Circuit Court for Wicomico County
Case No.: C-22-CR-20-000559

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1880

September Term, 2022

JERROD TERRENCE TIMMONS

v.

STATE OF MARYLAND

Leahy,
Reed,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: October 30, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Jerrod Timmons ("Appellant") was indicted in November 2020, in the Circuit Court for Wicomico County, Maryland, and charged with multiple counts of second-degree rape, third-degree sexual offense, and sexual abuse of a minor for acts that allegedly took place between July 1, 2014, and December 5, 2016. After the first trial ended in a mistrial, Appellant was convicted by a jury on September 20, 2022, of two counts of sexual abuse of a minor and two counts of third-degree sexual offense. He was sentenced to an aggregate fifteen (15) years' incarceration. In this timely appeal, Appellant presents the following questions:

> 1. "Did the trial court err in denying Appellant's motion to dismiss on constitutional speedy trial grounds?"
>
> 2. "Did the trial court abuse its discretion in denying Appellant's motion for mistrial in response to improper remarks made during the State's rebuttal closing argument?"

For the reasons explained in our discussion below, we discern no error or abuse of discretion by the trial court. We shall affirm.

BACKGROUND[1]

Seventeen-year-old V.[2] testified that, beginning when she was either eight- or nine-years-old and continuing throughout elementary and middle school, Appellant was living

[1] Because Appellant does not challenge the sufficiency of the evidence to sustain his convictions, we will provide only a brief background of the facts of the case to provide context for our discussion of the issues presented. *Lovelace v. State*, 214 Md. App. 512, 518, n.1 (2013).

[2] Under Md. Rule 8-125, this Court shall not identify the victim of a crime, or related individuals, except by his or her initials, if the victim was a minor child at the time of the crime, or if the alleged crime would require the defendant to register as a sex offender if

[Footnote Continued]

in the same household with her, her mother, and her mother's boyfriend. V. related that Appellant was a friend of her mother's boyfriend, and that he slept on the couch. Appellant was in charge of babysitting V. while her mother was at work.

V. told the jury about several incidents on which the charges against Appellant were based. She testified that the first incident occurred when she was "[]like 8 or 9" on the morning after the Fourth of July when everyone was asleep. V. walked into the living room and passed by Appellant on the living room couch. As she did so, Appellant reached under her dress and put his fingers in her vagina. V. believed this happened during the summer between fourth and fifth grade. And, although she was not certain, V. believed Appellant touched her vagina in this manner one other time.

V. further testified that Appellant "used to sneak into my room late at night when everybody was asleep, and he used to just rub" her legs and butt. She also recounted that Appellant made her touch his penis one time when they were sitting on the couch watching television.

Another time, V. described how Appellant pulled her pants and her underwear down and started to rub her "legs" and her "butt and stuff" while they were sitting on the couch watching television. Upon further direct examination, V. clarified that Appellant

convicted. Md. Rule 8-125 (a), (b)(1). The Rule further provides that this Court shall not include other information from which the victim could be identified. Md. Rule 8-125(b)(2). We choose to identify the victim in this case by the initial "V.," which has no correlation to her actual name.

exposed his penis by taking his pants down and then placing his penis inside her vagina. V. testified that Appellant placed his penis in her vagina other times as well.

In response to the prosecutor's question, asking V. if Appellant ever threatened her, V. responded that Appellant kept a gun in the house and showed it to her. Although he never directly threatened her, V. testified that "I felt like if I said anything then he would shoot me" with that same gun. She never told anyone what happened while Appellant lived with them because she was "scared."[3]

V. testified she could not talk to her mother about these incidents and that she first reported them to her best friend's mother, S.B., when she was in eighth grade. She told S.B. that a "man that used to live on my couch had raped me when I was younger." After this, V. told her mother, and her mother told her that she needed to "press charges" against Appellant. V. testified that "I didn't want to because I didn't want to go through this," and that "I didn't want to remember it." After these incidents were reported to authorities around June 2020, V. and her family moved to Texas.

S.B. confirmed that V. was her daughter's best friend and that, around April 2020, V. came over to her house to watch television. During the visit, S.B. asked the girls if they had ever been "molested," and V. replied that she had. V. told her that, when she was in

[3] When V. was interviewed by Angela Brewington at the Child Advocacy Center, she told Brewington that she was threatened with a gun and was told she would be shot if she reported the incidents. However, V. agreed during cross-examination that her statement to Brewington about the threat with the gun was false and that she made that allegation "because I thought it would get him more time in jail, and he wouldn't come out."

eighth grade, Appellant came into the bathroom, touched her inappropriately, and asked her to touch his penis. S.B. clarified, on cross-examination, that V. told her that Appellant "had her touch his penis[.]" S.B. reported this to V.'s mother. S.B. also testified, on further cross-examination, that V. told her that Appellant had "sexual intercourse" with her.[4]

Detective Daniel Schultz, of the Wicomico County Sheriff's Office and assigned to the Child Advocacy Center, interviewed Appellant on August 28, 2020. Appellant confirmed that he lived in the same household with V. during the relevant timeframe, and would babysit her on occasion. Appellant told him that V. was "sexually active," and that they had "sexual conversations." He also "mentioned a time that she tried to grab his dick. He said she would play like that sometimes."

Detective Schultz then referred to a transcript of the interview with Appellant, identified, but not admitted, as State's Exhibit Number 2. Appellant claimed that V. made the allegations against him because he "turn[ed] her down." The detective testified that Appellant stated that he referred to "her physically touching him. He would tell her to stop, don't do that stuff" meaning that "she was messing with him."

Detective Schultz also testified that Appellant originally denied that V. ever saw his penis. The detective then asked Appellant why he thought V. could describe his penis.[5]

[4] V.'s mother, S.P., confirmed that Appellant lived in the household for approximately three and a half years and that he would babysit V. when she was at work or otherwise not at home. S.B. told S.P. about V.'s report in June 2020. She also confirmed that Appellant had a gun.

[5] On cross-examination, Detective Schultz agreed that he had no information that V. could describe Appellant's penis, "[o]ther than the allegation of sex" between the two.

At that point, Appellant claimed that V. walked in on him taking a shower, pulled the curtain back, later tried to take his towel off, and tried to touch his penis. The detective further testified that Appellant denied V.'s allegations.

The prosecutor then asked Detective Schultz, "how did him alleging that she grabbed his penis come to be discussed?" The detective did not recall but agreed that it probably originated from his questions. After additional discussion about Appellant's admission that V. saw his penis in the shower, the detective was asked about Appellant stating that "they had sort of like a touchy feely, there was a lot of touchy feely things happening," and Detective Schultz confirmed, "[t]hat's how he described it." The detective's direct examination concluded with him confirming that he asked Appellant if he ever had sex with V., and Appellant replied "I ain't had sex that I know."

We will supplement the relevant background facts in our discussion of the issues.

DISCUSSION

I.

SPEEDY TRIAL

Appellant first contends the court erred in denying his motion to dismiss because of a lack of a speedy trial. The State agrees that the length of delay, amounting to approximately nineteen (19) months, was of constitutional dimension. Both sides also agree that the majority of that delay was due to court closures during the COVID-19 pandemic. They disagree, however, on the weight to be assessed to the various reasons for the overall delay and the balance to be struck under the factors as enumerated in *Barker v.*

Wingo, 407 U.S. 514 (1972), and its progeny. Before we consider the parties' arguments, we review the timeline of pertinent events.[6]

A. Timeline

November 16, 2020 – *Indictment filed* – Appellant was charged with multiple counts of second-degree rape, third-degree sexual offense, and sexual abuse of a minor. Arrest warrant issued.[7]

November 20, 2020 – *Arrest* – Appellant was arrested.

[6] During much of the time this case was pending, Maryland courts were operating under emergency protocols and were closed for extended periods of time due to the COVID-19 pandemic. *See Murphy v. Liberty Mut. Ins. Co.*, 478 Md. 333, 351-63 (2022) (describing the effect of the COVID pandemic on Maryland courts and the administrative orders issued by the Chief Judge of the Maryland Supreme Court in response to the pandemic). For a complete list of orders and the timeline, go to the following websites, referred to hereinafter collectively as "COVID-19 Orders and Timeline":

https://mdcourts.gov/sites/default/files/import/coronavirus/marylandjudiciarycovid19timeline.pdf

https://www.mdcourts.gov/coronavirusorders

The "phases" referenced in the orders and timeline are explained at the following link: https://www.mdcourts.gov/coronavirusphasedreopening

To review a summary of the history of the COVID-19 pandemic, as set forth by the Centers for Disease Control and Prevention ("CDC"), go to the following link: https://www.cdc.gov/museum/timeline/covid19.html

[7] On November 12, 2020, Chief Judge Barbera issued administrative orders returning the Maryland judiciary to Phase III operations until December 31, 2020. *See* COVID-19 Orders and Timeline. *See also Murphy v. Liberty Mut. Ins. Co.*, 478 Md. 333, 341–63 (2022) (reviewing the powers of the Chief Justice of the Maryland Supreme Court to issue administrative orders during the COVID-19 pandemic). Among other things, the orders suspended jury trials and other criminal matters until January 4, 2021. *See* COVID-19 Orders and Timeline.

