Circuit Court for Prince George's County
Case No.: CT 14-1051B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1381

September Term, 2015

NICHOLAS WAYNE MCNAMEE

v.

STATE OF MARYLAND

Meredith,
Leahy,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned)0,

JJ.

Opinion by Meredith, J.

Filed: April 23, 2018

Nicolas Wayne McNamee, appellant, was convicted by a jury in the Circuit Court for Prince George's County, Maryland, of robbery with a dangerous weapon, use of a firearm in a crime of violence, two counts of illegal possession of a regulated firearm and other related counts. He was sentenced to twenty years, all but fifteen years suspended, for robbery with a dangerous weapon, to be followed by a consecutive five years for illegal possession of a firearm, as well as concurrent sentences on the remaining handgun offenses. Mr. McNamee timely appealed, asking us to address the following questions:

> 1. Did the court err in denying Appellant's motion to suppress?
>
> 2. Did the court err in admitting the prior statements of a key State's witness?
>
> 3. Did the court err in ordering a key State's witness, in the presence of the jury, to testify over that witness's claim of the privilege against self-incrimination?
>
> 4. Did the court err in ordering Appellant to pay $450 in restitution?

We agree with Mr. McNamee's argument (relative to question 4) that the court erred in ordering the amount of restitution, and we shall vacate the restitution order and remand the case for further proceedings as to that issue only. But we conclude that, otherwise, all judgments are affirmed.

BACKGROUND

Motions Hearing

Mr. McNamee's pretrial motion to suppress challenged two separate warrantless searches of Apartment 4 at 6234 Maxwell Drive in Suitland, Maryland, that took place within hours of each other on April 30, 2014, and May 1, 2014. Sergeant William

Clifford and three other officers from the Prince George's County Police Department first went to this location because a vehicle registered to Tyricka Cofield, a resident of that apartment, was observed near the scene of a robbery that had occurred in Oxon Hill at 10:30 a.m. on April 30, 2014.

Upon their arrival at the apartment, one of the officers knocked on the door, and Ms. Cofield answered. Sergeant Clifford testified: "We knocked on the door and announced ourselves as Prince George's County police officers, asked to come in. She let us come in. Once inside the apartment, Detective Li spoke with her and explained to her what the situation was going on." Sergeant Clifford noticed that Ms. Cofield had an infant with her. Ms. Cofield advised the officers that other children were upstairs sleeping. No other adults were home at this time. When Sergeant Clifford was asked to describe Ms. Cofield's demeanor, he testified that Ms. Cofield seemed a "little shocked, but she was fine." Sergeant Clifford also testified that he stood in the doorway while Ms. Cofield was seated in the living room with the infant.

Ms. Cofield told the officers that Mr. McNamee also lived with her in that apartment. Sergeant Clifford testified that the police then asked Ms. Cofield if there were any weapons inside the house, and Ms. Cofield replied that, to her knowledge, there were none.

The officers then asked if Ms. Cofield would consent to them checking the apartment for weapons, and they presented her with a Prince George's County Police Department consent-to-search form. Ms. Cofield replied, "that would be fine," but she

also asked the police to go over the form with her. Sergeant Clifford discussed the consent form with Ms. Cofield. He testified that he "went over the form in its entirety, reading to her the entire form. And after I read the form to her, I asked if she had any questions. She said no, and she signed the form." He said that Ms. Cofield appeared to understand the form, did not ask any questions, and ultimately signed the form. Sergeant Clifford further testified that no threats or promises were made to Ms. Cofield to induce her to agree to the search. He also testified that he did not say, or hear any other officer say, anything to Ms. Cofield about her children. The consent form was admitted into evidence at the motions hearing.[1]

During the officers' search, a handgun was recovered from on top of a cupboard in the kitchen. Sergeant Clifford testified that Ms. Cofield expressed shock that a weapon was found in her home. According to Sergeant Clifford, the search also resulted in the recovery of "clothing that matched . . . the description of the clothing the person was wearing in our earlier commercial robbery" in Oxon Hill.

Sergeant Clifford also testified that the officers used a "very soft" tone of voice with Ms. Cofield so as not to wake the children she said were sleeping. And Sergeant

[1] Because the original record sent to this Court did not include any exhibits, this Court ordered the Clerk of the Court for Prince George's County to transmit the exhibits from appellant's trial in response to appellant's Unopposed Motion to Correct the Record. Following the entry of that order, the trial exhibits were transmitted and made part of the record on appeal. But, although there is some overlap, the separately identified and admitted exhibits from the January 23, 2015, motions hearing were not transmitted.

Clifford said he never saw a child wake up while the police were there. He further testified that Ms. Cofield was not a suspect in the case.

On cross-examination, Sergeant Clifford testified that neither he nor the other officers informed Ms. Cofield that Mr. McNamee was already in custody when they spoke with her. Additionally, Sergeant Clifford testified that there was never a discussion with Ms. Cofield about obtaining a search warrant or what would happen if the police were required to obtain one.

Meanwhile, Detective Joseph Bellino, who was assigned to the homicide unit for the Prince George's County Police Department, was on duty on April 30/May 1, 2014, when he responded to Prince George's County Hospital and met with Mr. McNamee.[2] Detective Bellino was called because Mr. McNamee, who had been arrested in connection with a commercial armed robbery, had said that he had information regarding three unrelated murders.

After Mr. McNamee was released from the hospital by the doctors, he was transported back to the homicide unit at the police station. During the ensuing conversation, Mr. McNamee told Detective Bellino that he lived at 6234 Maxwell Drive, with his girlfriend, *i.e.*, Ms. Cofield, and at least one child. Mr. McNamee informed the detective that "the actual weapon that was used in these other murders was still at his

[2] Detective Bellino testified that he did not believe that Mr. McNamee had sustained any injuries in connection with his arrest, and that he was taken to the hospital for some unidentified illness. (Mr. McNamee would later testify that he was at the hospital because he has asthma and was experiencing shortness of breath.)

residence." Detective Bellino testified that he asked Mr. McNamee whether he was "willing to bring us back to [his] house so we can recover this gun, [and] he said that he was." According to Detective Bellino, he did not know Mr. McNamee prior to receiving the call from the hospital, and he did not promise Mr. McNamee anything.

During the interview in the homicide unit, Detective Bellino asked Mr. McNamee to sign a consent-to-search form. The detective read the form to Mr. McNamee, and Mr. McNamee appeared to understand the form. Mr. McNamee also read the form for himself and did not ask any questions.

When Detective Bellino was asked if he threatened or promised Mr. McNamee anything, the detective testified as follows:

> I discussed with him that information he gave to me I would provide to the State's Attorney's Office. As far as what type of agreement the State's Attorney's Office would make with him, I made no promises nor could I make any promises to him about what the State's Attorney would do.

