Circuit Court for Allegany County
Case No. 01-K-16-017359

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 609

September Term, 2017

KYLE JOSHUA POINDEXTER

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: May 8, 2018

Appellant, Joshua Poindexter, was tried and convicted by a jury in the Circuit Court for Allegheny County (Getty, J.) of second-degree murder, first and second degree child abuse, first and second-degree assault and reckless endangerment. Judge Getty sentenced Appellant to seventeen years and six months' imprisonment for the second-degree murder conviction and to seventeen years and six months' imprisonment, consecutive, for the first-degree child abuse conviction.

Appellant filed the instant appeal, in which he posits the following questions for our review:

1. Did the trial court err when it permitted the State to introduce evidence of Appellant's post-*Miranda*[1] silence?

2. Did the trial court err when it permitted a detective to testify that he was able to dial 911 from the Samsung phone?

3. Must Appellant's sentence for first-degree child abuse be merged into his sentence for second-degree murder?

FACTS AND LEGAL PROCEEDINGS

The daughter of Appellant and Francesca Robosson, Avery Poindexter, was born on February 3, 2016. On April 8, 2016, paramedics responded to the trailer where the family lived. Robosson was at work and Appellant was alone with Avery. Avery was unresponsive when the paramedics arrived and she was subsequently pronounced dead. The State's theory of the case was that Appellant inflicted the injuries that cause Avery's

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

death at some point in time before he was left alone with her.

On behalf of the State, Robosson testified that Avery was born premature. As a result, she was on oxygen and a pulse oximeter that monitored her oxygen levels. On Wednesday, April 6th, Robosson noticed that Avery had some blood on her onesie. When Robosson picked Avery up, she saw blood on her own shoulder; consequently, Robosson determined that the blood was coming from Avery's mouth. Robosson testified that she also noticed what she described as "little bruises" under Avery's eyes and she said that they were having to "kind of coerce" Avery to eat.

Later that day, Robosson and Appellant took Avery to see her pediatrician, Dr. Michael Levitas. Robosson testified that Dr. Levitas said that it appeared as if the blood was coming from Avery's nose, which was dry due to her "nose canula drying out her nasal passages," and he said that the bruises Avery had under her eyes were due to a lack of iron. According to Robosson, she informed Dr. Levitas that, when Avery took her bottle, she would suck for a second and then she would act like it hurt and stop. According to Robosson, Dr. Levitas said that he did not see anything wrong with Avery.

On Thursday, Robosson went to work. When she returned home along with her mother, around 6:30 or 7:00 p.m, Robosson noticed that the bruises under Avery's eyes were darker, but she did not observe any other injuries.

On Friday, April 8th, Robosson got up around 6:00 a.m. Avery and Appellant were still sleeping. After Robosson took her shower, she returned to the bedroom and, while she finished getting ready, Appellant fed Avery. Appellant, who did not indicate that he was

having any difficulty, was still feeding Avery when Robosson left for work between 7:10 and 7:20 a.m. Robosson did not see any injuries on Avery other than the bruising under her eyes.

At 12:39 p.m., Appellant texted Robosson and said that Avery was on her way to the hospital. Appellant then telephoned and said that he and two neighbors, Steven and Amy, would pick her up. According to Robosson, during the ride to the hospital, Appellant called his father and said "that they were going to pin it on him, that he was going to go to jail and, if he did, he was going to kill himself."

After Avery died, a Child Protective Services ("CPS") employee questioned Robosson and Appellant at the hospital. The worker asked where the bruises had come from and Robosson told her that, except for the bruising under Avery's eyes, the bruises were not there when she left for work. Appellant, however, said, "No, Frankie, they were there that morning when you left."

On cross-examination, Robosson admitted that she watched Avery while Appellant was at work on Tuesday, April 5th from 4:30 a.m. to sometime before noon. That same day, Robosson left Avery at her friend's house from "like 11 to 4." Robosson also admitted that, on Tuesday night, Avery started getting fussy and was acting like it hurt to suck.

Robosson admitted that she asked her mother, on Thursday, April 7th, about the bruising under Avery's eyes because it had gotten darker. Later, she texted her mother that she had looked online and had determined that Avery's bruises were from Avery "rubbing or hitting" her eyes. Robosson also admitted that, on the morning of April 8th, Avery had

"a little teeny, tiny bit" of blood "in the corner of her mouth."

Charlene Robosson, Avery's grandmother and Francesca's mother, testified that she took Avery, Robosson and Appellant to Avery's doctor's appointment on Wednesday. Avery "was kind of dark underneath the eyes," "like when you get sick and you get dark circles under your eyes."

Charlene held Avery for an hour or an hour and a half on Thursday evening. Avery was sucking her bottle, but was not swallowing at all. Charlene testified that Avery did not usually do that, but she also testified that Avery ate "pretty well." Charlene also noticed that Avery's eyes looked darker than they had before.

On Friday, Charlene went to the hospital. When Charlene, Robosson and Appellant went into the room where Avery was, Charlene "just couldn't believe" it and asked Appellant "what happened to her." Appellant did not say anything at that point. Charlene looked at photographs taken of Avery in the hospital and testified that she did not have any of those injuries the last time she saw her.

Dr. Levitas and his nurse, Abby Phillips, testified about their interactions with Avery on April 6th. Based on Avery's vital signs that Phillips recorded and that Dr. Levitas reviewed, everything appeared normal. Dr. Levitas also testified that he examined Avery's scalp, forehead, mouth and eyes and did not see any injuries or bruises. Similarly, Phillips testified that she did not see any signs of injury on Avery's body, including her face, forehead and/or scalp.

While on the stand, Dr. Levitas reviewed a photograph of Avery's head that was

taken after her death and he testified that the bruises on her forehead and face were not present when he saw her. He also reviewed a picture of a tear in Avery's inner and upper lip, testifying that he did not see that injury on April 6th.

