, 406 Md. at 652. Defense counsel did not identify the type of surveillance system used in either residence, other than to say she believed they had time stamps. There was no proffer that the detective could testify "to the type of equipment or camera used," much less "its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system." *Id*. at 653 (quoting *Stephens*, 202 F. Supp.at 1368). Nor did defense counsel proffer anything about how the detective reproduced the images.

This bare bones proffer contrasts with the thorough foundation laid earlier in the trial when the court admitted surveillance video from the city's camera at the convenience store where the Ford Explorer was parked before the shooting. In that regard, the State first elicited testimony by Detective Shane Blankenship that "the City of Hagerstown does have an entire network of surveillance cameras" and that the "Police Department does have access to the . . . images from these cameras." The detective explained, "[t]he surveillance images themselves are store[d] on . . . [o]ur central computer database" that is "housed at an offsite location" and accessible "through applications on our desktop computers at work that allow[] us to access those images and pull up the digital data." He testified that these images could not be altered, but could be saved and downloaded onto a DVD or thumb drive.

Detective Brashears later testified that on September 28, 2017, four days after the shooting, the video from "this City camera at 7 Eleven[,]" time stamped from 9:58 p.m. to

9:59 p.m. on September 24, depicted "a Ford SUV" that he recognized was connected to the Mazingo investigation. The detective confirmed that he "pulled" an image from the video footage, and that the image presented at trial was "a fair and accurate representation of what [he] saw on [his] computer screen[.]" Following this authenticating testimony, that image was admitted into evidence without objection.

The State's detailed authentication of that video footage contrasts sharply with the defense's proffer regarding the two home video surveillance systems canvassed by Detective Brashears. The defense proffer did not address the ownership, location, or nature of the two video surveillance systems that produced those videos. When Detective Brashears testified that he canvassed for surveillance footage in the area, defense counsel made no attempt to ask him about either of these videos. When defense counsel attempted to recall Detective Brashears, her proffer did not include comparable information establishing the reliability of those two home surveillance systems. On this record, the trial court did not err or abuse its discretion in determining that the defense failed to authenticate these videos under the silent witness method. *See Cole*, 342 Md. at 26-27. (explaining that while we "decline to adopt any rigid, fixed foundational requirements necessary to authenticate photographic evidence under the 'silent witness' theory[,]" there must be "sufficient indicia of reliability").

III.

THE REASONABLE DOUBT INSTRUCTION

Acknowledging that he failed to object to the trial court's instructions on the presumption of innocence and reasonable doubt, Mr. Broussard asks this Court to grant

plain error relief, arguing that those instructions were "outdated" and "omitted critical portions" of the current pattern instructions.[1] The State maintains that plain error relief is not warranted because Mr. Broussard affirmatively waived this claim and, in any event, the instructions as given were "sufficient to convey the State's burden of proof."

[1] In 2013, the Maryland State Bar Standing Committee on Maryland Pattern Instructions, "at the invitation of both State appellate courts[,]" "added the requirement that the State prove, beyond a reasonable doubt, 'each and every element of the crime [crimes] charged.'" Maryland Criminal Pattern Jury Instructions ("MPJI-Cr") 2:02 PRESUMPTION OF INNOCENCE AND REASONABLE DOUBT, comment (spec. supp. 2021, 2d ed. 2020). The current pattern instruction is as follows:

> The defendant is presumed to be innocent of the charges. This presumption remains throughout every stage of the trial and is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This means that the State has the burden of proving, beyond a reasonable doubt, *each and every element of the crime [crimes] charged.* The elements of a crime are the component parts of the crime about which I will instruct you shortly. This burden remains on the State throughout the trial. The defendant is not required to prove [his] [her] innocence. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence.
>
> A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs. If you are not satisfied of the defendant's guilt to that extent *for each and every element of a [the] crime charged,* then reasonable doubt exists and the defendant must be found not guilty of that [the] crime.

MPJI-Cr 2:02 (emphasis added).