November 23, 2020 – *Initial Appearance of Appellant* (via videoconferencing, with counsel present for limited purposes) – Appellant was held without bond.[8]

December 22, 2020 – *Pleadings - Plea and Election of Speedy Trial by Jury filed.* Appellant filed motions pursuant to Md. Rule 4-252, including argument of an alleged violation of speedy trial. Defense counsel filed an initial appearance.[9]

May 3, 2021 – *Assignment* – The pre-trial conference is set for September 15, 2021, and trial dates are set for September 22-23, 2021. Witnesses are served.

August 13, 2021 – *Motions hearing* – Appellant was not present – hearing postponed "to allow Defendant to appear."

August 20, 2021 – *Motions hearing* – Appellant was present via videoconference – postponed "to allow Counsel to make contact with Defendant"

August 27, 2021 – *Motions hearing* – Appellant was present via videoconference – motions withdrawn.

September 14, 2021 – *State's Motion to Postpone Pre-Trial Conference and Trial Date filed* – The State requests postponement of the pre-trial Conference from September 15, 2021, to November 15, 2021, and postponement of trial from September 22-23, 2021,

[8] On November 24, 2020, Chief Judge Barbera ordered the Maryland judiciary to move back to Phase II operations until January 15, 2021, suspended jury trials until February 16, 2021, and tolled or extended other related deadlines. *See* COVID-19 Orders and Timeline.

[9] On December 22, 2020, Chief Judge Barbera ordered Phase II operations extended until March 14, 2021, jury trials suspended until April 23, 2021, and tolled related deadlines. *See* COVID-19 Orders and Timeline. On February 16, 2021, Chief Judge Barbera ordered Phase IV Operations, to include reopening the courts, to resume on March 15, 2021, and Phase V Operations, including jury trials, to resume on April 26, 2021. *Id.*

to November 29-30, 2021. The State avers that "S.B., who is a necessary State's witness, is unavailable on the trial dates due to being out of town between the dates of September 18-28, 2021." Defense Counsel objects to the postponement.

September 15, 2021 – *Hearing on State's Motion to Postpone*. Appellant appears via Zoom from quarantine at the Wicomico County Detention Center. The Court finds that S.B. is a necessary witness but that "it does not appear that her unavailability is something that can't be resolved" considering that she was under subpoena since May 14, 2021. Thus, the State's Motion was denied. The court further notes that Appellant is in quarantine and, upon inquiry with the jail, the court observed that, at that time, it was not clear if Appellant could be released from quarantine and be present for trial. Pre-trial conference held and concluded.

September 21, 2021 – *Order of Court postponing trial*. Finding as follows:

> On September 15, 2021, the Wicomico County Detention Center informed the Court that the Defendant was currently in quarantine due to a COVID-19 exposure and therefore his pre-trial conference was held with the Defendant appearing remotely from the detention center. On September 21, 2021, the Wicomico County Detention Center informed the Court that the Defendant is still in quarantine until at least October 2, 2021. Since the Defendant cannot appear in person for his jury trial scheduled on September 22, 2021 and September 23, 2021, the Court finds good cause to administratively postpone the jury trial.

September 29, 2021 – *Assignment* – Subpoenas were re-issued to witnesses, informing them trial was set for November 29-30, 2021.

October 23, 2021 – *Original* Hicks *date*.[10]

November 18, 2021 – *State's Motion to Postpone Trial Dates* – State avers that it learned, on November 15, 2021, that the complainant and her guardian moved to Texas, and that "makes travel for the current trial dates difficult especially with the upcoming Thanksgiving holiday." State also avers that S.B., a necessary witness, has surgery scheduled for November 19, 2021.

November 19, 2021 – *Hearing on State's Motion to Postpone* – The State proffered as follows:

> We are here for pretrial this morning in Mr. Timmons' case. I did file a motion to postpone the trial date, which are currently scheduled for November 29th and 30th. As I noted in my motion, the victim was believed to be still residing in Salisbury. We now confirmed recently that she's living in Texas. They are, however, cooperative and willing to return. I think we paid for their flight back. Obviously there's limited time for to us do so at this point.
>
> We also had contact with a State's witness who is essential, she was the person that the child initially made the disclosure to. She is having surgery out of state on the scheduled date. She's expected to not be available until early December, I think she told me December 5th was maybe sort of the date that she'd be able to attend trial from that point forward. The only dates that we were able to obtain from assignment are February 16th and 17th due to counsel's unavailability, both [Defense Counsel] and myself are scheduled for trial throughout January and December. So I think those were the closest dates we were able to obtain for Mr. Timmons' new trial date –

[10] *See generally*, *State v. Hicks*, 285 Md. 310 (1979); *see also* Md. Rule 4-271; Maryland Code (2001, 2018 Repl. Vol.), Criminal Procedure Article ("CP"), § 6-103. In *Timberlake v. State*, 257 Md. App. 129, 136, 149 (2023), this Court concluded that circuit court's finding that there was good cause to go beyond *Hicks* due to COVID-19 closures was not an abuse of discretion. *Timberlake*, 257 Md. App. at 136, 149.

Defense Counsel opposed the State's motion, asserting as follows:

> [T]his case dates in Circuit Court from my appearance going in in December of last year. Mr. Timmons has been sitting through the height of the pandemic for more than a year at this point, or roughly a year, let's say it that way. It ought not be further postponed, especially given the procedural history.

After hearing about Appellant's prior criminal history, the court inquired if there was an address where he could reside. Appellant informed the court that he could stay with his daughter's mother. The court then postponed the trial to February 16-17, 2022, and ordered that Appellant would be released on his own recognizance, with house arrest and electronic monitoring at a specific address.

December 6, 2021 – *Assignment* – Subpoenas were reissued for new trial dates of February 16-17, 2022.

December 28, 2021 – *Letter from Department of Corrections to Court* – The Court was informed that the resident of the address provided by Appellant at the November 19, 2021 hearing will not permit Appellant to reside at that location. On this date, Appellant was in custody at the Wicomico County Detention Center.

January 10, 2022 – *Hearing on Pretrial Release* – The court confirmed that Appellant could not stay at the address provided. Held without bond.[11]

February 8, 2022 – *State's Motion to Postpone Pre-Trial Conference* – The State informed the court that "a brief postponement would be beneficial to assess whether the

[11] On January 14, 2022, Chief Judge Getty extended Phase III operations until March 6, 2022, with jury trials scheduled to resume on March 7, 2022. Statutory and rule deadlines tolled. *See* COVID-19 Orders and Timeline.

victim intends on returning [from Texas] to Maryland for trial." There was no objection by Defense Counsel to resetting the conference until February 15, 2022.

February 15, 2022 – *Pre-Trial Conference/Postponement Hearing* – The State informed the court that the complainant will return to Maryland from Texas to appear at trial. The State made a plea offer to Appellant. The State indicated that the Assignment Office had provided new potential trial dates for either June 27-28, 2022, or June 28-29, 2022. Defense Counsel responded as follows:

> I want to make clear that I don't have a preference as between those dates, I don't prefer them to each other, I don't like them at all. I want to make sure that I put on the record at present that this case has been long delayed, in substantial part because of the pandemic. But I would note on the record that I am making an oral motion to dismiss for denial of my client's right to a speedy trial. But I will be following that up in writing.
>
> * * *
>
> Particularly given what is going to be an additional substantial delay. We're in the month of February, and we're talking about a long time from now. If Hicks were not implicated or were not undone, was not undone because of the pandemic, it would have long since run and run and run. And now the victim is nowhere close physically. So, again, I'll follow it up in writing, but I just want to make sure, because I know my client wants me to make clear, that we view this as ridiculous. Particularly if we come back on this new trial date and we're still wearing masks and still doing all the same things that we could be doing tomorrow, so.
>
> I'll follow up in writing.

The Court responded that it was currently operating under the January 14, 2022 Administrative Order postponing jury trials until March 6, 2022. The Court postponed the trial until June 27-28, 2022. The Pre-Trial Conference reset to March 4, 2022.

March 4, 2022 – *Pre-Trial Conference* – Appellant rejected the State's plea offer. Pre-Trial Conference was reset for June 21, 2022.

March 18, 2022 – *Assignment* – Subpoenas were reissued for Trial on June 27-28, 2022.

