Circuit Court for Baltimore County
Case No.: 3K-16-001665

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1542

September Term, 2017

ALLEN WATKINS HICKS

v.

STATE OF MARYLAND

Meredith,
Kehoe,
Berger,

JJ.

Opinion by Kehoe, J.

Filed: January 24, 2019

After a jury trial in the Circuit Court for Baltimore County, Allen Watkins Hicks was convicted of first-degree rape, two counts of first-degree sexual offense, kidnapping, and robbery with a dangerous weapon. He was sentenced to three consecutive sentences of life imprisonment without the possibility of parole for the first-degree rape and first-degree sexual offense convictions, a consecutive sentence of thirty years for the kidnapping conviction, and a twenty-year sentence for the robbery with a dangerous weapon conviction to run concurrently with the sentence for kidnapping. Hicks presents four issues, which we have reworded slightly:

> 1. Did the circuit court err in denying the motion to suppress his post-arrest statement?
>
> 2. Did the circuit court err in not requiring the State to redact portions of the transcript of Hicks's interrogation during which police accused him of not affirmatively denying that he committed the crimes?
>
> 3. Did the circuit court err in permitting impermissible lay opinion testimony?
>
> 4. Did the circuit court illegally impose three consecutive sentences of life without parole?

We will affirm the court's judgments.

Background

Because Hicks does not challenge the sufficiency of the evidence against him, we will summarize the evidence produced at trial only to the extent necessary to provide context to his appellate contentions.

"A."[1] was a teacher at a school (the "School") in Baltimore County. On December 23, 2015, she stayed late because the school's alarm system would not activate. She eventually left at around 6:30 p.m. When walking across the School's otherwise-deserted campus to her car, she was accosted at gunpoint by a man dressed in a dark sweatshirt with a hood and baggy sweatpants with an elastic drawstring and a Velcro pocket. The man was wearing either a mask or a cap over his face. When A. attempted to pull away, the man struck her in the face with the butt of the handgun, knocking her to the ground. What followed was a horrific ordeal[2] during which A. was kidnapped, robbed, repeatedly beaten, and repeatedly sexually assaulted. After the assailant finished his last sexual assault, he tied her hands and ankles together, and then "washed" all parts of her body affected by his assaults with a liquid that A. could not identify. Her assailant then carried her to her car, placed her in the rear seat, and blindfolded her. A. remembered that her vehicle was driven away from the school, possibly onto an interstate, until it came to rest in what turned out to be a residential neighborhood in a suburb of Baltimore. The assailant left the car, telling A. that he would return. After a period of time—by her estimation, at least ten minutes, perhaps a bit more—A. heard the voices of people talking to one another. She managed to open a back door with her feet and roll out into the street. A. shouted for help, and the

[1] The initial is chosen at random. Neither the victim's first name nor her surname begins with the letter "A."

[2] A. testified that "I did my best to look and try to remember anything I could see to be able to help me identify this person if I made it out alive." She did survive and, although she was unable to provide a description of her assailant (because he was masked), she did supply police with detailed information about what her assailant was wearing.

people whom she had overheard came to her assistance. One of them called 911. This occurred at about 9:30 p.m.

Forensic investigators from the Baltimore County Police Department were unable to recover any identifying DNA, fingerprint or other physical evidence from A.'s SAFE exam, her car, or the campus of the School. However, the police did learn that, in the fall of 2015, Hicks was employed by Brickman Landscaping Service, which provided the lawn service for the School. Hicks was part of a Brickman crew that worked on the campus of the School approximately six times in 2015; the last time was in early December. Brickman provided all of its landscapers "Maxi-flex" gloves to wear. These gloves matched the description that A. gave to the police of the gloves worn by her assailant. At trial, Brickman's local branch manager testified that Maxi-flex gloves were part fabric and part rubber, noting that the palm and fingertips were rubberized to improve grip (this information was consistent with A.'s description of the assailant's gloves). He also testified that these gloves were special ordered and were generally not available at stores like the Home Depot or Lowe's. The police obtained a pair of Maxi-flex gloves from Hicks's residence that were introduced into evidence at the trial. A. testified that the gloves worn by her assailant were very similar to the pair introduced at trial, but that she could not state with absolute certainty that the gloves were identical.

The office manager at the School told police that someone, who did not identify him- or herself, called the School at approximately 1:00 p.m. on December 23 and asked only

when the school was closing that day. The call was made from 301-388-6531, the number of a cell phone that police later determined was used by Hicks.

The police knew that Hicks had been convicted of first-degree rape in Prince George's County in 1997, and he became a focus of their investigation.

On January 13, 2016, Baltimore County Police Detectives Michael West and Jessica Hummel interviewed Hicks at his home. Hicks confirmed that he had worked for Brickman the first two weeks of December, but that he had not been working recently due to the weather. Police obtained a cell phone number associated with Hicks and discovered that this same cell phone called the School at around 1:04 p.m., the date of the assault. Based on this and other information, the police obtained a search warrant for Hicks's residence and a warrant for his arrest for providing inaccurate and incomplete information on his sex offender registration statements.[3] The police executed both warrants on January 22, 2017. Pursuant to the search warrant, the police seized a pair of black Maxi-flex gloves, which, as we have mentioned, were introduced at trial. Hicks's DNA profile matched the DNA obtained from the gloves. Police also recovered, among other items, clothing and boots consistent with A'.s description of what the assailant was wearing, two cell phones, an MTA smart card, a Brickman t-shirt, and condoms. It was later discovered that one of the cell phones was used to call A.'s school on the date of the assault to learn when the school would close.

[3] *See* Md. Code (2001, 2018 Repl. Vol.) § 11-721 of the Criminal Procedure Article ("Crim. Proc.") (prohibiting a knowing failure to register, or to provide notice or required information).

After he was arrested, Hicks was interviewed at the police station by Detective Hummel. We will discuss this interview in parts 1 and 2 of this opinion. A redacted version of Hicks's statement was played for the jury at trial.[4]

The jury also heard audio recordings of two phone calls Hicks made from jail. In those calls, dated January 25, 2016 and February 9, 2016, respectively, Hicks can be heard speaking with another male, asking whether the police took his black work gloves from his bedroom.

FBI Agent Matthew Wilde, accepted as an expert in historical cell site analysis, examined the T-Mobile records associated with Hicks's cell phone. Using cell phone location information, Wilde opined that Hicks's cell phone made calls or texts near his home in the White Marsh area on December 23, 2015, at 1:04 p.m., 1:44 p.m., and 1:47 p.m. However, later that day, at around 4:50 p.m. to 4:54 p.m., Hicks's cell phone made text messages in the vicinity of A.'s school. Hicks's cell phone then made text messages later that evening, between 11:05 p.m. and 11:07 p.m., from the cell tower located back near his home.

Two witnesses, Detective Hummel and Dana McAlister, a computer forensic expert employed by the Baltimore County Police Department Crime Laboratory, testified as to Hicks's cell phone. Their testimony is the subject of part 3 of this opinion.

[4] The unredacted version of the same interview was admitted during the motions hearing, discussed below.

Discussion

1. The Motion to Suppress

Hicks challenges the admission of his statement to the police on January 22, 2016, on two grounds. First, he asserts that his statement was the result of an illegal arrest because Hicks was not required to register as a sex offender at the time of the arrest, and the police officer who prepared the warrant knew or should have known that. Second, his statement was obtained in violation of his constitutional rights guaranteed by *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). These contentions, or variations of them, were raised to the trial court in a motion to suppress. The trial court found neither of them to be persuasive, and nor do we.

The general standard of review is well-established:

> Appellate review of a motion to suppress is limited to the record developed at the suppression hearing. We view the evidence and inferences that may be drawn therefrom in the light most favorable to the party who prevails on the motion, here, the State. We accept the suppression court's factual findings unless they are shown to be clearly erroneous. We give due weight to a trial court's finding that the officer was credible. We review legal questions *de novo*, and where, as here, a party has raised a constitutional challenge to a search or seizure, we must make an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case.