Maryland Rule 8-131(a) provides:

> The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

As such, while this Court ordinarily will not decide any issue unless it was raised in or decided by the trial court, we may "on [our] own initiative or on the suggestion of a party," "take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object." Md. Rule 4-325(f); *see also Conyers v. State*, 354 Md. 132, 150 (1999). Maryland Rule 4-325(f) expressly provides that "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." As such, "[t]he plain error hurdle, 'high in all events, nowhere looms larger than in the context of alleged instructional errors.'" *Gross v. State*, 229 Md. App. 24, 37 (2016) (quoting *Peterson v. State*, 196 Md. App. 563, 589 (2010)).

The four requirements for plain error relief are well-established:

> (1) there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings; and (4) the error must seriously affect[] the fairness, integrity or public reputation of judicial proceedings.

Newton v. State, 455 Md. 341, 364 (2017) (internal quotation marks omitted) (quoting *State v. Rich*, 415 Md. 567, 578 (2010)).

"Even if an appellant is able to satisfy the threshold burden of proving a plain and material error, the Court need not recognize the error." *Steward v. State*, 218 Md. App. 550, 566 (2014). Generally, "we will do so only when the error was so material to the rights of the accused as to amount to the kind of prejudice that precluded an impartial trial." *Newton*, 455 Md. at 364 (cleaned up). Not surprisingly, this exercise of appellate discretion is a "rare" phenomenon. *Id.*

In our view, Mr. Broussard cannot establish the third and fourth requirements. The trial court instructed the jury that the State had to prove all elements of each offense beyond a reasonable doubt. This instruction tracked the instruction approved in *Ruffin v. State*, 394 Md. 355, 357 n.1, 373 (2006), a decision issued before the "each every element" language was added to the pattern instruction in 2013.[2] With respect to the one charge on

[2] The trial court gave the following instruction:

> The defendant, Mr. Broussard, is presumed to be innocent of the charges. This presumption remains throughout every stage of the trial and is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This burden remains on the State throughout the trial. The defendant is not required to prove his innocence. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstances of innocence.

(continued . . .)

which he was convicted, the court instructed the jury that "[i]n order to convict the defendant of this first degree assault theory" of assault with a weapon, "the State must prove all the elements of second degree assault and must also prove . . . that the defendant used a firearm to . . . commit the assault."

As the Court of Appeals has held, the absence of such "each and every element" language does not render an instruction constitutionally deficient, because the concept of reasonable doubt may be adequately explained by instructions consistent with *Ruffin*, which did not include such language. *See, e.g.*, *Carroll v. State*, 428 Md. 679, 690 (2012) ("Read together, the reasonable doubt instruction (emphasizing the meaning and importance of that standard of proof) and the repeated message in every instruction that the State 'must prove' the elements of each charged offense adequately imparted to the jury the mandate that the State must prove each element beyond a reasonable doubt."). In these circumstances, plain error review is not warranted.

IV.

CLOSING ARGUMENT

Mr. Broussard also asks this Court for plain error relief based on the following argument made by the prosecutor during rebuttal closing:

> A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs. If you're not satisfied of the defendant's guilt to that extent, then reasonable doubt exists, and the defendant must be found not guilty.

> [PROSECUTOR]: This -- that evening J-Mac, Mariah Butts and Clarence Broussard went hunting. Tony Mazingo was the prey. The other people got caught up in it. I think they're probably trying, even though they were there innocently, people get scared, they are trying to protect themselves a little bit. But those three people went hunting. They were just like in nature, they were working as a pack and a pack works together to get the prey.
>
> You know, the wolves may have -- this wolf is the one that runs and chases. The other wolf, couple wolves go to the right to go block them off other wolves to this way --
>
> THE COURT: Mr. [Prosecutor], I'm getting a request. I think that somebody has to go to the bathroom.

When the prosecutor continued his rebuttal closing, he did not return to the wolfpack analogy, instead arguing that "this was a concerted effort to find Tony Mazingo and kill him."

