Circuit Court for Prince George's County
Case No. CT-15-1439X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 655

September Term, 2017

GIGI MARIE THOMAS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Grill Graeff,
Thieme, Raymond G. Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: March 23, 2018

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A jury in the Circuit Court for Prince George's County convicted Gigi Marie Thomas, the appellant, of second degree specific intent murder. The court sentenced her to a term of 30 years, suspend all but 20 years, and 5 years' supervised probation. She appeals, presenting three questions that we have rephrased slightly:

> I. Did the trial court err by ruling that a portion of a video-recorded statement the appellant gave to the police was voluntary and therefore admissible for impeachment?
>
> II. Did the trial court err by not instructing the jury on involuntary manslaughter during the perpetration of an illegal act?
>
> III. Was the evidence legally sufficient to sustain the appellant's conviction?

For the following reasons, we answer the first two questions in the negative and the third question in the affirmative and therefore shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

On October 16, 2015, at 7:49 p.m., the appellant called 911 and told the operator, during a mostly incoherent phone call, that her friend had been cut and was not breathing. Officer Luke Allen from the Prince George's County Police Department ("PGCPD") responded to the appellant's home at 5712 Linda Lane, Temple Hills. Upon entering, Officer Allen smelled the strong odor of a decomposing body. The appellant directed Officer Allen to an upstairs guest bedroom, where he found the partially decomposed body of a man, later identified as 42-year-old Devale "Vale" Avery. Mr. Avery had been stabbed multiple times in the chest, neck, arms, abdomen, and thigh.

The appellant was transported to the PGCPD criminal investigation division ("CID"). At 9:54 p.m., she was placed in an interrogation room. She remained there for more than eleven hours, during which time she was continuously video recorded. The following morning, she was advised of her *Miranda*[1] rights and gave a statement to the police in which she confessed to stabbing Mr. Avery with a butcher knife. (We shall discuss the video-recorded statement in greater detail, *infra*.) She was arrested and charged with murder.

The appellant filed a pre-trial motion to suppress the video-recorded statement. In its response, the State conceded that the appellant was not "coherent" enough to knowingly and intelligently waive her *Miranda* rights because she was under the influence of drugs and/or alcohol. Consequently, the State agreed that it would not use the appellant's statement in its case-in-chief. It argued, however, that the appellant's statement was voluntary under federal and state constitutional law and Maryland nonconstitutional law and therefore was admissible for impeachment purposes if the appellant elected to testify. The defense maintained that the statement was involuntary because of the appellant's level of intoxication and should be suppressed in its entirety for all purposes. Ultimately, the court ruled that the final three hours of the video-recorded statement would be admissible for impeachment purposes.

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

The case against the appellant was tried to a jury over four days in February and March 2017. The extent of the appellant's culpability was disputed at trial, but her criminal agency was not. In its case, the State called eleven witnesses, including Mr. Avery's fiancée, Jean Brown; the medical examiner who performed the autopsy; and numerous PGCPD officers who participated in the investigation. The appellant testified on her own behalf. Consistent with the court's pre-trial ruling, the State used the admissible portion of the appellant's video-recorded statement to impeach her.

The testimony and other evidence adduced at trial, which was largely undisputed, established the following. The appellant and Mr. Avery grew up together in southeast Washington, D.C. and remained friends into adulthood.[2] They often returned to their old neighborhood in Washington, D.C. where Mr. Avery sold illegal drugs on "the strip" and where they both would purchase illegal drugs for their personal use. The appellant used phencyclidine ("PCP") "dippers," which are marijuana cigarettes dipped in liquid PCP and then smoked. Mr. Avery snorted heroin and also used PCP dippers. They both used alcohol.

On the evening of Monday, October 12, 2015, Mr. Avery was with the appellant. He had been staying in the guest bedroom of her home for a few days prior to that night. He had made plans to meet Ms. Brown, who as mentioned was his fiancée, at the

[2] The appellant identified as a male during her childhood, but has identified as a transgender female since her early twenties. At times during the trial testimony, witnesses used the male pronoun to refer to the appellant before she transitioned. We shall use the female pronoun to refer to her.

Maryland Live Casino later that night. Shortly before 11 p.m., Mr. Avery drove the appellant's white Cadillac Escalade to a McDonald's restaurant near the casino. The appellant accompanied him and sat in the passenger seat. She testified that she was unable to drive because she had smoked PCP.

Meanwhile, Ms. Brown had been at the casino for several hours waiting for Mr. Avery. She had expected him to meet her there much earlier, but he had not shown up. Around 11 p.m., she left and went to the same McDonald's restaurant to buy some food. She saw Mr. Avery and the appellant sitting in the Escalade in the parking lot and walked toward them. Mr. Avery got out of the vehicle and went to speak to Ms. Brown. They argued because Ms. Brown was upset that Mr. Avery was spending time with the appellant. He told Ms. Brown that he loved her. When he tried to kiss her, she pushed him away. He asked her for some money, but she refused. Ms. Brown left and went home.

