

Circuit Court for Baltimore City  
Case Nos.: 113114022  
113114023  
113114024

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 2512

September Term, 2015

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JOSEPH OGLESBY

v.

STATE OF MARYLAND

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Kehoe,  
Leahy,  
Alpert, Paul E.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Kehoe, J.

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Filed: September 6, 2018

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A jury in the Circuit Court for Baltimore City convicted Joseph Oglesby, appellant, of felony murder and first-degree burglary following the April 1, 2013 death of Ralph Timmons. He presents five questions on appeal:

1. Did the State fail to present sufficient evidence to sustain the convictions?
2. Did the lower court err by instructing the jury that Mr. Oglesby could be guilty of felony murder if the jurors believed that another person was the shooter?
3. Did the lower court err in prohibiting the defense from introducing several pieces of evidence that tended to establish an alternative suspect?
4. Did the lower court err in refusing to allow the defense to use a psychiatric evaluation to impeach Mr. Timmons's son?
5. Did the lower court err by permitting the prosecutor to make improper remarks in closing argument, and by refusing to re-instruct the jury on the reasonable doubt standard?

For the reasons stated below, we answer these questions in the negative and affirm.

### **Background**

Mr. Timmons was murdered on April 1, 2013.<sup>1</sup> On that evening, he was at home with his eleven-year-old son—whom we shall refer to as “the child”—and his girlfriend. Around 9:00 P.M., Timmons left the house to pick up a pizza for dinner. Approximately fifteen minutes later, Timmons returned. From upstairs, the child heard his father yell, “Stop” and “Don’t move.” When the child went downstairs, he observed Timmons holding a man at knifepoint, but he only saw the man’s feet. Timmons told his son to call the police, but

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<sup>1</sup> A pathologist testified that Timmons had been shot seven times and that the cause of his death was multiple gunshot wounds.

before Timmons could give the child the phone he was holding, another man ran upstairs from the basement and shot Timmons. The child testified that he heard several gunshots and that the shooter was wearing a black and white bandana to mask his face.

The child turned and ran back upstairs. The shooter fired at the child, wounding him. The child, however, managed to exit the house from his bedroom and used a bystander's phone to call the police.

Officer Virgiree Boles and other Baltimore City police officers responded to the scene. When Officer Boles entered the home, she observed Timmons's body lying on the floor. Officer Boles and Sergeant Valencia Nock then went downstairs into the basement to clear the scene. There, Officer Boles observed couch cushions moving, and the police discovered appellant hiding in the couch. At the time the police found appellant, he was wearing a black and white scarf. The officers also discovered another man hiding in the basement.

Detective Eric Ragland arrived and assumed the lead of the investigation into the shooting. From the scene and Timmons's body, the police recovered seven bullet casings, three fired bullets, one unfired bullet, a knife, and a 9mm semiautomatic handgun. James Wagster, who was accepted as an expert in the identification and comparison of firearms, testified that the recovered casings came from the recovered gun, which was found in the basement underneath a freezer near the couch. Of the three recovered fired bullets, Wagster testified that one of them could have come from the recovered gun, but the other two did not.

In the days following the shooting, Detective Ragland interviewed the child, appellant, and the other man found in the basement.<sup>2</sup> Initially, during the interview, the other man—whom the police learned was John Knox—stated that he and appellant attempted to burglarize Timmons’s home, but that he was in the basement when Timmons was shot. Detective Ragland then informed Knox that a child had been shot, and Knox said, “All right. I’m going to tell you the truth.” At trial, Knox testified that he changed his story because he “couldn’t protect the person who would do that [shoot a child].”

Knox told Detective Ragland that on March 31st, appellant—who was known to Knox through appellant’s son—approached him with a plan to get drugs and money. The next day, Knox and appellant entered Timmons’s home after they witnessed Timmons leave, and appellant’s son acted as a lookout. Shortly after entering the home, appellant’s son alerted Knox and appellant that Timmons was returning. Knox attempted to hide in a closet, but surmised that Timmons saw him because Timmons opened the closet door and said, “You know, you f---d up.” Timmons was holding a knife.