State v. Johnson, 458 Md. 519, 532-33 (2018) (citations, quotation marks, and brackets removed).

A. Fruit of the Poisonous Tree?

Hicks leads with the argument that his initial arrest was illegal because, at the time he was arrested, he was not required to register as a sex offender. Because the arrest was

illegal, his post-arrest statement to the police should have been suppressed. Hicks does not dispute that, when he was released from prison after serving his sentence for his 1997 first-degree rape conviction, the Department of Public Safety and Correctional Services entered his name in the Maryland sex offender registry. Nor does Hicks assert that he provided up-to-date and accurate information to the Department. None of this matters in his view because he asserts that the Department should have removed his name from the sex offender registry as a result of the decision of the Court of Appeals in *Doe v. Dep't of Pub. Safety & Corr. Servs*., 430 Md. 535 (2013), and that the officer who prepared the arrest warrant was aware or should have been aware of the *Doe* decision and its implications for Hicks's obligation to register. On this basis, Hicks argues that his arrest was illegal, and that admission of any portion of his post-arrest statement was barred by the exclusionary rule.

In its brief, the State acknowledges that it is possible that Hicks was not required to register as a sex offender at the time of his arrest.[5] But, the State continues, there was no dispute that Hicks was listed on the sex offender registry at the time the arrest was made. The State asserts that Hicks was arrested pursuant to a facially valid warrant, and that there was no showing that the information in the application for the warrant was false or made with reckless disregard for the truth. According to the State, even if there were errors of

[5] However, both the State and Hicks have acknowledged that in 1996, persons convicted of a child sex offense were required to register. *See* Md. Ann. Code, Art. 27 § 792 (1996 Repl. Vol). No evidence was produced at trial, by either Hicks or the State, indicating the underlying circumstances of Hicks's 1996 conviction.

fact or law contained in the application for a warrant, those errors were not of the nature that would require exclusion of evidence flowing from the execution of the warrant. We agree with the State.[6]

"An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense and thus the warrant primarily serves to protect an individual from an unreasonable seizure." *Steagald v. United States*, 451 U.S. 204, 213 (1981). When appellate courts consider whether a warrant is legal, the question before us ordinarily is "whether the issuing judge had a substantial basis to conclude that the warrant was supported by probable cause." *Greenstreet v. State*, 392 Md. 652, 667 (2006) (citation omitted). This standard applies to both search warrants and arrest warrants. *See, e.g., Giordenello v. United States*, 357 U.S. 480, 485–86 (1958) ("The language of the Fourth Amendment, that '* * *no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing * * * the persons or things to be seized * * *,' of course applies to arrest as well as search warrants."). A warrant is presumptively valid, and "'the burden of proof is allocated to the defendant to rebut that presumption by proving otherwise.'" *Volkomer v. State*, 168 Md. App. 470, 486 (2006) (quoting *Fitzgerald v. State*, 153 Md. App. 601, 625 (2003)).

Generally, in determining whether probable cause exists to support a warrant, the issuing judge is confined to the four corners of the warrant application. *See Valdez v. Stat*e,

[6] Moreover, the State argues that the fact that appellant was given his *Miranda* warnings attenuated any illegality in his arrest. It is not necessary for us to address this contention.

300 Md. 160, 168 (1984) (Ordinarily, a judge cannot consider "evidence that seeks to supplement or controvert the truth of the grounds stated in the affidavit"); *accord West v. State*, 137 Md. App. 314, 322, *cert. denied*, 364 Md. 536 (2001).

At the suppression hearing, defense counsel conceded that the information contained in the four corners of the application for a statement of charges would have been sufficient "[i]f] those statements were true and the police submitted them not knowing they were false[.]"[7] However, continued counsel, the application contained information that the

[7] Hicks was charged with violating Md. Code Criminal Procedural Article § 11-721, which states in pertinent part:

> (a) A registrant may not knowingly fail to register, knowingly fail to provide the notice required under § 11-705 of this subtitle, knowingly fail to provide any information required to be included in a registration statement described in § 11-706 of this subtitle, or knowingly provide false information of a material fact as required by this subtitle.

The application for the statement of charges states, in pertinent part:

> Allen Hicks is a registered Tier III sex offender. He was convicted in Prince George's County Circuit Court (1997) of Rape – First Degree. He is required to register every three months with local law enforcement. Required in his registration, he must supply any and all addresses, phones, emails, vehicles, and employment.
>
> Mr. Hick's latest registration was completed on November 22, 2015. He listed his only cell phone as 301-665-0014 and did not supply an employment.
>
> On January 13, 2016, Detective West and Detective Hummel interviewed Mr. Hicks at his residence. He supplied the same cell phone number, but added that he has been working for Brickman Group. He also supplied an email account.

Footnote continued . . . .

police knew was false "at the time they submitted that information in the application for an arrest warrant." The motions court treated this contention as a *Franks* challenge,[8] and held a *Franks* hearing, which we will now describe.

> Upon checking it was revealed that Mr. Hicks obtained a new cell phone in December 2015. He did not report this cell number to the registration as he is required to do.
>
> Mr. Hicks has been employed with the Brickman Group since November 2015. He did not report his employment 3 days prior to the change in employment status as required to do so per the Notice of Sexual Offender Registration Requirements that he signed and agreed to on February 25, 2015.
>
> Mr. Hicks is prohibited from entering onto school property or any licensed daycare property. On 11/14/2015 and 12/04/2015, Mr. Hicks did enter the real property of [the School]. [The School] is a licensed school by the Maryland State Department of Education and the Office of Childcare of Baltimore County. He is required to obtain written permission from the school. The school has not provided him with any written or verbal permission to be on school grounds at any time. Mr. Hicks does not have any children at the school.

[8] *See Franks v. Delaware*, 438 U.S. 154, 155–56 (1978):

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

The first witness was Jennifer Brown, Hicks's probation agent. She first met with Hicks in March 9, 2015, when he was released by the Division of Correction following his term of confinement on his prior rape conviction. Brown testified it was her understanding that Hicks was required to register every three months with the Department. Brown further testified that she did not know that there was any question about Hicks's inclusion on the registry until a week before the motions hearing.

The other witness was Detective Michael West, a 32-year veteran of the Baltimore County Police Department, who was responsible for overseeing all registered sex offenders in Baltimore County. He testified he had been contacted by detectives investigating the assault on A., who inquired about registered sex offenders living in or near the area where the crime occurred. West identified Hicks, as well as other individuals on the registry, in response to this inquiry. It was then that investigators learned that Hicks worked for Brickman, and had been working at the School in November and December of 2015.

With this information in hand, West reviewed Hicks's sex offender registration reports, and found that he had not reported that the was working for Brickman. He spoke with Hicks on the phone, and, along with the supervising detective in the investigation, Detective Jessica Hummel, met with him on January 13, 2016. During the interview, West learned that the telephone number that Hicks provided on his registration report was no longer

working and that Hicks has failed to update his report with his current number.[9] When West asked Hicks about employment, Hicks responded that, up until December 2015, he had been working part time for the Brickman Group. Hicks told West that he had not reported his employment because it was "weather dependent." Finally, West asked Hicks about email addresses. Hicks responded that he had an email address. West testified that a registered sex offender was required to report email addresses to the Department but had not done so at the time of the interview.

Based on the discrepancies between the information Hicks provided at this interview and the information listed on Hicks's registration forms, Detective West prepared a statement of probable cause and an application for a statement of charges, which we have set out in footnote 7. West testified that, when he prepared the statement of probable cause, he had "no doubt" that Hicks was in violation of the sex offender registry law. He related that "the instructions we had gotten from the AG's office all the way down through the bureau" were that the holding of *Doe* applied only to cases arising before October 1, 1995.