In Mr. Broussard's view, the wolfpack analogy improperly appealed to the passions and prejudices of the jury, by portraying him as "a vicious, frightening beast." He argues that "[i]f the prosecutor merely wanted to illustrate the concept of concerted action, there are myriad other ways to do so[,]" such as an orchestra, flock of geese, or ant colony. The State responds that "this Court should decline to review the prosecutor's rebuttal closing argument for plain error" because Broussard "has failed to show that the trial court clearly or obviously erred by not intervening *sua sponte* to the sole instance of this analogy[.]"

Trial courts give attorneys "great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999). "Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom" and, in doing so, to "indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions." *See Wilhelm v. State*, 272 Md. 404, 412-13 (1974).

Nevertheless, among the recognized limits on argument is the principle that it is "improper for counsel to appeal to the prejudices or passions of the jurors, or invite the jurors to abandon the objectivity that their oaths require[.]" *Mitchell v. State*, 408 Md. 368, 381 (2009) (internal citations omitted). "What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Smith v. State*, 388 Md. 468, 488 (2005). Consequently, we evaluate both the propriety and the impact of prosecutorial argument "contextually, on a case-by-case basis[.]" *Mitchell*, 408 Md. at 381.

In support of his plain error claim, Mr. Broussard cites *Lawson v. State*, 389 Md. 570, 596-97 (2005), where, among other impermissible statements made throughout the trial, including a "Golden Rule" argument and comments on the defendant's failure to present evidence to rebut the State's case, the prosecutor improperly "appealed to the jurors' prejudices and fears" by referring to the accused as a "monster" and "child molester." *Lawson*, 389 Md. at 597. It was in the context of the entire case—namely, the prosecutor's improper comments throughout the trial—that the Court determined that the "monster" and "child molester" remarks were improper. *Id*.

Mr. Broussard also relies on *Walker v. State*, 121 Md. App. 364, 380-82 (1998), in which this Court held that calling the accused an "animal" and a "pervert" was "inappropriate" and "beneath the dignity of the prosecutor's office." In disapproving such pejorative descriptions, however, this Court viewed such remarks in the context of other inappropriate comments made during the prosecutor's closing argument. *Walker*, 121 Md. App. at 381-82. Because we granted a new trial on other grounds, however, we did not decide whether the offensive comments warranted a new trial. *Id*. at 382.

In contrast, the wolfpack analogy challenged here was not accompanied by any attempt to appeal to the jurors' prejudices or fears or other offensive or inappropriate remarks. *Cf. Lawson*, 389 Md. at 597-98. Nor was the wolfpack analogy repeated as was the "name calling" in *Walker*.

And finally, the wolfpack remark was evidently not effective. Mr. Broussard was not convicted of either first- or second-degree murder, but was instead convicted of the less serious offense of first-degree assault. In these circumstances, the court's failure to intercede *sua sponte* during the State's closing argument does not constitute plain error.

V.

SENTENCING

In his final assignment of error, Mr. Broussard contends that the trial court abused its discretion in denying his "request to continue sentencing after a four-day murder trial." For reasons that follow, we agree that proceeding with sentencing over the defense's objection violated Mr. Broussard's right under Maryland Rule 4-342 to present information and argument in mitigation of punishment.

The relevant provisions of Maryland Rule 4-342 provide:

> **(c) Presentence Disclosures by the State's Attorney.** Sufficiently in advance of sentencing to afford the defendant a reasonable opportunity to investigate, the State's Attorney shall disclose to the defendant or counsel any information that the State expects to present to the court for consideration in sentencing. If the court finds that the information was not timely provided, the court shall postpone sentencing.
>
> **(d) Notice and Right of Victim to Address the Court.**
>
> (1) *Notice and Determination.* Notice to a victim or a victim's representative of proceedings under this Rule is governed by Code, Criminal Procedure

> Article, § 11-104 (e). The court shall determine whether the requirements of that section have been satisfied.
>
> (2) *Right to Address the Court.* The right of a victim or a victim's representative to address the court during a sentencing hearing under this Rule is governed by Code, Criminal Procedure Article, § 11-403.
>
> **(e) Allocution and Information in Mitigation.** Before imposing sentence, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement and to present information in mitigation of punishment.
>
> **(f) Reasons.** The court ordinarily shall state on the record its reasons for the sentence imposed.

