UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1178

September Term, 2014

DION WARE

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Leahy,
Davis, Arrie W.,
(Retired, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: August 24, 2016

Kearri Ware was only six weeks old when he died. The father of Kearri, Dion Ware ("Appellant"), was charged in the Circuit Court for Baltimore City with second degree murder and first-degree child abuse. A jury convicted Appellant of first-degree child abuse, but was unable to reach a verdict on the second-degree murder charge. Appellant was sentenced to thirty years in prison.[1] Appellant timely appealed and presents the following questions for our review:

1. Did the hearing court below err in denying the motion to suppress Appellant's statements?

2. Did the trial court err by admitting cumulative and unduly prejudicial autopsy photographs?

3. Should the court below have granted Appellant's motion for a mistrial during jury deliberations?

We affirm. We are persuaded that Appellant's mental capacity did not prevent him from making a knowing and voluntary waiver of his *Miranda* rights. Therefore, we hold that the trial court properly considered the record testimony and, based on its factual findings, properly denied Appellant's motion to suppress. We also conclude that the trial court did not abuse it discretion in admitting the photographs at issue after determining that the probative value of the photographs was not outweighed by the potential for improper prejudice. Finally, because the instruction given before the motion for mistrial accurately stated the law as well as the fact that there were no objections to the instructions that were

[1] The commitment record incorrectly indicates that appellant was convicted of Criminal Law § 3-301(c)(2). That section of the statute, though, simply provides the general definitions section for sexual crimes. Appellant was actually convicted under Criminal Law § 3-601(b).

read to the jury by the court, we hold that the trial court properly denied the motion for mistrial.

I.

Admissibility of Appellant's Statements

Kearri was born on October 9, 2012. Approximately six weeks later, on the afternoon of November 26, 2012, Kearri died at his parents' shared residence in Baltimore City, Maryland, after he was in the Appellant's sole custody and care. During Appellant's trial, the jury learned details concerning this tragedy from two recorded statements Appellant gave just hours after Kearri's death to Baltimore City Police Detectives.

Appellant challenges the circuit court's decision to deny his pre-trial motion to suppress his statements on two grounds. First, Appellant contends that his limited cognitive abilities precluded a valid *Miranda* waiver. Second, Appellant claims that his statements were not voluntary because they were induced by an improper promise by police that he would be able to go home if he answered their questions.[2] Before we address

[2] Appellant also presents a third theory of inadmissibility in his brief on appeal. He explains that the "court could have found" that his diminished reasoning abilities and limited education, together with the trauma he suffered through the death of his son and his extended time in police custody, formed "a confluence of factors" that led to a false confession. Appellant does not present any specific law to support this theory, *see Conrad v. Gamble*, 183 Md. App. 539, 569 (2008) (observing that it "is not our function to seek out the law in support of a party's appellate contentions") (citation omitted). Still, we recognize that *Miranda* is ultimately designed "to protect against 'the compelling atmosphere inherent in the process of in-custody interrogation'—and the effect that danger can have on a suspect's privilege to avoid compelled self-incrimination." *Alston v. Redman*, 34 F.3d 1237, 1246 (3d Cir. 1994) (quoting *Miranda v. Arizona*, 384 U.S. 436, 478 (1966)). In light of settled principles governing *Miranda* and voluntariness of confessions, we conclude that our discussion and analysis of the questions presented adequately address Appellant's additional theory.

Appellant's contentions, we review the evidence presented to the court during the pre-trial motions hearing held over two days—April 7 and 8, 2014.

A. Motions Hearing

Detective Kazmarek's Testimony

Detective Chris Kazmarek, the primary investigator in this case, testified that he and his partner, Detective Brian Lewis, first spoke with Appellant on November 26, 2012, at around 4:15 p.m., at Johns Hopkins Hospital. Appellant's six-week-old son, Kearri Ware, was pronounced dead little more than an hour before. Det. Kazmarek testified that Appellant told him that he was home alone with Kearri when he died, and that Kearri's mother arrived home shortly before medics arrived at the scene. According to Det. Kazmarek, Appellant appeared "shaken up" at the hospital, but he was not crying or displaying any unusual behavior at that time.

Det. Kazmarek told Appellant that he wanted to talk to him about his son's death. Appellant was then transported to the police station at around 5:10 p.m. After his arrival, Appellant was able to use the bathroom and get a drink of water before he went into an interview room where Detective Delasandro collected general information, including Appellant's name and address. Meanwhile, Det. Kazmarek remained at the hospital until he could speak with the medical examiner about the baby's death. Right after that, Det. Kazmarek went to Appellant's residence to execute a search warrant and then returned to the police station.

At around 10:50 p.m., Det. Kazmarek and Detective Brian Lewis went to the interview room where Appellant was being detained. They woke Appellant and

reintroduced themselves. Det. Kazmarek advised Appellant of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Det. Kazmarek testified that he did not notice anything unusual about Appellant's comprehension or his behavior at this time. Appellant told the detectives that he understood and could read and write the English language, and that he was able to read and understand all of the rights listed on the advice of rights form they presented him. Det. Kazmarek made sure that Appellant read each right aloud and then Appellant initialed each right after signing the bottom of the advice of rights form. Det. Kazmarek explained that he normally had individuals read the *Miranda* rights aloud so that he knew that they could read. He also would ask if they understood those rights, and if they did not, he would help them. After going through the form and waiving his rights, Appellant agreed to speak with the police.

The initial conversation between Appellant and the detectives was unrecorded, but Det. Lewis took notes. Appellant informed them that, on the morning of Kearri's death, the mother, Markell Johnson, and two other children left the house, leaving Appellant alone with the infant. He and Kearri slept in bed for awhile, and then Appellant placed Kearri in a Pack-N-Play portable crib, located at the foot of the bed. Appellant fed Kearri around noon, and the two of them remained inside the house until the mother returned later that afternoon. After the mother returned, seemingly upset about something, Appellant left her in the kitchen and went to check on Kearri. Upon entering the bedroom, Appellant realized the baby was not breathing. Appellant attempted to resuscitate the baby, but he was unsuccessful. Then, because there was no phone inside the house, Appellant took the baby outside and, at approximately 2:12 p.m., a bystander called 911.

After Appellant completed his narrative about these events, Det. Kazmarek asked Appellant about bruises that were found on the baby, and Appellant explained that they must have been caused when he was placing Kearri inside the Pack-N-Play. According to Appellant, Kearri had fallen out of his arms and struck the side of the Pac-N-Play before he landed on the floor. Det. Kazmarek then asked if Appellant would agree to make a taped statement, and Appellant agreed. Appellant was given another break, and then gave a statement, that was recorded beginning at around 12:30 a.m. That statement was played for the court during the motions hearing and began as follows:[3]

> DET. KAZMAREK: 2012, my name is Det. Chris Kazmarek. Along with me is Det. Brian Lewis. We're both assigned to the Baltimore City Homicide Unit. We're currently located at the Baltimore Police Headquarters Building, it's located at 601 E. Fayette Street, we're on the fifth floor in the Homicide Office, Homicide interview room number seven. With us here is Dion Ware. Mr. Ware, could you please state your full name and date of birth.
>
> [APPELLANT]: I'm Dion Ware. My birthday is June 6, 1992.
>
> DET. KAZMAREK: Okay, Mr. Ware, are you aware that this statement is (inaudible) being recorded?
>
> [Appellant]: Yes.
>
> DET. KAZMAREK: This statement, this taped statement is being done in reference to a suspicious death of [Kearri Dion Ware] whose date of birth is 10/9/12. This incident occurred at 343 East 22nd Street. It's reported under Baltimore City Central Complaint No. 123 K King 11003. Mr. Ware, before we get started, you were brought down here by a uniformed patrol officer from Johns Hopkins Hospital today, is that correct?
>
> [APPELLANT]: Yes.

[3] Although we only reproduce certain portions in this opinion, the tape was played in its entirety before the jury during trial.

DET. KAZMAREK: Okay, and since you've been on our, at Headquarters, have you been treated fairly?

[APPELLANT]: Yes.

Appellant agreed that he had been "treated fairly," that he had been given food, water, and cigarettes, that he had been taken to the bathroom, and had a chance to sleep, and that he had not been beaten or threatened. Appellant also agreed that he had read and understood the advice of rights form, that his signature did appear on that form, and that no one forced him to initial or sign that form. Appellant then described what happened to his infant son earlier that day:

> [APPELLANT]: Um, everything was fine. Um, Markell, my girlfriend, my baby's mother, she went to take our two kids to get shots. I was in there watching my son. I was laying there for a little while, 'til like 'round the afternoon when I went to feed him. I changed him and before, right before I put him back in his Pac-N-Play, he fell out [of] my arms. He hit into the, he hit into the railing on the Pac-N-Play and then hit the floor. Then I continued to grab him. He was crying. I put the pacifier in his mouth and I laid him down. I got back (inaudible). After all that he seemed fine.
>
> My girlfriend, my baby's mother, she walked, she walked in a couple of minutes later after that. She walked in, she seemed liked she was mad about something. I tried and calm her down. I kept asking her was she all right, is everything all right (inaudible) everything all right. She asked, she was looking at me and asked me why I kept asking her if she's all right. She's like yeah, I'm all right, I'm all right. I just walked back to the room, I heard my son, having like trouble breathing.
>
> I pulled my shirt down, pulled my shirt down (inaudible) put my head on his stomach. I put it on his stomach and I went back in there and asked her if she was all right. I asked her all the time was she all right. (inaudible) all right, you're all right, you're good? And she was like yeah, I'm all right, I'm all right. I went back in there, I heard him again, my son (inaudible) breath like, huuuh, then I didn't hear nothing. I put my hand on his shirt and he wasn't breathing. And from there I patted him. I got scared and I tried to do everything that I could. I tried CPR, and when that wasn't working I just, I was hitting him on the side trying to get him to breathe. And when that wasn't working I just threw my pants on and put my shoes on and wrapped him up and went outside.