Then, Knox observed Timmons instruct someone else to do something, before turning to the basement stairs and saying, “Oh, s--t.” Knox then heard seven or eight gunshots and saw Timmons fall to the floor. Emerging from the closet, Knox saw appellant—with a gun in hand—turn toward a “smaller frame” running upstairs while Timmons yelled, “No, that’s my son.” Knox estimated that appellant fired three or four shots at the child. Knox

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<sup>2</sup> Portions of an interview with the child were played for the jury at trial.

wanted to leave, but appellant said, “You’re not leaving until we get what we came for.” When the police arrived a short time later, Knox and appellant hid in the basement. Knox informed the police that the knife recovered from the basement—which was found near him—was the same one Timmons had held on him; Knox had taken it after appellant shot Timmons.<sup>3</sup>

At trial the State played portions of Detective Ragland’s interview with appellant. Appellant claimed to have run into Timmons, an old friend, at the pizza place around 8:30 P.M. and to have ridden back in Timmons’s vehicle to his house. When they entered the home, appellant said that Timmons observed that someone else was in the house before gunshots rang out. Appellant ran into the basement, whereupon he attempted to hide in the couch. He claimed that he did not come out when the police arrived because he had become stuck in the couch’s pull-out bed. In the interview, appellant claims not to have seen Knox, nor to have seen Timmons get shot.

The State charged appellant with first-degree burglary, first-degree murder, felony murder, use of a handgun in a crime of violence, and attempted first-degree murder. The jury acquitted appellant of all charges except for first-degree burglary and felony murder. The court merged appellant’s conviction for burglary into felony murder and subsequently sentenced appellant to life in prison. This appeal followed.

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<sup>3</sup> On November 14, 2013, Knox pled guilty to first-degree burglary, unauthorized possession of a firearm, use of a firearm in a crime of violence, attempted first-degree murder, and first-degree murder.

## Analysis

### 1. The Sufficiency of the Evidence

Appellant first contends that the State did not present sufficient evidence to sustain his convictions because the State had not corroborated the testimony of Knox, an accomplice. Appellant maintains that he may not be convicted based on the uncorroborated testimony of an accomplice, and that his presence at the scene in addition to the child’s testimony was not sufficient corroboration of Knox’s testimony.

The State responds that there was sufficient evidence to sustain the convictions and that it did corroborate Knox’s testimony. The State contends that it needed to produce only “slight corroboration,” and if the State corroborated *any* portion of Knox’s testimony, then the jury could accept other uncorroborated parts. The State maintains, therefore, that there was sufficient corroboration of Knox’s testimony based on the discovery of appellant and Knox hiding in the basement of the dwelling in which the crime had occurred, appellant’s presence in the home, and the child’s testimony.

Maryland courts have adopted the test the Supreme Court laid out in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), that considers “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (Emphasis in the original). *See, e.g., Bible v. State*, 411 Md. 138, 156 (2009). In this undertaking, “[w]e give ‘due regard to the [fact-finder’s] findings of fact, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.’” *Potts v.*

*State*, 231 Md. App. 398, 415 (2016) (quoting *Harrison v. State*, 382 Md. 477, 487-88 (2004)).

Appellant is correct that “[i]t has been firmly established that a ‘person accused of a crime may not be convicted on the uncorroborated testimony of an accomplice.’” *McCray v. State*, 122 Md. App. 598, 605 (1998) (quoting *Turner v. State*, 294 Md. 640, 641-42 (1982)). However, “only slight corroboration is required[.]” *Id.* Evidence corroborating an accomplice’s testimony must address material facts that tend to either connect the defendant with the individuals who carried out the crime or point to the defendant having participated in the crime. *Correll v. State*, 215 Md. App. 483, 500 (2013). If the evidence “tends to establish either of these matters, the trier of fact may credit the accomplice’s testimony even with respect to matters as to which no corroboration was adduced.” *Id.* (quoting *Woods v. State*, 315 Md. 591, 616-17 (1989)).