Dr. Melissa Brassell, who performed Avery's autopsy, was accepted as an expert in the field of forensic pathology. Dr. Brassell first testified about Avery's external injuries. Avery had several injuries to her left upper and lower eyelid, bruises on the left side of her forehead, the right side of her forehead and her central forehead, bruises on her left cheek and right and left side of her lower jaw. Avery also had an injury to the frenulum, or the inside of her upper lip and she had several "small abrasion and contusions" on her left arm and torso.

Dr. Brassell also testified about Avery's internal injuries. Avery had a subarachnoid hemorrhage that involved both sides of her brain, a subdural hemorrhage at the base of her skull and at the mid-line of the brain, as well as bruising of the brain tissue itself. Dr. Brassell categorized the subarachnoid and subdural hemorrhages as "fresh," which she testified meant "acute" or "it just happened."

Dr. Brassell ordered further examination of Avery's eyes, which revealed that the retinas for both eyes had "extensive hemorrhage," that the retinas were detached and that there were multiple areas of hemorrhage around the optic nerve sheath. Additionally, there were bilateral, perimacular retinal folds or folds in the retinal tissue itself. There was a hemorrhage in the white of the eye on the right side, and the left eye had focal, acute hemorrhaging involving the muscle which connects the eyeball to the bones of the orbit.

Dr. Brassell concluded that Avery died from head injuries and that a two-month old could not cause those injuries to herself. She also testified that there was no medical explanation for the injuries and that Avery was the victim of child abuse.

Dr. Scott Krugman, who was accepted as an expert in child abuse pediatrics, also testified about Avery's injuries. Dr. Krugman reviewed Avery's birth records, her medical records from her April 6th visit to Dr. Levitas, pictures taken at the hospital on April 8th, and the autopsy report. Dr. Krugman testified that Avery's subdural and subarachnoid hemorrhages, the brain contusion and the retinal hemorrhages were "highly specific for abusive head trauma in a [two]-month-old infant" and he characterized the brain injury as "severe." He also testified that, in light of the fact that there were "multiple different locations" of bruising across the face, the bruises were not the result of an accidental trauma and were not inflicted by Avery herself. Dr. Krugman opined that, taken together, Avery's injuries "mean[t] that she suffered severe trauma . . . trauma to her head with acceleration, deceleration, blunt force." He testified that he could not "say exactly what happened," but he said "there was [sic] multiple blows to her head that caused lots of bleeding." Dr. Krugman also testified that a two-month-old could not have sustained Avery's injuries through normal play, bumping her head on a baby swing or from an accidental fall.

According to Dr. Krugman, a child with the type of injuries Avery had would "absolutely" be symptomatic and would stop breathing "pretty quickly." Furthermore, Dr. Krugman testified that a child with the type of injuries Avery had would not be drinking from a bottle and would not be able to play, nor would such a child be able to make eye

contact. Dr. Krugman also testified that such a child would "pretty quickly" lose consciousness.

Dr. Krugman explained that Avery's brain was not swollen. He said that "typically," after "a major amount of trauma, the brain just swells up." The fact that Avery's brain was not swollen indicated to Dr. Krugman "[t]hat she died very quickly." Dr. Krugman testified that he could not give an "exact time" when Avery's injuries occurred in relation to her death. Instead, he testified, "[I]f you told me that it was, you know, one hour, I'd say yes. If you told me it was two hours, I'd say could be. If you told me six hours, like, seems unlikely; that seems a little long. Um, but it's, I, I would say it was soon. You know, the injuries happened, her symptoms happened very soon after these injuries."

On cross-examination, Dr. Krugman admitted that fussiness could be a sign of head trauma, as could poor feeding and eye bruising. Dr. Krugman was aware that there was an injury to Avery's frenulum. He explained that it was a "commonly missed finding." Finally, Dr. Krugman agreed that, if Avery had bruising to the eyes, fussiness or irritability, indeterminate bleeding from the mouth, was spitting up, not eating and was drooling excessively prior to Friday, it "absolutely" could have caused concern related to abuse and/or head trauma.

Amy Moore and Steven Nichol lived in the same trailer park as Appellant and Robosson. Moore testified that, on April 8th, Appellant ran through their door and told them that his daughter had stopped breathing. According to Moore, they ran to Appellant's trailer where Avery was lying on the floor. Moore and Nichol took turns doing CPR. Moore

began to cry and told Nichol to call 911.

Moore testified that, when the paramedics arrived, she, Nichol and Appellant drove to pick Robosson up from work and then drove to the hospital. Moore said that, during the drive, she heard Appellant call someone and say, "I'm not going to jail. If she dies, they're going to pinpoint this on me, 'cause [sic] I'm the last one with her."

Nichol testified and confirmed that Appellant came to their trailer and told them that his baby was not breathing. Nichol and Moore started CPR and Nichol asked Appellant if he had called 911. Appellant had not, so Nichol called 911.

Nichol testified that, while they were waiting for the ambulance to arrive, he saw Appellant get rid of a two-liter bottle, which was called a "gravity." According to Nichol, a gravity is a device used to smoke marijuana.

Katrina Wolf was a paramedic who responded to Appellant's trailer within two to three minutes of the phone call. Wolf noticed that the baby had bruising on both eyes, her cheek and her forehead. Wolf asked Appellant where the bruises came from, and she testified that she received no response. The baby was warm but very pale and gave no indication of life.

Samantha Wampler provided aid to Avery when she arrived at the emergency room. Wampler observed "extensive bruising" on Avery's "entire left eye and upper and lower eyelid," "bruising on her right eye," two horizontal scratch marks above her left eyebrow, bruising "all over the left side of her forehead" and bruising on both sides of her jawline. Wampler testified that, after Avery was pronounced dead, Robosson, Charlene and

Appellant came into the room at the same time. Charlene asked if the bruising came from "trying to save her." Wampler responded that it had not. Robosson then asked, "Where did all the bruising come from?" Appellant said that "it was all there last night" and "that none of the bruising was new." According to Wampler, Robosson "started getting pretty upset," and said, "That was not there when I left this morning. None of that was there."