> And we was on the corner and I'm trying to get someone to call the police. A lady came right down and asked me what was going on and I was like my son can't breathe, he stopped breathing. She called the police and the lady on the phone walking us through the procedure of CPR . . . .

Appellant then told the detectives detailed information about his efforts to resuscitate the baby, including following specific instructions over a speaker phone from the 911 operator. Shortly thereafter, medics arrived and transported the baby to the hospital, where he was pronounced dead later that afternoon.

Appellant provided additional detail about the events that day, including that, as he was placing Kearri into the Pack-N-Play, the baby not only hit the railing after Appellant dropped him, but also fell all the way to the floor:

> [DET. KAZMAREK]: And actually you went to put him in the Pac-N-Play?
>
> [APPELLANT]: Uh-huh.
>
> [DET. KAZMAREK]: And he fell?
>
> [APPELLANT]: Yes.
>
> [DET. KAZMAREK]: Which side of his body and where did he hit the side of the Pac-N-Play?
>
> [APPELLANT]: I believe it was his, the left side that he fell on on the Pac-N-Play.
>
> [DET. KAZMAREK]: And where at on his body did he strike the side of the Pac-N-Play?
>
> [APPELLANT]: On his left lower rib.
>
> [DET. KAZMAREK]: Okay, so he hit the side of the Pac-N-Play and then he hit the floor?
>
> [APPELLANT]: Yes.

[DET. KAZMAREK]: Could you tell what part of the body hit the floor first?

[APPELLANT]: When he fell and he hit the floor, actually his face hit the floor.

[DET. KAZMAREK]: Was it like right in the center of the face? Was it in the right side?

[APPELLANT]: On the side.

[DET. KAZMAREK]: Which side?

[APPELLANT]: On his right side.

[DET. KAZMAREK]: Okay. And then you scooped him up and checked him?

[APPELLANT]: Uh-huh. I grabbed him. Just as fast as he fell grabbed him.

[DET. KAZMAREK]: How hard did he hid the Pac-N-Play?

[APPELLANT]: He hit it pretty hard, because I had him up high in my hands.

[DET. KAZMAREK]: Did you accidentally drop him or did he like just fall out when you were bending over?

[APPELLANT]: (inaudible) it was accidental because I love kids, I do. And I wouldn't do nothing to hurt them kids. It was like I was holding him up and then he fell on his side and he hit the floor.

* * *

[DET. KAZMAREK]: And how long after that did his mother, your girlfriend, Markell, come home?

[APPELLANT]: I believe, it was anywhere, it wasn't no longer than like maybe an hour.

[DET. KAZMAREK]: An hour?

[APPELLANT]: Maybe an hour, it wasn't no more, not no more than that.

> [DET. KAZMAREK]: And from the time he fell until the time she got there did you check on him periodically to make sure he was okay?
>
> [APPELLANT]: Uh-huh. He was, everything was okay.
>
> [DET. KAZMAREK]: He was breathing all right?
>
> [APPELLANT]: Uh-huh, everything was okay. Like you seen his stomach moving up and down. That right there, that means that he was breathing and he was doing okay.

Appellant admitted that he did not tell the baby's mother, Markell, when she returned home about the baby falling to the floor because, he said, when he and Markell got mad at each other he could not talk to her. Appellant told the police that he then heard the baby "breathing like, some hard breathing." Appellant went to the baby, laid him on his stomach, and then heard a strange noise. It was at that time that he began attempting resuscitation.

Appellant was taken to a holding cell after he concluded his recorded statement. Det. Kazmarek testified that Appellant was never placed in handcuffs during this encounter. At around 2:25 a.m., Appellant was given more food and something to drink. Officers checked on Appellant again at around 10:30 a.m. and noted he was sleeping. They woke Appellant around 11:00 a.m., took him to the bathroom, and then gave him breakfast. Sometime after breakfast, the police gave Appellant a prompt presentment form because Appellant had been in custody since approximately 5:10 p.m. the previous day. Appellant

waived the right of presentment before a court commissioner, and that form was signed at around noon on November 27, 2012.[4]

While Appellant was at the police station, Det. Kazmarek attended the autopsy. The medical examiner ruled the baby's death a homicide, noting that the baby sustained multiple injuries including that "nearly every rib was broken and the liver was severely lacerated multiple times." The baby also sustained a collapsed lung.

After the autopsy, Det. Kazmarek went to interview Markell Johnson. He did not consider her a suspect. After obtaining the autopsy results, he believed he had enough information to file charges against Appellant, so he presented an application for Appellant's arrest to a court commissioner at 7:00 p.m. The warrant was issued at 8:35 p.m. Finally, around 9:05 p.m. on the evening of November 27 he returned to the police station and spoke to Appellant again. When he spoke to Appellant this second time, he was accompanied by Detective Vernon Parker. First the detectives re-advised Appellant of his rights. Det. Kazmarek testified that Appellant's demeanor appeared "fine" and that he appeared to understand what was going on and why the police wanted to speak with him. Appellant read the rights and then initialed and signed the form.

[4] We note that before the motions court, defense counsel also argued that Appellant's statement was inadmissible because Appellant's right to a prompt presentment before a court commissioner was not honored. Appellant does not pursue this argument on appeal. As a result, we need not address it any further. *See McCracken v. State*, 429 Md. 507, 516 n.6 (2012) (declining to address a separate argument that evidence was properly seized under the Fourth Amendment where that argument was abandoned by the State at oral argument).

Det. Kazmarek then presented Appellant with a diagram showing the injuries to his son. That diagram showed that the baby's ribs were broken and that his liver was lacerated. Det. Kazmarek told Appellant that the doctor indicated that these injuries would not have been caused by a "simple drop on the floor." According to Det. Kazmarek, Appellant then told him that he did not tell the detective the "complete truth," because "[h]e was scared, he didn't want people to think he was a failure, he was a monster." Appellant then expounded that, after the baby fell, he would not stop crying and he repeatedly told the baby to shut up, and then hit the baby. Det. Kazmarek testified that Appellant, as he was telling the story, "was taking his right hand into his left first," as he described hitting the baby. Appellant believed he hit the baby twice, but was not sure. After this, the baby got quiet and Appellant placed him in the Pack-N-Play. Appellant left, then returned and found that "there was fluid coming out of the baby's nose and he started hitting the baby again believing he was going to get him to breathe."

Det. Kazmarek asked Appellant if he would agree to be recorded again, and Appellant agreed. A second taped statement began at around 10:00 p.m. on November 27, 2012. That statement was played for the motions court.[5] During that statement, Appellant acknowledged that he had been advised a second time of his rights, that he read and understood those rights, and that he signed the form. Appellant agreed that no one forced him to sign the form, that he had been treated fairly, that he had been given bathroom breaks and cigarettes, and that no one "beat" him to get him to speak with the police.

[5] The tape was played in its entirety before the jury during trial.

Appellant then stated, on the recorded interview, that he struck the baby in the ribs after he fell to the floor:

> [APPELLANT]: The part that I left out, after I fed him I went to go put him back in the Pac-N-Play and he fell out of my arms. I can't remember (inaudible) side of the Pac-N-Play onto the floor. I grabbed him up and he wouldn't stop crying. I tried to put the pacifier in his mouth several times and he still wouldn't stop crying. And I struck him on his side, (inaudible).
>
> [DET. KAZMAREK]: What side did you strike him on?
>
> [APPELLANT]: On his right side.
>
> [DET. KAZMAREK]: Like the right side of his chest?
>
> [APPELLANT]: Right, by the ribs.
>
> [DET. KAZMAREK]: By the ribs you said?
>
> [APPELLANT]: I didn't mean to hurt him. Then after that he kept crying. I put him down in the Pac-N-Play and walked out of the room. Came back and he was still crying. I picked him up and I kept trying to swing him around, (inaudible) stop crying. He stopped crying after a while and I put him back down. He kept moving.
>
> [DET. KAZMAREK]: What happened after that?
>
> [APPELLANT]: I kept putting the pacifier in his mouth.
>
> [DET. KAZMAREK]: Were you holding the baby at this time?
>
> [APPELLANT]: No, I put him back in the Pac-N-Play.
>
> * * *
>
> [DET. KAZMAREK]: And when you noticed that he wasn't breathing what did you do?
>
> [APPELLANT]: I put my hand in his shirt and I (inaudible) he wasn't breathing. I picked him up and I started hitting him on his back and all this stuff started coming out of his nose.
>
> [DET. KAZMAREK]: What did it look like?

> [APPELLANT]: It looked like, like milk and a little bit of blood came down with it. And I kept hitting him and kept hitting him so he could breathe. I kept breathing in his mouth. I kept hitting him and then I put both of my hands on his chest and pushing on it to try to give him CPR. And I kept breathing in his mouth and then when it wasn't working, I put my pants on and got some shoes on and went outside. And when outside I was on the corner for a little minute and I seen a lady walking down the street . . . .

Appellant confirmed that the baby's mother did not know that he had had problems earlier that day with the baby. She also was not aware of the efforts Appellant was attempting to try to get Kearri to breathe again. He maintained that the mother, Markell, was upset about some unknown issue when she got home and that he did not want to tell her because she would then get mad at him.

Upon further discussion with the detectives, Appellant clarified that the floor in the bedroom was a hardwood floor and that he believed the bruises on his son came from hitting that hard floor. He also stated that he did not tell the whole truth because he was "scared," "terrified," and had been "angry."

Det. Kazmarek then testified that, after this second interview was over, at approximately 10:35 p.m., Appellant was given another bottle of water and a cigarette. He was then photographed and transported to Central Booking. Kazmarek stated that this was the first time Appellant was ever placed in handcuffs. Kazmarek also maintained that he never made any promises to Appellant, in either of the two interviews. He further indicated that, during the second interview, Appellant stated that "maybe he'll get manslaughter." The detective testified that he did not respond to that comment.

