UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 566

September Term, 2015

JEOUY GARCIA

v.

STATE OF MARYLAND

Woodward, C.J.,
Eyler, Deborah S.,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: May 12, 2017

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

On March 12, 2015, the Circuit Court for Montgomery County convicted Jeovy Garcia[1] of possession with intent to distribute methamphetamine. She argues on appeal that the court improperly denied her motion to suppress statements and cell phone evidence at trial. Unfortunately, her primary argument—that the officer elicited statements from her in violation of her rights under *Miranda v. Arizona*[2]—was never raised in the trial court. We also agree with the circuit court that she consented to the detective's search of her cell phone and that she did not make statements as a result of threats by the officers, and so we affirm the judgment.

I. BACKGROUND

Ms. Garcia moved to suppress statements she made to police while in custody on July 31, 2014 and to suppress evidence obtained from her cell phone. The phone evidence was obtained through a warrantless search conducted during the interrogation in which she made the statements. What follows is a summary of the evidence presented and the circuit court's findings at the pre-trial suppression hearing on January 22, 2015. Additional facts will be discussed as necessary in our analysis.

A. The Seizure And Interrogation

On July 31, 2014, members of the Montgomery County Police Department intercepted a package that contained an ounce of methamphetamine at a FedEx facility, then delivered the package to its intended destination in Rockville and waited to see who

[1] Ms. Garcia's name is misspelled in the caption.

[2] 384 U.S. 436 (1966).

picked it up. Ms. Garcia arrived at the site, retrieved the package, returned to her car with it, and drove away. Police officers promptly blocked Ms. Garcia's vehicle and placed her under arrest.

Detective Richard Grapes, a member of the Montgomery County Special Investigations Division Drug Enforcement Section Drug Interdiction Team, testified that he and other officers placed Ms. Garcia in the front seat of his patrol car within ten minutes of the initial stop. The Detective confiscated Ms. Garcia's cell phone from her car "[m]aybe a minute or two after she was put in [his] vehicle." Ms. Garcia testified that she was in handcuffs the entire time she was in the patrol car, and presumably had been cuffed in the arresting process before she got into the patrol car.

Once inside the police car with Ms. Garcia, Detective Grapes used his county-provided cell phone to record the conversation. Detective Grapes told Ms. Garcia why they stopped her and advised her of her rights in the following manner:

> The reason we stopped you is because you took that parcel off the porch. And right now you are being detained . . . . And we definitely want to hear what you have to say, but you need to understand that you are under arrest. And you have the right to remain silent. Anything you say could be used against you. You have the right to an attorney. You have the right to be taken promptly before a District Court commissioner to have the charges explained to you. Do you understand what I've just said? All right?

Detective Grapes then asked Ms. Garcia about the package and her plans for it. She explained that she was taking the package to "Eileen," who would deliver it to someone

else. Ms. Garcia, twenty-two weeks pregnant at the time, also indicated that she was hungry and needed to use the bathroom.

Sensing a diminishing opportunity to identify and engage the downstream package recipients, Detective Grapes tried quickly to cobble together an operation to catch the intended recipients of the package. He told Ms. Garcia that he wanted her to call Eileen, but expressed concern that she would not be able to "hold it together" after being arrested and might give away the ruse. As Detective Grapes was explaining the plan, Detective King entered the car and joined the interrogation, and chimed in that "if you don't [hold it together], you're getting charged with it all."

Ms. Garcia revealed more information about others, explaining to the detectives that Eileen was supposed to take the package to its final recipient, "Bo Boy." The following exchange then occurred:

> Detectives Grapes: Bo Boy. Is he in your phone? Do you have his number?
>
> Ms. Garcia: Yeah.
>
> Detective Grapes: Can I get that out of your phone?
>
> Ms. Garcia: (No audible response.)
>
> Detective Grapes: Is that alright?
>
> Ms. Garcia: Yeah.
>
> Detective Grapes: All right. Well, he's been calling you or texting you. That's a text. I'm going to open that text to see what it says. All right? Is that him, the guy we're talking about?