After Mr. McNamee signed the consent form, Detective Bellino and two other Prince George's County officers (and possibly some officers from the F.B.I.) took Mr. McNamee back to the apartment he shared with Ms. Cofield. Mr. McNamee knocked on the door, and Ms. Cofield opened the door. A small child was present at the time.

After Mr. McNamee spoke to Ms. Cofield, Detective Ben Brown, of the Prince George's County police, also spoke to her in the kitchen area. Detective Bellino testified that he witnessed Ms. Cofield sign yet another consent-to-search form, *i.e.*, the third form purporting to give consent to search this same apartment. Detective Bellino did not hear

Detective Brown promise Ms. Cofield anything, nor did he hear anyone else promise her or threaten her to obtain her consent to search the apartment. Detective Bellino further testified that he did not hear Mr. McNamee threaten Ms. Cofield. When asked why the police again asked Ms. Cofield for her consent, Detective Bellino testified it was "protocol" due to an "abundance of caution," because Ms. Cofield also lived there and "she has a reasonable expectation of privacy in the residence."

Detective Bellino acknowledged that Ms. Cofield seemed "emotional because of the circumstances," noting the presence of the small child. However, Ms. Cofield seemed "more concerned about [Mr. McNamee]." Detective Bellino testified that, "if she was emotional, it was due to the circumstances of the defendant being in custody in her home, but she wasn't emotional in signing" the consent form. The consents signed by Mr. McNamee and Ms. Cofield were admitted into evidence at the motions hearing.

The police searched the apartment, and another firearm was located. Based on information provided by Mr. McNamee, this firearm was found in an air duct, located over a hot water heater in a closet. Detective Bellino testified that he did not believe police would have found that weapon without Mr. McNamee's cooperation. Detective Bellino said that Mr. McNamee was not threatened, and was not promised anything in exchange for telling police where this firearm was located.

On cross-examination, Detective Bellino testified that Mr. McNamee was taken from the hospital and interviewed in the homicide unit because he was a witness in three unsolved murders. Detective Bellino agreed that Mr. McNamee asked if providing

information would assist him in his separate robbery case, but the detective maintained that Mr. McNamee was told only that the information would be shared with the State's Attorney's Office.

The defense called Ms. Cofield at the motions hearing, and she testified that the police came to her apartment twice. The first time, two officers arrived around midnight. The officers knocked on the door, and, after Ms. Cofield opened the door, the officers asked to come in. Ms. Cofield testified that the officers entered and started asking her about Mr. McNamee. They also asked if they could search the residence. Ms. Cofield testified she told them "No." The officers also asked whether Mr. McNamee lived there, and, again, Ms. Cofield replied, "No."

Ms. Cofield testified that the officers then told her that, "if [she] didn't consent to them searching [her] house, that they can take the children, that they will ransack, make a big scene in the neighborhood and stuff like that." They also told her that, if they had to get a search warrant, "then that's when it will be bigger than what it is at that moment." Ms. Cofield testified that it was in response to those statements, that "I gave them consent."

On cross-examination, Ms. Cofield clarified that the first two officers arrived around midnight, and their supervisor, Sergeant Clifford, arrived shortly thereafter. She agreed that Sergeant Clifford explained the consent form, and that she signed it. But she maintained that the sergeant just told her to sign it without reading the form. Ms. Cofield confirmed that she provided a statement to police.

Ms. Cofield further testified that the police recovered a gun, some clothing, and three pairs of shoes, all of which belonged to Mr. McNamee. She agreed that the police did not "disturb" her house during this search, did not wake her children, and just took these items and then left.

Ms. Cofield also testified that there was a second search a few hours after the initial encounter. She had received a phone call from the police, informing her that they wanted to come back to her residence. She maintained that she told the police, on the phone, that she wanted to talk to Mr. McNamee first before she would agree to consent to another search. Four or five officers then arrived with Mr. McNamee. Ms. Cofield was unclear whether she spoke with Mr. McNamee before she was presented with the second consent-to-search form. Ms. Cofield maintained that the police again told her that they could obtain an order from a judge if she did not consent. Ms. Cofield then gave consent a second time. Ms. Cofield testified that she would not have signed either consent form but for the threat from the police that they would take her children. She did agree, however, that she eventually spoke to Mr. McNamee after he arrived with the police, and she also agreed that she never indicated that she wanted to withdraw her consent. Ms. Cofield confirmed that another police officer went over this second consent form before she signed it.

Mr. McNamee testified at the motions hearing. He explained that he was taken to the Prince George's Hospital that night, guarded by two police officers, because he had asthma and was experiencing shortness of breath. Mr. McNamee confirmed that when

Detective Bellino arrived at the hospital and said he had heard that Mr. McNamee had some information he would be interested in, Mr. McNamee told the detective he "was not going to say anything until I got some guarantees, not just for — for the alleged charges that was on me but for my safety and my family's also." Mr. McNamee testified that Detective Bellino then told him that the police could move him, his aunt, his grandmother, his children and Ms. Cofield into a witness protection program, and that he "wouldn't have to take [the] stand, take — and testify against my wife."

Mr. McNamee also testified that, initially, at the hospital, he told the police he wanted an attorney and had nothing to say. But, after the police told him that another person, Mike Clinton, had identified him as being involved in the armed robbery which formed the basis of the charges in this case, Mr. McNamee then decided to reveal "information" about Mr. Clinton. Mr. McNamee testified that he would not have signed the consent form but for the representations made to him by Detective Bellino. Mr. McNamee explained:

> They were pretty much telling me all they needed from me was information and possibly a weapon, and I wouldn't have to stand in front of the court and testify. And nobody would know that I did give up any information.

Once he was, according to Mr. McNamee, "forced" to leave the hospital, Mr. McNamee told Detective Bellino about Mr. Clinton's involvement in some unrelated murders. Mr. McNamee agreed he signed the consent form, that he took Detective Bellino and other officers to Ms. Cofield's residence, and that he told them the murder

weapon was located there. But Mr. McNamee maintained that he did not live at Ms. Cofield's apartment.

After testimony concluded, defense counsel challenged the validity of the consent forms signed in this case. With respect to Mr. McNamee's consent, counsel contended that "there's a great issue as to whether his consent was voluntary or not because it was based on promises." Counsel framed the issue as "whether or not the detective made any assurances for him as far as securing cooperation. And I think that cooperation includes information as well as the consent to search the residence."