On cross-examination, Det. Kazmarek testified that he did not think that Appellant had any "mental issues" and that he made certain Appellant could read and write. Appellant also told the detective that he knew he was at police headquarters. Appellant never asked to leave, for a break, or to use a phone. He denied telling Appellant he could go home after he answered some questions and further denied telling him that he would be charged with murder. And, when asked "did [you] explain to him that if it was an accident he should tell you and maybe everything would be okay?," Det. Kazmarek maintained, instead, that "I asked him to explain about the bruises on the baby and that's when he started to explain how he thought the bruises got there." He testified that he never yelled at Appellant.

Detective Lewis's Testimony

Det. Lewis was called by Appellant as a defense witness and confirmed that he was present during the first interview. Lewis witnessed Appellant read the *Miranda* rights and, when asked how Appellant read them, answered "very matter of fact, just read them out and was pretty fluid." Det. Lewis also corroborated much of Det. Kazmarek's testimony concerning the substance of Appellant's initial statement, and he testified that Det. Kazmarek was "very matter of fact," and was not "emotional in any way" in interviewing Appellant.

Det. Lewis initially did not recall whether Appellant ever asked to go home or to call his mother. However, Lewis did remember that Appellant was given a bag of chips to eat and was taken to the bathroom. Lewis also recalled that Det. Kazmarek told Appellant

that he needed to stay at the police station while the investigation continued, but Lewis did not recall Det. Kazmarek ever telling Appellant that he was a suspect.

On cross-examination by the State, Det. Lewis testified that Appellant was offered food and drink during the initial interview. Lewis then clarified that Appellant never asked to leave nor did he ever ask to go home. Det. Lewis specified that he was wearing a suit during the interview, his gun was stored in a lockbox, and that everyone, including himself, Det. Kazmarek and Appellant, were "pretty matter of fact" during the course of the interview. He further testified that Det. Kazmarek never raised his voice during the interview. He also stated that Appellant was not threatened and was never told that he would be released if he just told the detectives what happened. Det. Lewis indicated that he had no reason to believe that Appellant did not understand his *Miranda* rights, and that Appellant had no difficulty reading or writing his signature.

Detective Parker's Testimony

Appellant also called Det. Vernon Parker, who became involved with the case around noon on November 27, 2012. Parker gave Appellant notice of his right to prompt presentment before a commissioner. At that time, Appellant had been in custody for approximately 18 hours without being charged. After Det. Parker informed Appellant that he was not under arrest, he read the form to Appellant and Appellant indicated that he understood and signed the form, waiving his rights to prompt presentment. Det. Parker explained that, in "an abundance of care and caution," the form was used in order to make sure that Appellant understood these rights, which included his right to be taken before a District Court Commissioner.

Det. Parker further testified that he told Appellant that the police were awaiting the results of the autopsy, and that, when those results came back, a decision would be made whether or not to charge Appellant. Det. Parker confirmed that Appellant did not ask to go home or why he needed to stay at the police station. Det. Parker further testified that "[i]f the results were in his favor, meaning there was no charges, then he would be going home."

Later that evening, Det. Parker was present during the second interview with Appellant, and witnessed Appellant read—and waive—his *Miranda* rights (the second time) and agree to speak with the detectives. He testified that Appellant's demeanor was "calm" and "curious" at the start of the interview, but that Appellant was crying and was "clearly upset," when the injuries to his son were described by Det. Kazmarek. However, Appellant was "pretty free in conveying his thoughts and feelings at this point in time." According to Det. Parker, Det. Kazmarek was "[p]rofessional," and did not "show any emotion," when he relayed the information from the autopsy.

On cross-examination by the State, Det. Parker confirmed that Appellant did not ask any questions about his *Miranda* rights, nor did he have any reason to believe that Appellant did not understand his rights. Appellant did not ask to leave, did not ask to call anyone, for a break, or for food during the interview. Had Appellant done so, Det. Parker testified that they would have stopped the interview if needed. Det. Parker also confirmed that Appellant was not in handcuffs, that he, Parker, was wearing a suit, and, that Det. Parker's gun was stored in his desk. Det. Parker did not promise Appellant anything, nor did he threaten him in any way.

Appellant's Testimony

Appellant testified on his own behalf at the motions hearing. Appellant had completed the ninth grade and could read and write. Appellant agreed that he understood defense counsel's questions and testified that, when he did not understand, he would ask for clarification. However, he also indicated that, in the past, he normally would answer "yes, I understand," even though he did not understand something because he thought he "knew, without knowing."

Appellant testified that, on November 26, 2012, while he was with family in the hospital waiting room, Det. Kazmarek came to him and told him that he was going to ask him some questions and then Appellant "was free to go home." Appellant was driven to the police station and locked inside an interview room. He explained that after waiting for a while, Det. Kazmarek entered the interview room and "told me, once I answer his questions, that he was going to have a patrol car come take me home."

Appellant agreed that he was given a form at some point during the interview, advising him of his rights. Appellant claimed that he read the form to himself but he did not understand it, and testified that he thought "if I read it, and signed it, I was going to go home." He also thought he would go home after answering Det. Kazmarek's questions. Appellant testified that, after he answered some of the detective's questions, and before his first taped statement, he did ask Det. Kazmarek "was I going home?"

Appellant also testified that Det. Kazmarek told him there were bruises on the baby that did not occur from CPR. The detective then told Appellant that, if he dropped him, he would understand that it was just an accident. It was at this point during the interview,

according to Appellant, that he first admitted that he dropped the baby. At the end of the taped statement, Appellant claimed that Det. Kazmarek told him he was going to have a patrol car come and take him home. However, when the officer left, the door to the interview room was shut and locked.

Appellant continued, explaining that, after the interview, he was moved to a holding cell. The room had a small wooden bench that was nailed to the floor and was otherwise empty. Appellant agreed that the police gave him chicken and fries to eat. He also confirmed that he "dozed off" while he was in this room.

At some point, an officer came and got him and gave him the notice and waiver of rights to prompt presentment. Appellant testified that he thought that if he signed this form, he could go home. Appellant also claimed that this was the reason he told the detective that he understood the presentment waiver form.

Appellant was then re-interviewed by detectives Kazmarek and Parker. He did not know what time it was when this second interview began. After Det. Kazmarek told him the results of the autopsy, Appellant "got into what happened." Appellant claimed that Det. Kazmarek told him that he, himself, had a daughter, that he understood it could be frustrating with a baby, and that, if Appellant "hit the baby, . . . it'll be okay. He will say it was a[n] accident." When asked if he was alone with the baby when the injuries occurred, Appellant testified, contrary to his taped statements, that the baby's mother was also present in the house.

Appellant also testified that he started crying during this second interview when Det. Kazmarek began describing the injuries to the baby. When asked why he admitted striking

the baby, Appellant testified "I don't know why I told him I did it. I wasn't in the right state of mind. I was just off focused. I couldn't think." Appellant stated that Det. Kazmarek kept asking him how did his baby get the bruises and that, as a result, "I changed my answer to match what the bruises were on the baby." Appellant maintained that Det. Kazmarek told him that he caused the baby's injuries, but also kept telling him "everything was going be all right, and everything was going to be okay," and, as a result, Appellant explained, "thought I was going to go home." However, after Detective Kazmarek left for a short while, he returned to the interview room and told Appellant he was being charged in connection with this case.

On cross-examination, Appellant agreed that he told police he struck the baby with a closed fist. He also agreed that Det. Kazmarek did not physically touch or restrain him at the hospital when he told Appellant he wanted to speak with him. Appellant admitted that he did not tell Det. Kazmarek that he did not want to speak with him. He also acknowledged that he had been detained on two prior occasions, and that in this case, he told the police that he thought he had been treated fairly. He agreed that he had not been beaten by the police.

Appellant confirmed that he never told Det. Kazmarek or Det. Lewis that he wanted to leave, nor did he ask them when the patrol car was coming to pick him up. Appellant agreed that he read his *Miranda* rights. He also confirmed that he initialed the form and that he told the detectives that he understood his rights.

Michael O'Connell's Testimony

Dr. Michael O'Connell, accepted as an expert in forensic psychology, agreed that, although it was difficult to measure voluntariness, he was familiar with research on the question of whether a confession was a false confession. This research determined that a number of "risk factors" were based on the defendant's age and intelligence, and reading and comprehension abilities, and whether the defendant suffered from any developmental disabilities, anxiety, suggestibility, or sleep deprivation. The types of interrogation techniques also factor in, according to Dr. O'Connell, including the length of the interrogation and isolation, and whether the defendant suffered recent trauma.

After the parties finished their inquiries, the court then asked Dr. O'Connell if "a guilty plea is tantamount to a confession." Dr. O'Connell replied, "while there could be a situation where the person believes they didn't do something and they could plead guilty. But I would say that if someone pleads guilty that would be viewed as a form of a confession."

Dr. S. Mark Testa's Testimony

Dr. S. Mark Testa, called by the defense, was accepted by the motions court as an expert in clinical neuropsychology. Dr. Testa evaluated Appellant in May 2013. After administering some tests over the course of two visits with Appellant, Dr. Testa testified that Appellant measured in the 13th percentile for intelligence and that his academic performance measured at around a sixth or seventh grade level. Appellant's reading comprehension measured at a ninth grade level.

Dr. Testa concluded that Appellant had low average intellect, but was not intellectually disabled. He testified that, during their interviews, Appellant reported symptoms that were consistent with post-traumatic stress disorder, most likely attributable to the death of his son. Appellant was also reporting depressive symptoms; however, Dr. Testa opined that Appellant was performing "well" during their visits. When asked to opine about Appellant's ability to participate voluntarily with the police interview that occurred in this case, Dr. Testa concluded that Appellant "would be vulnerable to, you know, being more cooperative."

On cross-examination, Dr. Testa agreed that he reviewed Appellant's school records, as well as the transcripts of the interviews, but that he did not review the advice of rights forms in this case. Dr. Testa also testified that Appellant's school records listed a history of absenteeism and of not following through on assignments and that those could interfere with academic achievement. Appellant's actual learning disabilities were in math and written expression, meaning writing.