Detective Harold Dixon questioned Appellant at the hospital about an hour and a half after Avery was pronounced dead. Detective Dixon also interviewed Appellant at the police station on April 8th. Finally, Detective Dixon interviewed Appellant at the station on April 9th.

At the hospital, Appellant told Detective Dixon that he woke up with Avery around 6:30 a.m. Robosson had taken her shower, but she had not left the house. Avery was "acting a little weird" like she did not want to take her bottle; however, she looked at him and moved her hands. Appellant estimated that she drank an "ounce and a half maybe, maybe two and a half ounces." Normally, Avery drank four ounces. Appellant and Robosson noticed a "little blood" on the side of Avery's mouth after Appellant fed Avery. After Avery ate, she went back to sleep.

Avery woke up again around 11:30 a.m. or 12:00 p.m. Appellant woke up because he heard her pulse oximeter beeping, which indicated it "wasn't picking a signal up or something like that." Appellant also heard Avery making "normal noises that [ ] a baby would make." He picked up Avery, who was in the swing, and calmed her down. The machine stopped beeping. Appellant walked out of the room to fix a bottle. When he came

back in, the machine indicated Avery's "breathing level" was low. Appellant again picked Avery up from the swing, put her on the bed and changed her diaper. That is when "all this stuff happened," and Appellant "freaked[] out." Appellant gave Avery CPR and tried calling 911 "a hundred times." The calls did not go through even though he had a "text free app" that was supposed to allow 911 calls. At that point, he went to his neighbor's house.

Subsequently, on April 8th, Appellant told the Detective that Robosson was in the shower when the baby was waking up, and he stated that Robosson did not have Avery when he woke up. He also stated that, when Avery woke up, around 11:30 a.m., that he gave her a bottle after he fixed the pulse oximeter. It looked as if she was "sucking on it" but, when he looked at the bottle, "it was like she wasn't going nowhere with it." After that, Avery's breathing level dropped and that is when Appellant realized there was an emergency.

Detective Dixon questioned Appellant about any accidents that Avery might have had. Appellant said that, to his knowledge, Avery had never rolled off of the bed or the couch, that she had never been accidentally dropped and that there were no accidents of which he knew. Detective Dixon also questioned Appellant about the bruises that Avery had in the hospital. Appellant had "no theories" as to the bruises and did not know how they got there, but he did say earlier in the week, that Avery got a light bruise when he "dunked her head on the mirror" on the swing. Appellant saw the bruising on Avery's eyes that morning, but he did not see any of the other bruises.

Finally, on April 9th, Detective Dixon asked Appellant about the blood in Avery's

mouth that caused him and Robosson to take Avery to the doctor on Wednesday. Appellant explained that they saw blood on the nipple of the bottle and, when Avery spit up a little bit, the blood mixed with the formula got on Avery's face and they wiped it off.

Detective Dixon then asked Appellant about a bib that the police found with blood on it. Appellant stated that the bib had blood on it from Wednesday. He also said that it had blood on it from Friday when Robosson had "seen the blood" on Avery's chin and used the bib to wipe her chin.

Jennifer Judy responded to the home of Robosson and Appellant on the day of the incident. While there, Judy recovered a pink bib and two blankets. Later, Detective Andrew Mason executed a search warrant at the home and seized a Samsung phone. Detective Dixon participated in a search of Appellant's trailer and found a bong or a "gravity" under the porch of a neighboring trailer that was vacant at the time. Detective Dixon described the device as a pitcher of water with a two-liter bottle inserted into it.

Tiffany Keener, who was accepted as an expert in the field of forensic serology and STR DNA analysis, analyzed various pieces of evidence. Keener determined that the two blankets and the pink bib contained blood stains with a DNA profile that matched Avery's DNA profile. Keener also determined that the swab from the mouthpiece of the two-liter bottle contained a DNA profile from three contributors. The major male contributor matched Appellant's DNA. Finally, she determined that the swab from the pitcher handle contained a DNA profile from three contributors, including a "significant contributor." Avery could not be excluded as "one of the significant contributors," and Appellant could

be excluded as a significant contributor.

Detective Cory Beard testified that**,** on April 18th, he conducted a 911 test call on the Samsung phone. He powered the phone on, disabled the airplane mode which had been enabled when the phone was in the lab and successfully called 911.

After the State rested, Appellant called a number of witnesses in his defense. Dr. Amit Kalaria interacted with Robosson, Charlene and Appellant when he went to the consultation room at the hospital to update the family on April 8th. Dr. Kalaria advised the family of the gravity of the situation and asked, to no avail, what happened. Dr. Kalaria did not recall getting clear information because of the "grief reaction" from all three family members, including Appellant.

Trae Beasom was a friend to both Appellant and Robosson and testified that he saw Appellant with Avery "pretty much" every day since she came home from the hospital. Beasom was aware of the presence of blood in the oxygen tube and nose because Appellant and Robosson had told him. Beasom further testified that Appellant called him on Monday or Tuesday of that week about bruising to Avery's eyes. Beasom agreed that Appellant was concerned and said that he did not know "where they're coming from or what was going on." Beasom testified that he had seen "dark circles" under Avery's eyes on Wednesday and Thursday, but he admitted that he told a detective that he saw "bruises" under her eyes.

Debbie Wolford, a forensic investigator for the Medical Examiner's Office, was required to fill out a report that accompanied the body. When filling out the form, Wolford did not speak to Appellant or Robosson. Instead, she spoke to a grandparent. The checklist

in her report said no fussiness, no excessive crying, no decrease in appetite and no vomiting.

Vanessa Robosson is Robosson's older sister and testified that she did not "particularly think that" her sister "is the most honest person in the world."