Around 2 a.m. (October 13), Mr. Avery called Ms. Brown's cell phone and told her he had won money on a slot machine at the casino. She had been sleeping and hung up on him. A few minutes later, she received a text message from Mr. Avery with an attached blurry photograph of a slot machine. A minute later, she received a second photograph of the slot machine showing $200 in winnings. That message was from a number she did not recognize. It later was identified as the appellant's cell phone number.

On Wednesday, October 14, 2015, Ms. Brown tried to call Mr. Avery, but he did not answer. She never heard from him again.

Cell site data introduced at trial showed that the appellant and Mr. Avery's cell phones both were connecting to cell towers near the casino throughout the early morning hours of October 13, 2015. Around 7:30 a.m., their cell phones were connecting to towers in the vicinity of "the strip" in southeast Washington, D.C. Sometime after 10:30 a.m., their cell phones were connecting to towers near the appellant's house. Shortly before 1 p.m., their cell phones again were connecting to towers in southeast Washington, D.C. By a little after 4 p.m., their cell phones were connecting to towers near the appellant's house. The cell phone records do not show any movement of the appellant's or Mr. Avery's cell phones from that point forward.

The medical examiner testified that Mr. Avery had been stabbed 43 times, with 37 wounds in his chest. Twenty-one of his stab wounds injured major organs. One stab wound hit his aorta and two punctured his pericardium, which is the sac surrounding the heart. The stab wounds ranged in depth from 5/16ths of an inch to 3.5 inches. No one stab wound was instantaneously fatal, but the wound to the aorta was the most "rapidly fatal." All the stab wounds were inflicted prior to death. The medical examiner estimated that Mr. Avery had been dead for at least 60 and up to 72 hours when the appellant called 911 on October 16, 2015, just before 8 p.m., meaning that he had been killed sometime after 8 p.m. on October 13, 2015, and before 8 a.m. on October 14, 2015.

Toxicology reports showed the presence of PCP, alcohol, morphine, and codeine in Mr. Avery's blood. The medical examiner explained that the alcohol may have been a result of decomposition. It was impossible to determine the actual blood levels of the other three drugs because of the amount of blood loss and decomposition that had taken place prior to the testing.

Crime scene investigators testified that a large kitchen knife and a meat cleaver were found in the upstairs guest bedroom where Mr. Avery's body was found. The medical examiner opined that Mr. Avery's injuries were consistent with the kitchen knife having been used as the weapon. His DNA was found on that knife and on the meat cleaver.

The blood evidence in the house was consistent with Mr. Avery having been killed on the bed in the guest bedroom, where his body was found. Blood was found in other locations in the house, such as the kitchen and the dining room, but that blood had been transferred there by the appellant after Mr. Avery was stabbed to death.

The appellant's Cadillac Escalade was searched. The police recovered several tokens from the casino, cash-out vouchers from the casino dated October 13, 2015, with time stamps of 2:08 and 3:31,[3] and $679 in cash in a purse.

The appellant testified in her defense. At the time of her arrest, she was 45 years old and was employed as the head case manager at the Psychiatric Charter Center in

[3] It was unclear if the time stamps were a.m. or p.m.

Washington, D.C.[4] She also was employed at Job has Priorities, an organization assisting the homeless, in Greenbelt.

The appellant and Mr. Avery had known each other since the appellant was about 12 years old. She had been using drugs and alcohol since she was about 11 or 12 years old. She recalled that she and Mr. Avery used drugs together on October 12, 2015, and throughout the day on October 13, 2015. She usually purchased drugs for both herself and for Mr. Avery because she had a job and a steady source of income.

The appellant testified that she and Mr. Avery stopped at the McDonald's restaurant on October 12, 2015, because Mr. Avery needed a straw to snort heroin. While they were there, he jumped out of the vehicle and spoke to Ms. Brown. Later, they gambled together at the casino. She remembered that he won money. After they left the casino, they went to the "strip" to purchase drugs and then returned to her house. They both got high. She was using PCP, heroin, marijuana, and alcohol. She explained that when she uses PCP her speech becomes slurred, she is "unable to like really drive or function," she feels like she is "walking in slow motion," and sometimes she hallucinates. PCP also causes her to experience blackouts.

According to the appellant's trial testimony, later that day (October 13), she and Mr. Avery went to the strip to buy more drugs. When they returned to her house, she was "already high . . . [and she got] higher." She remembered them lying in bed in the guest

[4] She was hired in that position during a lengthy period of sobriety, from which she eventually relapsed.

bedroom together, watching television. She was feeling good, and there was no tension or animosity between them. The next thing she remembered was waking up in bed next to Mr. Avery's body. At the time, she did not realize that it was Mr. Avery, that he was dead, or that she had killed him. The cuts on his body appeared to her to be opening and closing. She called 911.