> Ms. Garcia: (No audible response.)
>
> Detective Grapes: It's 10 minutes ago, and he called twice. So I think you're probably supposed to go meet him, right? Okay. I understand being scared and making up a story about [Eileen], what's the passcode?
>
> Ms. Garcia: [Eileen is real. 1976].[3]
>
> Detective Grapes: Okay. But for now on we need absolute truth. Okay? I understand you were scared. No big deal.

Once Detective Grapes was "inside" the phone, he looked through Ms. Garcia's text messages, photos, and videos. Detective Grapes and Ms. Garcia had a series of conversational exchanges consisting mainly of the Detective asking her to clarify what certain messages meant (she wrote her texts primarily in Tagalog) or what was happening in a picture or video, and Ms. Garcia willingly answering the questions. Among other things, Detective Grapes saw Ms. Garcia's boyfriend, Robert Kinol, smoking methamphetamine on a video recording on Ms. Garcia's phone. After the Detectives identified Mr. Kinol, Ms. Garcia revealed to Detective Grapes that she told Mr. Kinol that she had been caught by the police when the police blocked her vehicle. By then, the Detective understood that the cover was blown, and he shifted his focus to Mr. Kinol. "What does Robert know about this box," he asked, "because he keeps, he keeps calling

[3] Although the transcript of the suppression hearing shows Ms. Garcia's response as "unintelligible" at this point, transcripts of the recording prepared for trial by defense counsel show the answers as provided in brackets. These interpretations of the recording were corroborated by testimony at the suppression hearing and are not disputed.

you." In response, Ms. Garcia adjusted her story to include Mr. Kinol. "[H]e's the one who's responsible for the box," she replied.

After a few more minutes of back-and-forth (that included inappropriate commentary about the food that Ms. Garcia and her family ate), an officer fluent in Tagalog arrived, and Detective Grapes asked him to translate Ms. Garcia's text messages. Armed with translations of the deal's general workings, Detective Grapes then asked Ms. Garcia for details. Ms. Garcia readily answered, that, for example, Mr. Kinol owed Bo Boy $1,000 more for the seized package. The following exchange between Detective King and Ms. Garcia then occurred:

> Detective King: How many kids do you have?
>
> Ms. Garcia: Two.
>
> Detective King: Two. Okay. I mean, I'm going to play bad cop right now, okay, right? You're trafficking crystal methamphetamine. And I'm going to tell Child Protection Services, and they're going to take your two kids and when you give birth. So you –
>
> Ms. Garcia: [This is my second one].
>
> Detective King: Okay. There you go. So you should probably be honest with me.

The only new, relevant information revealed by Ms. Garcia after Detective King's interjection and before the conclusion of the interrogation was about the car Mr. Kinol drives, that she and Mr. Kinol had been taking deliveries since May 2014, and that this was the largest shipment of drugs they had received since beginning in the trade.

B. The Trial Court Denied The Suppression Motion.

At the end of the suppression hearing, the court denied the motion to suppress from the bench. The court ruled on two issues: whether Ms. Garcia had given sufficient consent to justify the warrantless search of her phone, and the admissibility of statements Ms. Garcia made after Detective King's threat to call Child Protection Services. Ms. Garcia did not argue anything about the *Miranda* advisement.

First, the court found Ms. Garcia's consent sufficient to justify the search of her phone. The court found that the initial request for consent, the request for her passcode, and the absence of "any indicia whatsoever that this is anything but a consensual conversation" combined to provide sufficient consent for the entirety of the interrogation.

Second, the court addressed the admissibility of the statements Ms. Garcia made after Detective King threatened to call Child Protective Services on her. The circuit court found that Ms. Garcia did not rely on the threat by Detective King because she had corrected his threatening statement (on the number of children she had) and did not suffer a perceptible change in tone or anxiety after the threat was made. The court also found that the statements made after Detective King's threat only embellished information Ms. Garcia had already given. Because Ms. Garcia did not rely on Detective King's threats, the circuit court found her statements admissible.