Detective Jonathan Martin was a sergeant with the Maryland State Police. He interviewed Robosson approximately five times. He also spoke to Charlene. Detective Martin did not recall either of them mentioning iron deficiency as being the cause of the bruising and Robosson said that she asked Dr. Levitas about eye bruising and he said, "It's normal for babies to kind of like, if they rub their eyes too much." Robosson also said that Avery started to get fussy Tuesday night and was "really fussy" on Wednesday.

DISCUSSION

I.

Appellant's first contention is that the trial court erred when it permitted the State to introduce evidence of his post-*Miranda* silence. According to Appellant, there are two instances of silence at issue, *i.e.*, "near the end of the interrogation" when Appellant "remained silent in response to one question" and when he "invoked his right to counsel in response to the following question." Appellant alleges that the introduction of the DVD that contained these two instances of silence "violated [his] constitutional right against self-incrimination and was more prejudicial than probative given the inherently ambiguous nature of post-*Miranda* silence." Appellant maintains that, "[b]ecause the court erred in denying the motion and overruling the objection and because admission of [his] silence

was not harmless, this Court must reverse his convictions."

The State responds that Appellant's contentions are unpreserved. Regarding the first alleged instance of silence, the State asserts that Appellant failed to argue that introduction of the evidence would "constitute a forbidden use of post-*Miranda* silence as substantive evidence of guilt, and the trial court never purported to decide that question." The State further elaborates that, "[w]hen both the prosecutor and the court expressly framed the motion in this manner, defense counsel never protested that there was an additional constitutional component to his motion." Regarding the second instance of alleged impermissible silence, the State argues that Appellant "lodged no objection at trial whatsoever."

The State also argues that Appellant's contentions are without merit. Regarding the first instance of silence, the State maintains that Appellant's "argument below was a purely evidentiary challenge[.]" The State asserts that "defense counsel never protested that there was an additional constitutional component to his motion." The State also responds that Appellant was not silent. According to the State, "[b]y pausing five to six seconds before uttering 'uh' [Appellant] did not abstain from speech; rather, he haltingly vocalized an interjection." Therefore, according to the State, the evidence could not have admitted as evidence of guilt.

In his reply brief, Appellant responds that, regarding the first instance of silence, his constitutional argument is preserved for our review. Appellant notes that, at the outset of the pre-trial hearing, he "explicitly referred to the 'right to silence.'" Appellant also notes

that, "after the court asked counsel if he agreed that 'there aren't any cases on this point,' defense counsel said, 'Um no, Your Honor. I believe the Constitution would certainly . . . bar that'" and later that "[t]here are some cases regarding the right to silence, Your Honor, or, the right to remain silent." Finally, Appellant asserts that, when he renewed his objection to the introduction of the evidence at issue, he stated "I believe it would violate due process to have it in fact played for the jury."

Regarding the second instance of silence, Appellant concedes that no objection was made.[2]

Background

At the hearing on Appellant's motion *in limine* for the instances of silence at issue, Appellant's counsel argued the following:

> [APPELLANT'S TRIAL COUNSEL]: . . . . Um, there is a uh, question that is asked um of the Defendant when he is being questioned by Officer Dixon um, on April 9th um, 2016. Um, that is taken place at C31. It's after he *Mirandized* um, and he had been being questioned for uh, a, a few, half an hours or say, or around—in any instance um, the Defendant pauses after the question by Officer Dixon um, and eventually says uh and then he invokes his right to counsel, Your Honor.
>
> Um, the State um, is seeking to introduce that part of the transcript where he pauses

[2] Although Appellant erroneously states that "[t]he State is correct that [Appellant] *did* object to the admission into evidence of the second instance of silence[,]" (emphasis supplied) the following context from Appellant's brief clarifies his concession:

> Given the fact that the court denied the pre-trial motion *in limine* to redact the first instance of silence and thereafter overruled counsel's trial objection to the admission into evidence of the first instance of silence, it would have been futile for defense counsel to object to the admission into evidence of the second instance of silence. Accordingly, this Court should excuse counsel's failure to object to the State's use of the second instance of silence.

before he, in fact invokes his right to counsel. Um, I would just argue, Your Honor, that that particular part of the interview while he is contemplating what to say next um, is not um, relevant; um, is more prejudicial than probative if anything; um, and in fact uh, should not permitted to be uh, played before the jury. Um, it is not a response um, that is uh, verbal. It is not a response um, at this point in time, that has any meaning to it other than he eventually makes a, a statement like "uh," and then asks for counsel.

Um, so I believe, Your Honor, that, that us, that the other thing, Your Honor, is that the actual question um, that is asked to Mr. Poindexter at the time um, I would uh, indicate um, is extremely uh, confusing as well. Um, the question um, that is asked is not uh, the subject matter um, upon which they are speaking at the time. So there's a question a question as to whether the pause was because of confusion or whether he was, when and if he was thinking about um, invoking counsel um, or his right to silence um, or he was just confused as to what the officer had said to him.

Um, I think the State seeks to introduce this [uh] as some kind of a, a prejudicial uh, statement um, by his silence or by his uh, verbal, uh,—think he basically says "uh." "Uh," and then invokes his right to counsel.

Um, so that, that particular uh, pause, I believe um, Your Honor, is more prejudicial than probative um, and I would ask that the Court not allow that to be played as part of the uh, the [Appellant's] statement in this matter.

[COURT]: [Mr. Prosecutor]?

[PROSECUTOR]: Thank you, Your Honor.

Your Honor um, I think [Appellant's Trial Counsel] is correct when he analyzed the uh, situation before you in that it's a prejudicial versus probative type of analysis. There is no case law that would be directly on point for this.