On cross-examination, the prosecutor asked the appellant about a portion of her video-recorded statement during which she told homicide Detective Joseph Bellino that she remembered becoming angry with Mr. Avery because she counted her winnings from the casino and thought he had stolen money from her, and in which she remembered using a knife to stab him. The State played excerpts from the appellant's video-recorded statement to the police in which she recounted Mr. Avery telling her he was "hurt," asking her not to hurt him, and saying that he would never steal from her. The State also played excerpts in which the appellant recalled telling Mr. Avery that she was "tired of people taking from [her]."

The portion of the video-recorded statement that the court had ruled was admissible was introduced into evidence.

At the close of all the evidence, the defense moved for judgment of acquittal on first degree premeditated murder and second degree specific intent murder. The court granted the motion on first degree murder only.

The question of whether the appellant's statement to police was voluntarily made was submitted to the jury. The jurors were instructed on second-degree specific intent

murder, second-degree depraved heart murder, and involuntary manslaughter/grossly negligent act, and the verdict sheet included those three counts.

In closing argument, the prosecutor asked the jury to find the appellant guilty of second-degree specific intent murder based upon the evidence that she stabbed Mr. Avery 43 times in a fit of rage because she suspected he had stolen money from her. In the alternative, the prosecutor argued that if the jurors did not find that the appellant had the specific intent to kill Mr. Avery or to cause him such serious bodily harm that death would be the likely result, they should find her guilty of second degree depraved heart murder, which only required a finding that the appellant killed Mr. Avery while acting with extreme disregard for human life.

Defense counsel argued that the jurors should find the appellant guilty of involuntary manslaughter because she was so intoxicated at the time of the killing that she could not form the specific intent to murder Mr. Avery, nor could she have acted with extreme disregard for his life.

The jurors convicted the appellant of second degree specific intent murder. This timely appeal followed.

DISCUSSION

I.

Motion to Suppress

a.

The suppression hearing was held on January 12, 2017.[5] Prior to the hearing, the court had had an opportunity to view the video-recording of the appellant's statement. A memorandum submitted by the appellant highlighted key moments during the 11-hour recording that supported her position that her statement was involuntary. The parties agreed not to present live testimony at the suppression hearing or to play any of the video, but to present argument only.

We summarize the video. The tape starts at 9:54 p.m. on October 16, 2015, approximately 2 hours after the appellant called 911, and ends more than 11 hours later, at 9:20 a.m. the next morning. For much of the first six hours, the appellant is alone in the interrogation room. She is not handcuffed or otherwise restrained. She is sitting in a chair at a table, sometimes putting her head down. At times she stands up, and she makes occasional noises and gestures.

[5] On November 24, 2015, the appellant filed a motion to suppress her statement to police. Following a suppression hearing on April 7, 2016, the State agreed not to use the appellant's statement in its case-in-chief and the appellant withdrew her motion to suppress. The appellant subsequently moved to reopen the suppression hearing and specified that she was moving to suppress on the basis that the statement was involuntary due to extreme intoxication, resulting in mental impairment. The January 12, 2017 suppression hearing followed that motion to reopen.

At 11:15 p.m., a male police officer checks on the appellant and asks whether she is okay. She replies that she is "good." He asks if she wants a bottle of water. She replies in the affirmative and he returns with the water a minute later. The appellant thanks the officer.

At 11:33 p.m., the same officer enters the room for a little more than a minute and asks the appellant if she can tell him the name of the victim. She says, "Vale," but says she cannot recall his last name. She tells the officer she has known "Vale" for thirty years.

Shortly after 3 a.m., the appellant calls out, "Hello?" and the same police officer enters and asks how he can help her. He asks if she needs another bottle of water. He asks for her name and date of birth. She provides her full name but only the month and year of her birth. She tells him she has a master's degree in social work. She tells him she is "so sorry that [she] messed up." She asks if Mr. Avery is "living or dead." She says she feels like she has been there, *i.e.*, at CID, before. The police officer leaves after about 10 minutes, but returns a few minutes later to give her another bottle of water. The appellant asks for a tissue.

At 3:35 a.m., a woman enters the room and gives the appellant a box of tissues. After the woman leaves, the appellant calls out several times, "Ma'am, Ma'am?" A minute later, the male police officer reenters and the appellant asks him if she has "been [t]here before?" He replies that he has not seen her before. The appellant says that it feels like "déjà vu."

At 4:20 a.m., the male police officer returns and asks the appellant how she is doing. He again asks if she knows the victim's full name. She still does not remember.

At 4:47 a.m., the appellant begins wailing intermittently. A male police officer opens the door and asks if she is okay and whether she is hungry. She shakes her head no.