We are persuaded that the State sufficiently corroborated Knox’s testimony through the testimony of the child and Sergeant Nock. The child testified that he saw his father holding someone at knifepoint; Knox testified that he was held at knifepoint by Timmons. Both testified that Timmons instructed the child to call the police. The child and Knox both stated that the shooter fired shortly after Timmons spoke with the child. The child and Knox both testified that the shooter fired at the child after Timmons fell. Notably, the child testified that the shooter wore a black and white bandana like a mask, and Knox stated that appellant was wearing a black and white scarf as a mask. Sergeant Nock also testified that

when the officers pulled appellant out of the couch, he was wearing a black and white scarf. This testimony further served to identify appellant with Knox.

Accordingly, we are persuaded that the State provided more than slight corroboration sufficient to enable the jury to credit Knox’s testimony, even as to uncorroborated portions of that testimony. The State, therefore, presented sufficient evidence to sustain appellant’s convictions.

## 2. The Felony Murder Jury Instruction

While the parties discussed proposed jury instructions, the State requested the court to instruct the jury that it could convict appellant of felony murder if it concluded that either appellant or another participant in the burglary shot Timmons in the course of that crime. Appellant objected on the grounds that the State’s theory of the case was that appellant shot Timmons. Appellant argued that permitting the State to present an alternative theory after the presentation of evidence prejudiced him because he could not respond to the State’s new theory. The court overruled appellant’s objection and instructed the jury as to felony murder as follows:

The Defendant is charged with the crime of first degree felony murder. It is not necessary for the State to prove that the Defendant intended to kill Ralph Timmons[.] In order to convict the Defendant of first degree felony murder, the State must prove that the Defendant committed first degree burglary, that the Defendant **or another participant in the burglary** killed Ralph Timmons[], and that the act resulting in the death of Ralph Timmons[] occurred during the commission of first degree burglary.

(Emphasis added).



Appellant presents two arguments with respect to why the court erred in giving this instruction. First, appellant contends that there was insufficient evidence to generate the felony murder instruction. Appellant argues that the State’s theory of the case was that appellant—not Knox—was the shooter, and that the evidence the State presented at trial was in support of that theory. Appellant takes the position that because the State did not present evidence that Knox could have been the shooter, there was not enough evidence to generate the felony murder instruction as worded, particularly the portion that read, “In order to convict the Defendant of first degree felony murder, the State must prove that the Defendant committed first degree burglary, that the Defendant **or another participant in the burglary** killed Ralph Timmons[.]” (Emphasis added).

The difficulty with this argument is that appellant’s trial counsel failed to raise that specific argument at trial. Maryland Rule 4-325(e), which addresses objections to jury instructions in criminal trials, states, “No 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.” Substantial compliance may, in some cases, preserve an objection for appellate review, but such preservation requires certain conditions to be met, including that “‘the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record,’ and ‘the circumstances must be such that a renewal of the objection after the court instructs the jury

would be futile or useless.” *Hallowell v. State*, 235 Md. 484, 503 (2018) (quoting *Gore v. State*, 309 Md. 203, 209 (1987)).

Appellant’s trial counsel objected to the proposed instruction on the grounds that it went to a different theory of the case than what the State argued at trial, a contention that we will address in the following paragraphs. However, appellant’s trial counsel did not argue to the trial court that the instruction was not generated by the evidence. Therefore, that issue is not preserved for appellate review. *See* Md. Rule 8-131(a) (“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[.]”).

Next, appellant argues that the instruction as provided was inconsistent with the State’s theory of the case. Appellant contends that the State’s theory of the case was that the appellant was the shooter, and that the evidence presented by the State tended to establish that there were two participants in the crime—appellant and Knox—and that appellant was the shooter. Appellant therefore maintains that the instruction violated his right to due process because the instruction was inconsistent with the State’s evidence, because the instruction permitted the jury to convict him even if it found that he wasn’t the shooter, and because it was introduced too late in the trial for him to adequately respond. In order to make his argument, appellant relies on two Court of Appeals decisions, *Sifrit v. State*, 383 Md. 77 (2004), and *Cruz v. State*, 407 Md. 202 (2009).