With respect to Ms. Cofield's consent, counsel argued that she was told by the officers to either consent or the police would obtain a search warrant, take her children, and make a "big scene in the neighborhood." According to counsel, these statements constituted threats. Defense counsel also noted that Ms. Cofield "testified that it wasn't voluntary. It was – it was the threats of these other officers."

In response, the State argued that Mr. McNamee did not have standing to challenge the searches because he did not have a reasonable expectation of privacy in the apartment, given his testimony that he did not live there.[3] As for Mr. McNamee's consent, it was the State's position that, although Mr. McNamee was in custody, he was cooperating with the police. Further, in "an abundance of caution," Detective Bellino had asked Mr. McNamee to sign a consent-to-search form. The prosecutor contended that the

[3] The court ruled against the State on this point and the State does not raise this ground on appeal.

detective was more credible than Mr. McNamee in stating that no promises were made to obtain the consent. The State argued that Mr. McNamee simply hoped for some benefit in exchange for his consent and cooperation even though no promises of favorable treatment were made.

During further argument concerning Ms. Cofield, the court noted there were several discrepancies and inconsistencies about when the consent forms were signed. The court also observed that Ms. Cofield had claimed she was threatened, and the court expressed surprise that the State did not call Detective Ben Brown to rebut that claim.[4] But the court also said: "I'm not telling you that the Court gave her a whole lot of credibility." The State responded that there was credible testimony that Ms. Cofield was not threatened or coerced, primarily relying on the credibility of Sergeant Clifford. Further, the State argued, Ms. Cofield was biased in favor of Mr. McNamee, the father of her child, and her testimony was incredible.

The court denied the motion to suppress, ruling as follows:

> THE COURT: All right. I'm going to deny defense's motion on the first consent. I believe that the testimony of Sergeant Clifford is more believable than the testimony of Ms. Cofield. Cofield? Is that –
>
> [PROSECUTOR]: Cofield. Cofield.

[4] No argument is raised on appeal regarding that point. *See generally Streams v. State*, 238 Md. 278, 283 (1965) (reversing where the State did not rebut claims that a confession was coerced); *Chase v. State*, 120 Md. App. 141, 151 (1998) (rejecting Chase's argument that, under *Streams*, the State failed to rebut a claim that consent was involuntary).

THE COURT: Cofield. And I believe[,] as it relates to the first consent, that the police did receive it freely and voluntarily given the fact that Ms. Cofield had no knowledge that there was any weapon in the house.

As to the consent by the defendant and Ms. Cofield's second consent, as I pointed out to the State, there are inconsistent testimony by all three witnesses.

I certainly find that the defendant had an expectation of privacy as it relates to the residency. I think there is more than sufficient evidence to suggest that for more than just overnight visits, the defendant resided at the home, that a significant amount of his belongings were located at the home.

And as the officers testified, that the likelihood of them finding the second weapon without explicit directions from the defendant is not likely. And so I think he clearly had an expectation of privacy in that residence.

I think that clearly, he was under arrest at the time that he went to the hospital. So he was clearly under arrest at the time that Detective Bellino spoke to him at the hospital. And clearly he was under arrest at the subsequent conversation when the consent was signed back at CID.

I believe that the consent by the defendant was freely and voluntarily given, and I do not think that the detective made any promises other than – carefully worded – promised that he would inform the State, being the State's Attorney, of whatever information was provided for whatever worth it was provided in the – at a subsequent prosecution.

And I'm also going to rule that the second consent by Mrs. Cofield was freely and voluntarily given based upon the total circumstances of this case and particularly relying on the State's argument that during a phone conversation, she consented to the search and that she signed the search.

According to her testimony, the only real condition that she put on it was an opportunity to speak with the defendant, and that was not really a threat or a promise. At some point, she did speak to the defendant but I think she spoke to the defendant after the gun was located; but I'm going to find the second consent was freely and voluntarily given.

So I'll deny the motions to suppress the second gun for the reasons I have articulated as well as the State's.

Trial

There was evidence of the following at trial. At around 10:30 a.m. on April 30, 2014, Genet Woldu was working at the EZ Car Rental office on St. Barnabas Road, in Oxon Hill, Maryland. When she walked outside to retrieve something from her car, a man wearing dark clothing grabbed her and pointed a gun at her head. The man told her to "Get inside," and then dragged Ms. Woldu back into the office area.

There, the man demanded all the money from the back office and threatened to kill Ms. Woldu. Ms. Woldu replied that she did not have any money. In response, the man struck her in the head and Ms. Woldu fell to the ground. Ms. Woldu then opened a cash drawer and handed the man somewhere between $300 and $500, a small purse, and her iPhone. The man then fled the building. Ms. Woldu saw the man run toward a nearby parking area. Ms. Woldu called police and described what the man was wearing. But she could not identify the man who robbed the store because he covered his face.

Detective Timothy Woods testified that he responded to the EZ Rental location and spoke with Ms. Woldu. Detective Woods also obtained surveillance video from an adjacent business and, in the video, he saw the suspected robber enter and exit the EZ Rental office. The description of the suspect that was given to Detective Woods was someone wearing "a black jacket, . . . dark-colored pants, and red shoes." From the surveillance video, Detective Woods determined that the suspect was wearing "a North

Face jacket with emblem on the back, dark-colored jeans and red shoes, which I subsequently identified as Nike Veers."[5]

Shortly after the robbery occurred, Prince George's County Police Officer Keith Hopkins and Officer Rostin Ueno observed a black Nissan Maxima parked not far from the rental location. The vehicle's engine was running. A man named Michael Clinton got out of the vehicle. Noticing that Mr. Clinton was wearing red shoes, similar to ones reportedly worn by the robber, the officers detained Mr. Clinton and one officer transported him to the police station.

Officer Hopkins checked the registration for the Maxima and ascertained that it was registered to Tyricka Cofield. However, when Mr. Clinton was asked who the car belonged to, Mr. Clinton replied, "it's my man's car." Mr. Clinton did not have keys for the car. Officer Hopkins then searched the car and found a Maryland identification card that belonged to Mr. McNamee. Mr. McNamee's cell phone was also found inside the Maxima.

Based on the information the police found related to the Maxima, the police went to Ms. Cofield's apartment. There, Sergeant Clifford met with Ms. Cofield, ascertained that Mr. McNamee stayed there, and obtained consent to search the apartment. The police then recovered a loaded Intra-Tech 22 caliber semi-automatic pistol they found in

[5] The jury watched the surveillance video of the robbery. The jury also saw surveillance video from a nearby 7-11 convenience store, taken prior to the robbery. In addition, photographs and video from the robbery were played for the jury and admitted into evidence.

the kitchen, a black North Face jacket, gloves, and three pairs of red shoes that appeared to match the ones the robbery suspect was wearing.