"The State's compliance with these rules is never discretionary, as the Maryland Rules of Procedure have the force of law; they are not mere guides but are 'precise rubrics' to be strictly followed." *Dove v. State*, 415 Md. 727, 738-39 (2010) (internal citations omitted) (quoting *Williams v. State*, 364 Md. 160, 171 (2001)). "When a defendant requests, or otherwise makes clear that he or she wants the opportunity to introduce mitigating evidence, Rule 4-342 requires that he or she be permitted to present such evidence as he or she may have." *Jones v. State*, 414 Md. 686, 704 (2010).

After the jury was discharged, the trial court addressed the parties regarding sentencing:

> THE COURT: Everybody please be seated. State wish to proceed to sentencing or delay?
>
> [PROSECUTOR]: Your Honor, the State, the State --
>
> [DEFENSE COUNSEL]: Court's indulgence, Your Honor.
>
> [PROSECUTOR]: The State is ready to proceed. I think it would be fair, Your Honor, since the family has been here for --
>
> THE COURT: Three, four days, four days.

[PROSECUTOR]: The family has been here for four days for the trial, Your Honor, and I think it would probably be cruel to bring them back.

THE COURT: Okay. Do you have victim impact information and everything else you would need?

[DEFENSE COUNSEL] Court's indulgence, Your Honor --

THE COURT: I see a restitution sheet.

[DEFENSE COUNSEL]: -- we're just --

THE COURT: Yeah, I haven't heard whether the State -- the defense is ready to proceed to sentencing or not. But I'll hear from the State first. And I've got some information if the State -- if we are going to proceed.

* * *

THE COURT: The State indicates they're ready to proceed to sentencing. They handed me one victim impact. Apparently, Carol Pollard is Mr. Mazingo's mother from my read and then there's a restitution sheet that was given to me for about $7500 and from what I read that might be funeral expenses. But I'll hear more about -- that is if the defense -- are you ready to proceed to sentencing?

[DEFENSE COUNSEL]: No, we're not, Your Honor.

THE COURT: Why not?

[DEFENSE COUNSEL]: We would like, we would like the opportunity to prepare. We do have medical records and mitigation for this Court to consider. In addition to that we'd like Ms. Burgan[3] to prepare a report for this Court in -- to consider a psychological report for this Court to consider in sentencing.

THE COURT: Let me say this, I certainly would consider in any post trial motions Ms. Burgan's report because her work is uniformly excellent. But I agree with [Prosecutor], six, eight, ten people who apparently are family members of Mr. Mazingo have been, have been here this whole time. So, the defense, defense request for delay is denied. But any post trial motions

[3] Ms. Burgan is a licensed social worker with the Office of the Public Defender.

> certainly could be filed, including potentially a request for a Patuxent recommendation which –
>
> [DEFENSE COUNSEL]: This is --
>
> THE COURT: -- as counsel knows we did get the competency evaluation --
>
> [DEFENSE COUNSEL]: Correct.
>
> THE COURT: -- just a couple weeks ago. I understand Mr. Broussard does have some mental illness.
>
> [DEFENSE COUNSEL]: Yes, he does and that would be part of our --
>
> THE COURT: Wasn't enough to deem him incompetent.
>
> [DEFENSE COUNSEL]: That would be -- he was deemed competent but the report -- in addition that report does detail his mental health history and his psychological treatment that he's received throughout his life. In addition to that we do have records to corroborate what was in that report. Doesn't mean he was -- of course he was found competent to stand trial. However, that report does have some significant information we would like this Court to consider.
>
> THE COURT: I'll consider it in a post trial motion. Your request to delay sentencing is denied.

The prosecutor argued that even though "[t]he jury came up with their verdict[,]" nevertheless, "[t]his was a murder" because "Mr. Mazingo died[,]" so Mr. Broussard "should be sentenced to the full term for an assault first degree." The State reviewed Mr. Broussard's criminal history and presented testimony from Merle Pollard, Mr. Mazingo's step-father, regarding the losses to Mr. Mazingo's mother, daughter, and brother.