The State maintains that it never abandoned the theory that appellant was a participant in the burglary in the course of which Mr. Timmons was murdered. Indeed, the State argues

that the jury could have convicted appellant of felony murder regardless of who the shooter was, so long as the jury concluded that appellant participated in the burglary and that Mr. Timmons was killed in the course of that crime. This was an alternate theory, not an inconsistent theory, according to the State. As for the cases appellant cites, the State contends that *Sifrit* is inapposite because, unlike the circumstances surrounding appellant’s trial, that case involved separate trials and multiple defendants. The State also takes the position that *Cruz* is not applicable because it was actually the timing of the supplemental instruction, issued in response to a question from the jury during deliberation, that was problematic rather than the inclusion of an alternative theory of culpability.

We review a court’s decision as to the giving of a jury instruction for abuse of discretion. *See Hall v. State*, 437 Md. 534, 539 (2014). An abuse of discretion occurs where the decision under consideration “is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *Patterson v. State*, 229 Md. App. 630, 639 (2016) (quoting *McGhie v. State*, 224 Md. App. 286, 298 (2015), *aff’d*, 449 Md. 494 (2016)), *cert. denied*, 451 Md. 596 (2017). In reviewing jury instructions, the Court of Appeals has remarked that “so long as the law is fairly covered by the jury instructions, reviewing courts should not disturb them.” *Sail Zambezi, Ltd. v. Md. State Highway Admin.*, 217 Md. App. 138, 149 (2014) (quoting *Farley v. Allstate Ins. Co.*, 355 Md. 34, 46 (1999)). We “must examine ‘whether the requested instruction was a correct exposition of the law, whether that law was applicable in light of the evidence before the jury, and finally whether the substance of the requested instruction

was fairly covered by the instruction actually given.”” *Tharp v. State*, 129 Md. App. 319, 329 (1999) (quoting *Farley*, 355 Md. at 47), *aff’d*, 362 Md. 77 (2000).

Appellant is correct that the State’s main theory of the case was that appellant was the shooter. This is the version of events the State put forth in its opening statement, and the evidence the State presented at trial tended to go toward that theory. However, in response to the appellant’s objection that the felony murder instruction as worded injected an inconsistent new theory into the trial, the State noted that Knox made inconsistent statements as to how much he saw of Mr. Timmons’s death and who was responsible for it. Initially, Knox told the police that he was in the basement at the time of the shooting and did not see anything occur. Upon learning that a child had been shot during the crime, Knox gave a fuller version of events implicating appellant in the shooting. As the State argued before the trial court, this inconsistent statement could have given appellant the opportunity to advance the theory that it was Knox, the accomplice, not appellant, who pulled the trigger. This could have given the jury the opportunity to find as such. We agree with the State that the felony murder instruction addressed an alternative theory rooted in the evidence presented at trial, not an inconsistent one. Indeed, the basis of the State’s theory of the case was that Knox and appellant participated in a burglary of Timmons’s residence, in the course of which Timmons was killed. We, therefore, perceive no abuse of discretion in the trial court’s decision to give the instruction, which was a correct statement of the law governing felony murder.

As for the cases appellant relies on, neither is applicable here.

Appellant cites *Cruz v. State*, 407 Md. 202, 222 (2009) for the proposition that the eleventh hour insertion of a new theory of culpability is prejudicial to a criminal defendant. In *Cruz*, the State requested the trial court to instruct the jury as to the battery modality of second-degree assault. 407 Md. at 206-07. During deliberations, in response to a jury note, the court provided a supplemental instruction as to attempted battery. *Id.* at 207-08. The Court of Appeals concluded that it was an abuse of discretion to instruct the jury as to a new theory of the case in a supplemental instruction given during deliberations. *Id.* at 220. The Court wrote that “once the State locked into the battery theory of assault, and declined an instruction on the other theories, Cruz had a right to rely on the State’s elected theory of culpability and tailor his closing argument accordingly.” *Id.* at 222. Appellant suggests that like the defendant in *Cruz*, he was prejudiced by the State’s decision at the time of the jury instructions to insert into the case of a new theory, namely that Knox could have been the shooter. At that point in the trial, appellant argues, it was too late to elicit evidence to negate the State’s contention that either Knox or appellant killed Mr. Timmons.