Meanwhile, approximately 45 minutes to an hour after the armed robbery, and while Officers Hopkins and Ueno were at the scene where they had located the black Maxima, Mr. McNamee arrived in a taxicab. Mr. McNamee informed the police that he was there to pick up his girlfriend's Maxima. After Mr. McNamee made "exaggerated" and "hostile" inquiries about the status of the vehicle, and after Detective Timothy Woods had reason to believe that Mr. McNamee was involved in the underlying armed robbery, the police detained Mr. McNamee and transported him to the police station. When Mr. McNamee was patted down, keys to the Maxima were found in his pocket. The parties stipulated that Mr. McNamee's cellphone and identifying cards were also found in that vehicle.

The jury also heard from Detective Bellino at trial. Detective Bellino said that he met Mr. McNamee on May 1, 2014, at Prince George's Hospital after Mr. McNamee had volunteered that he had information related to several open murder cases. After Mr. McNamee was transported to the police station, Mr. McNamee revealed that a weapon used in two murders was being stored in his apartment. That gun had been provided to Mr. McNamee by Mike Clinton.

Mr. McNamee signed a consent-to-search form for the apartment in question. Detective Bellino also spoke to Ms. Cofield, both over the phone and in person. Ms. Cofield signed a second consent form to search her apartment.

During the second search of Ms. Cofield's apartment, the police recovered a firearm hidden in an air vent inside a closet near the water heater. Detective Ben Brown testified that this second firearm was found after Mr. McNamee "pointed it out to us." This second gun was a .40 caliber High Point Smith & Wesson handgun.

The State called Michael Clinton as a witness in its case. Mr. Clinton confirmed that he was with Mr. McNamee on April 30, 2014, but denied that they drove together to a gas station on that day. As will be set forth in more detail in the discussion that follows, after Mr. Clinton was reminded of a statement he gave to the police, Mr. Clinton testified that he drove to a gas station, that Mr. McNamee got out of the car and walked toward some stores, and that Mr. Clinton moved the car to a nearby location to wait for Mr. McNamee. Mr. Clinton also confirmed that Mr. McNamee was wearing a black jacket and red shoes. Mr. Clinton acknowledged that he had pled guilty to conspiracy to commit the robbery in this case, for which he was sentenced to "five years and all but 280 something days suspended." Mr. Clinton further testified that he did not see Mr. McNamee commit the robbery on the day in question. And Mr. Clinton agreed that he also pled guilty to murder in an unrelated case in Virginia.

The parties stipulated that Mr. McNamee had two prior felony convictions that disqualified him from possessing a firearm. The parties also stipulated that these prior convictions were for crimes of violence.

Mr. McNamee testified at trial, and explained that, the night before he was arrested, Mr. Clinton dropped off a gun at the apartment where Mr. McNamee resided.

Mr. McNamee said he took the gun because Mr. Clinton was his superior in an "organization" and "I just have to do what he say." With respect to the events of April 30, Mr. McNamee said he met Mr. Clinton and drove to a certain destination. Mr. McNamee then got out of the car and left the car running. Mr. McNamee acknowledged that he left his cellphone in the vehicle. He was away from the car for about thirty to forty-five minutes, and, when he returned, the car was gone. He then got a cab, drove around, and found his car surrounded by police vehicles. When he told the police that the Maxima was his car, Mr. McNamee was arrested.

After Mr. McNamee was arrested, he told the police he could provide information about a murder and that he knew where the gun used in the murder was located. Mr. McNamee signed a consent-to-search form, and took police to the gun. When asked how the second gun also came to be at his residence, Mr. McNamee replied: "I put it there myself." Mr. McNamee maintained that the guns did not belong to him and that he was just storing them for other members of his "organization."

With respect to the red shoes, Mr. McNamee acknowledged that he owned seven pairs of red Nike Retros. But he also testified that he was not wearing red shoes on the day in question. Mr. McNamee denied robbing anyone, and denied running away from the scene of the robbery.

On cross-examination, Mr. McNamee admitted he was driving Ms. Cofield's Nissan Maxima. He agreed that he stayed with Ms. Cofield at the apartment on "numerous occasions." He further testified that information that he provided to police

related to Mr. Clinton's murder case in Virginia. Mr. McNamee stated that he hid the gun in the air vent. He also clarified that the "organization" he referred to was the "Bloods" gang. Mr. McNamee testified that, although he was not wearing red shoes on the day of the robbery, Mr. Clinton was wearing red shoes that day.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Mr. McNamee contends that the consents to search the apartment were not voluntary and were coerced. He contends that his consent was given while he was in custody with four or more officers present and he was being interrogated about murders. And, he contends, Ms. Cofield's consent was the product of her submission to a show of authority by multiple police officers who arrived at her home late at night. The State responds that the argument Mr. McNamee articulates in his brief was not preserved because the grounds raised on appeal — namely, that the consent was involuntary and was a submission to a show of authority — were not the reasons he argued at the motions hearing. In reply, Mr. McNamee asserts that his primary appellate argument is that the consents were not given voluntarily, and that was the essence of the arguments made at the motions hearing.

We agree with Mr. McNamee's assertion that the essence of his arguments, both on appeal and at the motions hearing, is that the consents were not voluntary. Prior to the presentation of testimony at the motions hearing, defense counsel argued that the

consents were "not voluntary consents." During cross-examination of Mr. McNamee, defense counsel objected to certain questions about whether Mr. McNamee told police that he hid the murder weapon in Ms. Cofield's apartment, and, as grounds for the objections, argued that "that has nothing to do with the voluntariness of the statement." Defense counsel also asserted: "We're just focused today, at the hearing, on the voluntariness of his statement." In response, the prosecutor acknowledged that voluntariness of the consents was the "crux of what he is arguing, that he was basically forced into this situation."

"[A]n appellant/petitioner is entitled to present the appellate court with a more detailed version of the argument advanced" below. *Starr v. State*, 405 Md. 293, 304 (2008) (citation omitted); *see also State v. Greco*, 199 Md. App. 646, 658 (2011) (concluding that an issue was not waived where the State generally made the argument at trial, and where the trial court clearly decided the issue on the grounds raised on appeal), *aff'd*, 427 Md. 477 (2012). Voluntariness of the consents was clearly raised in, and decided by, the motions court. We will therefore consider Mr. McNamee's appellate arguments on that issue. But we are not persuaded that the motions court erred in denying the motion to suppress the evidence obtained as a result of the two searches of Ms. Cofield's apartment.