A minute later the appellant walks over and opens the door to the interrogation room. A male voice asks the appellant if she wants him to come in and talk to her. She says yes. The man tells her to sit down and that he will come in soon. She returns to a chair and sits down.

At 4:51 a.m., Detective Bellino enters the room and speaks to the appellant for more than an hour. He asks her for some basic identifying information and advises her of her *Miranda* rights. He asks her if she is under the influence of drugs or alcohol and she replies in the negative. A minute later, however, she says she took PCP two days earlier and is under the influence, but she feels like its "wearing off." She later says she took PCP a week earlier. She tells Detective Bellino she called 911 because her "friend's . . . stomach was exploding." The appellant intermittently responds to Detective Bellino's questions during this portion of the video, remembers that she and Mr. Avery had a fight, and agrees that it is possible that she stabbed him. She does not "recall" stabbing him, however.

At 5:56 a.m., Detective Bellino offers to purchase the appellant breakfast from Wendy's. She accepts his offer for a bacon, egg, and cheese sandwich and requests orange juice. He leaves the room.

Between 6:30 a.m. and 6:40 a.m., while the appellant is alone, she begins rocking, singing, squealing in a high-pitched voice, and kneeling on the chair while swinging her head around and making strange noises and facial expressions.

At 6:41 a.m., Detective Bellino brings the appellant her breakfast and leaves her alone to eat it.

At 6:57 a.m., Detective Bellino returns and begins speaking to the appellant about what she remembers about the days preceding her 911 call. The conversation lasts more than two hours. Detective Bellini occasionally asks questions, but spends most of his time listening. Throughout the conversation, the appellant speaks very slowly and her words are slurred.

The appellant tells Detective Bellino that she remembers going to the casino with Mr. Avery. She had smoked PCP earlier that day and he had snorted heroin. She played blackjack and slots. She thinks they stayed for 2 to 3 hours. She remembers that they won money and estimates that she won close to $800. They left the casino and drove back to her house. She remembers lying with Mr. Avery on the bed in the guest room, talking. She began counting her money from the casino. She believed that some of it was missing. She confronted Mr. Avery about the missing money. She told him she would "bust [his] ass up if [he] t[ook] something from [her]." She "found herself angry."

Detective Bellino asks whether "the anger overtook [her]," and the appellant replies, "the anger could have overtook me." Detective Bellino then asks whether the appellant remembers "cutting" Mr. Avery. She replies, "I don't remember. I don't remember" (repeating it several more times).

A moment later, the appellant says she remembers Mr. Avery saying, "Gigi . . . I wouldn't take nothing from you" and "Gigi, I'm hurt." The appellant says to Detective Bellino, "I think I hurt him." She repeats that numerous times. Detective Bellini asks if she used a knife, but she does not respond. Later, she says she remembers Mr. Avery saying, "I wouldn't hurt you at all."

At 7:46 a.m., Detective Bellini tells the appellant that Mr. Avery is dead. She puts her head on the table, gasping. The detective tells her the police know that she walked around the house after the killing and asks her if she tried to clean up. She does not respond.

The appellant says that Mr. Avery had said, "Gigi, don't hurt me" and "I would never do something to you." She comments, "it was the PCP."

Detective Bellini asks the appellant what she used to stab Mr. Avery. She does not respond at first, but later says it was a "kitchen knife." He asks whether she thinks she stabbed Mr. Avery more than 20 times and she replies, "it was," repeating that several times and crying.

The appellant says she remembers going down to the kitchen. She then says repeatedly, "[i]t was me. It was me."

Over and over the appellant talks about the money Mr. Avery stole from her, at one point saying she had a huge stack of cash and he took half of it. She remembers telling Mr. Avery that she would "hurt [him] if [he] st[ole] from [her]" and that she was "tired of people taking from [her]." He responded that he wouldn't "[]ever take from [her] again."

The appellant recalls that she used a "butcher knife" to stab Mr. Avery. She hit him in the throat with the knife because she knew he was lying to her. He tried to take the knife from her and that was why there are cuts on her hands. As she stabbed him, she repeated over and over that she was "tired of people stealing from [her]." She was "swinging [the knife]." Mr. Avery was "trying to protect himself."

After recounting the circumstances of the killing, the appellant begins to cry out over and over that "that was [her] buddy Vale" and "I'm sorry Vale."

At the suppression hearing, defense counsel argued that the appellant was "so completely inebriated or under the influence of a drug that her mind was such that she couldn't appreciate what she was actually saying to [Detective Bellino]." Noting that the court could observe the appellant's demeanor over the course of the 11-hour video, he asked the court to find, based upon the totality of the circumstances, that she was mentally impaired as a result of her intoxication. He emphasized points on the tape just after 5 a.m. when the appellant was unable "to converse or talk coherently," was struggling to find words, and told Detective Bellino she was feeling "discombobulated." He also pointed to times when the appellant made comments about seeing the chairs in

the interrogation room moving around and the time period after 6:30 a.m., when she was behaving bizarrely while waiting for her meal. In defense counsel's view, the tape as a whole showed that the appellant was not capable of making a voluntary statement to the police, and therefore the State should not be permitted to use her statement "for any purpose."