II. DISCUSSION

Ms. Garcia asks us to reverse the circuit court's denial of her motion to suppress for three reasons.[4] *First*, she contends that her statements were elicited in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). *Second*, she argues that she did not consent to the arresting officer's search through the contents of her phone. *Third*, she claims that the threat made by Detective King renders involuntary any statement she made from that point forward.

"On appellate review, [we] will look exclusively to the record of the suppression hearing when reviewing the denial of a motion to suppress evidence." *White v. State*, 374 Md. 232, 249 (2003). We defer to the lower court's factual findings unless they are clearly erroneous. *McCracken v. State*, 429 Md. 507, 515 (2012). We view the facts in the light most favorable to the prevailing party. *Briscoe v. State*, 422 Md. 384, 396 (2011). And on constitutional matters, we make an independent appraisal by reviewing the law and applying it to the facts ourselves. *Holt v. State*, 435 Md. 443, 457 (2013).

A. Ms. Garcia's *Miranda* Claim Is Not Preserved.

Ms. Garcia claims that the *Miranda* advisement she received "was insufficient to establish that she knowingly and intelligently waived her rights." Her complaint is not preserved for appellate review.

[4] Ms. Garcia phrased the question presented in her brief as follows: "Did the lower court err in denying Ms. Garcia's motion to suppress?"

Maryland Rule 4-252(a) states in relevant part that "[i]n the circuit court, the following matters shall be raised by motion in conformity with this Rule and if not so raised are waived unless the court, for good cause shown, orders otherwise: . . . (4) [a]n unlawfully obtained admission, statement, or confession." Following the lead of the United States Court of Appeals for the Third Circuit, we held in *Savoy v. State*, 218 Md. App. 130, 144–45 (2014), that failure to conform to Rule 4-252 also forecloses plain error review. And, because Ms. Garcia failed to raise her *Miranda* claim during the suppression hearing, the argument is waived and we cannot consider it.

B. Ms. Garcia Consented To The Warrantless Search Of Her Cell Phone.

"A search conducted pursuant to valid consent, *i.e.*, voluntary and with actual or apparent authority to do so, is a recognized exception to the warrant requirement." *Jones v. State*, 407 Md. 33, 51 (2008). Ms. Garcia argues *second* that she did not provide valid consent to a search of her cell phone, and therefore that the search of her phone was a violation of her Fourth Amendment rights. In the alternative, Ms. Garcia argues that she gave only limited consent to retrieve a single phone number from the phone, and that other evidence obtained from the phone was acquired outside of the scope of the consent given.

We address her arguments in turn, first by looking at the time leading up to and including the moment Ms. Garcia gave Detective Grapes her cell phone passcode, to determine whether that qualifies as valid (and at least partial) consent to search her phone. We look then to the entirety of the exchange between Ms. Garcia and Detective Grapes to determine whether the consent given to search her phone served as partial consent or

general consent, and whether at any subsequent time the interrogation became too coercive. Ultimately, we conclude that Ms. Garcia gave Detective Grapes consent to search her cell phone, that the scope of the consent was never exceeded, and that at no point during the interrogation did the detectives impermissibly coerce Ms. Garcia.

1. Ms. Garcia gave consent to Detective Grapes freely and voluntarily.

Ms. Garcia contends *first* that she did not give the officers valid consent to search her cell phone. Because there was undisputed evidence presented at the suppression hearing that Ms. Garcia gave Detective Grapes the passcode to her cell phone, her contention implies that providing her passcode did not even qualify as *limited* consent to search her phone sufficient to alleviate the constitutional requirement that police must obtain a warrant before searching a suspect's cell phone. *Riley v. California*, 134 S. Ct. 2473, 2495 (2014). For this to be true, we would have to find that the State failed to prove, by a preponderance of the evidence, that the ostensibly limited consent, Ms. Garcia's provision of her passcode, was "freely and voluntarily given," *Cherry v. State*, 86 Md. App. 234, 240 (1991) (citing *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)), or that the circumstances of Ms. Garcia's detention otherwise improperly compelled her to give her passcode.