The Fourth Amendment to the Constitution of the United States, made applicable to the States through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), guarantees, *inter alia*, "[t]he right of the people to be secure in their persons,

houses, papers, and effects, against unreasonable searches and seizures." But "[t]he Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

Consensual searches are permitted because it is reasonable for the police to conduct a search once they have been given permission to do so. *Id.* at 250-51. A search committed without a warrant "does not violate the Fourth Amendment if a person consents to it." *Varriale v. State*, 218 Md. App. 47, 53 (2014), *aff'd*, 444 Md. 400 (2015), *cert. denied*, 136 S.Ct. 898 (2016). *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (explaining that, to be valid, consent to search must be voluntary based on the totality of the circumstances); *Jones v. State*, 407 Md. 33, 51 (2008) ("A search conducted pursuant to valid consent, *i.e.*, voluntary and with actual or apparent authority to do so, is a recognized exception to the warrant requirement."); *Redmond v. State*, 213 Md. App. 163, 177 (2013) (voluntariness of search is based upon standards set forth in *Schneckloth*, *supra*).

Whether a person consents to a search is a question of fact, for which the State has the burden of proof. *McMillian v. State*, 325 Md. 272, 284-85 (1992). Consent may be given expressly, impliedly, or by gesture. *Turner v. State*, 133 Md. App. 192, 207 (2000). Because a court's ruling on the existence of consent is a question of fact based upon the totality of the circumstances, we may not reverse the court's decision unless it is clearly erroneous. *McMillian*, 325 Md. at 285.

Here, we are not persuaded that the motions court was clearly erroneous in finding that Mr. McNamee and Ms. Cofield voluntarily consented to the search of the apartment. The evidence presented at the suppression hearing supported the State's theory that Mr. McNamee willingly offered to provide information about unrelated murder cases when he informed the police that a weapon used in multiple murders could be found at the subject residence in the apparent hope that cooperation with the police would be to his benefit. There was testimony that Mr. McNamee initiated the conversation about the weapon and indicated that he was willing to show police where the gun could be found. There was testimony that Mr. McNamee read, and apparently understood, the consent-to-search form.

The evidence before the motions court included Detective Bellino's testimony that he did not promise Mr. McNamee anything, nor did he threaten him. Indeed, there was evidence that the only promise made to Mr. McNamee was that any information he provided would be relayed to the State's Attorney's Office. This was not an improper inducement. *Cf. Knight v. State*, 381 Md. 517, 535 (2004) (holding that the interrogating officer's remark was "not a promise of help or special consideration" where the officer told an accused that, if he cooperated by answering the questions posed by the police, the officer would let the State's Attorney know); *Harrison v. State*, 151 Md. App. 648, 655 (2003) (concluding that the interrogating officer's statement did not constitute an improper inducement where officer said: ". . . you wanted the State[']s Attorney to know what all happened, is that correct?"), *rev'd on other grounds*, 382 Md. 477 (2004).

Mr. McNamee also argues that his consent was not voluntary in light of the undisputed fact that he was in custody at the time the consent forms were discussed. "Although custody is a factor to be considered in determining voluntariness, it is not dispositive, and a person in custody may validly consent to a search." *Doering v. State*, 313 Md. 384, 402 (1988) (citing *United States v. Watson*, 423 U.S. 411, 424 (1976)); *accord Miles v. State*, 365 Md. 488, 530 (2001), *cert. denied*, 534 U.S. 1163 (2002); *see also United States v. Crowder*, 62 F.3d 782, 787 (6th Cir. 1995) ("Although the *Watson* Court recognized 'subtle forms of coercion that might flaw [the defendant's] judgment,' the defendant must show more than a subjective belief of coercion, but also some objectively improper action on the part of the police."), *cert. denied*, 516 U.S. 1057 (1996); *United States v. Davis*, 645 F.Supp. 2d 541, 551 (W.D.N.C. 2009) ("Whether the Defendant felt free to leave, however, is not determinative of the issue of voluntariness. Consent, even given while in custody, may still be considered voluntary."), *aff'd*, 460 F. App'x 226 (4th Cir. 2011).

Under the circumstances here, we conclude that the fact that Mr. McNamee was in custody did not undermine the voluntariness of his consent in light of the fact that he initiated the conversation with the police that led to the recovery of the handgun that he knew was secreted in an air duct inside a closet at the apartment he shared with Ms. Cofield.

With respect to Ms. Cofield, we are not persuaded that the motions court was clearly erroneous in concluding that her two consents were involuntary. Notably, the

motions judge — who indicated he did not give Ms. Cofield "a whole lot of credibility" — expressly credited Sergeant Clifford's testimony. Sergeant Clifford testified that Ms. Cofield let the officers into the apartment, and no threats or promises were made to her. Sergeant Clifford went over the consent-to-search form, using a very soft tone to avoid waking her children. Ms. Cofield appeared to understand the consent-to-search form, and did not ask any questions before signing the first consent form. Her expression of shock when the officers discovered a firearm in her home provided support for the State's contention that she willingly agreed to permit a search because she did not anticipate that there was anything illegal in the apartment. The motions court's assessment of relative credibility of the witnesses is not unreasonable. *See Jones v. State*, 343 Md. 448, 460 (1996) ("In performing its fact-finding role, the trier of fact decides which evidence to accept and which to reject."). As for the second consent, Ms. Cofield knew, at that point in time, that Mr. McNamee was encouraging the police officers to conduct that search. There was also evidence, through Detective Bellino, that the officer who asked Ms. Cofield to sign the second form did not promise anything or threaten her when officers returned to the apartment for this second search that was conducted based on information provided by Mr. McNamee.

Contrary to Mr. McNamee's argument, the officers were not required to inform Ms. Cofield that she need not consent to the search. *Scott v. State*, 366 Md. 121, 142 (2001) ("We therefore reject Scott's argument that a consent to search one's dwelling may not be held valid under the Fourth Amendment unless the person is advised, in

advance, that he/she has a right to refuse or limit the consent. That is clearly not the law."), *cert. denied*, 535 U.S. 940 (2002); *State v. Clowney*, 87 Md. App. 48, 55 (1991) (observing that police officers do not have to advise an individual that he/she had the right to refuse consent, although it is a factor for consideration by the court). We adopt, with minor revisions, the language the Court of Appeals used in affirming the denial of a motion to suppress in *Scott*, 366 Md. at 143:

> We are not persuaded by this record that the Circuit Court committed any error of law or any clear error of fact in determining that [Mr. McNamee and Ms. Cofield each] (1) consented to the search of [the apartment], and (2) the consent[s] w[ere] voluntary. In hindsight, that was a foolish decision, from [Mr. McNamee's and Ms. Cofield's] point of view, but the issue is not whether the consent was an intelligent one, only whether it was voluntary. The evidence, in a light most favorable to the State, shows no police overbearing, or even impoliteness.