The detective related that he became aware of the possibility of a problem with Hicks's sex offender registration status only when he spoke to Hicks's defense counsel in the court house after Hicks was arrested. After researching the matter further during the summer of 2016, and considering a timeline provided by the State's Attorney's Office concerning

[9] In the same interview, Detective West learned that appellant's current number was 301-388-6531. This was the number of the cell phone that contacted A.'s school on the day that she was assaulted.

developments in Maryland appellate case law on registration of sexual offenders, Detective West came to the conclusion that "Mr. Hicks should or could be possibly coming off the registry."

West testified on cross-examination that he worked with his supervisors and the clerks with the Baltimore County Police to oversee the sex offender registry for Baltimore County. He was familiar with the registry, how it was maintained and how individuals are removed. With respect to the retroactivity issues under *Doe*, Detective West asserted that *Doe* was "being interpreted several different ways, several different times," and that decisions whether to remove someone from the registry was up to the courts or the Department. He explained:

> My job is to understand the registry to the best of my ability. The issue [of who is required to register] comes into my game where appellate decisions are constantly being made changing my decisions. So when those decisions are made, when I get informed of them, or instructed or [receive] different instructions on how to—who is supposed to be on the registry, who is coming off, that sort of thing is all the more information for my part because, again, I can't put people on the registry; I can't take people off the registry. I'm more of a data collector and more of an enforcer of the Maryland law.

Detective West testified that "[b]ased on all of the information that [Hicks] had given . . . me at the time, his charge, his conviction, his release date, I believed at that time that he belonged on the registry."

After hearing argument, the court denied the motion, as follows:

> Having heard from the detective in the case, certainly there is nothing approaching evidence that he has perjured himself or filled out this affidavit with a reckless disregard for the truth. I was persuaded by the testimony from the witness stand that he was truthful on the witness stand, that he was under the good faith mistaken belief that on January 13th, when he conducted

> the interview, that he had a solid case of a violation of the sex offender registry. He indicated that they he believed that, that he had three separate areas of the sex offender registry that the Defendant hadn't complied with. One was an e-mail address, the other was the lack of employer information, the third was a cell phone number that wasn't disclosed.
>
> I further accept the detective's statements that the first knowledge that he had that his case was – his case being the violation of the sex offender registry case was a case that had problems was after he spoke to one of the two defense attorneys that is here today . . . and that was sometime in the summer of 2016. And at that point Detective West for the first time became aware that he has got – he may have a problem with that arrest. So I find his testimony credible. I don't believe that he either perjured himself or filled out false facts in order to have Detective Lane sign something that he himself would have refused to sign.
>
> For all those reasons, the motion to quash the arrest is denied. Motion to quash the arrest and suppress the evidence is denied.

To this Court, Hicks argues that he was not legally required to register as sex offender in 2015. We will agree with this proposition for the purpose of our analysis.[10] At this juncture, Hicks does not question Detective West's good faith, but argues that:

[10] Pertinent to our discussion, in 1995, Maryland's General Assembly passed the "Maryland Crimes Against Children and Sexual Offender Registration Law" which was originally codified in the Maryland Code at Article 27 § 692B, 1995 Md. Laws, ch. 142 (effective October 1, 1995), and then reorganized without substantive change as Article 27 § 792, 1996 Md. Laws, ch. 585 (effective October 1, 1996). The Maryland statute required a child sexual offender to register annually for ten years upon their release from prison, and to notify local law enforcement of their presence in the county in which they intended to live. See Art. 27 § 792; *Graves v. State*, 364 Md. 329, 337 (2001). The 1995 act applied prospectively to child sexual offenders convicted of offenses which occurred after October 1, 1995. *See* Terry L. Trimble, *Recent Developments - The Maryland Survey*: *1994-1995*, 55 MD. L. REV. 847, 848 (1996) (citing 1995 Md. Laws ch. 142).

It is undisputed that Hicks was convicted of first-degree rape in 1997. There is no information in the record about the age of his victim. If she was a child, and assuming that the crime was committed after October 1, 1995, then, *Doe* notwithstanding, he would have

> At the time of the allegations in this case, it should have been apparent to a properly trained police officer—especially Detective West, whose job it [was] to oversee all of the sex offenders in Baltimore County and to stay updated on applicable law—that Mr. Hicks did not have to register under *Doe* and its progeny.

Thus, according to Hicks, the trial court erred in denying the motion to suppress. We do not agree.

In *United States v. Leon*, 468 U.S. 897, 919-20 (1984), the United States Supreme Court held that evidence seized under a warrant, subsequently determined to be invalid, may be admissible if the officers executing the warrant acted in objective good faith and with reasonable reliance on the warrant. *Accord McDonald v. State*, 347 Md. 452, 467 (1997), *cert. denied*, 522 U.S. 1151 (1998). The *Leon* Court reasoned that because "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates," the rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Leon*, 468 U.S. at 916, 919. It noted nonetheless that "the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable." *Id*. at 922 (internal citation and footnotes omitted).

been required to register for ten years after the date of his release, which was in 2015. If the victim had been an adult, he would not be required to register. Although Hicks's registration status is unclear from the record, the State dismissed the registration violation charge before Hicks's trial in the present case.

The good faith exception is not applicable in all situations. As the Court of Appeals noted in *Patterson v. State*, 401 Md. 76 (2007), the Supreme Court has identified four situations when an officer's reliance on a warrant would not be reasonable:

> (1) the magistrate was misled by information in an affidavit that the officer knew was false or would have known was false except for the officer's reckless regard for the truth;
>
> (2) the magistrate wholly abandoned his detached and neutral judicial role;
>
> (3) the warrant was based on an affidavit that was so lacking in probable cause as to render official belief in its existence entirely unreasonable;
>
> (4) the warrant was so facially deficient, by failing to particularize the place to be searched or the things to be seized, that the executing officers cannot reasonable [sic] presume it to be valid.

Patterson, 401 Md. at 104 (citing *Leon*, 468 U.S. at 923).

We are concerned with the first exception, and specifically, whether Detective West knew or should have known that Hicks was not required to register, or acted in reckless disregard for the truth. In attempting to answer this question, Hicks directs our attention to *Doe*, and decisions of this Court, such as *Sanchez v. State*, 215 Md. App. 42 (2013), and *Quispe del Pino v. Maryland Dep't of Pub. Safety & Corr. Servs*., 222 Md. App. 44, 46, 63 (2015), to support his contention that West should have known that Hicks was not required to register.

This argument, in our view, is misplaced. West was not a lawyer, he was a police officer. West did not maintain the sex offender registry, the Department did. West had no authority to release a registrant, such as Hicks, from his obligation to register. Moreover, police officers routinely rely upon information contained in records of other public

agencies when they prepare applications for warrants or otherwise make probable cause evaluations, and sometimes that information is incorrect. *See, e.g., Arizona v. Evans*, 514 U.S. 1, 16 (1995) (arrest made based upon the arresting officer's reliance upon an error in court records); *Herring v. United States*, 555 U.S. 135, 137 (2009) (an arrest made because of an error in police records from a neighboring jurisdiction); *United States v. Miguel*, 368 F.3d 1150, 1154 (9th Cir. 2004) (traffic stop based on inaccurate motor vehicle administration records); *McCain v. State*, 194 Md. App. 252, 272 (2010) (same).

In these cases, and many more, courts have held that the police may rely on public records as long as the reliance is in good faith and is reasonable. "Reliance is reasonable even if there are occasional mistakes, arising from negligence, but unreasonable if mistakes are frequent enough to indicate gross negligence or 'systemic error or reckless disregard of constitutional requirements.'" *McCain*, 194 Md. App. at 272 (quoting *Herring*, 555 U. S. at 147).