We discussed the considerations present when determining the validity of consent in *Redmond v. State*, 213 Md. App. 163, 177 (2013):

> The voluntariness, *vel non*, of a consent is a question of fact determined under the totality of the circumstances based upon standards set forth in *Schneckloth v. Bustamonte*, 412 U.S. 218

> (1973) . . . The *Schneckloth* Court held that to meet its burden of proving valid consent, thus overcoming the presumption of unreasonableness, the government must show "that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." 412 U.S. at 248. The "knowledge of a right to refuse is a factor to be taken into account," but the lack of such knowledge does not make any consent given *per se* involuntary. *Id.* at 249.

This "totality of the circumstances" analysis includes other considerations as well, including the state of mind of the person granting consent, *Schneckloth*, 412 U.S. at 226–27, the "number of officers present, the age, maturity, intelligence, and experience of the consenting party, the officers' conduct and other circumstances under which the consent was given, and the duration, location, and time of the encounter," *Scott v. State*, 366 Md. 121, 142 (2001). Mere "acquiescence to a claim of lawful authority" does not, by itself, constitute valid consent. *See Bumper*, 391 U.S. at 549.

When she gave the passcode, Ms. Garcia had only been in custody for the time from the initial stop until the time it took to put her in the car (ten minutes or less according to Detective Grapes's undisputed testimony), plus the time consumed by the interrogation. In that time, Ms. Garcia indicated that she was hungry and needed to use the bathroom. The transcript reveals that before providing the passcode, Ms. Garcia had a level-headed conversation with Detective Grapes. Detective Grapes had only just begun to inquire about the package, and asked generic, fundamental questions about the circumstances of the package: "where are you supposed to take this?" "[w]ho is it for?" and "do you know where it is ultimately going?" He gave Ms. Garcia time to respond, and he reasoned with her about the story she was giving him and how he perceived her involvement. Ms. Garcia

herself agreed with the State at the suppression hearing that the tone of the exchange was "conversational." Shortly before Detective Grapes asked for the passcode, Detective King entered the car. Almost immediately, Detective King added some amount of coercive pressure to the situation by informing Ms. Garcia that if she did not cooperate in implicating later recipients, Ms. Garcia would likely get charged "with it all." Shortly after Detective King's arrival, Detective Grapes asked to access the phone and Ms. Garcia provided the passcode.

At the suppression hearing, Ms. Garcia testified that while this was happening, she was in handcuffs, and that she was scared, stressed, and her mind was "blank." Ms. Garcia testified that she was an immigrant from the Philippines, that English was her second language, and that she never had contact with the criminal justice system before. But on cross-examination, she testified that she has a bachelor's degree, took about half of her bachelor's courses in English, now speaks English proficiently, and has lived in the United States for 14 years.

There is no doubt that being taken into custody, arrested, handcuffed, and interrogated is stressful, but that sort of stress doesn't invalidate a suspect's consenting statements. *See United States v. Watson*, 423 U.S. 411, 424 (1976) ("[T]he fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search."). And though Detective King pressured Ms. Garcia to cooperate when he first entered the car, her will had not been "overborne," nor was her "capacity for self-determination critically impaired." *Id.* (quoting *Schneckloth*, 412 U.S. at 225). Even as

an immigrant and non-native English speaker, Ms. Garcia spoke English proficiently enough to understand what was happening. Before Detective Grapes asked for her passcode, the detectives had not threatened or tricked Ms. Garcia into revealing information, or offered a deal that they later refused to honor. The detectives never explicitly informed Ms. Garcia of her right to refuse consent, but Detective Grapes asked for it in a way that permitted her to refuse, and the situation was otherwise not coercive enough to make a reasonable person feel unable to refuse the detective's request. Ms. Garcia knew that she had the right to remain silent and that whatever she said could be used against her. Even so, she chose to reveal information and give the Detectives her passcode because she perceived it to be in her interest to cooperate, perhaps believing that such behavior would inspire leniency. All circumstances considered, we conclude that Ms. Garcia gave her passcode to Detective Grapes freely and voluntarily.