March 21, 2022 – *Motion to Dismiss for Denial of Client's Right to a Speedy Trial filed* – State's Response to Defendant's Motion to Dismiss.[12]

May 18, 2022 – *Hearing on Appellant's Motion to Dismiss* – The court ultimately denied Appellant's motion. Before doing so, the court heard arguments from both parties.

Defense Counsel began by observing that Appellant had been continuously incarcerated since November 20, 2020. Recognizing that the court ordered him released during this time, but that that release was not possible because Appellant could not provide a verifiable address that would accept him, Counsel stated that the reasons for the delay in this case were "in fairness, mostly, quote, unquote, due to the pandemic, but also due to the unavailability of the State's primary witness and/or their inability to secure that witness for purposes of trial." Counsel continued:

> Mr. Timmons is in a little bit of a different situation than individuals who would have made this argument in the past having spent 19 or 20 months in custody pretrial, in that during the period of time that he spent in the County Jail pretrial, he was subjected to repeated and lengthy multi-month 23-and-1 lockdowns, quarantining at the jail, again, for obvious reasons, to try to minimize the impact of the COVID-19 pandemic on the jail population.

[12] On March 28, 2022, Chief Judge Getty lifted the COVID-19 Health emergency. *See* COVID-19 Orders and Timeline. Statutory and Rules deadlines were tolled for the following periods during the emergency: March 16, 2020 through October 4, 2020; November 16, 2020 through April 25, 2021; and December 29, 2021 through March 6, 2022. *Id*.

> Notably, Mr. Timmons does have anxiety for which he takes medication, one pill twice daily. That anxiety fortuitously never got to the point of full-blown depression, suicidal ideation, or anything more serious, but it has been a real experience for Mr. Timmons during the period of time he's been in jail pretrial.
>
> This is, again, notable because we're not dealing with allegations that came from 2020 when he was arrested or 2019 or 2018 or 2017. We're dealing with five, six, seven years of delayed disclosure allegations dating from July of 2014 to December of 2016, for which now the State has been granted more than one postponement for the absence of their victim.

Acknowledging that one of the State's requests for a postponement was denied, and that Appellant was only exposed to COVID-19 and never contracted the disease, Defense Counsel asked the court "to dismiss the case because of the passage of time, because of the mental and emotional hardship that's been placed on Mr. Timmons," or in the alternative, to release him on his own recognizance pending further proceedings.

The State responded that the length of the delay in this case was primarily due to the pandemic and Appellant's exposure to COVID-19. The remaining delay of 79 days, the State continued, was attributable to the State because its witnesses were unavailable, but that delay was arguably neutral. The State concluded:

> You know, in the dated case law it says it's good cause when the State is missing a necessary witness, the victim in this case. I believe the, you know, prejudice alleged, I don't think it's anything specific. There's nothing been alleged that's a specific detriment to, like, to the Defense's case.
>
> I think in those situations, the Appellate Courts have found that when there's not a specific, you know, detrimental delay, other, you know, instances of prejudice such as anxiety or pretrial incarceration are not weighed as heavily. And, you know, the balancing test goes in favor of not dismissing.

After hearing a short rebuttal from Defense Counsel, the court denied the motion to dismiss, finding as follows:

All right. So the Court, in considering the Motion to Dismiss, considers the length of the delay -- the four factors that are laid out, the length of the delay, the reason for the delay, the Defendant's assertion of his right, and prejudice to the Defendant.

The Court will note, in analyzing the prejudice to the Defendant, the Court looks at, you know, you're looking at interests such as preventing oppressive pretrial incarceration, minimizing anxiety and concern of the accused, and to limit the possibility that the Defense will be impaired. And, generally, as stated, it's the prejudice to the Defense and the fact that the defendants would be impaired, which sort of weighs heaviest in the prejudice category.

The Court will note that the length of the delay in this part is triggered, I think, having, you know, the period that's over a year is the triggering mechanism, which then requires the Court to go to further analysis for the reasons of the delay. The Court will note the delay of over one year has been held by the courts to be of the length of time that would trigger further analysis.

The reasons for the delay are, while there was one postponement specifically attributable to the State as it relates to not having a witness present, the other postponements are attributable to the Judiciary, or the State, as [Defense Counsel] argues. And I understand that at some point, as it should, a case will go up to validate or to invalidate the actions taken by the Chief Judge in terms of her response to the COVID pandemic and the steps that she took.

There have been some cases that have already gone up. The Court of Appeals, and specifically her actions, were affirmed. I'm not sure exactly in this context or in the context that [Defense Counsel] is arguing, and specifically sort of tying the Judiciary to the Executive Branch in terms of moving in lockstep and making it, the Court's actions being a State action versus otherwise.

The Court will note that, as I've stated before, there's case law out there that discusses, specifically Hurricane Katrina and the actions courts took in light of that, the effect that that had on speedy trial rights and prejudice.

The Court would note that I think, the reasons for the delay I'm not going to attribute, other than the one postponement to the State's Attorney's Office, they were following administrative orders from the Court. Actually, they didn't really have a say in it as I was signing the orders to postpone the case is pursuant to the administrative order from the Court of Appeals.

> The Defendant definitely has asserted his right in this case. And when we look at the prejudice, the Court would note that I in no way want to minimize the anxiety or concern of the accused, especially defendants who have been incarcerated through what is a time that, in my 51 years, we've never had to experience in terms of a global pandemic and the effect that that's had on, not just our community but specifically incarcerated individuals.
>
> And the Court will note that, obviously, he has been incarcerated for a long period of time. The Court will note that, in looking at the last factors, that, while realizing that the passage of time in and of itself can be an impairment, the Court will note, in light of the reasons for the delay being mostly attributable to the COVID pandemic, the idea that the lack of sort of specific prejudice in this case in terms of impairing the defense, the Court is going to deny the Motion to Dismiss.

June 23, 2022 – *Pre-Trial Conference*.

June 27, 2022 – *Jury Trial* – A mistrial was granted on evidentiary grounds. Subpoenas were re-issued for retrial on September 19-20, 2022.

September 19, 2022 – *Jury Trial*

September 20, 2022 – *Jury Trial* – Appellant was convicted of two counts of sexual abuse of a minor and two counts of third-degree sexual offense.

December 09, 2022 – *Sentencing* – Appellant was sentenced to fifteen years' incarceration.

B. Legal Framework and Standard of Review

The Sixth Amendment, made applicable to the states by the Fourteenth Amendment, guarantees, among other things, a criminal defendant's right to a speedy trial. *Howard v. State*, 440 Md. 427, 447 & n.13 (2014). Article 21 of the Maryland Declaration of Rights contains a substantially similar guarantee. *Id*. at 447. In reviewing a trial court's denial of a motion to dismiss for a claimed speedy trial violation, we accept the court's factual

findings unless clearly erroneous, *Glover v. State*, 368 Md. 211, 221 (2002), but we review "without deference" its "conclusion as to whether a defendant's constitutional right to a speedy trial was violated." *Howard*, 440 Md. at 446-47 (citing *Glover*, 368 Md. at 220).

In performing that review, we must apply the four-factor balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *See, e.g.*, *Howard*, 440 Md. at 447; *Glover*, 368 Md. at 221-22. Those factors are the length of delay, the reason for the delay, the defendant's assertion of the right to a speedy trial, and the prejudice to the defendant. *Barker*, 407 U.S. at 530. "'None of these factors is, in itself, either necessary or sufficient to find a violation of the speedy trial right; instead, they are related factors and must be considered together with such other circumstances as may be relevant.'" *Phillips v. State*, 246 Md. App. 40, 56 (2020) (quoting *Nottingham v. State*, 227 Md. App. 592, 613 (2016)). "There is no bright-line rule to determine whether a defendant's right to a speedy trial had been violated," rather courts must use "a balancing test" to weigh the actions of the defendant and the prosecution. *Id*.

C. Analysis

1. Length of Delay

The Supreme Court of Maryland "has noted that the first factor, the length of the delay, is a 'double enquiry,' because a delay of sufficient length is first required to trigger a speedy trial analysis, and the length of the delay is then considered as one of the factors within that analysis." *State v. Kanneh*, 403 Md. 678, 688 (2008). "The length of delay, in and of itself, is not a weighty factor." *Glover*, 368 Md. at 225. It is measured "from the earlier of the date of arrest, filing of indictment, or other formal charges, to the date of

trial." *Greene v. State*, 237 Md. App. 502, 512-13 (2018) (citing *United States v. Marion*, 404 U.S. 307, 320-21 (1971); *In re Thomas J.*, 372 Md. 50, 73 (2002)). *Accord Divver v. State*, 356 Md. 379, 388-89 (1999). "Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992).[13]

Here, the delay began on November 16, 2020, the day Appellant was indicted. *See Greene*, 237 Md. App. at 512-13. His first trial date was on June 27, 2022. *See id.* at 519 (explaining that the end date, for speedy trial length of delay analysis, is the date of trial). This delay of just over nineteen (19) months was presumptively prejudicial and of constitutional dimension. Thus, the length of delay meets the threshold requiring further analysis and balancing.