In response, the prosecutor agreed that the appellant was "pretty high" at the beginning of the video recording. The prosecutor "classif[ied] th[e] statement as having two major parts; the first part when the [appellant] is kind of incoherent and the second part when she comes out of that incoherentness [sic]." In the prosecutor's view, the latter part begins at around 6:42 a.m., right after the appellant receives her meal. The prosecutor emphasized that after Detective Bellino returned to speak to her, the appellant was able to talk about the events of the night of October 12, 2015, and into October 13, 2015, in a fairly coherent manner. The prosecutor maintained that there was absolutely no coercive conduct evidenced in the video; rather, Detective Bellino was "nothing but pleasant, gentlemanly, nice, ... [v]ery, very, nice." The prosecutor argued that given that the case law holds that intoxication alone is insufficient to render a confession involuntary and that there was no evidence of coercion, the court should deny the motion to suppress.

The court agreed to permit the State to submit a supplemental memorandum and held the matter *sub curia.*[6] On February 10, 2017, the court reconvened and announced its ruling. The court emphasized that it had watched the video several times "in its entirety." The court ruled as follows:

> The officer came in and spoke to [the appellant] a few times, asked her if she would like some breakfast. She asked [sic] that she would. She was given some options. She made choices. She had a breakfast sandwich. She drank some juice. And there was a significant change in her behavior from the early part of the video and the last part of the video.
>
> And that significant change is in the Court's observation was the erratic behavior, the way she was speaking, how she was speaking, and the Court noted that. And so certainly once—after the Miranda, after her meal, she certainly seemed to be more lucid, more calm and interacting with the officer.
>
> And the Court has to look at a totality of all of the circumstances, and by my own observation, having reviewed obviously the appropriate case law, but more importantly the Defendant's own words, actions, over a significant period of time, the Court finds that the motion to suppress is denied as to that period after . . . 5:56 [a.m.] . . . .
>
> So anything—any statements made after the—5:56 [a.m.], the Defendant, after my review, I find consistent with being voluntary based on the totality of the circumstances, having reviewed her actions, based on the video, and will be – the suppression is denied, but only to be used for impeachment purposes if she takes the stand.

***b*.**

A statement made by a criminal defendant during a custodial interrogation that is not "elicited in conformance with the mandates of *Miranda*," *Griner v. State*, 168 Md. App. 714, 730 (2006) (citations omitted), nevertheless may be admitted into evidence for

[6] As mentioned, defense counsel already had submitted a memorandum to the court. That memorandum was sent directly to the motions judge by email and is not in the record.

impeachment purposes if the statement contradicts the defendant's trial testimony *and* is voluntary "as a matter of federal and state constitutional law and Maryland common law." *State v. Luckett*, 413 Md. 360, 375 n.4 (2010). *See also Harris v. New York*, 401 U.S. 222, 224–26 (1971) (holding that *Miranda*'s prophylactic rule does not make a statement obtained in violation of its mandates inadmissible for all purposes so long as it is otherwise trustworthy).

"When a defendant properly challenges the voluntariness of a confession or inculpatory statement in a pre-trial motion, the burden is on the State to affirmatively show voluntariness by a preponderance of the evidence." *Rodriguez v. State*, 191 Md. App. 196, 223 (2010). In *Hoey v. State*, 311 Md. 473 (1988), the Court of Appeals explained the overlapping tests a confession must satisfy to be deemed voluntary. First, under Maryland nonconstitutional law, a confession is voluntary if it is "'freely and voluntarily made at a time when [the defendant] knew and understood what he [or she] was saying.'" *Id*. at 481 (quoting *Wiggins v. State*, 235 Md. 97, 102 (1964)). There are two aspects to that test: 1) "whether the defendant was mentally capable of making a confession," and 2) whether the confession was "induced by force, undue influence, improper promises, or threats." *Id*. at 481, 483. Second, a confession must satisfy the Due Process Clause of the Fourteenth Amendment of the federal constitution, which is construed in *pari materia* with Article 22 of the Maryland Declaration of Rights. *Id*. at 480 & n.2. The test for voluntariness under the federal constitution, like the second prong of the test under Maryland common law, turns on "'the crucial element of police

overreaching.'" *Id.* at 484. (quoting *Colorado v. Connelly*, 479 U.S. 157, 163 (1986)). Thus, a confession is deemed voluntary unless there was improper "'police conduct causally related to the confession.'" *Id.* at 485 (quoting *Connelly*, 479 U.S. at 163).