The cases cited above involved factual errors in records. Hicks asserts that Detective West should have known, as a matter of law, that he was not required to register as a sex offender in 2015. A mistake of law was the issue in *Heien v. North Carolina*, __ U.S. __, 135 S.Ct. 530 (2014), in which the United States Supreme Court agreed with the North Carolina Supreme Court that the related Fourth Amendment doctrine of reasonable suspicion can rest on a mistaken understanding of law. 135 S.Ct. at 536. The Court recognized that "searches and seizures based on mistakes of fact can be reasonable." *Id.* The Court stated:

> But reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.

After our own independent review of the record before the motions court, we agree with that court that Detective West was acting in good faith and in reasonable reliance upon the information available when he prepared the application for a statement of charges. Even if Hicks was eligible to be removed from the registry in 2016—and it is not entirely clear that such was the case[11]—West was not a lawyer and was entitled to rely on the fact that the Department maintained Hicks's name on the sex offender registry. Any suppositional error of West's part did not rise to the level of the sort of "deliberate, reckless, or grossly negligent conduct" by police officers that the exclusionary rule is intended to deter. *Herring v. United States*, 555 U.S. 135, 144 (2009).

B. A Violation of Hicks's Miranda Rights?

Hicks next asserts that the court erred in denying his motion to suppress his post-arrest statement because he did not validly waive his *Miranda* rights. The State responds that Hicks's waiver was valid under the totality of the circumstances. As will be explained, we agree with the State.

[11] *See* footnote 10, *supra.*

At the suppression hearing, Detective Hummel, a 17-year veteran of the police department, testified at the motions hearing that she interviewed A. on December 23, 2015. After police developed Hicks as a suspect in that incident, as well as another incident that occurred in October 2015 not far from Hicks's home, Detective Hummel accompanied Detective West to Hicks's house on January 13, 2016. Hicks was arrested, notably prior to the execution of separate search warrants, on or around January 22, 2016.

Hicks was transported to police headquarters, and interviewed by Detectives Hummel and Anderson. The interview took place in a ten by ten-foot room, containing three chairs, two doors, a table, and a handcuff bar. At the time of the interview, both detectives were attired casually, and neither was armed. Hicks was repeatedly offered food and drink and the use of a restroom. No promises or inducements were made to Hicks to get him to make a statement. After giving Hicks his *Miranda* warnings, Detective Hummel presented Hicks with a written waiver form. The form, together with Hicks's initials and signature (shown in italics) stated:

YOU ARE HEREBY ADVISED THAT:

A.H.	1.	You have the absolute right to remain silent.
A.H.	2.	Anything you say can and will be used against you in a court of law.
A.H.	3.	You have the right to talk with a lawyer at any time before or during any questioning.
A.H.	4.	If you want a lawyer and cannot afford one, you can request the court to appoint a lawyer prior to any questioning.

A.H. 5. If you agree to answer questions, you may stop at any time and no further questions will be asked of you.

I HAVE READ AND UNDERSTAND THIS EXPLANATION OF MY RIGHTS. MY DECISION TO WAIVE THESE RIGHTS AND BE INTERVIEWED IS FREE AND VOLUNTARY ON MY PART.

_____

/s/ Allen Hicks

During the interview, and pertinent to the issue raised, Detective Hummel advised Hicks of his *Miranda* rights, as well as his right to prompt presentment. An unredacted copy of the interview was entered at the motions hearing and played for the court.[12] Detective Hummel advised Hicks as follows:

> You are hereby advised that you have the absolute right to remain silent.
>
> Anything you say can and will be used against you in a court of law.
>
> You have the right to talk to a lawyer, at any time, before or during any of the questioning and the questioning is also our conversation here.
>
> If you want a lawyer and you can't afford one, you can request the court to appoint a lawyer prior to any questioning or our conversations.

Hicks agreed to sign his initials on the form indicating that each right was read to him. Hicks, however, declined to sign that part of the form indicating that he waived those rights and agreed to speak with the police. Hicks stated "I can't waive my rights" and "I can't even sign this." The following then ensued (emphasis added):

> DETECTIVE HUMMEL: If you agree to answer any questions, you can stop at any time and no further questions will be asked of you.

[12] The redacted version was played at trial.

MR. HICKS: Oh, I understand that right there.

DETECTIVE HUMMEL: Okay.

MR. HICKS: But this says --

DETECTIVE HUMMEL: This is the separate part. This is just says that, I read you your rights and you understand your five rights. These are your Miranda rights. That you understand them.

And that you're going to waive them and sit and talk and have a conversation back and forth with us.

MR. HICKS: *I can't waive my rights.*

DETECTIVE HUMMEL: *What do you mean by that?*

MR. HICKS: I can't waive it. I can't even sign this.

DETECTIVE HUMMEL: *You don't want to sit here and talk with me* --

MR. HICKS: I don't --

DETECTIVE HUMMEL: -- over what's going on?

MR. HICKS: -- understand that part right there.

DETECTIVE HUMMEL: Which one?

MR. HICKS: This one right here because I don't understand it. It just -- I don't understand that --

DETECTIVE HUMMEL: *Do you understand that you have the absolute right to remain silent?*

MR. HICKS: *Right. I understand all* --

DETECTIVE HUMMEL: Okay.

MR. HICKS: -- *I understand all of these.*

But this here --

DETECTIVE HUMMEL: Okay. This is just a summation, right? And this is just a summary of these five. This just basically says, in normal, non-legal, not big word terms, it just basically -- you're going to sit and talk -- you understand these five dot [sic] points.

MR. HICKS: Right.

DETECTIVE HUMMEL: Okay? And you understand each of these, correct?

MR. HICKS: Right.

DETECTIVE HUMMEL: Okay. This just says that you're going to sit and talk with me. You're not waiving any other right --

MR. HICKS: (Indiscernible) but that's what it says.

DETECTIVE HUMMEL: -- you are just waiving -- you are just waiving the right to be quiet. This just -- this states you're going to sit and talk with me. You understand that you have the right to remain silent.

You understand things can be held against you in a court of law.

You can understand that you have the right to a lawyer.

You can understand if you can't afford a lawyer, the court will appoint one to you.

And you understand that if you want to sit here with me, you can stop at any point you want to.

That's what this is saying. It's just another sentence to summarize all of this.

MR. HICKS: I -- I understand what you're saying but that's not how that's worded.

It says my decision to waive -- to waive these rights --

DETECTIVE HUMMEL: Uh-huh.

MR. HICKS: -- and be interviewed is free and voluntary. I'm -- I'm not waiving these rights.

DETECTIVE HUMMEL: You're -- but you just said that you -- you -- you want --

MR. HICKS: Okay. I -- I understand that.

DETECTIVE HUMMEL: I know -- and I get where you're -- do you want to sit here and talk with me?

That's essentially what we're laying on the line.

MR. HICKS: (Indiscernible) --

DETECTIVE HUMMEL: *Do you want to sit here and talk with me?*

MR. HICKS: -- *I ain't got no problem with it but I ain't -- I -- I'm not going to waive (indiscernible)* --

DETECTIVE HUMMEL: Well, that's what it is.

It's saying -- it's not like I'm taking your freedom away from you or I'm taking like your -- your – rights is a silly word. It's a legal word.

It's just -- all this -- all this form is is just saying if you want to sit here and talk with me, that's on you. It's completely, a hundred percent your decision.

You have the right to not talk to me. You have the right to tell me to go shut up. You have the right to sit here and be quiet.

You have the right to sit here and start talking to me and stop at any point you wish to.

You have the right to ask for the lawyer.

You have the right to have the lawyer appointed for you. And you have -- you understand each of these.

This is literally just all of these. It's just a sentence. And that really has nothing to do with –

MR. HICKS: That's not what it says.

DETECTIVE HUMMEL: -- back again.

DETECTIVE ANDERSON: The problem that we're going to have here is that if you do want to just have a little chat back and forth, we can't without that. So --

MR. HICKS: Okay. I can't sign that because I don't understand.