However, *Cruz* is inapposite. The problems with the supplemental instruction in that case were: (1) Cruz did not have a meaningful opportunity to respond at all to the new theory of culpability presented to the jury by the court’s response to the note; and (2) the State had purposefully abandoned the theory of attempted battery when discussing jury instructions with the trial court. No such timing or abandonment issues are at play in this case. The State requested the felony murder instruction prior to the beginning of

deliberations, leaving appellant’s trial counsel the opportunity to respond during closing arguments.

In *Sifrit v. State*, 383 Md. 77, 101 (2004), the State presented factually inconsistent theories of the crime at separate trials for different defendants. Erika Sifrit was convicted of first-degree murder, second-degree murder, and theft charges for her actions in the deaths of two people. Her convictions followed her husband Benjamin Sifrit’s convictions for second-degree murder, first-degree assault, and accessory after the fact to two murders in an earlier, separate trial concerning the same events. *Id.* at 81. On appeal, Erika argued that the State presented inconsistent theories in her and her husband’s cases, based on different representations of evidence concerning the possession of the murder weapon in the two trials, the testimony of two witnesses, and evidence adduced as to the number of shots fired by both Sifrits. *Id.* at 106-07.

After reviewing relevant case law from other jurisdictions as to due process violations in the inconsistent presentation of cases, the Court of Appeals held: “[W]e are in accord with the courts that hold that a due process violation will only be found when the demonstrated inconsistency exists at the core of the State’s case.” *Id.* at 106. The Court continued:

Discrepancies based on rational inferences from ambiguous evidence will not support a due process violation provided the two theories are supported by consistent underlying facts. . . .The few courts that have found due process violations did so in cases where the inconsistencies were inherent to the State’s whole theory of the case or where the varying material facts were irreconcilable. It is this type of inconsistency that renders the conviction fundamentally unfair, thus violating due process.

*Id.* The Court concluded that “[n]one of the differences in the two trials alleged by Erika go to the State’s underlying theory of the case which remained consistent throughout both trials, which was that Benjamin and Erika committed the crimes together.” *Id.* at 107. As such, the Court affirmed Erika’s convictions. *Id.* at 82.

Appellant points to the Court’s acknowledgement that a due process violation may arise where the “demonstrated inconsistency exists at the core of the State’s case,” and urges us to extend that same concept to theories advanced by the State in a single trial. *Id.* at 106. However, his reliance on *Sifrit* is misplaced. That case involved multiple trials and multiple defendants. In its review of the law in *Sifrit*, the Court discussed many cases, all of which involved multiple defendants and multiple trials. *Id.* at 100-06. Moreover, as we have already discussed, we do not conclude that the State took inconsistent positions during this trial. In short, we decline appellant’s invitation to extend *Sifrit* to his case.

### **3. The Admissibility of Evidence Linking the Victim to the Black Guerilla Family**

At trial, appellant’s theory of the case was that Timmons was killed in retaliation for his activities as part of the Black Guerilla Family (“BGF”), a gang. Indeed, appellant posited that Timmons was the “minister of finance” of a BGF group led by his half-brother. Appellant maintained that Timmons’s BGF activities led to his death, pointing to alternative suspects named in a federal indictment of various alleged BGF members which was handed down the day after his murder and unsealed some weeks after that. At trial, appellant’s counsel sought to introduce the federal indictment into evidence so as to deflect blame to a potential murderer named in that document. Appellant also noted that part of

the indictment included the so-called BGF “code of conduct” for gang members, which included a section denoting punishments ranging from beatings to death for cooperating with law enforcement. Lastly, appellant sought to introduce a series of letters or writings found in Timmons’s home, which appellant’s counsel claimed were authored by Timmons and expressed a fear that there was a gang “hit” out for him. The trial court excluded the indictment and reserved a ruling on the writings.