The State uh, at no point in time intends to offer the invocation itself. Obviously that would be uh, a non-permissible uh, non-permissible use of that uh, evidence. However, the State feels that the probative nature in this matter is that when he is confronted in this last portion of his statement with inconsistencies that he's provided over the course of two prior days, the fact that he has no response when he is confronted with those inconsisteens [sic] that point of time, is in and of itself very probative. Uhm, while it's not a verbal response, it's a response that, when a person is asked a question and confronted with these inconsistencies, they would expect an, a response out of it. Mr. Poindexter is unable to provide a response, and that, and

therefore the State feels that that would be probative up to the point, of course, where he then invokes his right to counsel.

The video is going to have to stop at some point in time we all understand that—uh, however, the State does feel that that uh, that pause at that point in time is certainly probative of his ability address or at least confront the inconsisity [sic], inconsistencies that that he had been provided over the last uh, two interviews.

***

[COURT]: . . . [D]o you agree that there aren't any cases on this point?

[APPELLANT'S TRIAL COUNSEL]: Um no, Your Honor. I believe the Constitution would certainly . . .

[COURT]: No, no. No, no.

[APPELLANT'S TRIAL COUNSEL]: . . . bar that.

[COURT]: I understand the Constitution . . .

[APPELLANT'S TRIAL COUNSEL]: Not at a . . .

[COURT]: Do you have a case that shows that the Constitution would indicate that . . .

[APPELLANT'S TRIAL COUNSEL]: There are some cases regarding the right to silence, Your Honor, or, or the, the right to remain silent.

The court ruled as follows:

Alright. Well, the Court believes that uh, this the legal issue is, as outlined by both counsel, a balancing of probative value uh, of the uh, proffered evidence uh, and weighed against the uh, the standard of whether it unfairly uh prejudices the Defendant. Uh, there may be some confusion about what this means uh, but that is something for both sides to uh, argue and ultimately for the jury to make a determination on.

So I will permit um, the introduction of the statement uh, all the way up up, [sic] to the pause, but it needs to stop before we get the response from uh, Detective Dixon. So in that regard, uh, I guess it's granted in part and denied in part, the motion.

Later, after the evidence was introduced at trial, Appellant made the following objection at the bench:

> . . . I want to renew that uh, objection to having uh, the pause played um, as we had already done the motion *in limine*. I want to renew um, the reasons therefore. Uh, I don't believe it's incriminatory. I don't believe, I believe it would violate due process to have it in fact played for the jury um, simply because the question um, is not one that is even along the same lines as the line of questioning the officer was asking him. It's design or accidentally uh, confusing, and I think it would be confusing to the jury.

The State submitted on its prior argument. The court overruled Appellant's objection.

The two instances of silence at issue, during the video recording played for the jury are (1) a "five to six second" pause[3] before the utterance of "Uh" in response to a question posed by Detective Dixon and (2) and pause/silence that occurred because of the redaction of Appellant's invocation of his right to counsel, *i.e.*, the "edited non-response" as Appellant characterizes it.

The interview was as follows:

[BEGIN VIDEO PLAYBACK]

[APPELLANT]: . . . before she went back to work.

[DET. DIXON]: That Friday morning, when did the blood get on the bib?

[APPELLANT]: That's what I meant. Yesterday is Friday, correct?

[3] According to both parties, the transcript does not include a notation concerning the pause, but both parties agree that it exists and the State included a notation in its transcription of interview.

[INVESTIGATOR GOLDSTROM]: Yes.

[APPELLANT]: Okay. And that's when I told you that [when she] woke up, she had some blood on her chin too.

[DIXON]: But you told me yesterday that Friday morning she was in the shower when the baby woke up.

[APPELLANT]: [five to six second pause] *Uh* . . . .

[DET. DIXON]: You said that to me twice now.[4] I think we need to get to the point where we're, we're start [sic] talking about truth . . .

[APPELLANT]: I am.

[DET. DIXON]: . . . here.

[APPELLANT]: Can I, can I ask a question, too.

[DET. DIXON]: Sure.

[APPELLANT]: Okay, can I just get a, a lawyer, cause I think, I just, my, I just don't feel comfortable where you just sent me. I really don't I'm not . . .

[END VIDEO PLAYBACK]

(Emphasis supplied).

Although the transcript does not include the colloquy concerning the second instance of silence, Appellant alleges that the DVD, at the 34:27 mark, includes Detective Dixon's statement: "You said that to me twice now[,]" and further shows Appellant's lips moving but no audible sound "for eight seconds" and then the conclusion of the recording at the 34:55 mark. The State argues that "it is not even clear that the jury even heard [the]

[4] After this statement by Detective Dixon, the video was redacted for the jury.

portion of the recording" that included the second alleged instance of silence. The State infers that Appellant's countdown of the recording's playback is not precise, asserting by stating that the starting point utilized is "vague" and suggests that Appellant's failure to object at trial suggests the last seconds of the recording, *i.e.*, the second alleged instance of silence, were not played for the jury.

Preservation

As a preliminary matter, we address the State's contention that Appellant has failed to preserve his claims for our review. "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[.]" MD. RULE 8–131(a). "It is well established that a party opposing the admission of evidence 'shall' object "at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." *State v. Jones*, 138 Md. App. 178, 218 (2001) (citing MD. RULE 4–323(a)).

> The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs. *** But, when particular grounds for an objection are volunteered or requested by the court, "that party will be limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated."

Id. (citations omitted). Furthermore, Maryland courts "have not hesitated to decline to review on direct appeal claims of constitutional dimension that were not preserved under Rule 8–131(a)." *Savoy v. State*, 420 Md. 232, 241–42 (2011).

Regarding the second instance of silence, Appellant made no objection. Without a contemporaneous objection, the issue is waived. *Jones, supra*. Accordingly, we hold that

Appellant's claim regarding the second instance of silence has not been preserved for our review.

As it pertains to the first instance of silence, Appellant did make an objection to the introduction of the evidence. Although not required, Appellant did volunteer the grounds for the objection and, therefore, will be limited to those grounds on this appeal. *Jones, supra.* At the point in time that Appellant made his objection, he also renewed the arguments from his motion *in limine*, wherein he stated the following:

> So there's a question as to whether the pause was because of confusion or whether he was, when and if he was thinking about um, invoking counsel um, or his right to silence um, or he was just confused as to what the officer had said to him.