DETECTIVE HUMMEL: But this -- this line, you did sign it though. This --

MR. HICKS: Okay. But I --

DETECTIVE HUMMEL: -- okay. Let me ask you this.

MR. HICKS: -- didn't sign this right here.

DETECTIVE HUMMEL: *In signing this paper, you understand all five rights.*

MR. HICKS: *Right.*

DETECTIVE HUMMEL: Correct?

MR. HICKS: Right.

DETECTIVE HUMMEL: Do you choose to sit -- you understand each right?

MR. HICKS: Right.

DETECTIVE HUMMEL: Okay. Do you understand that you have the decision to sit and talk with me?

MR. HICKS: *Right.*

DETECTIVE HUMMEL: *Do you want to sit and talk and with me right now?*

MR. HICKS: *Yeah. But that's not what this is saying.*

DETECTIVE HUMMEL: But that is what this is saying. The -- then, this, we will put away, okay? This is you.

Do you -- do you want to sit and talk with me right now?

MR. HICKS: *I don't have no problem with talking to you but I can't sign that part right there.*

DETECTIVE HUMMEL: *Okay.*

MR. HICKS: I don't understand it.

DETECTIVE HUMMEL: And that's fine. *But you understand each of your Miranda rights.*

MR. HICKS: *Yeah.*

DETECTIVE HUMMEL: One through five?

MR. HICKS: *Yes.*

DETECTIVE HUMMEL: *And you want to sit and talk with me?*

MR. HICKS: *I don't have no problem –*

DETECTIVE HUMMEL: *And you do understand, you'll talk and, if you don't want to talk with me, you'll be like, I don't want to talk anymore, Detective Hummel.*

MR. HICKS: *Okay.*

DETECTIVE HUMMEL: *Okay?*

MR. HICKS: *I understand that.*

DETECTIVE HUMMEL: And you do understand if you want a lawyer -

MR. HICKS: Right.

DETECTIVE HUMMEL: You've been through -- whatever.

MR. HICKS: Right.

DETECTIVE HUMMEL: You understand all that?

MR. HICKS: (Indiscernible) --

DETECTIVE HUMMEL: Okay. Then, that's --

MR. HICKS: And I didn't sign that last one.

DETECTIVE HUMMEL: Then, that is all -- okay.

> *Then, you don't have to sign that line as long as we have gone over it and you understand what we just said.*
>
> MR. HICKS: *Right.*
>
> DETECTIVE HUMMEL: Okay. Then, we're good.[13]

On cross-examination, Detective Hummel agreed that Hicks signed the bottom of the waiver form in the signature line. Detective Hummel also testified that she used the word "silly" when referring to his rights to prompt presentment, but agreed that she did think the "legal jargon" in the *Miranda* form was "silly" and that "it would be much easier if it was cut down to basic English. Much easier to explain." But, she maintained that it was her "intent that Mr. Hicks understands his *Miranda* rights. We went over them *ad nauseam*. We went over them and he understood them."

After hearing argument, and after taking a brief recess, the court denied the motion to suppress Hicks's statement, as follows:

> I listened again to the excerpts of the interview of the Defendant. This Defendant I find at no point in time invokes his right to remain silent. He never said anything like that. In fact, he says at one point I don't have any problem talking to you. I can't sign that. I don't have a problem talking to you. He is told on three separate occasions and acknowledges that he understands his rights. I mean, I don't want to call it a quibble but his disagreement is whether or not he is going to sign the form in the case. . . . [E]ssentially in order to invoke a right to remain silent all he has to say is he wants to remain silent or he doesn't want to talk to police or make any other unambiguous statement that would indicate that he doesn't want to talk. In this case he doesn't want to do any of those things. Essentially indicates that he wants to talk and goes ahead and talks.

[13] Appellant then continued to speak to the detectives, at length, about the allegations at issue in this case.

> So I find that it is a voluntary statement. I'm going to admit it for that reason. Anything else?

In his brief, Hicks asserts:

> Under the totality of the circumstances here, the record does not show that Mr. Hicks ever knowingly and voluntarily waived is rights before being subjected to custodial interrogation. Put another way, any presumption that Mr. Hicks waived his rights before continuing to speak with police was rebutted under the facts of this case. Appellant's argument challenging the validity of the supposed waiver goes well beyond the mere fact that Mr. Hicks did not initial the line between advisement (5) and the summary. Rather, at multiple instances during the interrogation, Mr. Hicks indicated that he would not waive his rights, would not sign the waiver form, and did not appreciate the overall significance of continuing to speak with police. These acts, in and of themselves, cast in doubt the validity of any purported waiver of rights.

(Citation to record omitted.)

In *Berghuis v. Thompkins*, 560 U.S. 370 (2010), the Supreme Court succinctly summarized the relevant legal standards

> the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived *Miranda* rights when making the statement. The waiver inquiry has two distinct dimensions: waiver must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception, and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Berghuis, 560 U.S. at 382–83 (2010) (citations, quotation marks, and brackets omitted).

A valid waiver of *Miranda* rights "can be established even absent formal or express statements of waiver that would be expected in, say, a judicial hearing to determine if a guilty plea has been properly entered." *Id.* at 383. In other words, "[t]he prosecution . . . does not need to show that a waiver of *Miranda* rights was express. An 'implicit waiver'

of the 'right to remain silent' is sufficient to admit a suspect's statement into evidence." *Id.* at 383-84. The State must demonstrate that the waiver was both voluntary and informed by a preponderance of the evidence. *State v. Tolbert*, 381 Md. 539, 557 (2004). The *Berghuis* Court noted that *Miranda "*does not impose a formalistic waiver procedure that a suspect must follow to relinquish those rights." 560 U.S. at 385. "As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." *Id. See In re Darryl P.*, 211 Md. App. 112, 170 (2013) ("Once informed of and understanding his *Miranda* rights, a suspect who then voluntarily speaks to the police may be found to have implicitly waived those rights").

The transcript demonstrates that Detective Hummel explained each *Miranda* right to Hicks and that Hicks positively affirmed that he understood each of those rights. It was clear that Hicks was advised of, and understood, each of his individual *Miranda* rights.[14] Indeed, Hicks signed the bottom of the form. However, Hicks made a decision not to initial that part of the form which called for an express waiver of his *Miranda* rights. Whatever his reasoning for that compartmentalized decision, the fact remains that Hicks wished to speak to the police officers about the case and did so after being advised of his rights and

[14] For example, one portion of the transcript states:

> DETECTIVE HUMMEL: And that's fine. But you understand each of your Miranda rights.
> MR. HICKS: Yeah.
> DETECTIVE HUMMEL: One through five?
> MR. HICKS: Yes.

affirmatively stating that he understood each of them. His refusal to sign the form is not dispositive. *See Berghuis*, 560 U.S. at 388 ("[T]he trial court, of course, considers whether there is evidence to support the conclusion that, from the whole course of questioning, an express or implied waiver has been established.").

Hicks could have remained silent, or he could have waived his right to remain silent to speak to the police. By speaking to the police after his rights were explained to him, and after he affirmatively informed Detective Hummel that he understood those rights, he implicitly waived his rights when he spoke to Detective Hummel. There is nothing to suggest that Hicks's waiver was coerced or that he was threatened or promised anything in return for making a statement. We are persuaded that Hicks knowingly, voluntarily and intelligently waived his *Miranda* rights.

2. The State's Use of Hicks's Custodial Statement

At trial, the State introduced a redacted transcript of Hicks's custodial interrogation. On appeal, Hicks next contends that the trial court erred when it failed to exclude a portion of that transcript, specifically, a statement by one of the interrogating detectives that Hicks never denied raping A. Hicks asserts the pertinent exchange amounted to impermissible commentaries on his credibility and his post-arrest, post-*Miranda* silence.