Before this Court, appellant contends that the trial court’s actions infringed on his ability to present a defense. Appellant maintains that without the actual indictment, the code of conduct, and the letters, he could not adequately develop an alternative suspect. Accordingly, he argues that the court erred in excluding relevant, admissible evidence.

The State maintains that the court properly excluded these documents. As for the federal indictment, which included the BGF code of conduct, the State contends that it was irrelevant, mainly because it was handed down and made public after Timmons’s murder. Moreover, the State argues, appellant presented no evidence that Timmons cooperated with law enforcement, that Timmons was a “minister of finance” of BGF, or that anyone leaked the names in the indictment prior to it being unsealed. The State further notes that the court granted appellant great leeway in questioning Detectives Michael Baier and Ragland as to the FBI investigation into BGF.

As for the letters, the State contends that this issue was not preserved for appellate review because appellant never attempted to introduce them at trial. Moreover, the State maintains that appellant failed to properly authenticate the writings.



Ordinarily, “[a] trial court’s decision to admit or exclude evidence will not be disturbed in the absence of an abuse of discretion.” *Gasper v. Ruffin Hotel Corp. of Md., Inc.*, 183 Md. App. 211, 224 (2008), *aff’d*, 418 Md. 594 (2011). As to a defendant’s ability to present a defense, the Court of Appeals has remarked: “It is the adversarial system of justice which requires that the defendant be given every opportunity, within procedural and evidentiary boundaries, to present a defense.” *Kelly v. State*, 392 Md. 511, 533 (2006). A defendant may attempt to offer an alternative suspect, but “[t]he proffered evidence must be sufficiently relevant, rather than ‘cast[ing] a bare suspicion upon another.’” *Taneja v. State*, 231 Md. App. 1, 10 (2016) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)), *cert. denied*, 452 Md. 549 (2017). Indeed, we have noted that the right to present a defense is subject to two restrictions: “‘The first is that evidence that is not relevant to a material issue is inadmissible. The second is that, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.’” *Id.* at 11 (emphasis omitted) (quoting *Muhammad v. State*, 177 Md. App. 188, 274 (2007)).

*The Federal Indictment and BGF Code of Conduct*

Maryland Rule 5-401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Pursuant to Maryland Rule 5-402, irrelevant evidence is inadmissible. We review *de novo* whether

evidence is relevant. *See Wash. Metro. Area Transit Auth. v. Washington*, 210 Md. App. 439, 451 (2013).

In this case, we are persuaded that the federal indictment and the BGF code of conduct were irrelevant. The federal indictment was handed down the day after Timmons’s murder, and it was unsealed after that. Accordingly, we fail to see how the indictment would cause an alleged gang member named in the indictment to suspect that Timmons was cooperating with law enforcement. There was no evidence that the contents of the indictment were known to anyone outside of law enforcement circles before it was unsealed. Additionally, there was no evidence that Timmons was actually cooperating with law enforcement. Furthermore, appellant presented no evidence that Timmons was the “minister of finance” of a BGF group. Detective Baier, who worked in cooperation with the FBI to investigate the BGF, testified that Timmons might have been a named defendant in the federal indictment, but that Timmons was “[n]ot very” important in the gang. There was no evidence that there had been a “hit” ordered on Timmons as a result of the information in the indictment.

Despite its ruling, the court permitted appellant great leeway in questioning Detectives Baier and Ragland concerning BGF, even permitting counsel to question the detectives with the aid of the indictment. Indeed, Detective Baier was permitted to testify about some of the minor tasks Timmons performed at the request of his half-brother and the criminal acts that BGF undertook. As such, the jury was aware that Timmons may have had some

role in the gang, and appellant’s counsel was permitted to present his theory of the case in closing arguments.

In short, we are not persuaded that the court erred in excluding the federal indictment and evidence about the BGF code of conduct from evidence. They were irrelevant, and appellant presented no evidence beyond bare suspicion and speculation that an unknown gang member named in the indictment killed Timmons.