When the court paraphrased the argument as prejudicial versus probative and the prosecutor concurred, Appellant's trial counsel did not object nor sought clarification. The law does not require that the grounds for objection be exhaustive or overwhelmingly stated. Therefore, we hold that Appellant has preserved his claim regarding the first instance of silence for our review.

Legal Analysis

"The Fifth Amendment, as applied to the states by the Fourteenth Amendment, guarantees an accused the right to invoke his privilege against self-incrimination." *Coleman v. State*, 434 Md. 320, 333 (2013) (citing U.S. CONST. amend. V, XIV). The Court of Appeals has noted that

> [t]he protections bestowed upon citizens by the privilege against self-incrimination do not disappear once the accused initially waives his or her rights. An accused may invoke his or her rights at any time during questioning, or simply refuse to answer

any question asked, and this silence cannot be used against him or her.

Id. (quoting *Crosby v. State*, 366 Md. 518, 529 (2001)).

"Additionally, '[e]vidence of post-arrest silence, after *Miranda* warnings are given, is inadmissible for any purpose,' due to the fact that, '[a]s a constitutional matter, allowing such evidence would be fundamentally unfair and a deprivation of due process.'" *Id.* (quoting *Grier v. State*, 351 Md. 241 (1998)). "[A] defendant's silence at that point [*i.e.*, post-arrest] carries little or no probative value, and a significant potential for prejudice." *Grier v. State*, 351 Md. 241, 258 (1998) (quoting *United States v. Hale*, 422 U.S. 171, 180 (1975)).

Furthermore, "[i]n Maryland, we have said that, '[i]n general, silence is evidence of dubious value that it is *usually* inadmissible under Maryland Rule 5–402 [relevance] or 5–403 [prejudice].'" *Lupfer v. State*, 420 Md. 111, 125 (2011) (emphasis supplied) (quoting *Kosh v. State*, 382 Md. 218, 227 (2004)). *See Grier*, 351 Md. at 260–63 (discussing the "opening the door" doctrine and the "fair response" rule as exceptions to the inadmissibility of silence as evidence).

"Silence," as defined by Black's Law Dictionary, can mean "[a] restraint from speaking" and, "[i]n criminal law, silence includes an arrestee's *statements* expressing the desire not to speak and requesting an attorney." (10th ed. 2014) (emphasis supplied).

In the instant appeal, the State's contention that Appellant was not silent, *i.e.*, "the complete absence of sound" is incongruent with the legal definition and meaning in regards to the Constitutional right to remain silent. Although a "restraint from speaking" is a part

of the definition, "an arrestee's *statements*" can also constitute legal silence if they are an expression of the desire not to speak and/ or a request for an attorney. *See Wainwright v. Greenfield,* 474 U.S. 284, 295 n. 13 (1986) ("With respect to post-*Miranda* warnings 'silence,' we point out that silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted.).

In the case *sub judice*, there is an ambiguity regarding Appellant's utterance of "Uh." It could very well have been, as the State suggests, a "hesitat[ion] about what to say next" or a faltering response to the Detective's question about an alleged inconsistent statement. However, it could also very well be a pause or reflection concerning the right to remain silent or the invocation of the right to counsel. It would be preposterous to say that any statement of "Uh" or "Um" or any other ambiguous utterance cannot be admitted into evidence due to a potential violation of the accused's Constitutional rights; however, in the specific context of this case, the utterance could mean several different things. It is particularly so given the context of the silence and how the recording was redacted for the jury, *i.e.*, the last words of Appellant are the pause and "Uh." It is precisely this ambiguity that renders most post-arrest, post-*Miranda* silences too prejudicial to admit as evidence. Therefore, we hold that the lower court erred in allowing the admission of Appellant's five to six second pause and the utterance of "Uh."

However, we are persuaded that the trial court's error was harmless.

The harmless error test is well established, and relatively stringent. [The Court of

Appeals] stated it in *Dorsey v. State*, [276 Md. 638, 659 (1976)]:

> "[W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict."

Dionas v. State, 436 Md. 97, 108 (2013).

> In performing the harmless error analysis, we are not to find facts or weigh evidence. Instead, what evidence to believe, what weight to be given it, and what facts to flow from that evidence are for the jury . . . to determine. To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record.

Dionas v. State, 436 Md. 97, 109 (2013) (internal quotation marks omitted) (quoting *Bellamy v. State*, 403 Md. 308, 332 (2008).

We are convinced that the error was harmless in relation to the evidence that the jury considered on the issue. Appellant argues that the case was circumstantial and that his "defense depended in large part on whether the jury believed [his] various statements that the bruises were present before Ms. Robosson went to work on Friday and that [he] did not know the injuries occurred." However, there was substantial lay witness and expert testimony, reports, autopsy, and physical evidence submitted to the jury for its consideration before it returned a verdict of guilty. Expert evidence was adduced concerning the potential timeframe of the incurrence of Avery's injuries and her death. Robosson left for work on Friday around 7:10 or 7:20 a.m. At 12:39 p.m., a span of over

five and a half hours, she received a text stating that Avery was on her way to the hospital. Paramedic Katrina Wolf testified that, upon arrival, she found that Avery was warm, but very pale and gave no indication of life. Dr. Krugman testified that Avery's brain was not swollen, which is atypical for brain trauma victims, indicating "[t]hat she died very quickly." He further testified that it was likely the timeframe between the incursion of her injuries and death was 1 to 2 hours, and that 6 hours "seems unlikely; that seems a little long."