2. Detective Grapes's search of the contents of Ms. Garcia's cell phone never exceeded the scope of her consent.

The closer question relates to the scope of the consent Ms. Garcia gave to the Detectives. She never gave them a single blanket consent to search the phone *in toto*, and we agree with her that giving her passcode in the manner she did here did not imply consent to an unfettered search. She argues, however, that she gave only limited consent to retrieve a single phone number from the phone, and that therefore other evidence obtained from the phone was acquired outside of the scope of the consent given. The reality lies in between.

"The standard for measuring the scope of a person's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable

person have understood by the exchange between the officer and the person giving consent?" *Redmond*, 213 Md. App. at 186 (quotation omitted). Although "valid consent to search may be oral," *Frobouck v. State*, 212 Md. App. 262, 279 (2013) (quotation omitted), it may also be "implied, by conduct or gesture," *Turner v. State*, 133 Md. App. 192, 207 (2000), or "fairly inferred from context," *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016).

We agree with the circuit court that after the initial request for consent and response got the Detective into the phone, the ongoing conversation between Detective Grapes and Ms. Garcia included follow-up requests for consent to look at additional items on the phone, and that the Detective never exceeded the scope of the incremental consents. In a vacuum, the scope of consent after the initial consent colloquy might seem ambiguous:

> Detectives Grapes: Bo Boy. Is he in your phone? Do you have his number?
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> Ms. Garcia: Yeah.
>
> Detective Grapes: Can I get that out of your phone?
>
> Ms. Garcia: (No audible response.)
>
> Detective Grapes: Is that alright?
>
> Ms. Garcia: Yeah.
>
> Detective Grapes: All right. Well, he's been calling you or texting you. That's a text. I'm going to open that text to see what it says. All right? Is that him, the guy we're talking about?
>
> Ms. Garcia: (No audible response.)

> Detective Grapes: It's 10 minutes ago, and he called twice. So I think you're probably supposed to go meet him, right? Okay. I understand being scared and making up a story about [Eileen], what's the passcode?
>
> Ms. Garcia: [Eileen is real. 1976].
>
> Detective Grapes: Okay. But for now on we need absolute truth. Okay? I understand you were scared. No big deal.

Ms. Garcia's response could be interpreted as mere acquiescence to Detective Grapes's second request to look for more than just Bo Boy's phone number ("I'm going to open that text to see what it says. All right?"). But when we look at the conversation in its entirety, as we are charged to do (since valid consent is a "question of fact determined under the totality of the circumstances," *Redmond*, 213 Md. App. at 177), Ms. Garcia was not just acquiescing, but affirmatively consenting and attempting to cooperate with the detectives. Prior to the initial consent colloquy, but after Ms. Garcia was informed that she had the right to remain silent, Ms. Garcia gave the detectives details about the plans for the package of drugs. She gave names and told the detectives where Bo Boy worked. Immediately after the consent colloquy, Ms. Garcia chimed in with more detail: "the box is really . . . for Eileen, and that's the person who is really in charge of the box."

As the conversation advanced, Ms. Garcia guided Detective Grapes to an understanding of what her text conversations meant and what was happening in photographs on her phone. At times she clarified who was responsible for which texts, where various role players in the life of the package lived, the precise financial details of the drug deal, and what car her boyfriend drove. The circuit court found that at one point

during the recording, it seemed like Ms. Garcia did not want the detectives asking about some of the family reunion-type photographs on her phone because they were too personal, implying that she and the detectives could resume looking at the other contents of her phone.

We agree with the circuit court that Detective Grapes and Ms. Garcia had a "consensual conversation" and that the detectives never exceeded the scope of the incremental consents she gave them, and thus that the State met its burden to prove that consent was freely and voluntarily given.