As previously mentioned, the State agrees that the delay was sufficient to trigger the *Barker* analysis, but Appellant presses that the "delay weighed heavily in Appellant's favor." The State argues that such a delay is not enough to create a speedy trial violation and cites to *Wilson v. State*, 281 Md. 640, 651 (1978), where, after balancing the *Barker* factors to a delay of four years and two months in that case, the Supreme Court concluded that the delay did not constitute a speedy trial violation. We agree with the State that, once the delay is determined to be significant enough to be of constitutional dimension, the

[13] In this context, the phrase "presumptively prejudicial" refers to prejudice sufficient to trigger a speedy trial analysis—not to the ultimate question of whether the constitutional right to a speedy trial has been violated. *See Griffin v. State*, 262 Md. App. 103, 160-62 (2024).

duration of the delay is then correlated to the other factors in the *Barker* analysis. As we recently observed, about the Supreme Court's instruction on this point in *Glover*:

> The opinion stressed that although fourteen months had been adequate as a trigger mechanism, it was not adequate to be a "weighty factor" on the ultimate merits of a speedy trial violation:
>
> > The fourteen-month delay certainly requires constitutional scrutiny. It is not so overwhelming, however, as to potentially override the other factors. The length of delay, in and of itself is not a weighty factor.
>
> [*Glover*,] 368 Md. at 224-25.

Griffin v. State, 262 Md. App. 103, 159 (2024) (emphasis removed). Accordingly, at this stage, we consider the length of delay in conjunction with the other *Barker* factors.

2. Reasons for the Delay

"Closely related to length of delay is the State's reason justifying a delay with different weights being assigned to different reasons." *Phillips*, 246 Md. App. at 59. The Supreme Court stated in *Barker*:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

407 U.S. at 531 (footnote omitted).

Here, the original trial date of September 22, 2021, was postponed three times before Appellant's first trial on June 27, 2022, ended in a mistrial due to manifest necessity. The reasons for the postponements and resulting delay are explained as follows.

November 16, 2020 to September 22, 2021 – *First scheduled trial date* – This period of approximately ten months and six days was spent in pre-trial preparation and is accorded neutral status in our analysis. *See White v. State*, 223 Md. App. 353, 384 (2015) ("The span of time from charging to the first scheduled trial date is necessary for the orderly administration of justice, and is accorded neutral status." (quoting *Howell v. State*, 87 Md. App. 57, 82 (1991))). *Accord Hallowell v. State*, 235 Md. App. 484, 515 (2018).

September 22, 2021 to November 29, 2021 – *Second scheduled trial date* – On September 14, 2021, the State filed a motion to postpone the trial date because one of its witnesses, S.B., was unavailable. That motion was denied. However, the court learned on September 15, 2021 that Appellant was in quarantine due to COVID-19 exposure. Good cause was found to postpone the trial until November 29, 2021. This resulted in a delay of two months and seven days.

The State contends that this delay "was no fault of the State's, and should be accorded either neutral status or should weigh minimally against Appellant, who caused the delay albeit inadvertently." Appellant replies that "[i]t strains credulity that the State would attribute to Appellant, even 'minimally,' the jail's decision to quarantine him after his exposure to COVID, which incarcerated awaiting trial, in the midst of a deadly nationwide pandemic."

There does not appear to be a Maryland case directly addressing whether a delay caused during the COVID-19 pandemic is considered a neutral reason or should be attributed to a party in a constitutional speedy trial claim. In considering this reason, we begin by quoting pertinent provisions from one of Chief Judge Barbera's Administrative

Orders concerning pending judicial proceedings during the coronavirus and COVID-19 pandemic:

> WHEREAS, In instances of emergency conditions, whether natural or otherwise, that significantly disrupt access to or the operations of one or more courts or other judicial facilities of the State or the ability of the Judiciary to operate effectively, the Chief Judge of the Court of Appeals may be required to determine the extent to which court operations or judicial functions shall continue; and
>
> WHEREAS, Due to the outbreak of the novel coronavirus, COVID-19, and consistent with guidance issued by the Centers for Disease Control and Prevention (CDC) and the Maryland Department of Health (MDH), an emergency exists for which measures continue to be required to mitigate potential for exposure for individuals visiting a court or judicial facility and for judicial personnel; and
>
> WHEREAS, The impact of the restrictions required to respond to the COVID-19 pandemic has had a widespread detrimental impact upon the administration of justice, impeding the ability of parties and potential litigants to meet with counsel, conduct research, gather evidence, and prepare complaints, pleadings, and responses, with the impact falling hardest upon those who are impoverished; and
>
> WHEREAS, The detrimental impact of the COVID-19 pandemic is so widespread as to have created a general and pervasive practical inability for certain deadlines to be met; …
>
> * * *
>
> NOW, THEREFORE, I, Mary Ellen Barbera, Chief Judge of the Court of Appeals and administrative head of the Judicial Branch, pursuant to the authority conferred by Article IV, § 18 of the Maryland Constitution, do hereby order this 6th day of August 2021, that, effective August 9, 2021: . . .
>
> * * *
>
> (h) By previous Order, pursuant to Maryland Rule 16-1003(a)(7), all statutes and rules deadlines to conduct pending judicial proceedings shall be tolled or suspended, as applicable, effective March 16, 2020, by the number of days that the courts are closed to the public due to the COVID-19 emergency by order of the Chief Judge of the Court of Appeals; and

> (i) For the purposes of tolling of all statutes and rules deadlines to conduct pending judicial proceedings, in this Order, "tolled or suspended by the number of days that the courts were closed" means that the days that the offices of the clerks of court were closed to the public (from March 16, 2020 through July 20, 2020) do not count against the time remaining to conduct judicial proceedings; and
>
> (j) With the offices of the clerks of courts having reopened to the public on July 20, 2020, the deadlines to conduct proceedings pending on March 16, 2020, having been extended, by previous Order, by an additional 60 days in order for the courts to reschedule and hold the same; …

COVID-19 Administrative Order – Tenth Revised Administrative Order on the Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines Related to the Initiation of Matters and Certain Statutory and Rules Deadlines in Pending Matters (August 6, 2021).

We recognize that the right to a speedy trial is a fundamental right under the United States Constitution. *See, e.g., Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020) (stating, in a case under the First Amendment, that "even in a pandemic, the Constitution cannot be put away and forgotten"). However, courts considering the impact of the coronavirus pandemic also recognize that the global emergency requires a contextual balancing of the right to a speedy trial against matters of public health and safety. *See, e.g., United States v. Olsen*, 21 F.4th 1036, 1047 (9th Cir.) ("[S]urely a global pandemic that has claimed more than half a million lives in this country, and nearly 60,000 in California alone, falls within such unique circumstances to permit a court to temporarily suspend jury trials in the interest of public health") (footnote omitted). Indeed, cumulatively, there have been approximately 1,207,814 deaths in the United States attributable to the coronavirus. *See* https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last visited October 23,

2024). And, on September 11, 2021, just four days before the first postponement due to COVID-19 in this case, there were 687,963 deaths. *Id*.

The overwhelming majority of courts to consider this issue under the *Barker* analysis have weighed delays caused by the pandemic only slightly, or not at all. *See United States v. Gordon*, 93 F.4th 294, 307 (5th Cir. 2024) ("[T]he primary reason for the pretrial delay in this case was the COVID-19 pandemic. These delays cannot fairly be attributed to the Government or to Gordon."); *United States v. Macken*, No. 2:20-CR-00023-KJM, 2021 WL 2711250, at *3 (E.D. Cal. July 1, 2021) (denying the motion to dismiss for alleged violation of Sixth Amendment right to a speedy trial and observing that one of several reasons for delay was "the impossibility of a safe jury trial during the pandemic" and that "[t]he government was neither negligent nor deliberately slow. Neither party is to blame"); *United States v. Akhavan*, 523 F.Supp.3d 443, 451 (S.D.N.Y. Mar. 1, 2021) ("[T]he three-month delay thereafter is not attributable to the Government but rather to the pandemic, a neutral reason outside of the Government's control"), *aff'd on other grounds*, 2022 WL 17825627 (2d Cir. 2022); *see also United States v. Walker*, 68 F.4th 1227, 1238 (9th Cir. 2023) ("The pandemic, not the prosecution, caused the delay").