Whether a confession is voluntary is a "mixed question of law and fact." *Winder v. State*, 362 Md. 275, 310 (2001). We confine our review of a circuit court's grant or denial of a motion to suppress to the record of the suppression hearing, reviewing the facts found by the court, and the reasonable inferences drawn therefrom, in the light most favorable to the prevailing party. *Knight v. State*, 381 Md. 517, 535 (2004). We review *de novo* the court's "ultimate determination on the issue of voluntariness." *Id*. That determination must be made based upon the "totality of circumstances":

> "[We] look to all elements of the interrogation, including the manner in which it was conducted, the number of officers present, and the age, education, and experience of the defendant. Not all of the multitude of factors that may bear on voluntariness are necessarily of equal weight, however. Some are transcendent and decisive. We have made clear, for example, that a confession that is preceded or accompanied by threats or a promise of advantage will be held involuntary, notwithstanding any other factors that may suggest voluntariness, unless the State can establish that such threats or promises in no way induced the confession."

Id. at 533 (quoting *Williams v. State*, 375 Md. 404, 429 (2003)).

***c*.**

The appellant contends her statements on the video recording were involuntary under Maryland nonconstitutional law because she was not mentally capable of making a confession given that she was "hallucinating and still under the effects of various drugs, including PCP." It also was inadmissible under the federal and state due process

principles because, although Detective Bellino's questioning was not overtly coercive, the decision to question the appellant at all while she was so obviously intoxicated was "offensive to a civilized system of justice" (quoting *Connelly*, 479 U.S. at 163).

The State responds that during the portion of the statement the court ruled admissible, the appellant plainly was not "'so mentally impaired' that she does not 'know or understand' what is being said" (quoting *Hoey*, 311 Md. at 481). It maintains, moreover, that Detective Bellino's conduct during the interrogation was not "remotely coercive or overreaching," and therefore the statement also was admissible under due process principles. We agree.

This Court and the Court of Appeals have considered the issue of "mental impairment" and its bearing on voluntariness on several occasions. In *Hoey*, the Court of Appeals considered whether a defendant who had been diagnosed as schizophrenic had voluntarily confessed to throwing a Molotov cocktail at a building. It noted that the defendant's father had testified at the suppression hearing that his son was acting "peculiarly and abnormally" on the day of the crime, which was the day before the defendant was arrested. 311 Md. at 478. The defendant testified that he felt "fine" on the day of his arrest, but could not remember much about the interrogation. *Id*.

The Court opined that it was "clear that under Maryland nonconstitutional law a defendant's mere mental deficiency is insufficient to automatically make his [or her] confession involuntary." *Id*. at 482. The Court noted that, in *McCleary v. State*, 122 Md. 394 (1914), the defendant had been hallucinating "on the eve of [his] confession" that he

"heard groans, saw ghosts, and thought he was fighting wild beasts" and the day after his confession was speaking "irrationally and incoherently." *Hoey*, 311 Md. at 481. Based upon testimony from the jail physician and the state's attorney that the defendant was behaving rationally at the time he made his confession, however, the *McCleary* Court had held the confession to be voluntary, noting that the issue was "not whether the defendant 'was mentally agitated, but [whether he] was . . . so far deprived of his sense of reason as not to be responsible for what he may have done or said.'" *Hoey,* 311 Md. at 481 (quoting *McCleary*, 122 Md. at 402).

The *Hoey* Court also discussed *Wiggins*, 235 Md. at 97, which involved a defendant who was withdrawing from alcohol at the time he confessed. The *Wiggins* Court held the confession to be voluntary even though, while in police custody, the defendant was suffering from delirium tremens, which caused him to have hallucinations. In so holding, the Court relied upon testimony from police officers involved in the interrogation who said that the defendant's "speech was coherent and his answers were rational on the day of his confession." *Hoey*, 311 Md. at 482.

Returning to the facts before it, the *Hoey* Court reasoned that, although there was "conflicting evidence . . . regarding [the defendant's] mental capacity to know and understand what he was saying at the time of his confession[,]" the testimony that he "comprehended questions, gave prompt, responsive answers, and did not display bizarre behavior while he was at the station after his arrest" was sufficient to support the circuit court's conclusion that he was "mentally capable of understanding what he was saying."

Id. at 482–83. With respect to coercion, the Court concluded that the circuit court did not err by crediting the police detective's testimony that he made no promises to the defendant, and rejecting the defendant's testimony that he had been promised leniency in exchange for his confession, and therefore by finding that the confession was freely and voluntarily made.