### *The Writings*

Prior to trial, appellant moved to introduce into evidence a collection of writings found in Timmons’s home. Appellant’s counsel argued that the writings referred to Timmons’s nickname of “Bussa” and made references to events in his life. Appellant’s counsel maintained that the writings were relevant because they referred to gang hits, snitches, and surveillance, suggesting that Timmons was aware of a hit against him. The State argued that the writings were “rap songs,” and authorship was unclear because there appeared to be at least two different handwriting styles. The court reserved ruling on the admissibility of the letters, permitting appellant’s counsel to lay a foundation as to authenticity. Appellant’s counsel did not attempt to lay this foundation later, nor did appellant attempt to introduce the writings at trial.

Maryland Rule 5-901 provides that evidence must be authenticated prior to being admitted, meaning that there must be “evidence sufficient to support a finding that the matter in question is what its proponent claims.” Writings may be authenticated by the testimony of someone familiar with the document, the testimony of someone familiar with

the purported author’s handwriting, or comparison with a known handwriting exemplar. *Sublet v. State*, 442 Md. 632, 658-59 (2015) (permitting authentication of writings by the “reply letter doctrine” or through testimony demonstrating that the writing “contain[s] circumstantial evidence indicating the identity of its author[.]”).

Although appellant posited that the child might have been able to authenticate the writings as his father’s handwriting, appellant did not attempt to have the child do so. Furthermore, appellant never attempted to introduce the writings into evidence at trial. As such, we conclude that appellant never made an effort to authenticate the writings after the court reserved ruling on admissibility, and, accordingly, this issue is not preserved. *See* Rule 8-131(a).

#### **4. Appellant’s Efforts to Impeach the Credibility of the Child**

Prior to trial, appellant’s counsel sought permission to use a psychiatric evaluation of the child in order to impeach his testimony. At some point after witnessing Timmons’s death, the child was evaluated at the Villa Maria psychiatric hospital. The child’s mother reported that the child had a history of setting fires, stealing, and making false accusations of sexual abuse. Appellant’s counsel maintained that this information was admissible evidence of the child’s prior bad acts pursuant to Maryland Rule 5-608(b) and could be used to impeach the child. The trial court denied appellant’s request, concluding that the mother’s reports were hearsay within hearsay and that there was “no substance” to these statements. Rather, the child’s mother was “complaining about him” and never referred to a specific prior bad act.

To this Court, appellant contends that these statements were admissible to impeach the child's testimony. Appellant maintains that the court violated his right under the Confrontation Clause because he was not permitted to adequately question the child's credibility. Appellant asserts that there was a reasonable factual basis for the mother's report, and cross-examining the child was central to appellant's case due to the importance of the child's testimony in the State's case.

The State maintains that the court properly refused appellant's request to impeach the child with the psychiatric evaluation. The State contends that appellant lacked a reasonable factual basis that the child actually committed the acts his mother reported. The State also argues that the mother's report did not provide any details about the alleged misconduct. Moreover, the State contends that the alleged misconduct, even if sufficiently detailed, did not relate to the child's credibility.

Rule 5-608(b) permits the impeachment of witnesses through prior bad acts not resulting in a conviction in order to demonstrate that the witness is untruthful: "The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness." Importantly, the party seeking to impeach the witness must, upon objection, "establish[] a reasonable factual basis for asserting that the conduct of the witness occurred." Rule 5-608(b). The Court of Appeals has remarked that there must be a reasonable factual basis for the prior bad act because "the primary purpose of the inquiry is not to harass or embarrass the witness, and [also so] that there is little likelihood of

obscuring the issue on trial[.]” *Thomas v. State*, 422 Md. 67, 77 (2011) (quoting *State v. Cox*, 298 Md. 173, 179 (1983)). Stated another way, to accept an accusation of a prior bad act without a reasonable factual basis that it occurred ““would be tantamount to accepting someone else’s assertion of the witness’[s] guilt and pure hearsay.”” *Id.* (quoting *Cox*, 298 Md. at 180). We review a court’s determination as to prior bad act impeachment evidence for an abuse of discretion. *See id.* at 73.