The Court's Decision

At the conclusion of the hearing, defense counsel argued, *inter alia*, that Appellant's limited cognitive abilities prevented him from making a knowing and intelligent waiver of his *Miranda* rights. Counsel also argued that Appellant's statement was involuntary because he was improperly induced into making a confession by a promise from police to release him from custody if he made a statement. After hearing from the State, the court denied the motion to suppress. In so ruling, the court made the following findings. With respect to whether Appellant was induced by an improper promise, the court observed:

> And I look at the waiver as to whether it's voluntary under the non-constitutional law. And what I have to consider is, was the confession -- the statement -- that was made at the time -- was it made at the time when the Defendant knew or understood what he was saying at the time that he said it?
>
> All three of the officers indicated that the Defendant gave a statement during the pre-interview, and he gave a statement on the taped statement.
>
> And I will have to tell you that initially, when I listened to the first statement that was made -- the audio that was played for me -- I, too, sat here and I'm thinking to myself, hmm, that sounds like an accident.
>
> That's what it sounded like to me. And I was wondering, how did we get from that to murder? I didn't know, because I'm sort of -- you all lived with this case; I haven't -- I've been listening to it as it's coming along.
>
> * * *
>
> Maybe the officers were thinking that perhaps this was an accident; I don't know. But I do have three officers -- two officers for this first statement -- that came in and testified that there were no inducements, promises made.
>
> I can't look beyond that. I can't look beyond what the Defendant said on the taped statement, as to whether or not, you know, he made any promises? **Has anybody forced you; has anybody -- and these are my words -- put their hands on you, or anything like that. And he said, no.**

(Emphasis added).

On the subject of the validity of Appellant's *Miranda* waiver, the court then found as follows:

> Detective Kazmarek indicated that he had the Defendant, which is his practice, read out loud what the advisement of rights are. And that if he had any questions, did he understand them, and he initialed all of the particular spaces --
>
> * * *
>
> -- looked at all of the -- each of the rights that he was waiving, if in fact he was going to waive them, but that he understood them, and he signed it -- . . .
>
> But he indicated with his initials that he understood each and every one of them. I found it interesting, because -- and I did write that down -- when the Defendant was asked by his attorney, when he was testifying, you

asked him -- and I may be paraphrasing, but I think I'll get to the gist of what it is that he said.

Because you were asking him, [Defense Counsel], as to, you know, what do you do if you don't understand something? And he says, "Well now, I would ask questions." "But then, I would probably just say 'yes'." You asked him, "Why?" And he said, "Because I always thought I knew the answer."

So, there are times that you think you know the answer. You may find out later that you're wrong, but you think that you know the answer. So, it wasn't because he thought in his mind that somebody was doing something to him to force him to do something in one way or the other.

The court then addressed the argument concerning Appellant's cognitive abilities:

And both detectives indicated that there was nothing -- I say that because a lot -- not a lot, but something was made of, or some points were made, as to what the detectives ought to consider when they are taking a statement, when they are getting a waiver from a suspect -- that they should consider his age; they should consider his education; they should consider his mental capacity.

And I don't disagree with you, but what I do disagree, that these officers -- or any officers -- have to go beyond what it is that is obvious to them. Meaning that, I'm sitting in here now; I'm looking at everybody in this courtroom. I can't tell you from one person in this courtroom as to whether these persons have the cognitive ability to do anything until I talk to them.

And this is what the officers did. Mr. Ware wasn't doing any kind of bizarre behavior; he wasn't sitting in the corner talking to people that weren't in the room. He was not banging . . . his head on the table. He was not walking around in circles.

And I'm making these things up to just show you, there was no bizarre behavior or any behavior that he exhibited that the officers could have said, oh, hold up for a minute. We may have a problem here with somebody who has some kind of mental capacity issues.

And that's my way of putting it. Or that there was some deficiency somewhere, but there was nothing that gave them that. So, I can't say that the officers -- in their taking his waiver of his rights –[were] inappropriate.

The Court noted, citing *Hoey v. State*, 311 Md. 473, 482 (1988), that a person's mental capacity does not render a confession involuntary. Then, after reflecting on the

court's question to Dr. O'Connell on whether a guilty plea could be considered a form of confession, the court made the following analogy:

> Because every single day, half of the courthouses or courtrooms in here, Judges are taking guilty pleas. And what do we do? We go down a list of -- you all do anyway, you all do most of the advisement -- you go down a list of waivers the rights that people are giving up. Your right to have a lawyer; do you understand? Your right to have whatever; do you understand? Your right to have this; do you understand that you're giving up these rights.
>
> And more likely than not, people say yes. The reason they say yes can vary. They can say yes, because they want to get this over with. They can say it, but does that make it an involuntary waiver? It does not. It does not.
>
> * * *
>
> I listened to Mr. Ware testify. Mr. Ware did use some words that I thought was kind of interesting. He has a good grasp of the English language. I don't find that -- there's some things that he doesn't know, and he'll say, I don't know.

The court then returned to the issue of coercion:

> And what are we talking about? Susceptibility to coercion. And so, I have to look at what coercion even if I look at it on Mr. Ware's testimony as to how he believed he was being coerced, isolated, police officers offering -- telling him that he could go home, as long as he would say certain things.
>
> And again, I look at, you know, the weight of the evidence. I have three officers and -- well, two officers in this first statement -- talk about the fact that none of these promises were made to him. There were no threats made of him. Nobody was screaming to him.

After observing that the police may use some deception during an interrogation, citing *Lincoln v. State*, 164 Md. App. 170, 195 (2005) ("The totality of the circumstances standard applies to whether a confession resulting from the deception was voluntarily made."), the motions court continued:

> And so, in looking at all that I have to look at, I don't find that there was improper coercion by the police officers; nor do I find that Mr. Ware's

> cognitive ability or lack thereof was such a factor that would make this Court believe that he was more susceptible than anybody else.
>
> I think if I had more coercion -- or proof of more improper coercion that I might [sic] would say so. But I don't; I don't have that here.

The court then, after reviewing the testimony concerning what transpired during and in between Appellant's two interviews with the detectives, concluded its ruling by denying the motion to suppress.

B. Discussion

In reviewing the decision by the motions court to deny the motion to suppress in this case, we are limited to the facts developed at the hearing, and we view the evidence in the light most favorable to the State, being the party that prevailed on the motion. *Paige v. State*, 226 Md. App. 93, 106 (2015) (citations omitted). "We review the motions court's factual findings for clear error, but we make our own independent constitutional appraisal, 'reviewing the relevant law and applying it to the facts and circumstances of this case.'" *Id.* (quoting *State v. Luckett*, 413 Md. 360, 375 n.3 (2010)). The issue of whether a confession is voluntary presents a mixed question of law and fact. *Winder v. State*, 362 Md. 275, 310 (2001). As a result, we review the legal issue under a *de novo* standard, but give deference to the trial court's factual findings. *Id.* at 310-11.

In *Ball v. State*, the Court of Appeals determined that a confession can only be admitted against an accused when the confession was "'(1) voluntary under Maryland non-constitutional law, (2) voluntary under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article 22 of the Maryland Declaration

of Rights, and (3) elicited in conformance with the mandates of *Miranda*.'" 347 Md. 156, 174 (1997) (quoting *Hof v. State*, 337 Md. 581, 597-98 (1995)).

i. Voluntariness of *Miranda* Waiver

In *Maryland v. Shatzer*, the Supreme Court of the United States instructed:

> The Fifth Amendment, which applies to the States by virtue of the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., [amend. V]. In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Court adopted a set of prophylactic measures to protect a suspect's Fifth Amendment right from the "inherently compelling pressures" of custodial interrogation. *Id.*, at 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694.

559 U.S. 98, 103 (2010).

In *Miranda*, *supra*, the Supreme Court "announced that police officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney." *Shatzer*, 559 U.S. at 103-04 (citing *Miranda*, *supra*, 384 U.S. at 444). "[A] suspect may waive his Fifth Amendment privilege 'provided the waiver is made voluntarily, knowingly and intelligently.'" *Colorado v. Spring*, 479 U.S. 564, 572 (1987) (quoting *Miranda*, *supra*, 384 U.S. at 444). There are two distinct dimensions to the waiver inquiry:

> "First the relinquishment of the right must have been voluntarily in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived."

Id. at 573 (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (further quotation omitted)).

"'[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.'" *Berghuis v. Thompkins*, 560 U.S. 370, 383 (2010) (quoting *Miranda*, 384 U.S. at 475). Rather, "[t]he prosecution must make the additional showing that the accused understood these rights." *Id.* at 384 (citing *Spring*, 479 U.S. at 573-575).

In *Berghuis*, the Supreme Court noted that the detective had handed the suspect a written copy of the *Miranda* warnings, ensured that he could read and understand English, gave him time to read the warnings, and had him read aloud the portion of the warning that stated "you have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned." *Id.* at 385-86. The Supreme Court found that "[t]here was more than enough evidence in the record to conclude that [the suspect] understood his *Miranda* rights." *Id.* at 385; *see also United States v. Sledge*, 546 F.2d 1120, 1121-22 (4th Cir. 1977) (concluding that a waiver was valid where defendant admitted he could read and write, was given a legally sufficient rights form, was observed reading it, orally admitted that he fully understood his rights, and signed the waiver form).

Pertinent to the issue of mental capacity raised by Appellant in this case, the Court of Appeals has clarified that

> under Maryland nonconstitutional law a defendant's mere mental deficiency is insufficient to automatically make his confession involuntary. Rather, a confession is only involuntary when the defendant, at the time of his

> confession, is so mentally impaired that he does not know or understand what he is saying.

Hoey, 311 Md. at 482; *see also Rodriguez v. State*, 191 Md. App. 196, 224-25 (2010) (concluding that the confession of a defendant who "'was not acting in his right mind'" was voluntary when the record demonstrated that the defendant "correctly answered the questions posed to him and his answers demonstrated that he understood the severity and consequences of his actions").

Here, the motions court heard from the police officers involved in the actual interrogations. In regard to the initial interview, Detectives Kazmarek and Lewis testified that Appellant was read his *Miranda* rights, and signed the form indicating that he was waiving those rights. They both testified that there was nothing unusual about Appellant's behavior when this occurred, and that it appeared that Appellant could read and write and that he understood his rights prior to waiving them.