Notably, the federal Eastern District of Virginia found that the COVID-19 pandemic was a valid reason for delay, and rejected any suggestion that said delay should weigh heavily, or at all, against the government. *See United States v. Pair*, 522 F.Supp.3d 185, 194 (E.D. Va. Feb. 26, 2021), *aff'd*, 84 F.4th 577 (4th Cir. 2023). That Court explained:

> Pair's argument that pandemic-related delay should be weighed slightly against the Government is unavailing. In *Barker*, the Supreme Court reasoned that a "more neutral reason [for delay] such as negligence or

> overcrowded courts" should weigh against the Government "since the ultimate responsibility for such circumstances must rest with the government." In the case of the COVID-19 pandemic, the Government does not bear the ultimate responsibility for the pandemic; the pandemic is outside of the control of either the parties or the courts.

United States v. Pair, 522 F. Supp. at 194 (internal citations and emphasis omitted).

The Fourth Circuit affirmed this ruling, stating in part:

> It would be the worst kind of hindsight to say that this judgment was in error. To hold a trial amid the pandemic would have required that jurors, witnesses, counsel, and courthouse personnel act contrary to the advice of public health professionals and put themselves in harm's way. In late 2020, the Centers for Disease Control was still urging individuals to mask, avoid crowds, and social distance. *See* Margaret A. Honein, PhD et al., *Summary of Guidance for Public Health Strategies to Address High Levels of Community Transmission of SARS-CoV-2 and Related Deaths*, 69 Morbidity and Mortality Wkly. Rep. 1860 (2020). In some cases, trial participants might also find themselves acting contrary to the cautions of their own physicians. The trial might have soon fallen into disarray. Jurors and witnesses could have been exposed to the virus and would need to be excused. The basic requirement of capturing a cross-section of the community for the jury would have been undermined, given that the pandemic hit some sections of the population harder than others. Mistrust would fester if jurors sensed one of their peers was coming down with an illness. Imagine, too, how a district judge would feel if someone were hospitalized (or worse) due to COVID-19 because of insufficient protection in the courtroom. These are but a handful of the difficulties that could have plagued an in-person trial.
>
> A remote trial would have been no real answer either, given the question of whether remote trials are the equivalent of the real thing. Remote trials raise questions about the diminished capacity of the jury to make credibility findings, of defense counsel to achieve meaningful cross-examination, and of attorneys to effectively connect with jurors. In short, the district court was well within reason to find that delaying trials during the pandemic served the ends of justice and outweighed the interest in speedy trials.

United States v. Pair, 84 F.4th at 585.[14]

[14] *See United States v. Smith*, 494 F.Supp.3d 772, 783 (E.D. Cal. Oct. 14, 2020) ("Instead, the Court's decision to take responsible, emergency health measures to limit the spread of COVID-19 is responsible for the delay. The Court's inability to safely conduct a jury trial is a good-faith and reasonable justification for the delay. One that does not weigh against the Government"); *United States v. Leveille*, No. 1:18-CR-02945-WJ, 2020 WL 4698511, at *5 (D.N.M. Aug. 13, 2020) (rejecting Sixth Amendment claim and stating, in a case where a superseding indictment was filed, and where some delays attributable to motions to determine competency, that "an unprecedented worldwide pandemic has necessitated trial delays and has caused every step of the litigation to take longer than expected. The Government has no control over any of this"); *United States v. Hernandez*, No. 19 CR 97 (VM), 2020 WL 4547900, at *3 (S.D.N.Y. Aug. 5, 2020) (dismissing a case without prejudice, under the federal Speedy Trial Act, and stating that "the temporary lack of vigilance with regard to the Speedy Trial Act clock in this case coincided with a period of drastic changes to the conduct of criminal proceedings in this District necessitated by the COVID-19 pandemic"); *United States v. Briggs*, 471 F.Supp.3d 634, 639 (E.D. Pa. July 9, 2020) (recognizing that "there is a substantial and compelling reason" to grant a continuance over a claimed violation of right to speedy trial based on the "public health crisis caused by the COVID-19 pandemic"). *See also State v. Tuinman*, 535 P.3d 362, 380 (Utah Ct. App. 2023) ("Indeed, it seems to us that delays associated with a once-in-a-century worldwide pandemic should not in fairness be held against the State in a Sixth Amendment speedy trial analysis. This view comports with that of nearly all courts to have considered the matter"); *Labbee v. State*, 869 S.E.2d 520, 529-30 (Ga. Ct. App. 2022) (delay due to pandemic was neutral); *State v. Paige*, 977 N.W.2d 829, 838 (Minn. 2022) ("[W]e conclude that trial delays due to the statewide orders issued in response to the COVID-19 global pandemic do not weigh against the State"); *State v. Mize*, 195 N.E.3d 574, 587 (Ohio Ct. App. 2022) ("We have also rejected speedy trial claims where delay was caused by the COVID-19 pandemic"); *Ali v. Commonwealth*, 872 S.E.2d 662, 676 (Va. Ct. App. 2022) (concluding that the "pandemic-related delay" was "valid, unavoidable, and outside the Commonwealth's control[,]" and that "the pandemic made it unsafe for all witnesses and other trial participants to come to court for a period of time, rendering them justifiably absent to protect their "health and safety"); *Vlahos v. State*, 518 P.3d 1057, 1072 (Wyo. 2022) ("Delays due to COVID-19 pandemic are neutral because the pandemic 'was an extraordinary circumstance not attributable to either [party.]'"). *But see State v. Labrecque*, 307 A.3d 878, 885 n.3 (Vt. 2023) ("We have explained that '[d]elays resulting from logistical challenges presented by the COVID-19 pandemic are attributable to the State.'"); *Kurtenbach v. Howell*, 509 F. Supp. 3d 1145, 1152 (D.S.D. 2020) (finding "that the COVID-19 pandemic does not justify the extent of the delay in the cases challenged by petitioner. South Dakota has done little, if anything, to curtail the spread of the virus").

We are in accord with the overwhelming majority of these other courts. The delay from September 22, 2021 to November 29, 2021 was due to the coronavirus pandemic, a catastrophic and unique event beyond either party's control. We hold that the delay is neutral and does not weigh against either party.

November 29, 2021 to February 16, 2022 (third scheduled trial date) – On November 18, 2021, the State sought to postpone the trial because: (1) the primary witness, V. had moved to Texas, was willing to return to Maryland for trial, but travel was problematic; and, (2) another witness, S.B., was scheduled for surgery on the scheduled trial date. After hearing opposition, the court ordered that Appellant was to be released on house arrest with electronic monitoring at a specific address, with conditions, and then granted the State's motion.[15] The attempt to release Appellant on house arrest later failed when the address Appellant suggested declined to accept him.

In their briefing before this Court, both parties focus on the unavailability of V., the primary witness. Appellant contends that "[t]his delay weights heavily against the State for its inexcusable lack of diligence." Specifically, Appellant argues that "it was the State's responsibility to know the whereabouts of its witness and ensure her timely attendance at trial." The State admits that "[t]his delay was attributable to the State," but argues that "the witness's relocation was a 'valid reason' that justified the delay." *Glover v. State*, 368 Md.

[15] We note that, when the court postponed the trial date on November 19, 2021, the COVID-19 pandemic had not subsided. Indeed, on December 27, 2021 Chief Judge Getty returned the Maryland judiciary to Phase III operations due to the omicron variant of the coronavirus.

211, 225 (2002). The state contends that this "delay should weigh only minimally against the State, if at all."

The Maryland Supreme Court has concluded that, in some cases, a missing witness is "a valid reason . . . [that] should serve to justify appropriate delay." *Howard* v. State, 440 Md. 427, 448 (2014) (quoting *Barker*, 407 U.S. at 531); *see also Matthews v. State*, 23 Md. App. 59, 66 (1974) ("Two and one-half months of the delay was caused by the absence of a prosecuting witness and is, at most, a 'neutral' reason under *Barker v. Wingo*[.]"). Here, however, the absence of the State's primary witness was due to a foreseeable, scheduled event—the witness moving to another state—and the State could have arranged transportation in time for trial if had been more diligent. Therefore, this delay was due to the negligence of the State and is weighed against it. *Barker*, 407 U.S. at 531. Still, we do not view this postponement as a "deliberate attempt to delay the trial in order to hamper the defense." *Id.* Therefore, although weighed against the State, this delay is not weighed heavily. *Id.*

February 16, 2022 to June 27, 2022 (fourth scheduled trial date) – On February 15, 2022, the Maryland Judiciary was in Phase III operations, with all jury trials postponed until March 6, 2022. *See* COVID-19 Orders and Timeline. As with the earlier delay due to the pandemic, this delay of four months and one week is neutral.

June 27, 2022 to September 19, 2022 (fifth and final scheduled trial date) – On June 27, 2022, defense counsel requested a mistrial after V.'s mother testified, and the court found that the unfair prejudice to Appellant warranted that remedy. For our purposes, declaration of a mistrial for manifest necessity resets the speedy trial clock, and we then

assess the period between the mistrial and the new trial when considering a speedy trial claim. *See Hallowell, supra*, 235 Md. App. at 513-14 ("In a case, as here, in which there was a retrial following the declaration of a mistrial, the starting point for computing the length of delay begins at the time when the mistrial was declared, and the relevant time period runs until the commencement of the retrial") (citing *Icgoren v. State*, 103 Md. App. 407, 420 (1995)). To the extent that this three-month period after the mistrial is even to be considered in the analysis, we conclude it is neutral as there is no indication that it was due to the actions of either party, but, as the court found, the prejudicial testimony of an "ungovernable witness."

3. Assertion of the Right

Appellant filed a Plea and Election of Speedy Trial and a motion under Maryland Rule 4-252, which included an assertion of the denial of his right to speedy trial on December 22, 2020. Defense counsel opposed the State's motion to postpone the trial on speedy trial grounds at the November 19, 2021 hearing. Appellant's counsel then moved to dismiss on speedy trial grounds, orally at the February 15, 2022 Pre-Trial Conference and Postponement Hearing, and in writing thereafter, on March 21, 2022. We conclude that Appellant sufficiently asserted his right to a speedy trial and this factor is weighed in his favor. *See generally*, *Henry v. State*, 204 Md. App. 509, 554 (2012) ("The appellant clearly asserted his right to a speedy trial").

4. Prejudice

The final and "the most important factor in the Barker analysis is whether the defendant has suffered actual prejudice." *Phillips*, 246 Md. App. at 67 (quoting *Henry*, 204

Md. App. at 554). The prejudice factor is "weighed with respect to the three interests that the right to a speedy trial was designed to preserve": (1) avoiding "oppressive pretrial incarceration"; (2) minimizing "anxiety and concern of the accused"; and (3) limiting potential impairment of the defense. *State v. Kanneh*, 403 Md. at 693 (quoting *Barker*, 407 U.S. at 532). "Oppressive pretrial incarceration with its attendant anxiety and concern to the accused is generally afforded only slight weight." *Hallowell v. State*, 235 Md. App. 484, 518 (2018). In contrast, the "most serious" of the three interests "is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Kanneh*, 403 Md. at 693 (quoting *Barker*, 407 U.S. at 532).

Appellant argues that he suffered actual prejudice because (1) during Appellant's pre-trial incarceration, "he was subjected to repeated and lengthy multi-month 23-and-1 lockdowns [23 hours per day in a prison cell with one hour out], as a result of the jail's effort to try and minimize the impact of the COVID-19 pandemic on the jail population"; (2) Appellant suffered from anxiety, a diagnosed psychiatric condition, which "was exacerbated by both the conditions at the jail and the lengthy pre-trial delay"; and (3) Appellant's case was prejudiced because of witnesses' fading memories. The State responds that the first two interests, preventing oppressive pretrial incarceration and minimizing anxiety of the accused, are afforded only slight weight. Further, the State argues that Appellant does not point to any substantive impairment of his defense due to the delays.

We conclude that Appellant suffered prejudice while incarcerated pre-trial in the form of severely restrictive COVID-19 lockdowns, which exacerbated Appellant's existing

anxiety. However, this form of prejudice is afforded only slight weight in the constitutional analysis. *See Hallowell*, 235 Md. App. at 518. Appellant cannot point to any specific prejudice to his case, beyond a general assertion that witnesses' memories faded due to the passage of time. Thus, the constitutional interest in "limiting potential impairment to the defense"—the most important interest—is only slightly implicated. The impacts of COVID-19 on Appellant's anxiety are certainly troubling; however, as explained above, the consequences of the COVID-19 pandemic do not weigh for or against either party under the *Barker* factors.

5. Balancing

Here, Appellant was continuously incarcerated from November 20, 2020, until his trial. There is no dispute that the delay in this case of over nineteen months was of constitutional dimension. The majority of the pre-trial delay in this case was due to either pre-trial preparation, postponements due to the COVID-19 pandemic, or the three months between the mistrial and the retrial, none of which weighs against either party. Only one delay—the 79-day delay due to the primary witness's unavailability—is attributable to the State. Appellant repeatedly asserted his right to a speedy trial. Appellant suffered only light prejudice (in constitutional terms) due to the delays. This prejudice counts most strongly against the State during the 79-day period that trial was postponed due to the State's negligence, but the prejudice of incarceration is slightly mitigated by the court's attempt to release Appellant on house arrest during this period. Having weighed all relevant factors, we hold that the court properly denied Appellant's motion to dismiss for the alleged violation of his constitutional right to a speedy trial.

II.

IMPROPER ARGUMENT

Appellant next asserts the court erred in denying a mistrial following alleged improper comments by the prosecutor during the rebuttal closing argument. The State responds that, to the extent preserved, the court did not err in denying a mistrial.

A recurring theme in both closing arguments concerned V.'s delay reporting the allegations against Appellant. The prosecutor, in her initial remarks, comments on V.'s reluctance to report the incidents, included, for example, that "throughout the years all she's wanted is to not necessarily think about it or talk about it." Defense counsel closed with that theme, arguing that "[d]elayed disclosure sex offenses are tough enough to begin with. The physical evidence has gone away. There isn't any document in this case to support that a note of this was even written down" and that "[t]he idea that it could have happened without someone knowing is implausible if not impossible."

However, defense counsel's main theme was that V. was not credible whatsoever. Counsel's argument began with "Can you believe a known liar? Because that's what the State of Maryland has just asked you to do." After suggesting there are different types of lies, counsel turned to the allegations in this case, as follows:

> But the worst version of a lie is the lie that's told by [V.] when she talks to a social worker investigating an allegation of rape. She tells Ms. Brewington about what happened in the aftermath of these events, that Jerrod Timmons told her that he was going to shoot her with his gun. A gun, by the way, that is not introduced into evidence, never been recovered, no evidence that it even existed, but for this testimony.
>
> [V.] was asked, why would she tell such a lie to a person who is part of an investigation in a delayed disclosure rape case? And she said it yesterday,

> I've got it written down so that there is no confusion, I said that because I thought it would get him more time in jail. And because then he wouldn't come out.
>
> This is the most evil, malicious, gross version of a lie. The version of a lie where you take advantage of a system to try to hurt somebody, to try to punish somebody. Someone you acknowledge you didn't like, someone you acknowledge you didn't want living in your home.
>
> * * *
>
> But what I do suggest is that you have to evaluate the testimony of a person who would lie in that sort of way for what it is. Yes, you should give her story the credibility that it deserves. None.

In rebuttal, the State first addressed any inconsistencies in the timeline, noting that even the adults involved were inconsistent, but stating "you're not here to decide beyond a reasonable doubt when she reported" the incidents. The State continued:

> But there was at least opportunity every time he was alone for him to commit these offenses. What she described there would be no witness to or evidence of, touching of her buttocks, *him having her touch his penis,* the penetration she described was one time, and then one time digital penetration. Although she thinks it happened repeatedly, she doesn't know, or kept track of everything that happened to her during that time.
>
> [Defense Counsel] conveniently wants you to sort of minimize the Defendant's statement by saying he denied it. *Sure, he denied it, but he also said that a child made advances on him, touched his penis, that he turned her down. And when asked if he had sex with her, he said not that he knows. So that in and of itself is telling.*
>
> So, of course, he's denying when he's flat out asked, but I don't know that it's a denial to say not that he knows. I think it's a pretty clear answer. And it's unreasonable to say that a child is making advances on this man. He's just trying to justify and explain away what he knows there's no reason for, which goes to the motive.

(Emphasis added.)