II.

Mr. McNamee next avers that the court erred in admitting Mr. Clinton's prior inconsistent statement because the court did not first find that Mr. Clinton's purported lack of memory was feigned. The State responds that Mr. McNamee did not raise these grounds at trial and they are not preserved. Further, the State argues, the record establishes that the court implicitly found that the prior statement was inconsistent, and any error in admitting the prior statement was harmless because the substance came without objection during other parts of Mr. Clinton's testimony.

Mr. Clinton was a reluctant witness, and he initially testified that he did not remember what time he met Mr. McNamee on April 30, 2014, he did not remember where they went, and he did not go to a gas station with Mr. McNamee. But Mr. Clinton

agreed that he encountered Detective Timothy Woods on April 30. At that point, defense counsel objected and the following ensued:

> [DEFENSE COUNSEL]: [The Prosecutor is] going to try to use his statement at this point.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: And she has – he's not been declared a hostile witness at this point.
>
> THE COURT: It doesn't have anything to do with that. He doesn't have to be a hostile witness for her to use the statement.
>
> [DEFENSE COUNSEL]: That's fine.
>
> THE COURT: I mean, I don't know where she's going with it yet, but she can give him a statement to refresh his memory. There are all sorts of ways to use a statement, but we're just not there yet.
>
> [DEFENSE COUNSEL]: Okay.
>
> [Counsel returned to trial tables.]

Mr. Clinton then testified that he spoke with Detective Woods at the police station about the events of April 30, 2014. He agreed that he wrote a statement and, when asked if it was correct that that statement was video recorded, replied, "I guess so." Mr. Clinton maintained at trial that Mr. McNamee never drove him to a gas station, but he did remember giving a different statement to Detective Woods. He acknowledged that he had told the detective that Mr. McNamee drove there, parked the car, and then got out of the car.

Mr. Clinton also agreed that, in the statement he gave Detective Woods, he had said that Mr. McNamee walked toward some stores while he (Mr. Clinton) got into the

driver's seat and drove the vehicle a short distance away. But Mr. Clinton denied that he was waiting nearby for Mr. McNamee, and said instead that he was "just waiting." When the prosecutor repeated the inquiry and asked whether he was waiting "for Mr. McNamee," Mr. Clinton responded: "Not on that street I was not." But, when asked if he remembered "telling the police that you were waiting for Mr. McNamee," Mr. Clinton answered: "I remember what I told the police."

Mr. Clinton continued to be uncooperative in his responses to the prosecutor's questions, and he denied that he could remember what Mr. McNamee was wearing on the day in question. At that point, the prosecutor questioned him further about his statement to Detective Woods, and the transcript reflects the following:

> Q. [BY PROSECUTOR] And do you remember what Mr. McNamee was wearing that day?
>
> A. [BY MR. CLINTON] No, I didn't.
>
> * * *
>
> Q. Mr. Clinton, you're saying that you don't remember what Mr. McNamee was wearing that day; is that correct?
>
> A. Correct.
>
> Q. Do you remember telling the police on April 30th that you knew what he was wearing that day?
>
> A. Yes. And I also remember telling them that I didn't know what he was wearing.
>
> Q. Well, I'm going to show you State's Exhibit 94. Is this your handwriting?
>
> A. Yes, that's my handwriting.

Q. And this is signed by you?

A. Correct.

Q. I'm also showing you State's Exhibit 93 we were referring to earlier. That's your handwriting?

A. Yes, it is.

Q. And it's signed by you?

A. Mm-hmm.

Q. These are the statements that you made to Detective Woods, right?

A. Correct.

Q. Along with Exhibit 95, correct?

A. Yes.

Q. Also signed by you?

A. Yes.

Q. And when you met with Detective Woods, isn't it true that you stated that Mr. McNamee was wearing red shoes, a black jacket with some – a black jacket, and was wearing similar clothes that you were wearing that day?

A. Correct.

Q. And you were shown this photograph, right?

A. (Nods head.)

Q. And you indicated that that is what he looked like on that day?

A. No, I did not.

Q. You said that, "It is similar clothing as my friend. I'm not sure if that's him."

A. Similar.

Q. So you said he was wearing red sneakers?

A. (Nods head.)

Q. Black jacket?

A. As I was.

Q. In fact, you told Detective Woods that you were one hundred percent positive that he was wearing red sneakers that day; is that correct?

A. No, I don't remember saying that.

(Played a video from 14:55:20 to 14:56:11 on the counter.)

Q. Do you remember now saying you were one hundred percent positive that he was wearing red shoes?

A. Clearly, I said it.

After cross-examination was concluded, the State sought to introduce Mr. Clinton's prior statement as substantive evidence. The following ensued:

[DEFENSE COUNSEL]: While it might have been used to impeach him, they're not admissible on his statement alone.

[PROSECUTOR]: Pursuant to Nance Hardy [sic], Your Honor, they're absolutely admissible as prior inconsistent statements and they come in as substantive evidence.

THE COURT: They come in under 582.1. [sic, presumably Rule 5-802.1]

[PROSECUTOR]: Thank you.

(Counsel returned to trial tables.)

THE COURT: State's Exhibit 93, 94 and 95 are all admitted.

As the transcript shows, defense counsel did not assert at trial that the court needed to explicitly find that Mr. Clinton's memory lapses were feigned before the statements could be admitted. When the exhibits were offered, Mr. McNamee's argument was that the statements could be used only for impeachment. Consequently, we agree with the State that Mr. McNamee's current argument was not properly preserved. "'A party must bring his argument to the attention of the trial court with enough particularity that the court is aware first, that there is an issue before it, and secondly, what the parameters of the issue are.'" *In re Roberto d. B.*, 399 Md. 267, 311 (2007) (quoting *Harmony v. State*, 88 Md. App. 306, 317 (1991)). Furthermore, "[t]he trial court needs sufficient information to allow it to make a thoughtful judgment." *Id.* at 311-12 (citation omitted); *see also Stewart-Bey v. State*, 218 Md. App. 101, 127 (2014) (limiting appellate review to "the ground assigned" in the objection during trial) (citation omitted).

But, even if the argument had been preserved, we would conclude the trial court did not abuse its discretion in admitting Mr. Clinton's prior inconsistent statements pursuant to Maryland Rule 5-802.1(a), which provides:

> The following statements previously made by a witness who testifies at trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and signed by the declarant; or (3) recorded in substantially verbatim

> fashion by stenographic or electronic means contemporaneously with the making of the statement.