We are not tasked with finding facts or weighing evidence upon a harmless error review, but we note that, in relation to all the jury was required to consider, the error of playing the portion of the DVD that showed Appellant's ambiguous post-arrest, post-*Miranda* silence was "unimportant." *Dionas, supra.* Therefore, upon an independent review of the record, we hold the belief beyond reasonable doubt, that the error in no way influenced the verdict.

II.

Appellant's next contention is that the trial court erred when it permitted Detective Cory Beard to testify that he was able to complete a 911 call using Appellant's cell phone. According to Appellant, "[b]ecause the [D]etective's testimony was not relevant, the court erred when it overruled defense counsel's objection." Although Appellant concedes that the term "relevant" was not cited during his objection at trial, Appellant argues that "he was, in essence, making a relevancy objection when he argued that 'we don't know how' the detective's test call 'correlate[s]' to the 'probability' that [Appellant] was able to make

a 911 call on the day of the incident."

The State responds that the trial court correctly admitted the prosecution's rebuttal evidence showing that Appellant's cell phone was capable of calling 911 days after the victim's death. According to the State, "Detective Beard's rebuttal testimony established that the phone had the capacity to connect with 911, thus making it less likely (indeed, ruling out the possibility) that the phone was intrinsically unable to make such a call by some flaw in either the software or hardware design." The State argues that "[t]his tended—however slightly—to support an inference that [Appellant] was falsely downplaying his culpability, an obvious form of consciousness of guilt." The State does not address the argument that Appellant has failed to preserve this issue for our review.

"'Relevant evidence' means 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." MD. RULE 5–401 (Emphasis supplied).

"Relevant testimony is generally admissible and irrelevant testimony is not admissible. Evidence is relevant if it has a tendency to establish or refute a fact that is at issue in the case." *Sifrit v. State*, 383 Md. 116, 128 (2004) (citing *Merzbacher v. State*, 346 Md. 391, 404 (1997)).

"It is well established in this State that the admission of evidence is committed to the considerable discretion of the trial court." *Id.* (citing *Merzbacher v. State*, 346 Md. 391, 404 (1997)). "We are generally loath to reverse a trial court unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse

of discretion." *Id.* at 128–29 (citing *Merzbacher*, 346 Md. at 404–405).

> While often noting the important distinction between weight and admissibility and favoring a policy of broad admissibility, [the Court of Appeals] ha[s] consistently held that a party seeking to establish the relevancy of proffered evidence does not have to demonstrate that the evidence is weighty enough to carry that party's burden of persuasion.

Snyder v. State, 361 Md. 580, 591 (2000). Rather, the threshold laid out in Md. Rule 5–401 "expressly require[s] only that the evidence have 'any tendency' to prove a fact of consequence to the cause of action." *Id.*

At an objection made at the bench during Detective Bear's testimony, Appellant's trial counsel made the following remarks:

> Uh, Your Honor, we would object to the uh, officer conducting, either testifying about a past experiment or conducting a uh, in court uh, experiment of the uh, function of the phone to dial 9-1-1 uh, because we don't know how that correlate[s] to the uh, *probability* at the time the uh, Defendant alleged that he tried to uh, use the phone to dial 9-1-1, and we don't know uh, the way that the phone was set up at the time in terms of any uh, apps that were open or uh, if he had, you know, what, what mode it had been in uh, at the time he was attempting to, or attempting to make that call.

(Emphasis supplied).

Although Appellant did not expressly state "relevancy" as his grounds for the objection, he did volunteer that the Detective's testimony concerning any experiments with the cell phone did not correlate to the probability of the phone's status at the time of the incident. As relevance evidence concerns making a fact more or less probable, we hold that Appellant has preserved the relevancy claim for our review.

The State argues that, in response to Appellant's statements to the police that, "after

'a hundred' attempts to call 9-1-1, his cell phone 'kept telling [him] I can't call I can't call[,]"

> Detective Beard's rebuttal testimony established that the phone had the capacity to connect with 9-1-1, thus making it less likely (indeed, ruling out the possibility) that the phone was intrinsically unable to make such a call by some flaw in either the software or hardware design.

We are persuaded that, based on Detective Beard's testimony, it was more likely than not, that the cell phone did not have an intrinsic defect that made calling from it impossible.

The main thrust of Appellant's argument concerning this claim conflates the weight of the evidence versus its admissibility. According to Appellant, "[t]he fact that the [D]etective was able to place a call in a different location with a different path to a tower therefore said nothing about whether Mr. Poindexter was able to make a call on April 8." Appellant also cites numerous other geographic and technical concerns that would render Detective Beard's testimony ineffective in establishing that Appellant had the ability to use the cell phone in question on the date of the incident. That, however, raises a question of the weight of the evidence, which is decided by the fact-finder. Here, we are concerned with the admissibility of the evidence, which has a lower threshold of having "'any tendency' to prove a fact of consequence to the cause of action." *Snyder, supra*.

Accordingly, we hold that the trial court properly admitted Detective Beard's testimony illustrating that Appellant's cell phone was capable of calling 9-1-1 days after Avery's death.

III.

Appellant's final contention is that this Court must merge his sentence for first-degree child abuse into his sentence for second-degree murder. Although Appellant acknowledges that the child abuse statutes contain anti-merger provisions, nevertheless, he asserts that sentences for child abuse merge into felony murder convictions predicated on child abuse, citing the dissent in *Fisher v. State*, 367 Md. 218 (2001). Appellant also asserts that his conviction for second-degree murder was based on a general jury verdict. According to Appellant, this ambiguity leaves the possibility that his conviction of second-degree murder may have been based on second-degree felony murder and, therefore, the ambiguity must be resolved in his favor.

The State responds that the trial court correctly imposed separate sentences for the second-degree murder and first-degree child abuse convictions. According to the State, "[t]he former conviction was entered on a general verdict that did not differentiate between second-degree specific intent murder and second-degree felony murder, both of which were the subject of jury instructions." Citing *Alexis v. State*, 437 Md. 457, 488 (2014), the State argues that it was the intent of the General Assembly that punishments for convictions under a statute containing plain, anti-merger language, do "not merge[] with a conviction for any other offense." The State urges this Court to affirm the decision of the lower court.