As for V.'s statement and testimony concerning the gun, the prosecutor reminded the jury that there was no dispute that Appellant showed her the gun and that she felt threatened by it. Then, and turning to the issue raised on appeal, the State continued its rebuttal argument as follows:

> *She also can stop the process at any time, so she could have just said he didn't do anything to me, nothing happened*. What she has done is testified under oath and described very detailed events, very emotionally detailed events, so are we assuming that this girl, who is now 17 years old, flew from Texas, faked all this emotion, faked it in 2020 when she was interviewed, in 2022, it's now two years later, she's come before the Court, she's testified under oath, and she sort of faked this entire thing, coming from Texas so she could lie against a man who cramped her style from the age of nine to eleven, how does that make any sense? What is she gaining from going through all this process?
>
> This is certainly not a comfortable process. It's an embarrassing, uncomfortable process for anyone, even more so for a child when she's talking about these things that are uncomfortable for anyone to talk about. Or does it make more sense that the reason she is so angry, the reason she wants him to be punished is because he did those things to her?
>
> Does it make more sense that she would fly from Texas, she would describe these events so detailed and so emotionally, because the reason she wants this man held accountable is because of what he did to her? Because she's carried it throughout the years, because despite the fact that she doesn't want to think about or remember it, she does. And sometimes it comes out and sometimes she gets emotional about it, mostly when she has to stand in front of him and talk about it, doesn't make more sense.
>
> Again, the Court told you you can believe all, part, or none of a witness's testimony. The fact that she came forward and admitted that she was dishonest about that part says a lot about the fact that she was at least willing to be honest about that and come forward. *She didn't take anything else back. She could have. She described it emotionally and powerfully, I would submit to you. And I think it makes simply no sense that this girl would have this grudge against a man that nobody has seen in years*, that she's had no relationship, she clearly remembers his name, he lived on their couch for that long, for only two years of her childhood life and she remembers his name. She remembers these details. She remembers he would babysit her. She

> remembers a whole lot of things that he tries to explain away as advances, which is really just an inappropriate relationship when he had the opportunity, when he was left alone with her.
>
> So, I don't think it's inappropriate for me to say that you should give her the credibility she deserves. The fact that she came back, that she wanted to testify and provide that emotional testimony that she did I think is very telling, and that she was willing to come forward and say, yes, I did exaggerate because I wanted him to be punished, but for what, what other reason would this child want this man, who she has no other connection to, punished other than she wants him held accountable for the abuse that she endured when she was nine to eleven years old.
>
> And that's what I ask that you find him guilty of. Thank you.

(Emphasis added).

After the conclusion of closing argument, defense counsel objected and the parties approached the bench. Defense counsel first argued that the prosecutor misstated the law:

> I'm objecting to the State's rebuttal close, and I'm asking the Court to reinstruct with respect to the presumption of innocence. The reason I make that request is, my primary concern is Madam State says that the victim could have, quote, unquote, stopped the process at any time. That's, one, not true as a matter of law. And, two, basically is giving the imprimatur of the State's credibility to the victim, basically saying I believe the victim because if the victim said it didn't happen, well, then it stops, that's the implication. So it's a misstatement of how it works, because he's being prosecuted by the State of Maryland. But it has the additional problem of putting the State's imprimatur of support of the victim through the statement. So, I object.
>
> I'm asking as my remedy a re-reading of the presumption of innocence. I'm not asking for a mistrial, if the Court is willing to reinstruct with respect to the presumption of innocence, I'd otherwise ask for a mistrial, but I'm asking for the midway remedy in my mind of re-instructing with respect to the presumption of innocence.

The State responded:

> I think my comment was that she could stop the process at any time, and then I said she could've just testified and said that nothing happened. So I don't, it wasn't implying that outside of this it, it pretty much meant she could've

> just testified and said nothing happened, or when she was interviewed by the social worker she could've simply said nothing happened.

The court denied Appellant's request to reread the presumption of innocence instruction, stating: "I mean, if one assumes that you have a valid point as to that one sentence which [the Prosecutor] uttered without considering what came before or after or any of the contents, I've instructed as to the presumption of innocence, I don't really see that re-instructing would be a cure." Defense counsel then requested a mistrial, stating the following:

> Yes. I would additionally say that, in addition to that statement, Madam State's Attorney indicated during her rebuttal closing argument that Mr. Timmons told the deputy that she had touched his penis, that's not something that was said by Mr. Timmons to the deputy. It's not something that the deputy said that Mr. Timmons said to him. It's an important misstatement of fact.
>
> And in conjunction with the statement about [V.] being able to, quote, unquote, being able to stop the process at any time, I think it's a problem requiring a mistrial, or in the alternative, as I said, re-instructing with respect to the presumption of innocence.

The court denied the mistrial, finding as follows:

> Well, I'll consider these factors. First, with respect to touching penis, I instructed the jury that the comments by counsel in opening and closing arguments are not evidence, and if there's a difference, that the jury is to rely on their own recollection of the evidence. So if one assumes for purposes of argument that [the Prosecutor's] statement with respect to the Defendant saying, or making a statement about touching the penis was inaccurate and was not supported by prior testimony, it seems to me that the Court's instruction that the jury is to rely on their recollection of the evidence is sufficient, and I don't think that's grounds for a mistrial.
>
> As to the statement that [V.] could stop the process at any time, I also think that, considering that statement in the context of [the Prosecutor's] full argument, that does not constitute grounds for a mistrial.

> I consider whether it was a single isolated statement or a pervasive use of that argument. It was, in fact, a single isolated statement. I'm looking at the Guesfeird versus State, 300 Maryland, 653, with respect to these points that, one of the other factors which is whether or not the witness making a reference was a principle witness. Well, [the Prosecutor], of course, is not a witness. Whether credibility is a crucial issue. Again, that assumes that the statement was by a witness. Whether a great deal of other evidence exists. So, taking the statements in context with respect to the, quote, stop the process, unquote, I don't think that, the single isolated statement, particularly considering the context of surrounding statements, does not warrant a mistrial.
>
> So I'll deny the motion.[16]

A. Legal Framework

"Generally, a party holds great leeway when presenting their closing remarks." *Cagle v. State*, 462 Md. 67, 75 (2018). "Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way[.]" *Mitchell v. State*, 408 Md. 368, 380 (2009) (quoting *Wilhelm v. State*, 272 Md. 404, 412 (1974). "[T]he 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." *Id*.

Moreover, the Maryland Supreme Court has held that, under certain circumstances, a prosecutor's rebuttal argument responding to comments made by the defense during its

[16] In addition to instructing the jury as to Appellant's presumption of innocence, the court gave the pattern instructions that closing arguments were not evidence and that, if there was any difference between argument of counsel and their recollection of the evidence, that they should rely on their own memory of the evidence. *See* Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 2:02, 3:00 (2d ed. 2022)

closing must be placed in context and may be an entirely appropriate argument in response. *See DeGren v. State*, 352 Md. 400, 431-32 (1999) (finding comments by the prosecution during closing argument, though "unprofessional and injudicious," to be nonetheless acceptable when "made in response to the defense counsel's comments during closing argument that the jury should not believe the State's witnesses because they had various motives to lie"); *see also Brown v. State*, 339 Md. 385, 394 (1995) (stating that a State's rebuttal closing argument is proper if it is "nothing more than a reasonable reply to the arguments made by defense counsel").

"However, this leeway is not without limitation." *Cagle*, 462 Md. at 75; *see Jones v. State*, 217 Md. App. 676, 691 (2014) ("A prosecutor's artistic license is not unlimited: '[n]otwithstanding the wide latitude afforded prosecutors in closing arguments, a defendant's right to a fair trial must be protected.'") (citations omitted). For instance, the State may not vouch for the credibility of a witness, *Spain v. State*, 386 Md. 145, 153-54 (2005), appeal to the prejudices or passions of the jurors, *Mitchell*, 408 Md. at 381, or argue facts not in evidence or materially misrepresent the evidence introduced at trial, *Whack v. State*, 433 Md. 728, 748-49 (2013).

But "not every ill-considered remark made by counsel . . . is cause for challenge or mistrial." *Wilhelm*, 272 Md. at 415. Whether a reversal of a conviction based upon improper closing argument is warranted "depends on the facts in each case." *Whack*, 433 Md. at 742 (quoting *Wilhelm*, 272 Md. at 415). Ultimately, "[t]he permissible scope of closing argument is a matter left to the sound discretion of the trial court." *Cagle*, 462 Md. at 74 (citations omitted). To determine whether there was an abuse of discretion, the

question is "whether the jury was actually or likely misled or otherwise 'influenced to the prejudice of the accused' by the State's comments." *Whack*, 433 Md. at 742 (quoting *Wilhelm*, 272 Md. at 415-16). "Only where there has been 'prejudice to the defendant' will we reverse a conviction." *Whack*, 433 Md. at 742-43 (quoting *Rainville v. State*, 328 Md. 398, 408 (1992)).

In addition, as to whether a mistrial is warranted, our Supreme Court has explained that "declaring a mistrial is an extreme remedy not to be ordered lightly." *Nash v. State*, 439 Md. 53, 69 (2014). As with our review of closing argument, "[a]ppellate review of a decision to deny a mistrial is conducted 'under the abuse of discretion standard.'" *Vaise v. State*, 246 Md. App. 188, 239 (2020) (quoting *Nash*, 439 Md. at 66-67). In reviewing a trial court's exercise of discretion, we consider whether it was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Baker*, 453 Md. 32, 46 (2017) (internal citation and quotations omitted). We recognize that the trial court is in a superior position to assess the effect of any improper testimony. *Howard v. State*, 232 Md. App. 125, 161 (2017). "The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594-95 (1989)).

B. Analysis

1. Arguments Concerning the Victim's Credibility

Appellant first contends the argument that V. could "stop the process at any time," was "not true as a matter of law" and "conveyed that V. must be telling the truth or else Appellant would not have been prosecuted." [Brief of Appellant at 22] Appellant also

suggests the prosecutor "conveyed her personal opinion of Appellant's guilt," in other words, improperly vouched for the victim, when she argued "I think it makes simply no sense that this girl would have this grudge against" Appellant. [Id.]