In order to put the colloquy in context, after being confronted with information that placed his cell phone in the vicinity of the School on the day that the assault took place, Hicks admitted to Detective Hummel that he had been in the area. He stated that he had made arrangements through the Back Page website to have an assignation with a woman

at a hotel near the school but, when he arrived, he could not find the hotel, became lost, and wandered about until he eventually found a taxi (a "hack") to drive him to a metro station. Towards the end of the interview, the following exchanges occurred:

> DETECTIVE HUMMEL: Do you want to know the one thing -- in all of our conversation here this evening about all of this, the one thing I --I'm sitting here and I'm like, I haven't heard out of your mouth yet is an adamant denial that this -- you did not rape anyone. 'Cause if I'm sitting in your seat, I sure as hell –
>
> MR. HICKS: You can't say that. No you wouldn't. You can't say what you're going to say. You can't say what you were going to say 'cause you on the other side so you can't say what you would sit here and say.
>
> DETECTIVE HUMMEL: Bullshit.
>
> MR. HICKS: No you wouldn't.
>
> DETECTIVE HUMMEL: I don't care what crime you had me going on.
>
> * * *
>
> MR. HICKS: You just saying what they're saying that it's impossible –. . . for me to pick up a –. . . to pick up a hack in that area.
>
> DETECTIVE HUMMEL: No, I said it's near impossible.
>
> DETECTIVE ANDERSON: We're beyond that.
>
> MR. HICKS: Okay.
>
> DETECTIVE ANDERSON: We're beyond that.
>
> MR. HICKS: Of course.
>
> DETECTIVE HUMMEL: Allen.
>
> MR. HICKS: Of course.
>
> DETECTIVE ANDERSON: We're talking about gloves –

MR. HICKS: Of course.

DETECTIVE HUMMEL: Allen.

DETECTIVE ANDERSON: -- and fingerprints.

DETECTIVE HUMMEL: You have –

MR. HICKS: Of course.

DETECTIVE HUMMEL: I am telling you that I have vicious rape –

* * *

DETECTIVE HUMMEL: -- not at any point throughout this whole conversation, all night long, have I heard out of the mouth of Allen Watkins Hicks, I did not rape that woman at [the School].

MR. HICKS: What about it? You keep saying it.

DETECTIVE HUMMEL: Did you rape that woman at [A.'s] School?

MR. HICKS: What you think I'm going to say?

DETECTIVE HUMMEL: I'm not asking what you –

MR. HICKS: What you think I'm going to say?

DETECTIVE HUMMEL: Allen –

MR. HICKS: It don't make no sense.

DETECTIVE HUMMEL: -- did you rape the woman on [the] School –

MR. HICKS: I don't know.

DETECTIVE HUMMEL: -- property?

MR. HICKS: I don't know. I don't know. I'm finished. We done. I'm finished.

(End of audio recording.)

Hicks presents two arguments as to why the trial court erred in permitting the jury to hear the above-transcribed part of his interview. First, he contends that Detective Hummel commented unfavorably upon his credibility in violation of the well-established rule that, in criminal cases, "the credibility of a witness and the weight to be afforded the witness's testimony are solely within the province of the jury." *Bohnert v. State,* 312 Md. 266, 277 (1988). Second, he contends that permitting the jury to hear the closing exchanges between Detective Hummel and himself violated his right to silence.[15] We will address his contentions separately.

The Court of Appeals has recently summarized the applicable standard of review:

> Subject to supervening constitutional mandates and the established rules of evidence, evidentiary rulings on the scope of witness testimony at trial are largely within the dominion of the trial judge. Generally, appellate courts review the denial of a motion for a mistrial under the abuse of discretion standard. We will not disturb the trial court's ruling unless there has been an abuse of discretion of a character likely to have injured the complaining party. Trial judges have wide discretion to admit or exclude items of evidence. Where the evidentiary ruling is a discretionary one, a trial court's ruling on the admissibility of evidence is reviewed pursuant to the abuse of discretion standard. However, where a party complains that the trial judge's action abridged a constitutional right, this Court's review is *de novo*.

[15] The State asserts that these contentions are not preserved for appellate review. Without belaboring the point, we do not agree. To be sure, Hicks's appellate counsel has articulated these contentions more fully than did trial counsel. However, "an appellant/petitioner is entitled to present the appellate court with a more detailed version of the [argument] advanced at trial[.]" *Starr v. State*, 405 Md. 293, 304 (2008) (internal quotation marks and citations omitted).

Reynolds v. State, 461 Md. 159, 175 (2018), *cert. denied*, No. 18-698, 2019 WL 113204 (U.S. Jan. 7, 2019) (quotation marks, brackets, citations and an ellipsis omitted).

A. An Impermissible Comment on Credibility?

A guiding principle of evidence law is that "a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth. Testimony from a witness relating to the credibility of another witness is to be rejected as a matter of law." *Bohnert v. State*, 312 Md. 266, 278 (1988); *accord Hunter v. State*, 397 Md. 580, 595-96 (2007); *Crawford v. State*, 285 Md. 431, 443 (1979) (holding that the trial court erred in allowing the jury to hear evidence of the defendant's tape recorded interrogations during which police officers expressed disbelief in the defendant's story); *see also Casey v. State*, 124 Md. App. 331, 339 (1999).

Hicks primarily relies on *Bohnert v. State*, 312 Md. 266 (1988), and *Hunter v. State*, 397 Md. 580 (2007). *Bohnert* was a child sexual abuse case. The alleged victim testified that she had been abused by the defendant, and the defendant himself testified that he had not abused her. *Bohnert*, 312 Md. at 269-270, 273. The trial court permitted a social worker, admitted by the court over objection as "an expert in the field of child sexual abuse" to testify that, in her opinion, the alleged victim had, in fact, been sexually abused. *Id*. at 271. The Court of Appeals held that the trial court erred in permitting the witness to express that opinion. It explained:

> In a criminal case tried before a jury, a fundamental principle is that the credibility of a witness and the weight to be accorded the witness' testimony are solely within the province of the jury. . . . It is also error for the court to

> permit to go to the jury a statement, belief, or opinion of another person to the effect that a witness is telling the truth or lying.
>
> Whether a witness on the stand personally believes or disbelieves testimony of a previous witness is irrelevant, and questions to that effect are improper, either on direct or cross-examination.

Id. at 277 (footnote, citations, and quotation marks omitted).

In *Hunter*, a case also tried before a jury, two police officers testified that Hunter confessed when he was taken into custody, that he directed them to the premises that he had burglarized, and that he had not given them the name of a third party who had arranged for Hunter to pawn the stolen property. 397 Md. at 583-84. Hunter testified on his own behalf. On cross-examination, the State asked him five "were-they-lying" questions. *Id.* at 585-86. Hunter objected and the trial court overruled the objection. *Id.* The Court of Appeals held that the line of questioning was improper:

> These questions were impermissible as a matter of law because they encroached on the province of the jury by asking petitioner to judge the credibility of the detectives and weigh their testimony, *i.e.*, he was asked: "And the detective was lying?" The questions also asked petitioner to stand in place of the jury by resolving contested facts. Moreover, the questions were overly argumentative. They created the risk that the jury might conclude that, in order to acquit petitioner, it would have to find that the police officers lied. The questions were further unfair because it is possible that neither the petitioner nor the police officers deliberately misrepresented the truth. These questions forced petitioner to choose between answering in a way that would allow the jury to draw the inference that he was lying or taking the risk of alienating the jury by accusing the police officers of lying. Therefore, the trial court erred in allowing the State to ask petitioner "were-they-lying" questions. When prosecutors ask "were-they-lying" questions, especially when they ask them of a defendant, they, almost always, will risk reversal.

Hunter, 397 Md. at 595-596.