Detectives Kazmarek and Parker testified, similarly, that Appellant appeared fine, and that he appeared to understand what was happening at the police station in regard to his second recorded statement. Again, Appellant read his *Miranda* rights and signed another form prior to the second interview. Det. Kazmarek testified that he did not perceive any "mental issues" suggesting that Appellant had any lack of understanding.

In denying the motion to suppress, the court found that Appellant's mental capacity, or lack thereof, did not suggest he was unable to knowingly waive his rights and give a statement to police. The court made its ruling after it observed Appellant testify during the motions hearing, and after the two recorded statements were played in court. The court

also heard testimony from Appellant's expert witnesses concerning Appellant's mental capacity, including Dr. Testa's opinion that, although Appellant had a low average intellect, he was not intellectually disabled.

We conclude that from this evidence, the motions court could find, as it did, that Appellant's mental capacity was not such that would have prevented him from making a valid *Miranda* waiver. We are persuaded that Appellant's waiver was made knowingly.

ii. Appellant's Charge of Coercion

Appellant asserts his statements were not voluntary because he was induced by promises that he would go home, and because of his diminished mental capacity, he was more susceptible to coercion.

Confessions that are "the result of police conduct that overbears the will of the suspect and induces the suspect to confess" are prohibited. *Lee v. State*, 418 Md. 136, 159 (2011) (citing *Arizona v. Fulminante*, 499 U.S. 279, 288 (1991)). In assessing the voluntariness of a statement, courts "must examine the totality of the circumstances affecting the interrogation and confession." *Hill v. State*, 418 Md. 62, 75 (2011) (citing *Knight v. State*, 381 Md. 517, 532 (2004)). The Court of Appeals has cautioned that:

> Although a totality of the circumstances analysis is standard practice for determining whether an accused's statement to the police was voluntarily made, not all of the factors that bear on voluntariness are of equal weight; certain factors are "transcendent and decisive." Thus, "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."

Hill, 418 Md. at 75–76 (internal citations omitted).

On appeal, "we 'undertake[ ] a *de novo* review of the [suppression court]'s ultimate determination on the issue of voluntariness.'" *Williams v. State*, 219 Md. App. 295, 330 (2014) (quoting *Knight*, 381 Md. at 535), *aff'd*, 445 Md. 452 (2015). In assessing voluntariness, "[w]eighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact-finder." *Whittington v. State*, 147 Md. App. 496, 525 (2002) (citations omitted).

The Court of Appeals, in *Hillard v. State*, 286 Md. 145 (1979), adopted a two-prong test to assess the voluntariness of a confession. Under that test, "[b]oth prongs must be satisfied before a confession is deemed to be involuntary." *Winder*, 362 Md. at 310. The Court of Appeals reaffirmed the *Hillard* test as follows:

> Under that test, an inculpatory statement is involuntary under Maryland common law if (1) any officer or agent of the police promises or implies to the suspect that he will be given special consideration from a prosecuting authority or some other form of assistance in exchange for the suspect's confession, *and* (2) the suspect makes a confession in apparent reliance on the police officer's explicit or implicit inducement.

Lee, 418 Md. at 161 (emphasis added, citation omitted). An improper promise or inducement occurs when "an accused is told, or it is implied, that making an inculpatory statement will be to his advantage, in that he will be given help or some special consideration." *Winder*, 362 Md. at 308. However, not every deceptive practice is improper under the *Hillard* test. For instance:

> Lying to the suspect about the strength of the evidence against the defendant and showing false sympathy for the suspect, for example, do not rise to the level of the type of police coercion that is viewed as overbearing the will of the suspect. Indeed it is the rare and extreme case in which a court will find that a suspect confessed involuntarily.

Lee, 418 Md. at 159 (citations omitted).

And, "constitutional voluntariness does not require that all promises, threats, or inducements render a confession involuntary; instead, the federal constitution requires only that courts consider promises, threats, or inducements as part of the totality of the circumstances that courts must look at to determine voluntariness." *Id.* at 160 (citations omitted); *see also Winder*, 362 Md. at 311 ("[A] suspect's subjective belief that he or she will be advantaged in some way by confessing will not render the confession involuntary"). As set forth in more detail above, throughout his testimony during the motions hearing, Appellant claimed that he was told, and that he believed, that he would go home after he made a statement. This testimony was rebutted primarily by Det. Kazmarek, who testified at the hearing and denied that he told Appellant that he would go home after he answered some questions. Det. Lewis corroborated Det. Kazmarek's testimony. Furthermore, Det. Kazmarek, as well as both detectives Lewis and Parker, confirmed that they never heard Appellant ask to go home. The Court observed, "I look at, you know, the weight of the evidence. I have three officers and -- well, two officers in this first statement -- talk about the fact that none of these promises were made to him. There were no threats made of him. Nobody was screaming to him." Clearly the motions court in this case credited the testimony of the detectives as to what transpired during both interviews with Appellant. An appellate court may defer to a suppression court's factual findings unless they are clearly erroneous. *See Barnes v. State*, 437 Md. 375, 389 (2014) (accepting the testifying police officer's version of events when the suppression court had credited the testimony of police officers). *See also Knight v. State*, 381 Md. 517, 537 (2004) (focusing analysis on

the testimony of the police officers when trial judge had found officers to be credible but had discounted petitioner's testimony); *Jackson v. State*, 141 Md. App. 175, 187 (2001) (citation omitted) ("We defer to the motion court's first-level factual findings and its witness credibility determinations."). Based upon our review of the totality of the circumstances, we find no error with the court's determination that Appellant was not coerced into making a false confession.[6]

iii. Confluence of Factors

Citing no cases, Appellant makes a final argument that the court "could have found" that a confluence of factors—including his diminished reasoning ability, limited education,

[6] Numerous out-of-state cases have upheld a denial of a motion to suppress where a defendant claimed he was promised he would go home after he confessed to a crime. *See, e.g.*, *United States v. Huerta*, 239 F.3d 865, 872 (7th Cir. 2001) (accepting motions court's findings that defendant's statement was made voluntarily despite a claim by defendant that police told her that she could go home for Christmas if she confessed); *State v. Clark*, 585 A.2d 1266, 1270 (Conn. App. Ct. 1991) (observing that defendant's claim that he was told he could go home after answering officer's questions was rebutted by officers who claimed there was no such conversation); *People v. Holman*, 620 N.E.2d 1222, 1226 (Ill. App. Ct. 1993) (affirming denial of motion to suppress where "there was no merit to his claim that he was told by police that if he signed some papers he could go home"); *Jones v. State*, 655 N.E.2d 49, 56 (Ind. 1995) (upholding denial of motion to suppress a confession where police promised to release defendant after he offered to make a statement and "to work" for the police as "the promise of release was not a bribe for his confession"); *Potts v. Commonwealth*, 546 S.E.2d 229, 235 (Va. Ct. App. 2001) (minor defendant's confession was voluntary despite defendant's mistaken belief that he would be able to go home if he talked to police). Indeed, some courts have gone even further to suggest that such a promise is collateral and will not serve to exclude an otherwise voluntary statement. *State v. Brown*, 708 S.E.2d 63, 67 (Ga. Ct. App. 2011) ("When an accused is made a promise concerning a collateral benefit, however, his subsequent confession is not excludable. Indeed, we have previously held that statements referring to an accused going home after an interview are collateral promises that in no way relate to the sentence or charges facing the suspect." (footnotes omitted)).

the trauma he suffered by the loss of his son, as well as the 30 hours he spent in police custody, in addition to this diminished reasoning ability—produced a false confession.

The Court of Appeals in *Hoey*, *supra*, explained that the "first step in determining whether a confession is voluntary under Maryland nonconstitutional law is to determine whether the defendant was mentally capable of making a confession." 311 Md. at 481. "[A] defendant's mere mental deficiency is insufficient to automatically make his confession involuntary. Rather, a confession is only involuntary when the defendant, at the time of his confession, is so mentally impaired that he does not know or understand what he is saying." *Id.* at 482 (upholding the trial court's determination that Hoey's confession was voluntary despite conflicting evidence as to whether Hoey's schizophrenic mental disorder rendered him incapable of making a knowing, voluntary, and intelligent waiver of his rights).

In *Harper v. State*, the appellant claimed his inculpatory statement given to the police was involuntary under Maryland non-constitutional law because his intoxicated and sleep-deprived state rendered him so mentally impaired that he did not know or understand what he was saying. 162 Md. App. 55, 71 (2005). This Court affirmed the hearing judge's finding that the appellant's mental state at the time of interrogation did not render his statement involuntary, explaining:

> The appellant's intoxicated mental state was one factor in the totality of the circumstances pertaining to voluntariness. His sleepiness was another. Given the evidence of his awareness and understanding of what was said during the interview as reflected by his level of recall; that the appellant was arrested in the late afternoon, not during normal sleeping hours, as he was sitting in a public place; and that his statement was made within five and one-half hours

> of his arrest, the hearing judge's finding that the appellant was mentally aware when he made his statement was not clearly erroneous.

Id. at 85.

In the instant case, Appellant's argument undertakes to prove too much. Appellant's recorded statements demonstrate that he was able to speak clearly, and that when confronted with the autopsy findings, he tried to amend his earlier statement. During both recorded statements, Appellant acknowledged that he had been advised of his *Miranda* rights, that he read those rights, understood them, and signed the form. Appellant agreed that no one forced him to sign the form, that he had been treated fairly, and that he had been given bathroom breaks and cigarettes. The motions court observed, "I can't look beyond what the Defendant said on the taped statement, as to whether or not, you know, he made any promises? Has anybody forced you; has anybody -- and these are my words -- put their hands on you, or anything like that. And he said, no."

Accordingly, viewing the evidence under the totality of the circumstances and in the light most favorable to the prevailing party, we perceive no error in the court's factual findings or legal conclusions and are persuaded that the court properly denied the motion to suppress.

II.

Trial Issues

Turning to the issues Appellant presents concerning what happened during his trial, we note that he does not challenge the sufficiency of the State's evidence. Accordingly, we need only recite relevant portions of the record solely to provide a context for our

discussion of the issues presented. *See Kennedy v. State*, 436 Md. 686, 688 (2014) ("The circumstances leading to the charges against Petitioner in this case are largely irrelevant to this appeal, and a brief recitation of those facts are included only to provide context."); *Teixeira v. State*, 213 Md. App. 664, 666 (2013) ("It is unnecessary to recite the underlying facts in any but a summary fashion because for the most part 'they [otherwise] do not bear on the issues we are asked to consider.'" (alteration in original) (quoting *Fitzpatrick v. Robinson*, 723 F.3d 624, 628 (6th Cir. 2013)).

A. Admission of Autopsy Photographs

Appellant challenges the court's admission of autopsy photographs on the ground that they were cumulative and unduly prejudicial. The State maintains that the trial court properly exercised its discretion because the photographs were relevant and helped explain the nature of Kearri's internal injuries.

i. Facts

During trial, defense counsel moved to exclude certain photographs on the grounds that they were graphic and more prejudicial than probative. The State responded that the photos documented the specific internal injuries to the victim and would be referenced by the State's expert. The court and the State then went through a number of these photographs to determine which ones would be admissible and the court stated that it was concerned about photos that "would show somebody being cut open . . . ."

The State then went through all the photographs it wanted to admit, and asserted that photographs of the baby's liver, while it was still inside the body, and as it related to other internal organs, were admissible in order to show the "extremely numerous" injuries

Kearri sustained. The State also wanted to admit photographs depicting blood in the abdominal cavity, and numerous pictures of the baby's ribs. When asked whether the State needed more than one picture, the State responded that some of the pictures were from different angles and some showed the injuries "a little better," than others. During further discussion, the court stated the following:

> . . . I would ask that we keep them to a minimum until we at least know that -- and it isn't, and let me tell you this for the record -- it is not so much that it is more prejudicial than probative.
>
> Because I don't find -- this is a murder of a baby that had very severe injuries. Very severe injuries. And it is what it is. I can't get around that. It's not as if they're being used to shock the jury or anything like that. They're being used to discuss the actual injuries that were to the baby. The State and the jury can't help what the injuries are. They are what they are. We can't get around it. And so in order to discuss it so that the medical examiner can discuss it, I'm going to make a ruling initially as to excluding some, but if in fact she can't explain something without a photograph, or something that she is talking about is not on a photograph that we've already put into or agreed to, then I'm going to have you all come back up. . . .

After further discussion concerning photographs of the baby's liver, the conversation turned to a discussion of that photo depicting the baby's opened skull and brain. The court asked why that photo was essential, and the State replied that the photo in question showed bruising in the brain, as well as blood, and blood drainage. The photograph also showed the points of impact. The court asked the State what the expert would state, other than the baby was dropped on its head. The State responded that there were three separate areas of blunt force trauma inside the scalp and that these would be explained by the expert. Further, the State argued for admission because "there's been a statement by the Defendant that he dropped the baby. So it is essential we address the areas on the head where there was injury and show the bruising underneath."

The court then turned to photographs depicting the ribs, and the State wanted to admit photos that demonstrated "bleeding over the ribs" because that had not been documented before. When asked how this helped understand the cause of death, the State informed the court that the expert would indicate this was consistent with blunt force trauma.

The court ruled that some of the photographs would not be shown to the jury, but that others would be admissible. The court stated that "I don't find, honestly, that the pictures are graphic because it's a baby." The court then ruled:

> So I think I will have to, and I wish to give them a warning about them. But I don't find that they're more prejudicial than they are probative, because they're not just putting them in just for the sake of showing them. Each of the pictures that has been discussed with me so far goes to the weight of what it is that the doctor is going to say, was the cause of the injuries and the cause of death in this case. And so as graphic as they are or as unpleasant as they are to see, I can't, this is the case. I can't get around it. And so I don't find that they are pictures that are just duplic[ative] for the sake of being duplic[ative]. Each of them have a point to be made. So that's my ruling. They'll be able to be shown.

Thereafter, when the jury entered the courtroom, the court informed the jurors as follows, "I've asked Counsel and Counsel agrees that I just wanted to indicate to you that the witness who is about to testify is a medical examiner who will be discussing the autopsy. And so there may be some photographs, just to let you all know. External and internal photographs, just so that you will know. Okay?"

Dr. Erin Carney, accepted as an expert in forensic pathology, then testified that she conducted the autopsy of Kearri Ware in this case. After reviewing photographs of the baby's external injuries, Dr. Carney testified that she conducted an internal examination of

the baby's chest, abdomen, and brain. Almost all of the ribs, on both sides of the baby, were broken, with some broken in two places on the side and back. A photograph depicting those injuries was admitted over objection. Dr. Carney referred to this photograph while testifying.

The State then sought to admit a close-up photograph of the left side of the baby's rib cage. Before admitting the close-up photograph, the Appellant objected to admission of the photograph on the ground that the close-up did not add to Dr. Carney's testimony and would not assist the jury. The court overruled the objection and admitted the photo. Dr. Carney then testified that the injuries to the ribs could be caused by attempts to perform CPR, but that some of the injuries were "much more than I would expect for CPR." She also testified that rib fractures would not likely result from a fall onto a Pack-N-Play, but if there were any such fractures, she would have expected to see them only on one side.

Dr. Carney also explained that there were tears, or lacerations, to the baby's right lung. Dr. Carney opined that the broken ribs caused the lacerations. A photograph of the right lung was admitted over objection, and Dr. Carney confirmed that the photo depicted these injuries.

Dr. Carney next explained that she also examined the baby's liver and found multiple tears or lacerations. There was also approximately 40 milliliters of blood in the abdominal cavity that was caused by bleeding from the liver. Photographs depicting the injuries to the liver were admitted over objection. Dr. Carney referred to these photographs while testifying about the multiple tears to the liver.

In addition, there was a hemorrhage in the mesentery, or what is known as the soft tissue of the small intestine. Dr. Carney identified a photograph showing that injury, and that photo was admitted over objection.

Finally, Dr. Carney testified concerning her examination of the baby's brain. A photograph looking inside the scalp was admitted over objection. Referring to the exhibit, Dr. Carney explained that there was blood on the brain "that does not belong there." There was also evidence of blunt force trauma to areas of the scalp. Dr. Carney testified that these injuries were not consistent with either a fall or a child hitting a Pack-N-Play.

ii. Discussion

"Determinations regarding the admissibility of evidence generally are left to the sound discretion of the trial court." *Easter v. State*, 223 Md. App. 65, 74 (2015) (citation omitted), *cert. denied* 445 Md. 488 (2015); *see also Conyers v. State*, 354 Md. 132, 176 (1999). A trial court abuses its discretion only when "no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." *King v. State*, 407 Md. 682, 697 (2009) (alteration in original) (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994)).

Maryland law requires that a court employ a two-part test in determining the admissibility of photographs. "[F]irst, the judge must decide whether the photograph is relevant, and second, the judge must balance its probative value against its prejudicial effect." *State v. Broberg*, 342 Md. 544, 555 (1996); *accord Stevenson v. State*, 222 Md. App. 118, 142 (2015), *cert. denied*, 443 Md. 737 (2015); *Thompson v. State*, 181 Md. App. 74, 95 (2008). A photograph is relevant if it "'assist[s] the jury in understanding the case

or aid[s] a witness in explaining his testimony . . . .'" *Mason v. Lynch*, 388 Md. 37, 49 (2005) (quoting *Hance v. State Roads Comm*., 221 Md. 164, 172 (1959)).

Second, when a photograph is relevant, then "[t]he admissibility of photographs under this state's law is determined by a balancing of the probative value against the potential for improper prejudice to the defendant. . . . This balancing is committed to the trial judge's sound discretion." *Bedford v. State*, 317 Md. 659, 676 (1989) (internal citations omitted); *see also Johnson v. State*, 303 Md. 487, 502 (1985) ("[W]hether or not a photograph is of practical value in a case and admissible at trial is a matter best left to the sound discretion of the trial judge."). Generally, the judge's determination "will not be disturbed unless plainly arbitrary." *Grandison v. State*, 305 Md. 685, 729 (1984) (citing *Bowers v. State*, 298 Md. 115, 135-36 (1983)); *see also Lovelace v. State*, 214 Md. App. 512, 548 (2013) ("The trial court's decision will not be disturbed unless 'plainly arbitrary,' . . . because the trial judge is in the best position to make this assessment.") (quoting *Ayala v. State*, 174 Md. App. 647, 679 (2007)).

In assessing whether there has been an abuse of discretion, the Court of Appeals has recognized that even though photographs "may be more graphic than other available evidence . . . we have seldom found an abuse of a trial judge's discretion in admitting them in evidence." *Hunt v. State*, 312 Md. 494, 505 (1988) (citations omitted); *see also Mason*, 388 Md. at 52 (citations omitted) ("The very few cases finding reversible error are ones where the trial courts admitted photographs which this Court held did not accurately represent the person or scene or were otherwise not properly verified.").

Autopsy photos are frequently admitted because they are relevant to a wide spectrum of factual and legal issues, including the nature and cause of wounds. For instance, in *Bedford v. State*, 317 Md. 659 (1989), a case in which Bedford had been convicted by a jury of first-degree premeditated murder and related counts, Bedford argued, *inter alia*, that the trial court improperly admitted nine color photographs of the victim. 317 Md. at 662-63. Four photos showed the crime scene and the full body of the victim, one photo showed the injuries to the victim's hand and arms, and the four remaining photo were close-ups of injuries to the victim's head. *Id*. at 675. The Court of Appeals upheld the trial court's ruling admitting the photographs and stated that "'we have permitted the reception into evidence of photographs depicting the condition of the victim and the location of injuries of the victim's body at the murder site, . . . ; and the wounds of the victim.'" *Id*. at 676 (quoting *Johnson*, 303 Md. at 502 (alteration in original)). In fact, the Court explained that "'[t]he very purpose of photographic evidence is to clarify and communicate facts to the tribunal more accurately than by mere words.'" *Id.* (quoting *Johnson*, 303 Md. at 503-04).

The Court rejected Bedford's argument that a trial judge should err on the side of exclusion when a photograph has only "minimal significance," "no essential evidentiary value," and is "inflammatory." *Id.* at 677. The Court concluded:

> [W]e have not adopted such a test and require only that the trial judge not abuse his discretion. Using this accepted standard of review, we cannot find that the trial judge here failed to engage in a reasoned balancing process or that the disputed photographs were likely to distort the jury's deliberations. Accordingly, we find that the photographs were properly admitted.

Id. 317 Md. at 677; *see also Stevenson*, 222 Md. App. at 143 (holding that, in a first-degree murder prosecution, the trial court did not abuse its discretion when it admitted photographs showing the defendant's injured hand taken hours after the victim's death and which, thus, advanced the prosecution's argument that the defendant was involved in a struggle with the victim); *Ayala*, 174 Md. App. at 681 (holding, in first-degree murder case where defendant claimed self-defense, that photographs showing the nature and severity of the injuries victim sustained during a beating with baseball bats and a golf club were relevant to proving whether defendant acted with willfulness, deliberation and premeditation); *Roebuck v. State*, 148 Md. App. 563, 594-600 (2002) (holding, in prosecution for first-degree murder, that enlarged, color autopsy photographs of victim's body were properly admitted into evidence in that they illustrated testimony of medical examiner and were probative as to issue of intent); *Rasnick v. State*, 7 Md. App. 564, 570 (1969) (stating there was no abuse of discretion in admitting photos of murder victim's brain and skull during autopsy to illustrate impact of blunt force injury on victim).

Moreover, this Court and the Court of Appeals have recognized that "cumulative evidence is not necessarily irrelevant." *Thompson*, 181 Md. App. at 95-96. As the Court of Appeals has stated, "photographs do not lack probative value merely because they illustrate a point that is uncontested." *Broberg*, 342 Md. at 554; *see also Lovelace*, 214 Md. App. at 548-49 (citing *Broberg*, 342 Md. at 553) ("[P]hotographs may be relevant and possess probative value even though they often illustrate something that has already been presented in testimony.").

Turning to the case at bar, we are persuaded that the photographs at issue were relevant. Appellant's statements, introduced into evidence, raised the central question for the jury: whether the injuries Kearri sustained were a result of an accidental fall onto the Pack-N-Play and the floor, or whether they were inflicted when Appellant admitted that he struck the baby repeatedly. The jury resolved these issues by convicting Appellant of first-degree baby abuse. One of the elements of this crime required the State to show that Appellant abused Kearri, and "abuse" is defined by the pertinent statute as "physical injury sustained by a minor as a result of cruel or inhumane treatment or as a result of a malicious act under circumstances that indicate that the minor's health or welfare is harmed or threatened by the treatment or act." *See* Crim. Law § 3-601(a)(2). The photographs helped the witness explain the injuries, and whether there had been "cruel or inhumane treatment" or a "malicious act" under the circumstances.

We also conclude that the trial court did not abuse its discretion in concluding that the probative value of the photographs was not outweighed by the potential for improper prejudice. The record shows that the court considered a number of photographs, engaged in discussion with the parties, and ultimately decided which photos would, and would not, be admitted. In doing so, the court observed that the State was not "putting them in just for the sake of showing them." We hold that the court's decision was a proper exercise of judicial discretion. We conclude the court properly exercised its discretion in admitting the photographs at issue.

B. Motion for Mistrial

Appellant maintains that the trial court erred in denying his motion for mistrial concerning the jury instructions for child abuse, which his counsel averred at trial could confuse the jury. The State claims that Appellant's counsel did not move for a mistrial, but merely discussed the possibility of moving for a mistrial before the court. But even if properly presented, the State maintains that the trial court properly denied the motion.

i. Facts

By way of background, we begin by observing that the Statement of Charges, filed in the District Court of Maryland for Baltimore City, charged Appellant with two counts of first-degree child abuse, citing Criminal Law Section 3-601(b). *See* Md. Code (2002, 2012 Repl. Vol., 2014 Supp.), Criminal Law Article ("Crim. Law"), § 3-601. Appellant was also indicted in Case Number 112355030 and that indictment lists the charge as "Child Abuse - 1st Degree (Resulting in Death)."[7]

After all the evidence was received in the case, and after Appellant's motion for judgment of acquittal was denied, the court noted that the parties wanted an instruction for child abuse by physical injury. Defense counsel confirmed that she had read that

[7] The record in this case includes the cover page for this case, Case Number 112355030, charging child abuse. However, although both the Maryland Judiciary Case Search web site and the docket entries confirm that Appellant was charged with child abuse under that case number, the record on appeal does not appear to include the specific counts for that indictment. Instead, there are two pages nearby in the record that list the counts for Appellant's second degree murder charge under Crim. Law § 2-204. The Appellant informs us that charge, for which the jury was unable to reach a verdict, was in a different case, Case Number 12355029. The Maryland Judiciary Case Search web site confirms that that case was nol prossed on June 30, 2014.

instruction, proposed by the State. Thereafter, during its initial instructions to the jury, the court gave the following instruction:

> The Defendant is also charged with the crime of child abuse. Child abuse is the physical injury of a child under 18 caused by a parent or other person who has permanent or temporary care, custody, or responsibility of the supervision of that child, or by any household or family member.
>
> And in this case -- strike that. In order to convict the Defendant of child abuse, the State must prove:
>
> (1)that the Defendant was the caregiver of Kearri Ware; (2) that Kearri Ware was at that time under 18 years of age; (3) that the Defendant caused physical injury as a result of cruel or inhumane treatment, or a malicious act; and (4) under circumstances that indicate Kearri Ware's health or welfare was harmed or threatened.

At this point in its instructions, the court addressed the parties, in open court, as follows:

> THE COURT: Counsel, I'm reading the instruction that was provided; correct?
>
> [PROSECUTOR]: Yes (inaudible).
>
> THE COURT: That's what you all agreed to; correct? Well, I'm saying, here at the desk -- at my table -- that's what you all agreed to; am I right?
>
> [DEFENSE COUNSEL]: Right.
>
> THE COURT: Okay.

The court then continued:

> A parent or other person who has permanent or temporary care, or custody, or responsibility, for the supervision of a minor, may not cause abuse to the minor that: (1) results in the death of the minor; or (2) causes severe physical injury to the minor.
>
> Severe physical injury means:
>
> (1)brain injury or bleeding within the skull; (2) starvation; (3) physical injury that (a) creates a substantial risk of death, or (b) causes permanent or

> protracted serious disfigurement, loss of the function of any bodily member or organ; or impairment of the function of any bodily member or organ.

Looking to the order of the elements listed, this instruction appears to have been derived from a combination of the original pattern instructions, as set forth in the former first edition of those instructions, and portions of Crim. Law § 3-601(a)(5) (defining "severe physical injury"), § 3-601(d) (prohibiting "second-degree child abuse"), and § 3-601(b) (prohibiting "first-degree child abuse"). *See* Crim. Law § 3-601; Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 4:07, at 161 (1st ed. 1995) ("MPJI-Cr 1st ed."). Notably, there was no objection to this instruction.[8]

After closing arguments, the jury began to deliberate. During those deliberations, the jury asked for written copies of the instructions on both charges, and to rehear the 911 tape and the Appellant's statements. They also asked for further guidance on the unrelated charge of second-degree murder and for the "jail terms for each count." After returning to deliberations for a short while, the jury then informed the court that it was unanimous on one count but was unable to reach a verdict on another count. The court informed the jury to keep deliberating, and the transcript from the first day of deliberations suggests that the jury was excused for the day soon thereafter.

The next day, and still during deliberations, defense counsel requested to address the court. Defense counsel stated:

[8] Although the parties did not discuss the slight differences between the first and second edition of the pattern instructions, based on our review of the entire record, it appears that the initial instruction, prior to deliberations, was, in part, derived from the older edition of the pattern instructions.

> The issue that I was sort of addressing, sort of looking over last night was the instruction that we have provided in writing and I think it may be confusing in that the way that it's worded in that there is the actual instruction for the First Degree Child Abuse which is 4.07.1, which includes the second degree. And I kept thinking over and over, I think the way you said it was perfectly acceptable to the Defense when we instructed them verbally, but submitting to them the in-writing portion the way the State had put it was 4.07, it said "second degree" at the top, I think that it may be confusing them in that all the elements aren't together and I'm not sure, that maybe they don't quite understand what -- and second degree is not the charge that they're addressing, so if we looked at 4.07.1, that is all five elements of the first degree, and it also gives the definition of severe physical injury, parent, and determining whether there was physical force, et cetera. And I think that that might be the instruction that might clarify, and I don't know which one -- I don't know that that was sent back to them.

A written copy of the child abuse instruction, as requested by and provided to the jury, is included with the record on appeal. That instruction begins with the heading "Child Abuse-Abuse By Physical Injury Second Degree Child Abuse," located in the upper right corner of the print-out. The written instruction then mirrors the four elements relating to second-degree child abuse, as instructed orally by the court. There is then a heading for First Degree Child Abuse, followed by the language concerning parents or other persons with care of custody of a child. That language specifically says that such a person may not "cause abuse to the minor that: (I) results in the death of the minor . . . ." The written instruction provided to the jury concludes with the heading "Severe physical injury means:" followed by the pertinent definition.

Returning to the discussion during trial, the court responded that the instruction was the one agreed to by both the State and Defense counsel. When the court asked Defense counsel what she wanted the court to do, counsel initially stated, "the Defense wanted to

simply put it on the record that -- I'm not sure." The court asked the State to respond, and it contended:

> . . . I would state Defense is not arguing this is an incorrect instruction. They have had an opportunity to review it. Again, this is not an incorrect instruction. Additionally, this is the instruction the Court read in its entirety.
>
> And lastly, the jury has not indicated that they are confused in any way, shape or form. They simply asked for the instructions and the Court provided the instructions you read word for word.