The court did not abuse its discretion in denying appellant’s request to use the mother’s statements in the psychiatric evaluation to impeach the child. Appellant did not proffer an adequate reasonable factual basis to the trial court that the child actually committed the acts the mother reported, nor has he done so on appeal. Furthermore, the court noted that the mother may have been a source of the child’s difficulties, and the mother may have been complaining to the psychiatric evaluator. The mother offered no specific details as to when or how the child committed the various acts she reported. This sort of non-specific hearsay evidence is not a proper basis for impeaching a witness, and the trial court did not abuse its discretion in declining to permit appellant to use it to impeach the child’s credibility. *Thomas v. State*, 422 Md. at 79 (““A hearsay accusation of guilt has little logical relevance to the witness’[s] credibility.”” (quoting *Pantazes v. State*, 376 Md. 661, 691 (2003))).

### **5. The State’s Closing Argument**

In rebuttal closing arguments, the State argued, in part, as follows:

When I started the beginning of this trial and I said the most important thing you brought here was your common sense and your every-day experience, I knew what

the burden was in this case. You were all selected because you are reasonable people from this community with common sense, the ability to listen to all of the evidence and make a decision. So when you go back to the jury room, ask yourself, “What’s reasonable?”

Is it reasonable to believe that Joseph Oglesby had never once in his entire life, according to his own words, had never once been to that house? It just so happens the first day ever he goes to the home of his lifelong friend, this happens? Did he just get stuck in the basement? Is that reasonable to believe, that this is just a terrible coincidence?

Appellant’s counsel objected, arguing that the State was mischaracterizing the burden of proof. Appellant also requested the court to re-instruct the jury as to reasonable doubt. The court overruled the objection and declined to re-instruct the jury.

Appellant contends on appeal that the trial court permitted the State to offer an improper closing argument in that the State impermissibly mischaracterized the reasonable doubt standard. Appellant relies on *Carrero-Vasquez v. State*, 210 Md. App. 504 (2013), to argue that the State’s arguments in this case ought to compel this Court to reverse his convictions.

The State maintains that the prosecutor did not mischaracterize the reasonable doubt standard and was rhetorically asking the jury if the defense’s theory of the events was “reasonable to believe.” Essentially, the State was challenging appellant’s statement to the police, which is within the realm of permissible argument. The State also argues that if the prosecutor erred by offering this argument, it was not sufficiently improper to lead to a new trial for appellant.

The Court of Appeals has remarked on the limits of closing arguments as follows:

The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom. In this regard, generally, . . . the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused’s action and conduct if the evidence supports his comments, as is accused’s counsel to comment on the nature of the evidence and the character of witnesses which the prosecution produces.

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

*State v. Gutierrez*, 446 Md. 221, 242 (2016) (quoting *Donaldson v. State*, 416 Md. 467, 488-89 (2010)) (quotation marks omitted).

Whether the prosecutor oversteps the bounds of permissible argument is left to the discretion of the trial court. *See Paige v. State*, 222 Md. App. 190, 210 (2015).

We are not persuaded that the court abused its discretion in permitting the prosecutor’s rebuttal arguments in this case. The prosecutor’s comments in *Carrero-Vasquez* are not analogous to those appellant finds objectionable here. In *Carrero-Vasquez*, the prosecutor, while speaking about the reasonable doubt standard, said, “Reasonable doubt. Trust your gut. If your gut says I think he’s guilty, that’s reasonable.” 210 Md. App. at 510. Although the State argued that the prosecutor was merely commenting on the jury’s assessment of witnesses, this Court concluded that the prosecutor’s remark was improper because it mischaracterized the reasonable doubt standard, reducing it to a “gut” feeling. *Id.* at 510-

11.



In this case, by contrast, the prosecutor was asking the jury to assess the reasonableness of appellant's statement to the police. The prosecutor did not mischaracterize the reasonable doubt standard, and we, therefore, find no abuse of discretion in the court's decision to overrule the objection and to refuse to re-instruct the jury.

**THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE AFFIRMED. COSTS TO BE PAID BY APPELLANT.**