In mitigation, defense counsel acknowledged that she "cannot explain the jury's decision in finding him guilty of . . . first degree assault[,]" but pointed out that Mr. Broussard was acquitted "of the two major counts before this Court." She briefly argued

that Mr. Broussard's "last prior conviction for an assault was in 2007" and his subsequent convictions "involved theft; a drug cosmetic charge recently and carrying a concealed dagger." He "was employed," had demonstrated the ability to "find gainful employment[,]" and planned to "return to California." She did not address his mental health history or needs. Mr. Broussard declined his opportunity for allocution.

The trial court then imposed the maximum sentence, as follows:

> You were not found guilty of murder, but you were found guilty of a first degree assault with a handgun that resulted in the death of a human being. I don't know at this moment what the sentencing guidelines are. I will take a look at them when they're presented. I'm certain the sentence I'm about to impose probably exceeds the guidelines. But the sentence is 25 years in the Division of Correction. No portion of which will be suspended. You are also not likely to be in a position to pay this, but I am ordering restitution to be reduced to civil judgment in the amount of $3,085 in favor of Carol Pollard[.]

Mr. Broussard contends that "[t]he trial court abused its discretion by denying the defense request to continue sentencing and proceeding with sentencing immediately after [his] trial, without affording [him] the opportunity to present relevant information in mitigation." In his view, the sentencing court improperly considered the effect of a postponement on the victim's family, while failing to consider potentially mitigating circumstances that could result from the medical records and an additional psychological report that the defense wished to present. In these circumstances, the court abused its discretion by prioritizing the convenience of Mr. Mazingo's loved ones over Mr. Broussard's right to present mitigating information and argument.

Mr. Broussard contends that after "[d]efense counsel clearly communicated to the court that she was not prepared to speak to [Mr. Broussard's] mental health and treatment

history and that she required the aid of the additional materials[,]" the mitigation argument permitted by the court was rendered "meaningless." We agree. Because the court refused to continue the sentencing, defense counsel did not have an adequate opportunity to prepare for sentencing, so she "could only speak to [Mr. Broussard's] criminal record, recent employment history, and the fact that he wished to return to his parents in California after the resolution of his case." What counsel could not do, Mr. Broussard points out, was "to provide the expert report she had planned and to speak to [Mr. Broussard's] mental health and treatment history, which was relevant mitigation information the sentencing court was required to consider upon request."

The State maintains that the court "acted within its discretion in declining to postpone sentencing" because it had already received a competency evaluation and defense counsel had the relevant medical records, so that delaying sentencing was not justified by a need to obtain such information. The State also points out that Ms. Burgan's sentencing report and the June 13, 2019 competency evaluation were attached as exhibits to Mr. Broussard's post-sentencing motion to modify his sentences. In the State's view, "[i]t was unclear why – and defense counsel did not explain why – the defense needed a postponement to 'prepare' records already in its possession[,]" and that it was appropriate for the court to consider how postponing would affect the victim's family. According to the State, the court did not err because it followed Maryland Rule 4-342(e) by affording Mr. Broussard the opportunity to argue mitigation and to allocute, and the defense failed to establish that a postponement was reasonably necessary.

Rule 4-342 requires the court to permit a convicted person to develop and present mitigation evidence and argument if the right to allocute has not been waived. *See Jones*, 414 Md. at 704. Here, the trial court denied defense counsel's requests for additional time to obtain a new psychological evaluation focusing on Mr. Broussard's mental health, and to prepare and present relevant argument in mitigation. That ruling violated Mr. Broussard's rights under Rule 4-342(e).

Nevertheless, resentencing is not automatically required unless Mr. Broussard was prejudiced. *Cf. Dove*, 415 Md. at 732-33, 752 (harmless error properly applied to violation of Md. Rule 4-342(d)); *Lopez v. State*, 231 Md. App. 457, 473 (2017) (cleaned up) ("[I]f an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the sentence imposed, such error cannot be deemed harmless and the sentence must be vacated and a new sentencing hearing held."), *aff'd on other grounds*, 458 Md. 164 (2018).