The court asked Defense counsel to clarify whether counsel was arguing that the instruction was incorrect. Counsel did not state that the instruction was inaccurate, but replied that it might have been better to give the current pattern instruction on Child Abuse - First Degree Physical Abuse. *See* Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 4:07.1, at 439 (2nd ed. 2012) ("MPJI-Cr 2nd ed."). Defense counsel continued:

> [DEFENSE COUNSEL]: I am essentially saying that, in hindsight looking at it, I think that I was remiss by not saying this is silly, we should have just simply done the 4.07.1, which I guess where my, a little bit of confusion was, was in -- for example, for an assault first and second degree, one would read second degree assault and then say, you would need all of those elements and, plus the element for first degree assault. So I would say that it would be a similar situation here with second degree and then rising to the first degree.
>
> However, for whatever reason in the Maryland Pattern Jury Instructions, Criminal, they actually, 4.07.1 actually does list all five. And I think that that, maybe there's a reason why they corrected that and clarified it and made it its own instruction. It doesn't say you must prove second degree and then plus this, plus the additional which is how we sort of put it here.
>
> I think that it was an error on my part and I just simply wanted to put that on the record. I don't know where to go with it as far as further than that. [Co-Defense Counsel] indicated, you know, she and I discussed it and she said, you know, she's over in Part 22 with Judge Nance and whether, you know, whether to request a mistrial would be appropriate, I don't --

> THE COURT: Requesting a mistrial on something you agreed on. It's not like it was something that the State requested and you said, "No, Judge; no, Judge," and then I did it anyway and you found out that it was wrong, then maybe you could request a mistrial on that. But this is something that you have agreed to.
>
> [DEFENSE COUNSEL]: Right.
>
> THE COURT: I'm not granting a mistrial on that. I'm not doing it because you have agreed to it, and the jury has not indicated that they are confused about this particular instruction. . . .

Defense counsel then requested that the court send the jury a copy of MPJI-Cr 2nd ed. 4:07.1. The court noted that it did not give the jury that pattern instruction and declined to send a written copy of that pattern. Defense counsel responded that it was her argument that the jury had only been instructed on second-degree child abuse. The court noted the objection, and then, after hearing from the State, stated:

> My ruling remains. I'm not going to change it based on what I had indicated. You all had agreed to this. I don't see much substantive difference between what you're saying that was to go back, what you believe now should have gone back, but again, my ruling stands as that was what was agreed upon by both parties, so I'm not going to change it.

After addressing defense counsel's concern and other matters, the court recessed. Thereafter, the jury sent a note stating the following: "The top of the child abuse description says "Second Degree Child Abuse." Is Dion Ware being charged for First Degree Child Abuse or Second Degree Child Abuse?" Noting that defense counsel may have been "clairvoyant," the court asked for guidance from the parties.

After agreeing that the written instruction that was sent to the jury during deliberations listed both second degree and first degree child abuse, the State indicated that the instruction the court read to the jury included second degree child abuse, and then the

added element from first degree child abuse. Defense counsel agreed that the State charged Appellant with first degree child abuse, and that was covered by MPJI-Cr 2nd ed. 4:07.1. Counsel then stated that the instruction given to the jury was instead based on MPJI-Cr 1st ed. 4:07, second degree child abuse, and "then just sort of added the statute part to that which is not what 4.07.1 reads, but does have all the elements . . ."

After clarifying that Appellant was, in fact, charged with first degree child abuse, the court indicated, and the parties agreed, that it would read the pattern instruction on first-degree child abuse, or MPJI-Cr 2nd ed. 4:07.1. The court then called the jury back to the courtroom and then, after telling them that a written copy of the appropriate instruction would also be provided, reinstructed them on the pertinent crime as follows:

> The Defendant is also charged with the crime of child abuse in the first degree. In order to convict the Defendant of first degree child abuse, the State must prove (1) that the Defendant caused physical injury to Kearri Ware as a result of cruel or inhuman treatment or a malicious act; (2) that at the time of the conduct, Kearri Ware was under 18 years of age; (3) that at the time of the conduct the Defendant was a parent, and that means to Kearri Ware; (4) that as a result of the Defendant's conduct, Kearri's health or welfare was harmed or threatened; and (5) that the Defendant's conduct resulted in Kearri's death or caused severe physical injury to Kearri.
>
> Severe physical injury means (1) brain injury or bleeding within the skull; (2) starvation; or (3) physical injury that (a) creates a substantial risk of death; (b) causes permanent or protracted serious disfigurement; or (c) causes loss or impairment of a member or organ of the body or its ability to function properly.
>
> A parent may use reasonable, physical force to discipline or safeguard a child. However, a parent may not use physical force simply to inflict pain upon the child. In addition, a parent may not use physical force that is inhumane or cruel. In determining whether the physical force used by a parent was reasonable, you should look at all of the surrounding circumstances, including such factors as the age, physical mental condition of the child, the behavior that led to the use of physical force, the extent and duration of the physical contact with the child and the impact or injury to the child, if any, resulting from the use of force. And that is the instruction.

There was no objection to this reinstruction. Approximately three hours later, the jury was unable to reach a verdict on the second-degree murder charge, but convicted Appellant, according to the verdict sheet, of "Child Abuse against Kearri Ware Resulting in Death."

Appellant's claim on appeal relates to the court's initial instruction and its reinstruction. However, in neither instance did Appellant offer a timely objection after the instruction was given. Accordingly, any claim as to the substance of these instructions is not preserved for appellate review. *See* Maryland Rule 4-325(e) ("No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection."); *Alston v. State*, 414 Md. 92, 112 (2010) ("A principal purpose of Rule 4-325(e) 'is to give the trial court an opportunity to correct an inadequate instruction' before the jury begins deliberations.") (quoting *Bowman v. State*, 337 Md. 65, 69 (1994)); *see also Sims v. State*, 319 Md. 540, 549 (1990) (holding that generally, to preserve the issue for appellate review, an objection is necessary after instructions, even where matter was discussed prior to instructions); *Collins v. State*, 318 Md. 269, 284 (1990) ("Counsel's failure to except to the reinstruction is indicative of an acceptance and approval of the amended form used.").

In addition to noting the preservation issue with respect to the instructions themselves, the State asks us not to consider this question presented because of Appellant's ambiguous request for a mistrial. Although we agree that defense counsel appeared

uncertain in her request, we are persuaded by the record that the request was adequately presented to, and considered by, the trial court. Thus, we also conclude the issue is properly before this Court. *See, e.g., King v. State*, 434 Md. 472, 480 (2013) (citations omitted) ("[I]t is well-settled that Md. Rule 8-131(a) vests this Court with the discretionary power 'to decide such an [unpreserved] issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.'"); *Haslup v. State*, 30 Md. App. 230, 239 (1976) (considering *sua sponte* whether a party properly preserved an issue for appellate review).

Appellant's motion for mistrial focused on the headings on the written instruction sent back to the jury, as those headings listed both second-degree and first-degree child abuse. The motion also was concerned about whether the pattern instruction should have been given, as opposed to the instruction drafted by the State. "Generally, appellate courts review the denial of a motion for a mistrial under the abuse of discretion standard, because the 'trial judge is in the best position to evaluate whether or not a defendant's right to an impartial jury has been compromised.'" *Dillard v. State*, 415 Md. 445, 454 (2010) (quoting *Allen v. State*, 89 Md. App. 25, 42-43 (1991)) (further citation omitted). In determining the propriety of a court's ruling on a motion for mistrial, we recognize that "'[a] mistrial is an extreme sanction'" which is appropriate only "'when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice.'" *Diggs & Allen v. State*, 213 Md. App. 28, 70-71 (2013) (quoting *McIntyre v. State*, 168 Md. App. 504, 524 (2006)), *aff'd*, 440 Md. 643 (2014).

Maryland Rule 4-325(c) provides: "The court may, and at the request of any party

shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." "We review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard." *Arthur v. State*, 420 Md. 512, 525 (2011) (citations omitted). In determining whether a trial court has abused its discretion we consider whether "'(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction.'" *Bazzle v. State*, 426 Md. 541, 549 (2012) (quoting *Stabb v. State*, 423 Md. 454, 465 (2011)).

Here, at the time the mistrial was requested, there had been no communication from the jury indicating that they were confused or needed further clarification. More importantly, the court observed that Appellant agreed to the instruction. Even after the mistrial was heard and denied, Appellant also did not oppose the wording of the reinstruction after the jury note asked for clarification. This agreement suggests that Appellant was not contesting the accuracy or applicability of the instruction or whether the instruction correctly stated the law.

In fact, we note that the original instruction, both orally delivered in court, as well as the written copy, included the following: "A parent or other person who has permanent or temporary care, or custody, or responsibility, for the supervision of a minor, may not cause abuse to the minor that: (1) *results in the death of the minor*; or (2) causes severe physical injury to the minor." (Emphasis added). Although the wording of this particular instruction did not group the element of death or severe physical injury with the other four elements of child abuse by physical injury, as listed in the pattern instruction, *see* MPJI-Cr

2nd ed. 4:07.1, the original instruction was an accurate statement of the law of first-degree child abuse. Indeed, defense counsel conceded that that instruction included all the elements necessary to prove first-degree child abuse. That statute provides:

> (b)(1) A parent, family member, household member, or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause abuse to the minor that:
>
> (i) *results in the death of the minor*; or
>
> (ii) causes severe physical injury to the minor.

Crim. Law § 3-601(b)(1) (emphasis added).

Thus, the instruction given before the motion for mistrial accurately stated the law, was applicable under the facts of the case, and was not fairly covered in other instructions. *See Bazzle*, 426 Md. at 549. Considering this, as well as the fact that there were no objections to the instructions that were read to the jury by the court, we are persuaded that it was within the trial court's discretion to deny the extraordinary remedy of a mistrial under the circumstances. The court properly denied the motion for mistrial.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.