Initially, we agree with the State that Defense Counsel's objection did not include any reference to the latter remark concerning whether the victim had a "grudge" against Appellant. [Brief of Appellee at 25] Accordingly, we shall not consider that argument in our analysis. *See* Md. Rule 8-131(a); *Grandison v. State*, 341 Md. 175, 243 (1995) (complaint about closing argument at capital sentencing not preserved as to comments to which there was no objection); *Purohit v. State*, 99 Md. App. 566, 586 (objection to closing argument unpreserved where actual objection at trial went to a different portion of the closing argument) (citation omitted) (1994).

As for the State's suggestion that V. could have "stop[ped] the process at any time," we recognize that counsel is not permitted to argue law to the jury unless there is a dispute "as to the law of the crime." *Tetso v. State*, 205 Md. App. 334, 410-11 (2012) (quoting *White v. State*, 66 Md. App. 100, 118 (1986)). However, we are not persuaded that the prosecutor's argument was a misstatement of law as opposed to commentary that the State's case would not have been as strong without V. *See generally, Evans v. State*, 396 Md. 256, 298 (2006) (observing that prosecutors retain broad discretion in "determining which cases to prosecute, which offenses to charge, and how to prosecute the cases they bring") (citations omitted); *People v. Morrow*, 542 N.W.2d 324, 325-28 (Mich. Ct. App. 1995) (explaining that when a witness intends to recant prior testimony, it is within a prosecutor's discretion to decide whether to continue the prosecution).

Next, as for Appellant's assertion that the comments at issue improperly vouched for V.'s credibility, as stated, a prosecutor may not, "'vouch[]' for (or against) the credibility of a witness." *Spain*, 386 Md. at 153; *accord Donaldson v. State*, 416 Md. 467, 489 (2010). "Vouching typically occurs when a prosecutor 'place[s] the prestige of the government behind a witness through personal assurances of the witness's veracity . . . or suggest[s] that information not presented to the jury supports the witness's testimony.'" *Spain*, 368 Md. at 153. (citation omitted); *accord Donaldson*, 416 Md. at 489-90; *Sivells v. State*, 196 Md. App. 254, 277 (2010); *see also Walker v. State*, 373 Md. 360, 396 (2003) (characterizing the making of "suggestions, insinuations, and assertions of personal knowledge" as to a witness's credibility improper prosecutorial vouching). As the Court of Appeals explained in *Spain*, prosecutorial vouching presents two primary dangers:

> "[S]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Spain, 386 Md. at 153 54 (quoting *U.S. v. Young*, 470 U.S. 1, 18-19 (1985)).

However, mere commentary about a witness's credibility, without some assertion of outside personal knowledge about the witness does not constitute improper prosecutorial vouching. *See Small v. State*, 235 Md. App. 648, 698 (2018) ("[A]lthough vouching for a witness's credibility is improper, '[t]he rule against vouching does not preclude a prosecutor from addressing the credibility of witnesses in closing argument'") (quoting *Sivells*, 196 Md. App. at 277); *Stone v. State*, 178 Md. App. 428, 450-51 (2008) (rejecting

appellant's assertion of plain error regarding the prosecutor's remark that the witness "in my estimation was a very credible witness"; the prosecutor did not assert any personal knowledge such as "'I know [the witness]. We went to the same high school. [The witness] would never lie"); *U.S. v. Walker*, 155 F.3d 180, 187 (3d Cir. 1998) (stating that "where a prosecutor argues that a witness is being truthful based on testimony given at trial, and does not assure the jury that the credibility of the witness [is] based on his own personal knowledge, the prosecutor is engaging in proper argument and is not vouching"); *see also Sivells*, 196 Md. App. at 278 ("The credibility of witnesses in a criminal trial often is . . . a critical issue for the jury to consider").

We are not persuaded that the prosecutor improperly vouched for V.'s credibility in a manner that either misled the jury or was unfairly prejudicial. The remarks were merely an attempt to explain V.'s reluctance to testify and the delay in reporting. And nothing in the prosecutor's remarks suggested there was information beyond what was presented to the jury. Although we caution counsel that the better practice is to avoid declarations regarding what the advocate thinks is true, when the challenged argument is considered in context, we are satisfied that these comments, including the unpreserved commentary about whether V. had a "grudge," were adequately "tied to the evidence in the case" rather than the prosecutor's personal opinion of V.'s credibility. *See Sivells*, 196 Md. App. at 286. Moreover, we note the comments came in rebuttable closing argument after Defense Counsel asked the jury to question V.'s veracity. *See DeGren v. State*, 352 Md. 400, 431-32 (1999) (finding comments by the prosecution during closing argument, though "unprofessional and injudicious," to be nonetheless acceptable when "made in response to

the defense counsel's comments during closing argument that the jury should not believe the State's witnesses because they had various motives to lie"); *see also Brown v. State*, 339 Md. 385, 394 (1995) (stating that a State's rebuttal closing argument is proper if it is "nothing more than a reasonable reply to the arguments made by defense counsel").

2. Argument as to Facts Not In Evidence

Next, Appellant asks us to conclude that the trial court erred by not declaring a mistrial when the State argued that Appellant told Detective Schultz that V. touched his penis. Conceding that the prosecutor's statement was a "fact not in evidence," the State disagrees that this isolated remark was "extremely prejudicial" and that any error was harmless under the circumstances.

Our Supreme Court has made clear that "[a]rguing facts not in evidence is highly improper." *Fuentes v. State*, 454 Md. 296, 319 (2017) (citing *Lawson v. State*, 389 Md. 570, 591 (2005), and *Spain, supra*, 386 Md. at 156). There is no dispute that there was no direct evidence that Appellant told the detective that V. touched his penis. The prosecutor's remark was therefore improper. The question is whether the court erred in not granting a mistrial. To that end, we consider the following five factors:

> whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists.

Rainville, supra, 328 Md. at 408 (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)). *Accord Vaise*, 246 Md. App. at 239-40.

The State's argument that Appellant told the detective that V. touched his penis was not an inadvertent, unresponsive blurt by a witness in a case where credibility was an important issue. However, it was a single, isolated statement in rebuttal closing argument. Further, the State's primary witness was the child victim, V., and the jury heard direct evidence from her that Appellant made her touch his penis one time when they were sitting on the couch watching television. Indeed, V.'s testimony was not the only evidence of this touching. S.B. confirmed that V. told her that Appellant "had her touch his penis."

There was also other evidence that permitted an inference that Appellant acknowledged that V. touched his penis. According to Detective Schultz, when discussing the shower incident when Appellant admitted that V. saw his penis, Appellant described his interaction with her as "touchy feely stuff or touchy feely things would go on." Detective Daniel Schultz further testified that Appellant told him that V. made him "feel uncomfortable," and that "she tried to grab his dick" and "would try" to touch his penis.

We also are not persuaded that a mistrial was necessary considering that the prosecutor's misstatement was made during rebuttal closing argument after Defense Counsel argued extensively that V. should not be believed. *See DeGren, supra*, 352 Md. at 431-32; *Brown, supra*, 339 Md. at 394. Moreover, there was no objection when the State made similar arguments concerning whether the Appellant made V. touch his penis. For instance, the State argued, without objection, "[a]nd then him having her touch his penis would be another form of sexual contact." The State also addressed Appellant's statement to Detective Schultz during its initial closing argument:

> So what starts off as him saying she didn't like me, she hated me, to all of a sudden it turned into, so as Detective Schultz is saying, well, why would she be saying these things, what else did you do, how come she knows what your penis looks like, how come she's saying that you had this sexual interaction between the two of them, all of a sudden it turns into she was always on me, she was always touchy-feely. He talks about the fact that she was talking to him about sex. So he's supposedly someone that she hates, but she's opening up about her sex life at the age of nine to this man that's sleeping on their couch. He says that she was trying to touch his penis, and he describes that that essentially happened on several occasions, that she would apparently just randomly try to touch his penis, describes her essentially as being the one that's going after him when she was between the ages of nine to eleven. He actually references, and one of the quotes that was read by Detective Schultz, he actually calls it advances. And then when he's asked why would she be saying these things now, he says maybe it's because I turned her down.
>
> Which, again, is an interesting choice of words when you're referring to a nine to eleven-year-old.

Finally, Appellant was not simply charged with the sex offense of an illegal touching. This case included direct evidence of second-degree rape of an elementary school-aged girl by a person who had temporary care or custody of that child when he lived in her household. There was more than sufficient evidence for the jury to convict him of the charges. We hold that the trial court properly denied the motion for mistrial.

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