There is no dispute that Mr. Clinton's prior statements that the State introduced were in writing, signed by him, and recorded substantially verbatim and contemporaneously with the making of his statements. Mr. McNamee's argument on appeal focuses on the threshold issue of inconsistency. On this, the Court of Appeals has stated:

> The tendency of unwilling or untruthful witnesses to seek refuge in forgetfulness is well recognized. 2 *McCormick on Evidence*, § 251, at 121 [4th ed. 1992]. When witnesses display such a selective loss of memory, a court may appropriately admit their prior statements.

Nance v. State, 331 Md. 549, 572 (1993). *See also Tyler v. State*, 342 Md. 766, 776-77 (1996) ("[A] witness's testimony that he or she cannot remember events about which the witness testified earlier may be inconsistent with the earlier testimony, and hence the earlier testimony may be admissible under *Nance* as a prior inconsistent statement").

There is a broad test to gauge whether a prior statement is "inconsistent":

> Flat contradiction between the witness'[s] testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness'[s] trial testimony.

Carr v. State, 284 Md. 455, 460-61 (1979) (quoting *Jencks v. United States*, 353 U.S. 657, 667 (1957)).

Mr. McNamee contends the court erred by not expressly announcing a finding, on the record, that Mr. Clinton's prior statements were inconsistent with his trial testimony.

Mr. McNamee relies on *Corbett v. State*, 130 Md. App. 408 (2000), in support of this argument. The Court of Appeals addressed a similar argument about *Corbett* in *McClain v. State*, 425 Md. 238, 251-52 (2012):

> In *Corbett*, the Court of Special Appeals was asked to determine if, when a witness testifies that he or she does not remember a particular event, that testimony is, for purposes of Rule 5-802.1(a), "inconsistent" with an earlier written statement by the witness about the event. *Id.* at 421, 746 A.2d at 960. The Court of Special Appeals held that the inability to remember is "inconsistent" with the prior statement if such memory loss is falsely professed in order to avoid testifying on the matter at issue. *Id.* at 425–26, 746 A.2d at 963. The Court of Special Appeals explained that it was "confronted with an absence of any finding on the issue" of whether the witness's memory loss was feigned or genuine. *Id.* at 426, 746 A.2d at 963. As a result, the Court of Special Appeals concluded: "The court erred in permitting [the witness's] statement to come into evidence as a prior inconsistent statement without first making a finding on that preliminary, predicate issue." *Id.* at 426-27, 746 A.2d at 963 (citing Rule 5-104). **Nowhere, however, does the *Corbett* Court require that such a finding be made on the record.**

(Emphasis added.)

Moreover, the *McClain* Court stated: "Rule 5-802.1, unlike some other Rules, does not require explicitly that findings be placed on the record, and we decline to read into the Rule such a requirement." *McClain*, 425 Md. at 252. Here, the trial court was not required to announce on the record an explicit finding that Mr. Clinton's testimony was inconsistent with his prior statement.

And, as the State points out, Mr. McNamee did not offer any objection to Mr. Clinton's trial testimony that Mr. McNamee was wearing a black jacket and red shoes on the night in question. Consequently, evidence of the same facts that Mr. McNamee now claims caused him prejudice was admitted elsewhere during the trial without objection.

See Yates v. State, 429 Md. 112, 120-21 (2012) ("Where competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received." (citation and internal quotation marks omitted)); *see also DeLeon v. State*, 407 Md. 16, 30-31 (2008) (The Court of Appeals held that a defendant waived an objection to what he claimed was irrelevant and highly prejudicial testimony about his purported gang affiliation because "evidence on the same point [was] admitted without objection" elsewhere at trial.). Under these circumstances, we agree with the State's assertion that Mr. McNamee was not prejudiced by the admission of Mr. Clinton's prior statement.

III.

Mr. McNamee asserts that the trial court erred in the manner in which it handled Mr. Clinton's assertion that he wished to invoke his Fifth Amendment privilege against self-incrimination. The State responds (a) that this issue is not preserved, and (b) that there was no error.

Prior to Mr. Clinton being called as a witness, defense counsel inquired what course of action the court planned to take if Mr. Clinton refused to testify. After the court said, "I don't know," the State said: "I guess we'll cross that bridge when we get to it."

When Mr. Clinton was called to the stand, the prosecutor opened with the following questions:

> BY [PROSECUTOR]:
>
> Q. Good afternoon, Mr. Clinton. How are you?

[BY MR. CLINTON]

A. Not good.

Q. I understand that you don't want to be here today; is that correct?

A. Correct.

Thereafter, Mr. Clinton acknowledged that he knew Mr. McNamee, that he was arrested on April 30, 2014, and that he had already pled guilty to conspiracy to commit robbery. Mr. Clinton was then asked how his day began on April 30, 2014, and he responded: "I want to plead the [F]ifth right here." A bench conference ensued as follows:

> [PROSECUTOR]: I would just argue that the witness does not have a Fifth Amendment right in this case. He pled guilty to this matter almost [eight] months ago. His appellate rights have run. There certainly is not anything that the State is inquiring about that we could use against him in any sort of criminal investigation.
>
> [MR. CLINTON'S COUNSEL]: Your Honor, I would say at this point, because there is still the possibility of a reconsideration, there is still an interest available and so he should still be able to assert his Fifth Amendment right.
>
> THE COURT: Has he filed for reconsideration?
>
> [MR. CLINTON'S COUNSEL]: I do not have an answer to that.
>
> [PROSECUTOR]: I don't have any information with regards to that. And I believe – I'm not even sure – well, I'm not saying [Mr. Clinton's Counsel] is misrepresenting to the Court that that – the time that he is allowed to file for reconsideration hasn't run, but I think the rule is based

on any appeal rights, and his appeal rights have all run. You can always go for reconsideration of sentence.[6]

[MR. MCNAMEE'S COUNSEL]: Your Honor, even if the Fifth Amendment – if he refuses to answer the questions, all you can do is instruct him that – and hold him in contempt.

THE COURT: I understand that part.

[PROSECUTOR]: And I'm going to ask the Court to compel him to testify.

THE COURT: Okay.

Anything else?

[PROSECUTOR]: No.

[MR. MCNAMEE'S COUNSEL]: No.

(Counsel returned to trial tables).

THE COURT: Mr. Clinton, you have just testified that you have already pled guilty to the conspiracy to commit robbery. The Assistant State's Attorney's question was concerning that specific offense. You no longer have a Fifth Amendment right not to answer that question, because you have pled guilty and your appeal time on that plea has now run.

So the Court is going to instruct you to answer the State's Attorney's question as it relates to the conspiracy offense that you pled guilty to.

THE WITNESS: Okay.