When the record already contains evidence that tends to prove the same point as evidence the defense seeks to present, the court may reasonably conclude that delaying sentencing would not result in a different sentence. *See Dove*, 415 Md. at 744. We also may consider whether the sentencing judge "explicitly state[d] what evidence he or she relied upon in reaching a decision." *Id*. at 750; *cf. Lopez*, 231 Md. App. at 475 (finding that failure to require the State to specify the information it intended to rely on at sentencing was harmless error where defense counsel did not object during sentencing and the

sentencing court expressly relied, "in pronouncing sentences, on the uncontested brutality of the murders and [the defendant's] violent criminal history").

In this case, when defense counsel objected to immediate sentencing on the ground that she wanted to obtain a report by Ms. Burgan, the trial judge pointed out that Mr. Mazingo's family was in the courtroom and that he had already considered the competency evaluation, which contained information about Mr. Broussard's mental health history. The judge also promised to consider any additional information filed with a post-sentencing motion to modify the sentence. Although he did not expressly articulate why he imposed the maximum sentence of 25 years, his remarks referred to the fatal nature of the assault.[4]

We agree with Mr. Broussard that "a competency evaluation is not a substitute for a report prepared for the purposes of mitigation," and that refusing to allow defense counsel to obtain and argue the significance of information contained in such a report denied him "a meaningful opportunity to present information in mitigation of punishment." Here, we can compare the competency evaluation and the sentencing report, because Mr. Broussard later submitted both as exhibits to his motion to modify his sentence.

To be sure, both reports contain information about Mr. Broussard's mental health history and diagnoses, as well as background on possible causes of his mental health challenges, including his mother's drug use *in utero* and a traumatic brain injury he suffered

[4] We note that the trial court did not consider the sentencing guidelines. Maryland's Judiciary has adopted sentencing guidelines "for voluntary use by circuit court judges to assure that like criminal offenders would receive like sentences for like offenses." *Teasley v. State*, 298 Md. 364, 366 (1984). Because these guidelines are not mandatory, failure to consider or apply them "does not require vacation of the sentence and a new sentencing hearing." *Id*. at 370.

in a car accident. Yet these two reports materially differ in purpose, scope, and contents. Specifically:

- Whereas the purpose of the competency evaluation was to determine whether Mr. Broussard was able to "understand the nature or object of the proceeding" and assist in his defense, the purpose of the sentencing report was to present information relevant to "mitigation" in sentencing.

- Whereas the competency report was predicated on a single, one-hour interview with Mr. Broussard and review of extensive medical and court records, the sentencing report was predicated on four interviews with Mr. Broussard, an interview with Mr. Broussard's father, and Mr. Broussard's responses to six "screening tools" designed to identify trauma- and loss-related impacts, current depression symptoms, and alcohol/drug-related abuse-related issues.

- Although the competency report included a detailed review of Mr. Broussard's historical medical records, the sentencing report pointed out that "the last course of mental health treatment occurred in 2011, while [Mr. Broussard] was still in California."

- Whereas the competency report surveyed Mr. Broussard's personal, psychiatric, and medical background as that information related to his competency to stand trial, the sentencing report presented new information relevant to sentencing mitigation regarding his exposure to childhood instability, gun violence, and loss of family members, as well as his recent connection to "the Muslim faith," his desire to obtain his GED in prison, the extent to which his alcohol and marijuana use have impaired his daily functioning, and his significant history of self-harm.

Although we could point to further differences between the competency report reviewed by the court before sentencing and the mitigation report presented after sentencing, further comparison is not necessary for us to conclude that the court's refusal to postpone sentencing was not harmless error, because the material information that defense counsel sought to obtain, and to argue in mitigation, was not covered by the

competency report. Mr. Broussard was denied his right to present such mitigating evidence and argument before his sentence was imposed, in violation of Rule 4-342(e).

JUDGMENT OF CONVICTION AFFIRMED; SENTENCE VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR WASHINGTON COUNTY FOR RESENTENCING. COSTS TO BE PAID 80% BY APPELLANT, 20% BY WASHINGTON COUNTY.