"One of the twin evils traditionally guarded against by the prohibition against double jeopardy, pursuant to either the Double Jeopardy Clause of the federal Fifth Amendment or to the common law of Maryland, is that of multiple punishment for the

'same offense.'" *Pair v. State*, 202 Md. App. 617, 636 (2011).

"The necessary inquiry is that of whether separate punishments are being imposed for the 'same offense.'" *Id.* "Maryland recognizes three grounds for merging a defendant's convictions: (1) the required evidence test; (2) the rule of lenity; and (3) 'the principle of fundamental fairness.'" *Carroll v. State*, 428 Md. 679, 693–94 (2012) (citations omitted).

> Under the "required evidence" or "elements tests," courts look at the elements of the two offenses in the abstract. All of the elements of the lesser included offense must be included in the greater offense. Therefore, it must be impossible to commit the greater without also having committed the lesser.

Hagans v. State, 316 Md. 429, 449 (1989).

Furthermore, if the Required Evidence Test does not require sentences to merge, the Rule of Lenity may be employed.

> Two crimes created by legislative enactment may not be punished separately if the legislature intended the offenses to be punished by one sentence. It is when we are uncertain whether the legislature intended one or more than one sentence that we make use of an aid to statutory interpretation known as the "[R]ule of [L]enity." Under that [R]ule, if we are unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, we, in effect, give the defendant the benefit of the doubt and hold that the crimes do merge.

Monoker v. State, 321 Md. 214, 222 (1990) (noting that "[t]he rule of lenity, formulated as an aid to statutory construction, applies to statutory offenses" and the Court does not use the Rule when both offenses are common law offenses).

Finally, Maryland courts will sometimes look to "fundamental fairness" to determine if two sentences should have been merged. "One of the most basic considerations in all our decisions is the principle of fundamental fairness in meting out

punishment for a crime." *Id.* (citing *White v. State*, 318 Md. 740, 746 (1990)).

> In deciding whether fundamental fairness requires merger, we have looked to whether the two crimes are "part and parcel" of one another, such that one crime is "an integral component" of the other. This inquiry is "fact-driven" because it depends on considering the circumstances surrounding a defendant's convictions, not solely the mere elements of the crimes.

Carroll, 428 Md. at 695 (citations omitted). "Rare are the circumstances in which fundamental fairness requires merger of separate convictions or sentences." *Id.*

"A failure to merge a sentence is considered to be an "illegal sentence" within the contemplation of [Md. Rule 4–345]." *Pair*, 202 Md. App. at 624. *See* MD. RULE 3–345(a)("The court may correct an illegal sentence at any time.").

> Under section 2–204(a) of the Criminal Law Article, a "murder that is not in the first degree . . . is in the second degree." Although the statute itself does not further define that offense, there are, according to Maryland decisional law, "four different types" of second-degree murder. They are: first, the killing of another person, other than by poison or lying in wait, with the intent to kill but without the deliberation and premeditation required for first-degree murder; second, the killing of another person with the intent to inflict such serious bodily harm that death would be the likely result; third, "depraved heart murder," which is to say, "a killing resulting from 'the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not'"; and fourth, "murder committed in the perpetration of a felony other than those enumerated in the first-degree murder statutes."

Jones v. State, 222 Md. App. 600, 610 (2015), *aff'd, opinion vacated on other grounds*, 451 Md. 680 (2017) (quoting *Thornton v. State*, 397 Md. 704, 721–22, 721 n. 6 (2007)).

Md. Code Ann., Crim. Law ("C.L.") § 3–601(b)(1) governs child abuse in the first degree and subsection (e)[5] provides that "[a] sentence imposed under this section may be

[5] The current version of the statute is effective October 1, 2017. The version of the statute

separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation of this section."

In *Alexis*, 437 Md. at 488, the Court of Appeals, when encountering statutes containing anti-merger provisions identical to C.L. § 3–601(e), held that "[t]he plain language of these subsections indicates that the General Assembly intended punishment for convictions under either statute not to merge with a conviction for any other offense, including a conviction under the other statute." The Court further noted that this was particularly so when the legislative history does not contradict the "plain meaning of these provisions." *Id.*

> In *Fisher*, [367 Md. at 218,] we summarized the legislative history on this subsection as follows:
>
> > What is now [former version of C.L. § 3–601] was enacted by Chapter 604 of the Acts of 1990 for the express purpose of overruling the holdings in *Nightingale v. State*, 312 Md. 699 (1988), and in *White v. State*, 318 Md. 740 (1990), which had applied the rule of lenity to multiple sentences in child abuse cases. In *Nightingale*, this Court treated a conviction of second-degree sexual offense under § 464A(a)(3) as a lesser included offense of sexual child abuse, and we struck the additional sentence that had been imposed by the trial court for the sexual offense violation. In *White*, consecutive sentences had been imposed for murder in the first degree and for child abuse. Applying the rule of lenity we merged the child abuse conviction into the murder conviction.
> >
> > The purpose clause of Chapter 604 of the Acts of 1990 declares that the Legislature intended to allow the imposition of multiple sentences "if a conviction is entered against an individual for murder, rape, sexual offense, any sex crime, or any crime of physical violence, and a conviction is also entered for child abuse."

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that controlled at the time of the incident was effective October 1, 2012. Both versions contain identical statutory language for subsection (e).

Alexis, 437 Md. at 488–89 (2014).

We are unpersuaded by Appellant's contention that the dissent from *Fisher*, *supra*, overrules the legislative intent and the anti-merger provision of C.L. § 3–601(e). Patently, the General Assembly intended that sentences for crimes under the child abuse statute do not merge with sentences for other convictions. Therefore, we hold that the trial court correctly imposed separate sentences for second-degree murder and first-degree child abuse.

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