This case is readily distinguishable from *Bohnert* and *Hunter*. Detective Hummel did not express her disbelief in any of Hicks's statements. Nor did Detective Hummel subject Hicks to a series of the "were-they-lying" type questions at issue in *Hunter*. Instead, the detective simply noted that Hicks never denied his involvement in the underlying crime. That same objective observation would be apparent to the fact finders based on their independent review of the interview. Detective Hummel did not convey a personal assessment of Hicks's credibility, nor did any of her questions present a "were-they-lying" dilemma to Hicks. There was no need to redact that portion of the interview on these grounds, and the trial court did not abuse its discretion in declining to do so.

B. A Violation of Hicks's Right to Remain Silent?

Next, Hicks contends that the admission of the redacted portion of the interview violated his right to silence. In *Coleman v. State*, the Court reiterated that:

> Evidence of post-arrest silence, after *Miranda* warnings are given, is inadmissible for any purpose, due to the fact that as a constitutional matter, allowing such evidence would be fundamentally unfair and a deprivation of due process. It is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that the accused stood mute or claimed his privilege in the face of accusation.

434 Md. 320, 333–34 (2013) (quotation marks, brackets, citations and a footnote omitted). Moreover, "[a]n accused may invoke his or her rights at any time during questioning, or simply refuse to answer any question asked, and this silence cannot be used against him or her." *Id.* at 333 (internal citation and quotation marks omitted).

Hicks relies on *Younie v. State*, 272 Md. 233 (1974). During a custodial interrogation, Younie waived his right to remain silent and agreed to answer some, but not all, questions about the underlying crimes. 272 Md. at 236-38. At trial, and over objection, the jury learned that Younie answered only fifteen out of twenty-three questions. *Id.* Thereafter, the State referred to Younie's refusals to respond to all of the questions during closing argument. *Id.* at 238. On appeal, Younie maintained that "his silence was a permissible exercise of his privilege against self-incrimination and, since the only purpose the objected to evidence served was to create the highly prejudicial inference that his failure to respond was motivated by guilt, its inclusion was reversible error." *Id.* The Court of Appeals agreed, explaining that:

> Silence in the context of a custodial inquisition is presumed to be an exercise of the privilege against self-incrimination from which no legal penalty can flow, and the State has the heavy burden of demonstrating by clear and convincing evidence that a failure to respond was not an invocation of this right.

Id. at 244.

The case before us is factually distinguishable from *Younie*. In contrast to the defendant in that case, Hicks did not selectively invoke his right to remain silent by answering some questions and refusing to answer others; instead, in the portion of the interview presented to the jury, he responded to all of the questions put to him by Detective Hummel.[16] We agree with the State that "Hicks was not silent, he did not invoke his right to remain silent,

[16] Eventually, Hicks did invoke his right to silence. That part of the interview was not included in the excerpt presented to the jury.

and the trial court did not abuse its discretion" in permitting that part of the interview to be presented to the jury.

3. Lay Expert Testimony

Hicks next asserts that the court erred in allowing Detective Hummel to provide impermissible expert opinion testimony in the guise of lay opinion.

By way of context, the State introduced evidence that, on the day that A. was assaulted: (1) the School received a call from Hick's cell phone at about 1 p.m.; and (2) Hicks's phone sent a text message from a location near the School at around 4:50 p.m. In the relevant part of her testimony, Detective Hummel was asked to explain what appeared to be a discrepancy between the records of T-Mobile, Hick's cell phone provider, and data extracted from the cell phone by investigators. Specifically, although the T-Mobile records showed that Hicks's phone had called the School at about 1:00 p.m. on the day that A. was assaulted, the call history on the phone itself contained no such information. It was the State's theory that Hicks had deleted the record of the telephone call from his phone.

The pertinent exchange occurred during Detective Hummel's direct examination:

> [PROSECUTOR] A telephone handheld can have items deleted that may never be recovered; is that correct?
>
> [DEFENSE COUNSEL]: Objection. Not qualified as an expert in this.
>
> THE COURT: I'm sorry. Ask the question again.
>
> Q. Can you delete things from your handheld?
>
> THE COURT: Overruled. She can answer.
>
> Q. Do you know, can you delete items from your handheld phone?

A. You can.

Q. Can you delete items from your cell phone records?

[DEFENSE COUNSEL]: Objection. Not an expert.

THE COURT: I'm going to overrule the objection. Let the witness answer.

Q. You can answer that.

A. You cannot delete.

To this Court, Hicks argues that this part of Detective Hummel's testimony constituted inadmissible opinion evidence. Pursuant to the Maryland Rules of Evidence, a lay witness may testify to those opinions or inferences which are "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Md. Rule 5-701. In contrast, expert opinion "is testimony that is based on specialized knowledge, skill, experience, training or education." *Ragland v. State*, 385 Md. 706, 717 (2005) (discussing Md. Rule 5-702). Admission of opinion evidence is subject to an abuse of discretion standard. *Paige v. State*, 226 Md. App. 93, 124 (2015); *Ragland*, 385 Md. at 621.

The Court of Appeals has explained:

> "The prototypical example of the type of [lay opinion] evidence contemplated by the adoption of [Federal Rule of Evidence] 701 relates to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences. . . . Other examples of this type of quintessential Rule 701 testimony include identification of an individual, the speed of a vehicle, the mental state or responsibility of another, whether another was healthy, [and] the value of one's property."

Ragland, 385 Md. 718 (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d

1190, 1196-98 (3d Cir. 1995).

The testimony at issue in the present case does not appear to fit within these categories. As for whether it met the second requirement of being "helpful" to the jury, this Court has explained:

> The requirement that the lay opinion testimony be helpful to the trier of fact precludes a lay witness from offering conclusions and inferences that the jury is capable of making on its own when analyzing the evidence. Thus, a lay witness is not qualified to express an opinion about matters which are either within the scope of common knowledge and experience of the jury or which are peculiarly within the specialized knowledge of experts.

Washington v. State, 179 Md. App. 32, 55-56, *rev'd on other grounds*, 406 Md. 642 (2008).

We think that most cell phone users know that they can delete items from the call history on their devices. It is not so clear whether it is common knowledge that, when a person deletes items from the call history on his or her cell phone, those same items may not be deleted from the records maintained by the cell phone provider. Under the circumstances, this information should have been presented to the jury through the testimony of a qualified expert witness.[17]

[17] Maryland cases suggest that forays into cell phone technology is typically a matter for expert testimony. *See, e.g., Santiago v. State*, 458 Md. 140, 149 (2018) (senior network engineer for cell phone company permitted to testify about cell phone records); *cf. State v. Payne & Bond*, 440 Md. 680, 701-02 (2014) (holding that the trial court erred in admitting police officer's non-expert testimony regarding location of co-defendants based on cell phone and cell tower records); *Coleman-Fuller v. State*, 192 Md. App. 577, 619 (2010) (holding it was error for police detective to testify to lay opinion that cell phone records placed defendant in vicinity of crime); *Wilder v. Stat*e, 191 Md. App. 319, 364-65 (2010) (concluding it was error to permit police detective to testify about plotting defendant's location on map using cell phone records without qualifying the witness as an expert).

However, we agree with the State that any error was harmless beyond a reasonable doubt. Later in the trial, the State called Dana McAlister, a member of the Baltimore County Police Department Crime Laboratory, who was qualified without objection as an expert in computer forensics. She also addressed the discrepancy between the data extracted from Hicks's cell phone and information contained in the T-Mobile's records:

> Q. Can you explain to the folks how a number can be in [the service provider's] record and not appear in your extraction [of data from the cell phone itself]?
>
> A. The number can be deleted and overwritten.
>
> Q. Okay — Would you advise about the process? When something is deleted from your cell phone, how is it gotten rid of? And when you delete, is it automatically gone?
>
> A. Typically when an item is deleted it goes into unallocated space and it eventually may or may not get overwritten. Once an item is deleted and overwritten, there is no recovering it.
>
> * * *
>
> Q. Is it possible to recover items that have been deleted from a cell phone in your extraction?
>
> A. Yes.
>
> Q. And in fact, the extraction before you, State's Exhibit Number 17, a good bit of the text messages and the calls have been deleted in this case?
>
> A. That is true.

Thus, there was other evidence before the jury directly on point with Detective Hummel's testimony. *See Dove v. State*, 415 Md. 727, 744 (2010) ("[C]umulative evidence tends to prove the same point as other evidence presented during the trial or sentencing

hearing. For example, witness testimony is cumulative when it repeats the testimony of other witnesses introduced during the State's case-in-chief").

The substance of the testimony of the qualified expert—McAlister—was the same as the controverted portion of Detective Hummel's testimony. Hicks did not object to McAlister's qualification as an expert nor did he object to the testimony that we have previously quoted. Under these circumstances, the admission of Hummel's testimony as to deleting information from cell phones was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) ("An error is harmless when a reviewing court is 'satisfied that there is no reasonable possibility that the evidence complained of - whether erroneously admitted or excluded - may have contributed to the rendition of the guilty verdict'") (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). *See also Yates v. State*, 429 Md. 112, 120–21 (2012) ("This Court has long approved the proposition that we will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury without objection through the prior testimony of other witnesses.") (citing, among other cases, *DeLeon v. State*, 407 Md. 16, 30–31 (2008); *Grandison v. State*, 341 Md. 175, 218–19 (1995); and *Jones v. State*, 310 Md. 569, 589 (1987)).

4. Illegal Sentences?

Finally, Hicks contends he was illegally sentenced to three consecutive sentences of life imprisonment without the possibility of parole. The State responds that the sentences were legal. The State is correct.

The Double Jeopardy Clause forbids the imposition of multiple punishments for the same offense. *Purnell v. State*, 375 Md. 678, 691 (2003); *Holbrook v. State*, 364 Md. 354, 369 (2001). As the Supreme Court made clear in *Brown v. Ohio*, 432 U.S. 161, 164-65, 169 (1977), the bar against double jeopardy "'protects against multiple punishments for the same offense.'" (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnote omitted), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

There is no dispute that Hicks had a prior conviction for rape in the first-degree and was therefore subject to life without parole sentences for first-degree rape and first-degree sexual offense. *See* Crim. Law § 3-303(d)(3). Hicks argues that, because he received one such sentence for his first-degree rape conviction, he was not subject to additional life sentences for the two first-degree sexual offense convictions. He is wrong.

At the time of sentencing, the pertinent statute provided that:

> A person who violates subjection (a) or (b) of this section is guilty of the felony of sexual offense in the first-degree and on conviction is subject to imprisonment not exceeding life without the possibility of parole if the defendant was previously convicted of violating this section or § 3-303 of this subtitle.

Crim. Law § 3-305(d)(3).

Hicks argues that this statute, considered in light of the analogous rape sentencing statute, Crim. Law § 3-303(d)(3),[18] allows "the imposition of [only] one sentence of life

[18] Crim. Law § 3-303 states in pertinent part:
(a) A person may not:
(1)(i) engage in vaginal intercourse with another by force, or the threat of force, without the consent of the other; or

imprisonment without the possibility of parole." We discern nothing in the plain language of either statute that suggests such a conclusion. *See Jamison v. State*, 450 Md. 387, 396 n.9 (2016) ("In ascertaining legislative intent, we first examine the plain language of the statute, and if the plain language of the statute is unambiguous and consistent with the statute's apparent purpose, we give effect to the statute as it is written.").

Moreover, the various forms of sexual violence directed at A. were not part of a single criminal act for purposes of the Double Jeopardy Clause. Courts employ a three-step test in deciding whether to treat acts arising out of one criminal episode as one, or multiple acts:

> We look first to whether the charges arose out of the same act or transaction, then to whether the crimes charged are the same offense, and then, if the offenses are separate, to whether the Legislature intended multiple punishment for conduct arising out of a single act or transaction which violates two or more statutes.

> (ii) engage in a sexual act with another by force, or the threat of force, without the consent of the other; and
> (2)(i) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;
>
> * * *
>
> (d)(1) Except as provided in paragraphs (2), (3), and (4) of this subsection, a person who violates subsection (a) of this section is guilty of the felony of rape in the first degree and on conviction is subject to imprisonment not exceeding life.
>
> * * *
>
> (3) A person who violates subsection (a) or (b) of this section is guilty of the felony of rape in the first degree and on conviction is subject to imprisonment not exceeding life without the possibility of parole if the defendant was previously convicted of violating this section, or § 3-305 of this subtitle as it existed before October 1, 2017.
>
> * * *

Morris v. State, 192 Md. App. 1, 39 (2010) (quotation marks and citations omitted); *see also Alexis v. State*, 437 Md. 457, 485-86 (2014) (citing *Morris* with approval).

In *Morris*, we explained that:

> The "same act or transaction" inquiry often turns on whether the defendant's conduct was "one single and continuous course of conduct," without a "break in conduct" or "time between the acts." The burden of proving distinct acts or transactions for purposes of separate units of prosecution falls on the State. Accordingly, when the indictment or jury's verdict reflects ambiguity as to whether the jury based its convictions on distinct acts, the ambiguity must be resolved in favor of the defendant.

Id. (internal citations omitted).

The crime of first-degree sexual offense could be committed in various ways. The indictment did not identify separate modalities but instead generally charged Hicks with two counts of first-degree sexual offense. But during opening statement, the prosecutor identified the two acts that Hicks had allegedly committed that constituted first-degree sexual offense. A.'s testimony is clear that rape and both forms of sexual offense occurred, and that they occurred at separate times and locations on the School's campus.

In its charge to the jury, the court provided separate instructions as to first-degree rape and each of the relevant modalities of first-degree sexual offense. During closing arguments, the prosecutor argued that Hicks committed first-degree rape as well as two varieties of first-degree sexual offense. The verdict sheet separately delineated these same offenses, as did the jury's verdicts. We conclude that the instructions and the verdicts demonstrate that Hicks was found guilty of separate criminal acts, and that the evidence supported those verdicts.

Hicks also asks us to invoke the rule of lenity. Pursuant to the rule of lenity, "'a court confronted with an otherwise unresolvable ambiguity in a criminal statute that allows for two possible interpretations of the statute will opt for the construction that favors the defendant.'" *Bellard v. State*, 452 Md. 467, 502 (2017) (quoting *Oglesby v. State*, 441 Md. 673, 681 (2015)). Stated another way, "[i]f the intent of the legislature to impose separate punishments for multiple convictions arising out of the same conduct or transaction is unclear, then the rule of lenity generally precludes the imposition of separate sentences." *Paige v. State*, 222 Md. App. 190, 207 (2015). The rule of lenity does not apply in this case because, as we have explained, there are no ambiguities in the statutes and the sentences were imposed for separate acts, both in time and place.[19]

THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY ARE AFFIRMED. APPELLANT TO PAY COSTS.

[19] Hicks relies on *Price v. State*, 405 Md. 10 (2008); *Veney v. State*, 130 Md. App. 135, 147-52 (2000); *Diaz v. State*, 129 Md. App. 51,83 (1999); and *Calhoun v. State*, 46 Md. App. 478, 489 (1980). These cases involve different criminal statutes and the decision in each case turned upon the Court's interpretation of the relevant statute. *See Price*, 405 Md. at 29-34 (controlled dangerous substance law); *Veney*, 130 Md. App. at 147–52 (same); *Diaz*, 129 Md. App. at 83 (same); *Calhoun*, 46 Md. App. at 89 (holding that, where the armed robbery and handgun offenses were treated by the trial court as one criminal episode, it was error to enhance all of Calhoun's sentences under former Section 643B of Article, 27).