C. The State Established By A Preponderance Of The Evidence That Ms. Garcia Did Not Rely On The Threat By Detective King When Making Post-Threat Statements.

Third, Ms. Garcia contends that the circuit court erred by not suppressing statements made by Ms. Garcia after Detective King's threat. The State echoes the findings of the circuit court that Ms. Garcia did not rely on the threat made by Detective King when she made post-threat statements, and that they therefore did not require suppression. We agree with the circuit court and the State.

"[A] confession is involuntary if it is the product of an improper threat, promise, or inducement by the police." *Hill v. State*, 418 Md. 62, 74 (2011).

> 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." *Williams* [*v. State*], 375 Md. [404,] 429 [(2003)]. 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." *Knight* [*v. State*], 381 Md. [517,] 533 [(2004)] (quoting *Williams*, 375 Md. at 429 []).

Id. at 75–76. A threat by law enforcement and subsequent statements made by the arrestee trigger a two-part voluntariness inquiry under Maryland law. *Id.* at 76. The first inquiry is an objective one: "the court must determine whether a reasonable person in the position of the accused would be moved to make an inculpatory statement upon hearing the officer's declaration." *Id*. The second inquiry asks "whether the accused relied on that inducement in making the statement he or she seeks to suppress. . . . Specifically, the court must examine 'whether there exists a causal nexus between the inducement and the statement.'" *Id*. at 77 (quoting *Knight*, 381 Md. at 534). "In *Reynolds*, we made clear that '[i]f a suspect did not rely on an interrogator's comments, obviously, the statement is admissible regardless of whether the interrogator had articulated an improper inducement. By definition, there would have been no 'inducement' at all, because the interrogator 'induced' nothing." *Winder v. State*, 362 Md. 275, 311–12 (2001) (quoting *Reynolds v. State*, 327 Md. 494, 509 (1992)). Both prongs must be satisfied in order for a confession to be found involuntary. *Id.* at 310. "[W]e undertake a *de novo* review of the trial judge's ultimate determination on the issue of voluntariness." *Id.* at 310–11.

The State conceded at the suppression hearing that Detective King's statement was a threat. The circuit court found the first, objective inquiry satisfied, finding the threat to be "very fundamental . . . to threaten somebody who's pregnant and has a child to call CPS." But the circuit court resolved Ms. Garcia's claim on the second prong:

> [R]ight after [Ms. Garcia] corrects [Detective King] about the number of kids she has, the very first thing she says is it's true what I just said. Everything I just said is the truth. And then she goes on to, there's more. And there is some more information. It's not drastically different, but it's an embellishment. . . . So there's nothing in her tone or the way they're talking to each other, that is Officer Grapes and herself, that indicates that anything at all has changed in her mind. She's answering the same way, the same tone. . . [I]t sounds like a continuum of what went before. . . . [H]er reaction to what he said, that is Detective King, is, I mean, the fact that she seemed to have no reaction at all other than to clarify, and then she just kept talking, she may not even have known what that threat meant. She may not know what CPS is. Perhaps she does. And I'm not going to speculate and say she didn't. But there's just no scintilla here of evidence that she relied on this threat whatsoever in her further statements after that threat.

We agree that the statements made by Ms. Garcia after Detective King's threats were only minor details corroborating the statements she had made pre-threat, and that there was no change in Ms. Garcia's willingness to give information or in the cadence of their conversation post-threat. Nothing about Ms. Garcia's post-threat statements indicates to us that the circuit court misinterpreted the evidence, and we defer to the circuit court's interpretation of the facts because it is not clearly erroneous. *See McCracken*, 429 Md. at 515 ("We do not disturb [a circuit court's factual] findings unless clearly erroneous."). And because the State proved by a preponderance of the evidence that Ms. Garcia was not actually induced to confess, as she did not rely on Detective King's threat, we affirm the circuit court's decision to deny the motion to suppress.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY COSTS.