This Court's decision in *Rodriguez*, 191 Md. App. at 196, also is instructive. The defendant was arrested in connection with a series of burglaries. A police officer drove him to the sheriff's office. While he was being transported, he "went 'from one extreme to the other;' he was 'completely enraged' one moment and then 'fall[ing] asleep' the next." *Id*. at 204. His "'eyes were extremely red, and he was very upset.'" *Id*. The transporting police officer was unsure whether the defendant needed to be evaluated at a hospital, so she asked him a few questions to determine whether he was all right. The defendant said that he was okay and told her that he was "going to jail" because "[he] did it." *Id*. at 205.

The defendant moved to suppress that statement on the grounds that it was obtained in violation of *Miranda and* that it was not "voluntarily given." *Id*. at 207. At the suppression hearing, the police officer testified that she did not know whether the defendant "was under the influence of drugs or alcohol or if he was suffering from sleep deprivation[, but] . . . [h]e was not acting in his right mind[.]" *Id.* at 210. The circuit court ruled that the statement was voluntarily given because there was no coercion and, although the defendant was behaving somewhat bizarrely, he was able to answer the

police officer's questions and those answers convinced her that he did not require medical attention. On appeal, this Court affirmed, reasoning that the State "met its burden of proving, by a preponderance of the evidence, that [the defendant] was not so mentally impaired that he did not know what he was saying or understand what was being said to him." *Id.* at 25.

Likewise, in *McCray v. State*, 122 Md. App. 598 (1998), we considered whether a trial court erred in ruling a confession voluntary that was made when the defendant was intoxicated on alcohol. We summarized the testimony of the police officers at the suppression hearing as follows:

> [She] appeared to be under the influence of alcohol, but [the detective] did not know if she was intoxicated. He noted that, prior to her questioning, [the defendant] urinated on herself. The detective testified that [the defendant] slurred her speech, but that she could stand up and walk and that she was oriented as to her location and understood the questions asked of her. [Another detective's] testimony corroborated that of [the first detective], and he added that [the defendant]'s eyes were bloodshot and that there was a smell of alcohol on her breath, but that this was consistent with his prior contacts with [her]. [The second detective] also testified that, although [the defendant] paused before answering the questions posed to her, he believed that [she] understood the questions, but admitted that "there were times that her answers ... [were] off base . . . ."

Id. at 614. The circuit court ruled that "despite evidence suggesting that [the defendant] was intoxicated, there was no evidence that [she] 'did not understand what was going on, that she wasn't completely aware of everything that was going on around her.'" *Id*. On appeal, we affirmed, holding that although "the testimony was undisputed that [the defendant] appeared to be under the influence of alcohol," there was sufficient testimony

presented "to allow the court to conclude that [she] was mentally capable of understanding what she was saying." *Id*. at 616.

We return to the case at bar. Unlike in *Hoey*, *Rodriguez*, *McCray* and the cases discussed therein, where the court relied upon testimony characterizing the behavior of the defendant and the police before, during, and after the confession, here we have the benefit of an 11-hour video recording. As the circuit court, the appellant, and the State all agree, the appellant plainly was under the influence of drugs, most probably PCP, when she entered police custody on October 16, 2015. Her behavior during the 11-hour video was, at times, bizarre and her speech was, at times, incoherent. It was slurred throughout the video. Nevertheless, the video reflects that at 5:56 a.m. on October 17, 2015, the appellant was able to understand Detective Bellino when he asked her if she wanted breakfast and to consider options and make a choice about the meal she wanted. The next time she was subject to any questioning was at 6:57 a.m. By then, she was able to provide the detective with a basic timeline of the events of October 12 and 13, 2015, starting with her trip to the casino with Mr. Avery and ending with her stabbing him to death.[7] She appeared to understand the questions she was being asked. Considering the totality of the circumstances, the circuit court did not err by concluding that, in the second portion of the interrogation, the appellant was not so mentally impaired by

[7] It is worth noting that the timeline the appellant provided was consistent with other evidence in the case, including the cell phone records and the medical examiner's testimony.

intoxication as to be "deprived of h[er] sense of reason as not to be responsible for what [s]he may have done or said." *McCleary*, 122 Md. at 402.

We also reject the appellant's assertion that her confession was involuntary under Maryland nonconstitutional law and/or federal and state constitutional law because it was coerced. By the time of the second portion of the interrogation, the officers would not have thought that the appellant was in an obvious extreme state of intoxication, for the reasons just explained. The video recording reflects that neither Detective Bellino nor any other police officer made promises or threats to induce the appellant to confess. Detective Bellino was calm and respectful during his entire encounter with the appellant. He let her speak at length without interrupting or prompting her to change her answers. There was no evidence that her confession was procured by "force, undue influence, improper promises, or threats." *Hoey,* 311 Md. at 483. Accordingly, the circuit court did not err by permitting the State to introduce for impeachment purposes the portion of the statement deemed voluntary.

II.