Mr. Clinton then testified that he saw Mr. McNamee on the day in question. Following several of Mr. Clinton's evasive responses to a number of questions, defense counsel again objected as follows:

[6] Although there is ordinarily a 90-day time limit for a motion for modification of sentence, a motion to correct an illegal sentence may be filed at any time. *See* Maryland Rule 4-345(a), (e).

> [MR. MCNAMEE'S COUNSEL]: If the defendant [sic] testifies, it should be done outside the presence of the jury, not in the presence of the jury. So far he has answered the questions.
>
> THE COURT: He might not be the most cooperative witness, but he's continuing to answer the questions. Let's continue.

Mr. McNamee's argument on appeal is that "the court erred by instructing Clinton, in the presence of the jury, to testify despite his invocation of the privilege." However, the record shows that it was Mr. McNamee's counsel who initially suggested that the court instruct Mr. Clinton to answer, and that the remedy for refusal would be contempt. There were no facts proffered to support a claim that Mr. Clinton was still entitled to claim the privilege at the time of Mr. McNamee's trial. And Mr. McNamee did not object when the court instructed Mr. Clinton that he no longer had a Fifth Amendment privilege to refuse to testify. Even though Mr. McNamee's counsel *later* objected that "the defendant [sic]" should testify outside the presence of the jury, counsel never did object to the trial court's instruction that was given to the witness, or the fact that it was given in the presence of the jury. Consequently, the argument made in this Court, challenging that instruction, is not preserved. *See* Maryland Rule 8-131(a); *see also Rich v. State*, 415 Md. 567, 575 (2010) (the "invited error" doctrine precludes a party from challenging on appeal an action that that party asked the trial judge to take).

IV.

Finally, Mr. McNamee contends that the court erred in granting an award of restitution because there was insufficient evidence introduced regarding the value of the victim's iPhone. Appellant does not challenge the court's separate award of $250 to EZ

Car Rental. The State responds that the issue is not preserved and is without merit. We disagree.

At disposition, the following transpired:

> THE COURT: Now, they have recommended the following conditions of probation, which the Court will adopt. Let's see, stay away from any contact with the victim. Stay away from the vicinity of the property, which is 5618 Saint Barnabas Road, which is currently an EZ Car Rental. The State didn't ask for any restitution. Was the amount of the money stolen ever specified?
>
> [PROSECUTOR]: Your Honor, **I believe that the victim's cell phone was worth approximately $250 that was stolen.** And the funds that were stolen was $250. We ask for $500 in restitution.
>
> THE COURT: You are going to need to prepare to [sic] restitution form.
>
> [PROSECUTOR]: I will.
>
> THE COURT: Order restitution of $500.
>
> [DEFENSE COUNSEL]: Pardon? I'm sorry. I was speaking with my client. Would the Court mind restating?
>
> THE COURT: Shouldn't it be $450, $200 for the phone and $250 for the cash.
>
> [PROSECUTOR]: I said **I thought the phone was approximately $250** and what was stolen was $250. I certainly would not object to –
>
> THE COURT: The $450 to be paid during the probationary period.
>
> [DEFENSE COUNSEL]: If I could make an opposing objection.

(Emphasis added.)

It is clear that a challenge to an order of restitution may be waived absent an objection. *See Brecker v. State*, 304 Md. 36, 41-42 (1985) (failure to make timely

objection to order of restitution constitutes waiver). But, here, defense counsel did promptly object, and the issue is preserved.

An order of restitution entered in a criminal case, even when attached as a condition of probation, "is a criminal sanction – part of the punishment for the crime." *Chaney v. State*, 397 Md. 460, 470 (2007) (citing *Goff v. State*, 387 Md. 327, 338-40 (2005)); *see also Pete v. State*, 384 Md. 47, 54 (2004) ("restitution is generally available as part of a sentence for a criminal conviction under [Criminal Procedure Article] § 11-603 or as a condition of probation under [Criminal Procedure Article] § 6-221").

A trial court's determination regarding whether a person is a victim who suffered a qualifying loss as a direct result of a defendant's crime is a question of law, subject to *de novo* review. *In re Earl F.*, 208 Md. App. 269, 275 (2012) (citing *Walczak v. State*, 302 Md. 422, 425-27 (1985)). A victim of a crime "is presumed to have a right to restitution" if the victim or the State requests restitution and **"competent evidence"** of the victim's qualifying damages **"is presented"** to the court. Maryland Code (2001, 2008 Repl. Vol.), § 11-603(b) of the Criminal Procedure Article (emphasis added); *Chaney*, 397 Md. at 469; *see also In re Earl F.*, 208 Md. App. at 275 n.2 (opining that the State "bears the burden of proving the amount of the victim's loss by a preponderance of the evidence" (quoting *United States v. Evers*, 669 F.3d 645, 654 (6th Cir. 2012)). The amount of restitution awarded by a court is reviewed for abuse of discretion. *In re Earl F.*, 208 Md. App. at 275 (citing *In re Delric H.*, 150 Md. App. 234, 240 (2003)).

In *Juliano v. State*, 166 Md. App. 531 (2006), this Court made clear that "a victim's entitlement to a restitution award and the amount of the award are facts that the State must establish by a preponderance of the evidence." *Id.* at 540. Further, the statute states that a restitution request should be supported by "competent evidence," and this Court has stated that, "in every case the record should clearly reflect the basis for the amount of restitution ordered." *Juliano*, 166 Md. App. at 544. *See also McDaniel v. State*, 205 Md. App. 551, 559, *appeal dismissed*, 429 Md. 528 (2012). We recognize that an "owner of goods is presumptively qualified to testify to the value of his goods." *Pitt v. State*, 152 Md. App. 442, 465 (2003), *aff'd on other grounds*, 390 Md. 697 (2006). But a prosecutor's bare representation of a belief of approximate value does not qualify as "competent evidence." *Juliano*, 166 Md. App. at 543-44.

Because the part of the restitution award for the loss of the victim's iPhone was not supported by competent evidence, we shall follow the same procedure we did in *Juliano*, and "shall vacate the order of restitution [as to the $200 awarded for the iPhone] and remand the case to the circuit court so that it may conduct a restitution hearing, at which the prosecution must establish, by competent evidence, the appropriate amount of restitution to be ordered [for the iPhone] in this case." *Id.* at 544.

ORDER OF RESTITUTION VACATED IN PART AND CASE REMANDED FOR FURTHER PROCEEDINGS. JUDGMENTS OTHERWISE AFFIRMED.

COSTS TO BE ASSESSED THREE-FOURTHS TO APPELLANT AND ONE-FOURTH TO PRINCE GEORGE'S COUNTY.