Jury Instruction

The appellant contends the trial court erred by refusing to instruct the jurors on the crime of involuntary manslaughter during the perpetration of an unlawful act. The State responds that the appellant failed to preserve this issue for review and, in any event, the instruction was not necessary and any error was harmless beyond a reasonable doubt.

Defense counsel asked the court to give Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 4.17.8(C) or 4.17.9(B), which are identical. Tailored to this case, the instruction states:

> The defendant is charged with the crime of involuntary manslaughter. In order to convict the defendant of involuntary manslaughter, the State must prove:
> (1) that the defendant committed (unlawful act(s));
> (2) that the defendant killed [Mr. Avery]; and
> (3) that the act resulting in the death of [Mr. Avery] occurred during the commission of the (unlawful act(s)).

The court gave the jurors the instructions on second degree specific intent murder, voluntary intoxication, second degree depraved heart murder, and grossly negligent involuntary manslaughter as set forth in MPJI-Cr 4:17.1.[8]

After the court had instructed the jury, counsel approached and defense counsel noted that the court had not given the "involuntary [manslaughter instruction] . . . that involved the act, the illegal act." In the ensuing discussion, defense counsel suggested that the "illegal act" to be inserted in the requested instruction would be second-degree assault. Much of the discussion that followed concerned whether, if the court decided to give that instruction, it should give the entire depraved heart murder and involuntary manslaughter instruction again or just give the portion of the instruction concerning illegal act involuntary manslaughter. The prosecutor opposed any supplementation of the

[8] Consistent with that instruction the court directed the jurors that if they were to find the appellant guilty of second degree specific intent murder, they should <u>not</u> go on to consider second degree depraved heart murder or involuntary manslaughter.

instructions that highlighted involuntary manslaughter without reiterating the depraved heart murder charge. Defense counsel then stated that, in his view, "the illegal act variety of the involuntary manslaughter is a lesser included of second degree felony murder." He added, "It probably does not apply here to be perfectly honest with you, but . . . the negligent variety does."

The court ruled that "for the crimes charged the jury instructions I read encompass all of that. I don't see that there is a need for the court to read anything additional, including that or a portion of all of it together." Defense counsel responded, "Very well."

The State argues that this colloquy makes clear that the appellant did not preserve her objection to the court's failure to give the involuntary manslaughter/illegal act instruction. We agree. Pursuant to Rule 4-325(e), "[n]o party may assign as error . . . the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." Here, defense counsel alerted the court that it had not given the involuntary manslaughter/illegal act instruction but then conceded that the instruction "probably [did] not apply" to the facts generated by the evidence. When the court announced its decision not to supplement the instructions as given, defense counsel simply replied, "[V]ery well." This was insufficient to preserve this issue for review.

Even if this issue were preserved, we would not find reversible error. As the court instructed the jurors, without objection, the jurors only were to deliberate on involuntary manslaughter if they found the appellant not guilty of second degree specific intent

murder and second degree depraved heart murder. The jurors found the appellant guilty of second degree specific intent murder. Once they did so, the instructions for second degree depraved heart murder and involuntary manslaughter became immaterial. If there was error in the involuntary manslaughter instruction (and we do not suggest there was), it plainly was harmless beyond a reasonable doubt.

III.

Sufficiency of the Evidence

Finally, the appellant contends the evidence was legally insufficient to convict her of second degree specific intent murder. She asserts that, excluding her statement to the police, which she characterizes as "completely unreliable" because she was "obviously intoxicated on drugs, hallucinating, and delusional," the State did not meet its burden to show that she acted with the intent to kill Mr. Avery or to cause him such serious bodily harm that death would be the likely result. In addition, she suggests that the evidence was insufficient to show that she was the perpetrator.

The State responds that the evidence overwhelmingly showed that the appellant killed Mr. Avery in her home between October 13 and 14, 2015, and that the jury was free to reject her defense that she was so intoxicated when she stabbed Mr. Avery that she could not form the requisite specific intent. We agree.

The appellant did not dispute her criminal agency at trial. Defense counsel told the jury in opening statement and closing argument that he was not denying that she was the perpetrator. He emphasized that the only issue for the jury to decide was "what was

her mental state" when she stabbed Mr. Avery. On that issue, the jurors rationally could infer that the appellant acted with the specific intent to kill from the evidence that she retrieved a butcher knife from her kitchen on the first floor and then returned to the second floor where she stabbed Mr. Avery in the guest bedroom; that she stabbed him 43 times; that she sustained some defensive wounds to her hands; that 21 of the 43 stab wounds injured major organs; and that some of the wounds were 3.5 inches deep. The jury also had reason to disbelieve the appellant's trial testimony that she could not remember what happened in light of her prior statement to the police in which she confessed to killing Mr. Avery out of anger over her belief that he had stolen money from her. The evidence plainly was sufficient to sustain the appellant's conviction.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANT