UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 92 & 175

September Term, 2015

CONSOLIDATED CASES

JEROME LAMONT VERNON

v.

STATE OF MARYLAND

Graeff,
Leahy,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: October 3, 2016

On November 21, 2014, a jury in the Circuit Court for Montgomery County found Jerome Lamont Vernon, appellant, guilty of one count of armed robbery, one count of use of a handgun in a crime of violence, and possession of a handgun by a person convicted of a crime of violence. The circuit court sentenced appellant to ten years of incarceration for the armed robbery conviction and five years, concurrent, on the other two counts.

Appellant presents several questions for this Court's review, which we have rephrased slightly, as follows:

(1) Did the circuit court err in declining to suppress appellant's statement to police when it was involuntary and obtained in violation of his *Miranda* rights?

(2) Did the circuit court abuse its discretion in excluding testimony regarding the presence and nature of pills that were possessed by the victims at the time of the robbery?

(3) Did the circuit court abuse its discretion in permitting the State to ask appellant whether he was lying or telling the truth about statements he made to an officer?

(4) Did the circuit court abuse its discretion when it questioned the jury foreperson about the possible length of deliberations and later issued an *Allen* charge that deviated from the accepted pattern instruction?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The State and the defense presented two very different versions of the events that took place at the Extended Stay Hotel in Rockville, Maryland, on the night of October 29, 2013. The State presented testimony from Erik Howard, Peter Brown, and Jennifer Tedder, who all testified that they spent the evening with their children carving pumpkins in Mr. Howard's room at the Extended Stay. After dropping the children off at their

respective homes, Mr. Howard, Mr. Brown, and Ms. Tedder returned to the hotel to clean up the mess from the pumpkin carving and watch a movie. Shortly thereafter, Michelle Wilson came to the hotel with another female, who was not known to any of the three in the hotel room. The friend asked to use the bathroom, and after she was finished, Ms. Wilson stated that they were going to retrieve something they had left in the car. Mr. Howard gave Ms. Wilson his keycard so she could get back into the hotel room.[1]

After approximately 10 minutes, Ms. Wilson and her friend had not returned. Concerned that they were unable to get back into the building, Mr. Howard decided to go look for them. Just as Mr. Howard was exiting the hotel room, appellant and another male "kind of pushed their way into the door." Mr. Howard, Mr. Brown, and Ms. Tedder all testified that appellant was carrying a revolver, and the other man was carrying a shotgun. Appellant started brandishing the revolver, demanding money, and yelling that they "know what this is" and to "kick it out." Appellant pressed the revolver into Mr. Brown's face. Appellant became angry because Mr. Howard and Mr. Brown "didn't have what they wanted." Mr. Howard began to "tussle" with appellant, but after the other man threatened Ms. Tedder with the shotgun, Mr. Howard "backed down." Appellant then "pistol whipped" Mr. Howard, striking him in the back of the head with the revolver.

Appellant and his accomplice took from Mr. Howard $300-400, his cell phone, his neon green and black Nike Air Jordan shoes, and a coin collection. They took from

[1] The hotel keycard provided access to the exterior doors of the hotel in addition to the individual hotel room.

Mr. Brown approximately $100, his keys, his phone, and his black and white Converse shoes, and they took $700 of rent money from Ms. Tedder. When appellant tried to take Ms. Tedder's cell phone and keys, she pleaded with him to leave the phone so she could get in contact with her children. Appellant then wiped off the cell phone and threw it into the refrigerator. When appellant and his accomplice left, the three chased after them and observed two vehicles driving away, Ms. Wilson's sedan and a gold Maxima.

Appellant presented a different version of what occurred inside the Extended Stay hotel room. He denied ever having a gun or robbing anyone that night. He testified that he and Ms. Wilson drove to the Extended Stay Hotel, with a man known as "Big Brother" and another unidentified female. Appellant did not know they were going there. When they arrived, Ms. Wilson and the other female went inside the hotel, and appellant stayed outside and smoked a cigarette. When Ms. Wilson and the other female came out of the hotel, Ms. Wilson was rambling, saying things like "that bitch [Ms. Tedder] is messing things up for me."[2] Ms. Wilson asked appellant to "do a deal for her," i.e., trade a shotgun as "collateral for some pills until her mom got paid on the 1st." Appellant initially refused, but he eventually relented, agreeing to make the exchange, provided that he was not the person carrying the shotgun into the hotel.

Ms. Wilson then used a keycard to open the hotel door for appellant and Big Brother. Appellant testified that Big Brother, who carried the shotgun, was wearing a scarf over the

[2] Ms. Tedder testified that she disliked Ms. Wilson because she was "low class" and did not have anything "to offer to society at this time."

bottom part of his face, below his nose. When the two entered the hallway, appellant noticed a man walking toward them. Appellant did not know the man at the time, but at trial, he identified that man as Mr. Howard. Mr. Howard asked about Ms. Wilson, stated "come on, let's go," and then opened his hotel room door. They went inside, and Mr. Howard pulled out a little bag of pills. Appellant did not think that was what Ms. Wilson wanted, and he told Mr. Howard that Ms. Wilson "didn't tell me she wanted a small bag like that. It wasn't supposed to be small like that." Appellant then stated: "I'm not going to do it personally. I can't do it. I can't do this."

At that point, "[e]verybody started talking and they wanted to . . . call [Ms. Wilson]." Appellant grabbed Ms. Tedder's cell phone, which was on the table next to him. When Big Brother refused to call Ms. Wilson, appellant threw the phone in the refrigerator, "just trying to be an ass." Appellant moved toward the door, but Mr. Howard "jumped in between [appellant] and the door." After a "tense face-off," appellant and Big Brother left the hotel room. Mr. Howard followed them, cursing and claiming that he would "get" them.

Appellant testified that he never held any gun, never touched anyone in the room, and did not steal anything from the hotel room or its three occupants. After the incident at the Extended Stay Hotel, appellant told Ms. Wilson to drive him home. When they arrived, everyone went inside appellant's home.

After appellant left the hotel, Ms. Tedder called 911 and stated that appellant and an unidentified male had robbed her, Mr. Howard, and Mr. Brown. A couple of days after

the incident, the police stopped appellant as he was driving Ms. Wilson's car to the store, and they arrested him.[3] The police subsequently executed a search warrant on appellant's home. They recovered a loaded shotgun and black Converse sneakers.

Appellant testified that the shotgun the police found in his home must have been brought into the house by Ms. Wilson or Big Brother. With respect to the shoes, appellant stated that a lot of people visit his house, and someone must have left them there.

On November 6, 2013, the police executed a search warrant on Ms. Wilson's vehicle. Officers recovered a black Verizon Samsung Galaxy cell phone with a cracked screen, which Mr. Brown later identified as Mr. Howard's phone.

Sergeant Mark McCoy testified that he interviewed appellant after the incident. Appellant stated that he went to the hotel to confront "Eric," a "pretty bad guy" who was "a pill popper." Ms. Wilson gave him a revolver and another man a shotgun. They went in the hotel room, demanded cash, and took $300-$400. Appellant said that he did not expect to get in trouble because Eric was "not a good guy," and he did not think anyone would call the police.

[3] Detective Michael Chindblom testified that, when appellant was arrested, he was wearing black and green Nike Air Jordan sneakers. On cross-examination, however, Detective Chindblom conceded that the color of the shoes appellant was wearing was "tealish," and they lacked all the markings of a typical Air Jordan shoe (i.e., they did not have the Michael Jordan symbol, they did not have "Air Jordan" printed on the shoe, and they had a symbol of a football, not a basketball, printed on the tongue). The police were not able to confirm or deny whether the shoes appellant was wearing when he was arrested were those stolen from Mr. Howard.

The State introduced a three-part DVD containing a video recording of appellant's interview with Sergeant McCoy. In the first recorded part of the interview ("Part I"), appellant generally denied involvement in the robbery. In the third recorded part of the interview ("Part III"), however, appellant admitted going into the hotel room with a gun. Appellant later stated that he made a "very wrong decision, and [it was] bothering [him] so much."

Additional facts will be discussed as necessary in the discussion that follows.

DISCUSSION

I.

Appellant's Interview

Appellant's first contention is that the circuit court erred, for two reasons, in admitting into evidence his statement to police. First, he asserts that the statement was "a false, involuntary confession" obtained from appellant "by promising him an improper benefit," i.e., Sergeant McCoy's statements that appellant could "mitigate what happened" and if he talked, he could go home. Second, he contends that the police vitiated his *Miranda*[4] rights in obtaining the statement after making a promise of confidentiality.

The State argues that the circuit court properly denied appellant's motion to suppress the statement he gave to the police. It disagrees with appellant's claim that the statement was induced by an improper promise, asserting that the police officer's statement that appellant could "mitigate what happened" was not an improper inducement that caused

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

appellant's statement to be involuntary. With respect to the claim that the police told appellant that if he talked, he could go home, the State asserts that Sergeant McCoy denied making any improper promise, and the circuit court credited that testimony. Finally, the State contends that appellant's "knowing and voluntary *Miranda* waiver was not vitiated by either an express or implied promise of confidentiality."

A.

Proceedings Below

After appellant was arrested, he was taken to the police station for questioning. Sergeant McCoy and Detective Michael Chindblom, began the interview by advising appellant of his *Miranda* rights and having him sign an advice of rights form. The initial part of the interview was video recorded and lasted 40 minutes, ending at approximately 10:25 p.m. During this part of the recorded interview ("Part I"), appellant generally denied any involvement in the robbery.

During a break from the interview, the police obtained new information and confronted appellant with it. At approximately 10:45 p.m., the recorded interview ("Part II") resumed, and the following colloquy occurred:

> [McCOY]: Remember when I first sat down here, I said I'm going to put the ball in your court. I want to see how honest you're going to be with me. I know it sucks. Nobody likes to talk to the police. Nobody likes to admit that they've done something wrong. Nobody wants to deal with any of that, okay? However, it's done. There's nothing we can do to turn back time. All we can do is deal with what it was and what happened, okay? **And now there's a lot of things that, quite frankly, can mitigate what happened. Like one, were these guns even loaded? Or was it just a show? And if that's it, guess what, that's a huge step. And if we can get through this,** because,

man, Jerome, we already know we're lying to one another and I don't like it. And this is the thing. It's that we need to just put --

[APPELLANT]: Can you do me a favor?

[McCOY]: What's that?

[APPELLANT]: You can stop that camera for a second. I'll talk to you.

[CHINDBLOM]: Okay.

[McCOY]: I'm good with that. You going to be honest with me?

[APPELLANT]: 100 percent.

[McCOY]: **Okay. I got to take copious amounts of notes.**

[APPELLANT]: All right.

[McCOY]: Is that cool?

[APPELLANT]: Yeah.

(emphasis added).

The police officers stopped the recording at approximately 10:51 p.m. After a discussion off-camera, the recording resumed at 11:04 p.m. In the third recorded part of the interview ("Part III"), appellant admitted going into the hotel room. When asked if he had a gun, he stated that he "didn't pull it out." He testified that Ms. Wilson repeatedly "bugged" him into participating in the robbery, telling him that there "might be a few dollars in it" for him. He admitted that he entered the hotel room with a revolver, and the other man had a shotgun. The following colloquy then occurred:

[APPELLANT]: How long you think I'm going to get for this, sir, seriously?

[McCOY]: I don't know how long.

[APPELLANT]: I didn't think I was going to get in trouble for going [sic] something wrong to a criminal. Well, I did -- I mean, it's not like I hurt anybody but --

[McCOY]: Well, no, and that's -- **and that's what I tell you, is that's where the mitigation comes in.**

[APPELLANT]: Uh-huh.

[McCOY]: Okay? Is that. Were these guns loaded?

[APPELLANT]: No, not at the -- not at the time.

[McCOY]: Okay.

[APPELLANT]: But later on she did bring bullets, though.

[McCOY]: Oh, okay.

* * *

[APPELLANT]: So, seriously, how long do you think --

[McCOY]: How long?

[APPELLANT]: Or do you think I could possibly get a bond so I could --

[McCOY]: Yeah, I mean, it's – it's going to be a felony charge, so chances are --

[APPELLANT]: Felony? What kind of felony charge?

[McCOY]: Well, it's armed robbery.

[APPELLANT]: Huh?

[McCOY]: So it's going to be, you know -- it's going to be a felony charge and then there's a weapon involved. Nobody was hurt, so that's one of the things that goes for you. Chances are the bond is going to be high, but you'll have a hearing, PR bond hearing tomorrow or Monday, because today's Friday.

(emphasis added).

At the November 7, 2014, suppression hearing, Sergeant McCoy testified that Detective Chindblom asked him to interview appellant. Sergeant McCoy testified that he did not make any threats or promises about what would happen if appellant spoke to him. He did not try to induce appellant into doing anything.

Appellant testified at the suppression hearing about the conversation that took place after the video recording was stopped at 10:51 p.m. (i.e., the end of the second of the three recorded segments):

> [DEFENSE COUNSEL:] And at some point during this time when the tape was off, at least to your knowledge, did [the detective] bring the conversation back to the discussions of the incident that was alleged to have happened at the [E]xtended [S]tay?
>
> [APPELLANT:] Yes, he did.
>
> [DEFENSE COUNSEL:] What did he say to you at that point?
>
> [APPELLANT:] He told me that this was just between him and I, the tape's turned off, there's nobody here now but him and I. And he was trying to get, he was trying to put everything together, and if he heard something that he wanted to hear, we can hurry up and wrap this up and I can get on and go on about my day, because I had things to do, because I kept looking at the time, he said, and you said you have to move your mom in the morning, so we can do that.
>
> [DEFENSE COUNSEL:] And only after him saying those things to you, is that the point where you started to make a statement about the incidents alleged in this case?
>
> [APPELLANT:] Yes.

On cross-examination, appellant admitted that he had a prior arrest, and his interview with Sergeant McCoy was not the first time he had been read his *Miranda* rights. Appellant also acknowledged that Sergeant McCoy was very patient with him, and he

"offered to explain anything" that appellant did not understand about his rights. The prosecutor then followed up on appellant's testimony regarding Sergeant McCoy's statement that he was going to take copious notes once the recording was turned off:

> [PROSECUTOR:] So you indicated on direct examination that you didn't know what the word copious meant?
>
> [APPELLANT:] No, I do not.
>
> [PROSECUTOR:] You know what notes are though, right?
>
> [APPELLANT:] That's correct.
>
> [PROSECUTOR:] Okay, so when he said that I'm going to take copious amounts of notes, you knew that he was going to be taking notes, correct?
>
> [APPELLANT:] Yes.
>
> [PROSECUTOR:] And you understand that when people take notes, they take notes because they want to remember what is said later on, correct?
>
> [APPELLANT:] Yes.

The circuit court ultimately denied appellant's motion to suppress. After reviewing the DVD and finding that the conversation was very civil, the court addressed the claim that Sergeant McCoy made an improper promise. With respect to the statement that things could "mitigate what happened," the court stated:

> [I]t is objectively unreasonable to read this as some form of inducement or promise or favor, or anything in order to elicit information. In fact, he's asking him to, he's not saying you had guns. He's just saying these are things that make the offense less serious. If you have guns, I mean he could have said well, you know, it's more serious if you shoot someone rather than you don't shoot someone. That's not a promise of a favor.
>
> And he says "if we can get through this, because man, we already know we're lying to one another, and I don't like it." And what it means is

> getting through the interview. And I don't know, even though the cases cited by Defense counsel, and he has done thorough research on this, there's no doubt about it, is enough to suggest [that it meant] that we can get through this and you can be gone, and you can be on your way and you can be free. I can't objectively see that.

Finally, the court addressed what happened next, when appellant requested that the video be turned off. The court stated:

> Now whether it was appropriate to shut the video off may be Monday morning quarterbacking. It probably should have been left on. But the detective, because the request came from the defendant, said okay, we'll do it. He didn't indicate to him that it was going to be confidential. Maybe the defendant thought it was going to be confidential, but there was certainly no representation or implication by the State that that was the process, and in fact he said I'm going to take notes. What does that mean? That means I'm going to memorialize what you said. So with respect to . . . that portion of the videotape . . . that I saw, the [c]ourt does not believe that anything that was specifically elicited from what I just read constitutes the kind of promise or hope or favor, in any way that could be an improper inducement.

Finally, the court addressed appellant's testimony regarding what happened after the video was turned off. The court stated:

> The defendant seems to say that after the videotape was turned off, that the detective somehow changed character. That they discussed Eric, who's a friend of [Ms. Wilson], and then he said just between you and me, we'll try to put it together. And then he says if he heard what he wanted to hear, . . . the defendant could go on about what he needed to do. And as a result, he made the statement about the case. And that's what this case really hinges on now. And if in fact the [c]ourt believed the defendant, it might very well constitute an improper implication that somehow this was being a confidential situation.
>
> But after viewing the tape, the context, the demeanor of the police, by considering the distortions and the conflicting testimony of the defendant between what he told the officer, even about his sobriety then, and what he's saying now, and his depiction of the tape, the [c]ourt finds that the defendant

> is not credible in this regard. And therefore I find that the State has met its burden, and the motion to suppress will be denied.[5]

At trial, the State admitted into evidence, over objection, the DVD containing the three video recorded parts of appellant's police interview.

B.

Standard of Review/Admissibility of Statements

In reviewing the circuit court's decision on a motion to suppress, we are limited to the facts developed at the hearing, viewing the evidence in the light most favorable to the prevailing party on the motion. *Norwood v. State*, 222 Md. App. 620, 633, *cert. denied*, 444 Md. 640 (2015). *Accord Hill v. State*, 418 Md. 62, 67 n.1 (2011); *Robinson v. State*, 419 Md. 602, 611-12 (2011). The issue whether a confession is voluntary presents a mixed question of law and fact, subject to *de novo* review. *Paige v. State*, 226 Md. App. 93, 106 (2015). *Accord Jones v. State*, 173 Md. App. 430, 441-42 (2007). "On review, we will not disturb the motion court's first-level factual findings unless they are clearly erroneous." *Perez v. State*, 168 Md. App. 248, 277 (2006).

The Court of Appeals has explained what the prosecution must establish to introduce a defendant's custodial statements into evidence:

[5] The court noted two specific examples of inconsistencies that led the court to find appellant's testimony incredible. First, appellant told Sergeant McCoy during the interview that he had not consumed any alcohol that day, but he admitted to the contrary at the suppression hearing, i.e., he testified that he did drink alcohol that day. Second, appellant testified that, during the second recorded part of the interview, Sergeant McCoy's demeanor changed, and he "turned red, [and] told [appellant he] was lying," but the court did not observe any such behavior during its review of the recording.

> Only voluntary confessions are admissible as evidence under Maryland law. A confession is voluntary if it is "freely and voluntarily made" and the defendant making the confession "knew and understood what he [or she] was saying" at the time he or she said it. *Hoey v. State*, 311 Md. 473, 480-81, 536 A.2d 622, 625-26 (1998). In order to be deemed voluntary, a confession must satisfy the mandates of the U.S. Constitution, the Maryland Constitution and Declaration of Rights, the United States Supreme Court's decision in *Miranda*, and Maryland non-constitutional law. *See Ball v. State*, 347 Md. 156, 173-74, 699 A.2d 1170, 1178 (1997).

Knight v. State, 381 Md. 517, 531-32 (2004). *Accord Hill*, 418 Md. at 75.

Appellant challenges the voluntariness of his statement on the ground that it was obtained in violation of Maryland non-constitutional law and *Miranda*.[6] We will address each contention, in turn.

C.

Improper Inducement

"Under Maryland common law, a confession is involuntary if it is the product of certain improper threats, promises, or inducements by the police." *Lee v. State*, 418 Md. 136, 161 (2011). The State has the burden to prove that the confession was voluntary. *Id.*

Here, appellant argues that Sergeant McCoy obtained his statement after making improper promises. As this Court noted in *Smith v. State*, 220 Md. App. 256, 274-76 (2014), *cert. denied*, 442 Md. 196 (2015), there is a two-part test to determine whether a

[6] Under federal and Maryland constitutional law, the test for voluntariness is "whether the confession was 'the product of an essentially free and unconstrained choice by its maker' or whether the defendant's will was 'overborne' by coercive police conduct." *State v. Tolbert*, 381 Md. 539, 558, *cert. denied*, 543 U.S. 852 (2004). Although appellant mentions constitutional law, his argument that his statement was involuntary focuses only on Maryland non-constitutional law and *Miranda*, and therefore, that is what we will consider in this appeal.

confession was elicited through an improper promise. First, the court addresses whether a police officer "'promises or implies to a suspect that he or she will be given special consideration from a prosecuting authority or some other form of assistance in exchange for the suspect's confession.'" *Id.* at 274 (quoting *Winder*, 362 Md. at 309). *Accord Hill*, 418 Md. at 75 (if a confession relies on a "promise of advantage," it is *per se* involuntary under Maryland common law voluntariness test); *Hillard*, 286 Md. 145, 153 (1979) (an improper promise is one that implicitly, or explicitly indicates that making a statement "will be to the [suspect's] advantage, in that he will be given help or some special consideration"). This prong of the test is objective. *Smith*, 220 Md. App. at 311. The question is "whether a reasonable person in the position of the accused would be moved to make an inculpatory statement." *Hill*, 418 Md. at 76.

Second, if the court finds that an improper inducement was made, the court engages in a causation analysis, i.e., whether "the suspect makes a confession in apparent reliance on the police officer's explicit or implicit inducement." *Lee*, 418 Md. at 161 (citing *Hillard*, 286 Md. at 153). Factors to consider in this causation analysis include: "[T]he amount of time that elapsed between the improper inducement and the confession, . . . whether any intervening factors, other than the officer's statement, could have caused the confession, . . . and the testimony of the accused at the suppression hearing related to the interrogation." *Hill*, 418 Md. at 77. The State has the burden to prove, "by preponderance of the evidence, that the accused did not make the inculpatory statement in reliance on the

improper inducement." *Hill*, 418 Md. at 77. "Both prongs must be satisfied before a confession is deemed to be involuntary." *Winder*, 362 Md. at 310.

Appellant contends that Sergeant McCoy "expressly and impliedly offered [appellant] a benefit to induce his statement," asserting that there were "two separate instances of improper inducement." First, he points to Sergeant McCoy's statement that potential facts, such as the gun being unloaded, could "mitigate" what happened, and he asserts that Sergeant McCoy said that admitting such facts would be "a huge step" in helping him "get through this." Second, appellant asserts that, after Detective Chindblom turned off the video recording, Sergeant McCoy told him that, if he "told [Sergeant] McCoy what he wanted to hear, 'we can hurry up and wrap this up and [appellant] can get on and go about his day.'"

We begin with the allegation that Sergeant McCoy told appellant that he could take a "huge step" to "mitigate" and "get through" this if he gave a statement. Appellant contends that this statement is analogous to the impermissible statements made by police in *Biscoe v. State*, 67 Md. 6, 6-8 (1887), where the officer told the defendant that he would "have no more trouble if he confessed," and in *Winder v. State*, 362 Md. 275, 314, 316 (2001), where the police officer's statement that he could "help" the defendant and a confession would give a defendant "a better chance" rendered the ultimate statement involuntary. Appellant argues that "the inducements in these cases—such as to 'have no more trouble' or to have a 'better chance'— [are] functionally equivalent to [Sergeant]

McCoy's statements to [appellant] that he could take a 'huge step' to 'mitigate' what happened and 'get through this.'"

The State points out that Sergeant McCoy's comments must be taken in context. In that regard, it notes that the comments were made after appellant initially denied any involvement, but after being confronted with new information, appellant indicated that he had heard something about a robbery. At this point, Sergeant McCoy stated:

> Remember when I first sat down here, I said I'm going to put the ball in your court. I want to see how honest you're going to be with me. I know it sucks. Nobody likes to talk to the police. Nobody likes to admit that they've done something wrong. Nobody wants to deal with any of that, okay? However, it's done. There's nothing we can do to turn back time. All we can do is deal with what it was and what happened, okay? **And now there's a lot of things that, quite frankly, can mitigate what happened. Like one, were these guns even loaded? Or was it just a show? And if that's it, guess what, that's a huge step. And if we can get through this, because, man, Jerome, we already know we're lying to one another and I don't like it.** And this is the thing. It's that we need to just put --

The State asserts that Sergeant McCoy's statements that "we can get through this" was a reference to the dishonesty and lying. The circuit court construed the statement this way, and so do we. Sergeant McCoy's comment in this regard was not a statement, direct or implied, that he would "help" appellant or that appellant would receive a benefit from telling the police what happened. Rather, Sergeant McCoy merely suggested that providing details of what happened would be a "huge step" toward resolving the incident because they were not resolving anything by lying.

With respect to the comment that appellant could "mitigate" what happened, the State argues that this was not an improper inducement pursuant to *Smith*, 220 Md. App. at 273. We agree.[7]

In *Smith*, the accused was arrested for engaging in anal intercourse with a four-year-old. *Id.* at 261-62. During a police interview, detectives told Smith that a polygraph confirmed that he engaged in intercourse with a child, and if he denied it, they would move forward with the case presuming that Smith used force to compel the minor to have intercourse. *Id.* at 264-65. One of the detectives stated that "this is your opportunity, if it was not force, then you need to tell us, because what happens is you walk out of here, we're going with the force." *Id.* at 264. The detective then stated that the police frequently heard: "I was raped and I was forced," stating that "you're going to get in trouble for that. If it was consensual, that's a whole different story." *Id.* After Smith denied using force, the detective stated: "Okay. Tell me what the consensual part of it was and we can roll out of this. If it's consensual, then tell us it's consensual." Smith then confessed to having anal intercourse with the minor, asserting that it was her idea. *Id.* at 265.

[7] The State also argues that, not only did Sergeant McCoy not promise appellant anything in return for his confession, he told appellant the exact opposite. To be sure, the detective ultimately did tell appellant that he "can't promise you anything," stating that all he could do was tell the prosecutor about appellant's cooperation. This discussion, however, occurred *after* appellant provided his statement, and therefore, it would not cure any improper promises that were made to induce that statement. We do note, however, that when Sergeant McCoy said that he could not promise appellant anything, appellant did not suggest, as he argues on appeal, that Sergeant McCoy had promised that making a statement would somehow benefit him, other than by telling his side of the story.

On appeal, Smith argued that the detective's statements constituted an improper inducement, and he relied on those statements in making the confession. *Id.* at 271. We noted that the detectives "never actually said [Smith] would be charged with a lesser offense if the sex was consensual, and they never offered [Smith] assistance if he confessed." In any event, we stated:

> Even if [Smith] actually believed that the detectives' statements meant that by confessing to consensual sexual conduct, a lesser charge would be filed against him, we note that **encouraging a suspect to adopt a version of the facts that might mitigate the punishment for the crime he committed is not in itself an improper inducement under Maryland law**. [*Williams v. State*, 212 Md. App. 396, 338 (2013), *aff'd*, 445 Md. 452 (2015)]. Moreover, in the instant case, the detectives did not actually tell [Smith] that a lesser charge may be filed against him by saying the sex was consensual. We are not called upon to evaluate what [Smith] might have believed the detectives meant, but what a reasonable layperson would have understood the detectives' words to mean. *Lee*,[] 418 Md. at 156. Indeed, "[a]n accused's subjective belief that he will receive a benefit in exchange for a confession carries no weight under [prong one of the *Hillard* test.]" *Hill*, 418 Md. at 76.

Id. at 280-81 (emphasis added).[8]

Here, Sergeant McCoy's statements were nothing more than "encouraging [appellant] to adopt a version of the facts that might mitigate the punishment for the crime he committed," which, as we noted in *Smith*, "is not . . . an improper inducement under

[8] We ultimately held that "it is manifestly unreasonable for a person to believe that a four-year-old is capable of consenting to sexual intercourse and, accordingly, that confessing to "consensual" anal intercourse with a four-year-old would yield non-prosecution or leniency in prosecution." *Smith v. State*, 220 Md. App. 256, 280 (2014), *cert. denied*, 442 Md. 196 (2015). "Because no objectively reasonable layperson would rely on [the detective's] statements as a promise of non-prosecution or a lesser charge, [the detective's] statements did not constitute an improper inducement." *Id.* at 281.

Maryland law." *Id.* at 280. Sergeant McCoy's statements were not an improper inducement, and they did not render appellant's involuntary.

We address next appellant's argument that Sergeant McCoy improperly induced his statement by telling him, when the video was turned off, that if he told the detective what the detective wanted to hear, he could "get on and go about his day," i.e., go home. In addressing this argument, we note that the circuit court found that appellant's claim in this regard lacked credibility. After reviewing the record and the stated bases for this factual finding, we cannot conclude that this finding was clearly erroneous.

Appellant argues, however, that the State cannot rely on this adverse credibility finding because the State had the burden of proving that the statement was voluntary, and it failed to meet its burden because it "*never* rebutted [appellant's] testimony at the suppression hearing regarding what the officers said off tape." We are not persuaded.

Appellant is correct in arguing that the State has the burden to rebut a charge of improper inducement. *See Gill v. State*, 265 Md. 350, 353 (1972) ("[W]hen it is contended that someone employed coercive tactics to obtain inculpatory statements, the charge must be rebutted."). In *Streams v. State*, 238 Md. 278 (1965), upon which appellant relies, the Court of Appeals found that the State did not meet its burden in this regard. That case, however, is distinguishable from this case.

In *Streams*, the State relied solely on the testimony of one of the officers who interrogated Streams that no threats or inducements were made. *Id.* at 281-82. The Court

held that this was insufficient to rebut the defendant's testimony that other officers, at a time different from that discussed by the witness, had made promises to him.

Here, Sergeant McCoy was the officer who interrogated appellant, and he was the person who allegedly made the improper promises. In such a context, the Court in *Streams* stated:

> It may be enough if one credible witness can testify from personal observation that nothing was said or done prior to and during the obtention of the confession to mar or destroy its voluntary character and there is no claim by the prisoner of improper treatment by others than those covered by such testimony.

Id. at 282. That is the scenario here, and *Streams* does not support a claim that the State did not rebut appellant's contention of an improper inducement.

This Court subsequently has made clear that the required rebuttal may be general, i.e., it does not have to dispute the specifics of appellant's claims, and it may be made anticipatorily, i.e., the State may present the officer's testimony that no promises or inducements were made before the defendant makes his or her accusations. *See Pharr v. State*, 36 Md. App. 615, 628 ("If such testimony is foreseen, the prosecutor may refute it in advance."), *cert. denied*, 281 Md. 742 (1977); *Harris v. State*, 1 Md. App. 318, 323 (1967) (where police who interrogated suspect testified that no threats or promises were made, this was sufficient to show that statement was voluntary, despite defendant's testimony to the contrary, including testimony that the police told him that if he signed the statement he could go home). *Accord Jones v. State*, 229 Md. 165, 171-72 (1962) (where officers testified that no threats or inducements were made, fact that officers were not

recalled to refute specific claimed threats and inducements did not require a finding that the confession was invalid).

Here, Sergeant McCoy testified on direct examination that he made no threats, promises, or inducements. Pursuant to the case law, this evidence was sufficient to rebut appellant's later claim that Sergeant McCoy impliedly promised that he could go home if he confessed.[9] The circuit court properly rejected appellant's claim that Sergeant McCoy made promises that rendered appellant's statement involuntary under Maryland non-constitutional law.

D.

Miranda

Appellant next contends that the circuit court erred in refusing to suppress his pre-trial statement to the police because Sergeant McCoy vitiated his *Miranda* waiver in two ways. First, he argues that Sergeant McCoy expressly promised confidentiality by stating, off-camera, that their conversation was just between the two of them. Second, appellant contends that there was an implied promise of confidentiality when the Sergeant agreed to turn off the video recorder. He asserts that "a reasonable person would understand that a request to turn off a videotape connotes a request to speak off the record, a request that reflects an understanding inconsistent with *Miranda*," and Sergeant McCoy should have explained "that turning off the tape would not prevent his statements from being used

[9] As indicated, the court found appellant's testimony contradicting Sergeant McCoy to be incredible.

against him in court, as *Miranda* requires." Appellant argues that Sergeant McCoy's "subsequent statement that he would take 'copious notes' if the tape were turned off" did not cure appellant's belief that the conversation was confidential, but rather, it constituted the type of "cryptic attempt to capitalize on a potential misunderstanding of which courts disapprove."

We begin with the argument that there was an express promise of confidentiality. Appellant testified that Sergeant McCoy told him, after the tape was turned off, that the conversation was just between the two of them. Pursuant to *Lee v. State*, 418 Md. 136, 157-58 (2011), it is clear that, if such a statement was made, it was improper and would require suppression of the ensuing statement. In *Lee*, the Court held that the statement "[t]his is between you and me, bud," made by a detective to a defendant during questioning, was an improper promise of confidentiality, regardless of whether the detective intended it as such. *Id.* at 156-57. The Court held that this type of statement was improper because it "directly contradict[ed] the advisement that 'anything you say can and will be used against you in a court of law.'" *Id.* at 156.

Lee, however, is not controlling in this case. The circuit court made a factual finding that appellant's testimony, that Sergeant McCoy made that statement, was incredible, i.e., the statement was not made. It is not the province of this Court to second guess the circuit court's credibility findings. *See State v. Andrews*, 227 Md. App. 350, 371 (2016) ("[W]e extend 'great deference' to the factual findings and credibility determinations of the circuit court, and review those findings only for clear error."). As indicated, the court explained

the basis for its finding that appellant's testimony lacked credibility, including inconsistencies in appellant's testimony. Under these circumstances, we conclude that the circuit court's finding that there was no express promise of confidentiality was not clearly erroneous.

We thus turn to appellant's argument that Sergeant McCoy implied that their conversation would be confidential by the mere fact that he agreed to turn off the video-recording. Neither party cites any Maryland case, and we have not found one, directly on point.

In *Bond v. Commonwealth*, 453 S.W.3d 729 (Ky. 2015), however, the Supreme Court of Kentucky addressed a similar issue. In that case, at the beginning of the interview with Bond, one of the detectives told Bond "that he had a digital audio recorder for his use because he 'forget[s] a lot.'" *Id.* at 733. At some point during the interview, Bond asked the detective to turn off the recorder, to which the detective responded: "Oh, I don't care about that. It's just for me." *Id.* Bond replied: "Oh, Okay," and the detective "reiterated, that's just for me to remember." *Id.*

The court rejected Bond's argument that this scenario was the equivalent of an officer suggesting that the conversation would be "kept confidential or between the officer and the defendant," *id.* at 734, noting that the detective did not make any such statements. The court explained:

> It is the statements a defendant makes that 'can and will be used against' him, not necessarily the recording of those statements. If there had been no recorder present or if the recorder had been turned off, the

> Commonwealth would still have been able to use any statements made against him by Bond.

Id.

Similarly, here, Sergeant McCoy did not make any statement to appellant that the conversation would be confidential. He merely acquiesced to appellant's request to turn off the recorder. We hold that the mere acquiescence to a suspect's request to turn off recording equipment, by itself, does not vitiate the *Miranda* advice of rights. Such an action is not sufficient to permit a reasonable person, who previously has been advised of, and waived, his or her Miranda rights, to believe that what he or she says after that point will be confidential. It merely reflects an understanding that some people who want to give a statement want to do so without being recorded.[10]

Moreover, in this case, it was clear that turning off the recording did not mean that the ensuing statements would be confidential. Sergeant McCoy stated that he would turn off the recording, but he was going to take "copious amounts of notes." And the recording reflects that, as soon as this conversation occurred, Sergeant McCoy readied his pad of paper to take notes.

[10] Indeed, numerous cases can be found where a defendant agreed to talk to the police, but did not want to give a recorded statement. *See, e.g., People v. Box*, 5 P.3d 130, 157 (Cal. 2000), *People v. Samayoa*, 938 P.2d 2, 26 (Cal. 1997), *cert. denied*, 522 U.S. 1125 (1998); *Bivins v. State*, 642 N.E.2d 928, 941-42 (Ind. 1994), as amended (Mar. 9, 1995), *cert. denied*, 516 U.S. 1077 (1996); *State v. O'Neal*, 392 S.W.3d 556, 570 (Mo. Ct. App. 2013); *State v. Davis*, 471 N.E.2d 818, 821 (Ohio Ct. App. 1984); *State v. Piatnitsky*, 282 P.3d 1184, 1199, 1200 (Wash. Ct. App. 2012), *aff'd*, 325 P.3d 167 (Wash. 2014).

Given Sergeant McCoy's words and actions, it would be clear to a reasonable person that appellant's statements were not "off the record," but rather, Sergeant McCoy intended to memorialize appellant's statements with pen and paper instead of a video recorder. Indeed, appellant conceded at the suppression hearing that he understood that people take notes "to remember what is said later on."

In *People v. Samayoa*, 938 P.2d 2, 26 (Cal. 1997), *cert. denied*, 522 U.S. 1125 (1998), the California Supreme Court came to a similar conclusion. It rejected Samayoa's argument that his waiver of *Miranda* rights was not knowing or voluntary because, by refusing to have the interrogation tape-recorded, he "believed he was speaking off the record." *Id.* In support, the court noted that Samayoa

> was fully informed of his rights and expressly acknowledged that he understood them, was told the statements could and would be used against him, was an ex-felon who would have been familiar with the *Miranda* admonitions from his previous criminal involvement, and **was aware of conspicuous, detailed notetaking, which would enable the officers to reconstruct defendant's statements and use them against him in a future criminal proceeding.**

Id. (emphasis added).

Similarly, here, the record reflects that appellant, who had prior experience with the criminal justice system, understood his *Miranda* rights and was willing to speak to the police, but not on video. Sergeant McCoy's mere acquiescence to appellant's request to turn off the recording did not suggest that appellant's subsequent statements would be confidential, particularly where Sergeant McCoy stated that he would take "copious notes." There was no vitiation of the earlier *Miranda* advisement that anything appellant said could

be used against him. Accordingly, the circuit court properly denied appellant's motion to suppress his statement.

II.

Drug Evidence

Appellant next argues that he should be granted a new trial because the circuit court improperly excluded evidence that "there were illicit drugs in the [hotel] room, which . . . would have helped establish that this case involved a failed drug deal, not an armed robbery." He argues that this evidence was "central to [his] defense" that "the three alleged victims sought revenge for a drug deal gone bad."

The State argues that "the trial court acted within its broad discretion in precluding the introduction of evidence . . . concerning the nature of the pills found in the hotel room." It contends that the excluded testimony about the pills was only "marginally relevant," and permitting the testimony would only mislead the jury.

A.

Proceedings Below

Before addressing the specific claim, we note that there were multiple occasions when defense counsel attempted to admit testimony regarding pills in the hotel room. During cross-examination of Mr. Howard, the State objected to questions regarding whether the police found drugs in the hotel room on the ground that Mr. Howard was not an expert. After some discussion, the court stated that defense counsel could ask Mr. Howard if Ms. Wilson came to the hotel for a drug deal. The following then occurred:

> [DEFENSE COUNSEL A]: Mr. Howard, [Ms.] Wilson came to the room that night to get drugs; is that correct?
>
> [MR. HOWARD]: She didn't come to get drugs. She was supposed to have them but, I mean, yeah.

Mr. Howard further testified that he had two of his Suboxone pills in the room that night. The court sustained the State's objection to further questions regarding the nature of Suboxone.

During cross-examination of Mr. Brown, defense counsel showed Mr. Brown a photograph of alleged drugs. The prosecutor asked to approach the bench, objecting to questioning because it was not clear "whether these are drugs, and I think it's prejudicial at this point to introduce this picture through this witness." The prosecutor explained:

> It is unduly prejudicial when they don't have any testimony as to what it actually is and they're asking a jury to make an inference as to what it is without any basis for that inference, and that's the problem. They could have had this evidence tested and put in expert testimony as to what it was. They didn't choose to do so.

The court noted that there was no "chemist to tell us that these were, in fact, drugs, unlawful drugs," and the prosecutor stated that the witness could not "tell just by looking at it that it has a controlled dangerous substance in it, which is the problem." The court agreed, stating that, "at this point, giving [the photo] to him or introducing this evidence is going to be very misleading to the jury because they're not going to know what it is and we can't tell them what it is. So for now, the objection is sustained."

Ms. Tedder testified that she was not using drugs or alcohol on the night in question, but she was holding pills in her purse for Mr. Howard. The court sustained the

prosecution's objection to questions regarding what she understood the pills to be and to showing her a picture of the pills in her purse. The court stated: "I believe it would be error for me to allow testimony as to what the contents were of these pills without expert testimony or testing, and I'm going to grant the State's objection and not allow you to ask those questions." The court stated that it was misleading to have a witness testify that something was there without showing what it was, and the witness did not have "personal knowledge [of] the chemical composition of what they have."

Finally, during cross-examination of Detective Chindblom, counsel established that the "incident report list[ed] eight pink pills with N-8 markings" that were found in the hotel room. Upon objection by the State, the court ruled that the incident report was "fair game. But once again, he's not going to be able to say what they are."

B.

Analysis

Appellant argues that the "circuit court wrongly excluded evidence of the drug transaction in which the alleged victims were engaged, which constituted the centerpiece of [appellant's] defense." He asserts that the evidence was necessary to "establish that there were illicit drugs in the room, which would have helped establish that his case involved a failed drug deal, not an armed robbery."

The State argues that the trial court properly exercised its discretion in excluding evidence concerning the nature of the pills found in the hotel room. It contends that "non-expert testimony as to what a substance may have been would have served only to mislead

the jury concerning the nature of that substance," and therefore, it was properly excluded under Maryland Rule 5-403.

This Court recently explained the standard of review of a trial court's decision regarding the admission of evidence as follows:

> "Determinations regarding the admissibility of evidence are generally left to the sound discretion of the trial court. *Hajireen v. State*, 203 Md. App. 537, 552, *cert. denied*, 429 Md. 306 (2012). This Court reviews a trial court's evidentiary rulings for abuse of discretion. *State v. Simms*, 420 Md. 705, 724-25 (2011). A trial court abuses its discretion only when 'no reasonable person would take the view adopted by the [trial] court,' or 'when the court acts "without reference to any guiding rules or principles."' *King v. State*, 407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1, 13 (1994))."

Baker v. State, 223 Md. App. 750, 759 (2015) (quoting *Donati v. State*, 215 Md. App. 686, 708-09 (2014)).

Initially, we note that appellant was able to introduce evidence that there were pills in the hotel room. The excluded testimony involved the chemical composition of the pills. In that regard, the State argued, and appellant did not contest, below or on appeal, that the witnesses did not have sufficient expertise to render testimony in that regard. Appellant asserts on appeal, however, that it was "immaterial whether the pills they each carried *actually* were illegal," and "all that mattered was that everyone in that room understood the drugs to be illegal. To the extent that appellant was seeking opinion testimony, the admissibility of such evidence is within the sound discretion of the trial court. *Robinson*, 348 Md. at 115, 118.

With respect to Mr. Brown, defense counsel conceded that Mr. Brown was not the owner of the pills. The only basis for Mr. Brown's knowledge of the pills that was proffered by defense counsel was the fact that he was in the room and possibly observed the pills at one point. The court ruled that any testimony about the pills from Mr. Brown would be misleading to the jury. We perceive no abuse of discretion by the trial court in concluding that any speculative testimony from Mr. Brown was inadmissible.

With respect to Ms. Tedder and Detective Chindblom, they both testified that there were pills in the hotel room at the time of the robbery. We perceive no abuse of discretion in the court's ruling that they could not testify regarding the nature of the pills. Again, they were not qualified as experts to give an opinion on the chemical composition of the pills in the room. And it is not clear how the chemical composition of the pills was central to appellant's trial strategy. Appellant's defense was that he visited the hotel to trade a shotgun for "pills," and when the quantity of pills turned out to be insufficient, he terminated the deal and left. The exact nature of the pills was not critical, and therefore, the trial court did not abuse its discretion in excluding testimony about the specific chemical composition of the pills.[11]

[11] The court's rulings did not prevent defense counsel from stating in closing argument that "pain pills" were found in the hotel room.

III.

Questions Regarding Veracity

Appellant next contends that the circuit court deprived him of a fair trial by "permitting the State to question him regarding the veracity of Sergeant McCoy." Appellant cites *Hunter v. State*, 397 Md. 580, 595-96 (2007) for the proposition that, "[w]hen prosecutors ask "were-they-lying" questions, especially when they ask them of a defendant, they, almost always, will risk reversal." *Id.* at 596.

The State contends that appellant's claim is not preserved for this Court's review because he failed to object to this line of questioning. In any event, the State argues that appellant's claim is without merit.

The State concedes, as it must, that pursuant to *Hunter*, 397 Md. at 595-96, "'were-they-lying' questions [are] impermissible." Such questions are impermissible because they create "the risk that the jury might conclude that, in order to acquit [the defendant], it would have to find that the [witness] lied" and "because it is possible that neither the [defendant] nor the [witness] deliberately misrepresented the truth." *Id.*

Here, the prosecutor, on several occasions, asked improper "were-they-lying" questions.[12] The record reflects, however, that appellant failed to object to all but a couple

[12] For example, appellant testified that he was not sober when he was interviewed by Sergeant McCoy, although he admitted that he told Sergeant McCoy that he was sober because he had been driving. The following then occurred:

> [State:] So the police officer said that there was no evidence that you were anything but sober, the police officer was lying? (continued . . .)

of questions, and he did not request a continuing objection. That failure dooms his contention on appeal.

"'Cases are legion in the Court of Appeals to the effect that an objection must be made to each and every question'" to preserve an issue for appellate review. *Fowlkes v. State*, 117 Md. App. 573, 588 (1997), *cert. denied*, 348 Md. 523 (1998) (quoting *Sutton v. State*, 25 Md. App. 309, 316 (1975)). To "preserve an objection, a party must either 'object each time a question concerning the [matter is] posed or . . . request a continuing objection to the entire line of questioning.'" *Wimbish v. State*, 201 Md. App. 239, 261 (2011) (quoting *Brown v. State*, 90 Md. App. 220, 225 (1992)), *cert. denied*, 424 Md. 293 (2012). A continuing objection, which "obviates the need to object persistently to similar lines of questions that fall within the scope of the granted objection," must be granted by the court to be effective. *Kang v. State*, 393 Md. 97, 119 (2006).

Here, as indicated, counsel for appellant did not object to each of the "were-they-lying" questions, and he did not request a continuing objection. Accordingly, this claim is not preserved for this Court's review.

Although this Court has discretion to review unpreserved errors, the Court of Appeals has emphasized that "appellate courts should rarely exercise" this discretion because considerations of both fairness and judicial efficiency ordinarily require that all

(. . . continued)

> [Appellant:] I don't know what he, what he thought or what he believed, but I'm telling what I've done before. I drank before I saw them.

challenges that a party desires to make to a trial court's ruling, action, or conduct be presented first to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge. *Chaney v. State*, 397 Md. 460, 468 (2007). *Accord Kelly v. State*, 195 Md. App. 403, 431 (2010), *cert. denied*, 417 Md. 502, *cert. denied*, 131 S. Ct. 2119 (2011). In assessing whether we should, as appellant requests, exercise our discretion to review the argument for plain error, we note that plain error is error that "'vitally affects a defendant's right to a fair and impartial trial.'" *Conyers v. State*, 345 Md. 525, 563 (1997) (quoting *Rubin v. State*, 325 Md. 552, 588 (1992)). "We reserve our discretion to exercise plain error review for instances when the unobjected to error is 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Stone v. State*, 178 Md. App. 428, 451 (2008) (quoting *State v. Brady*, 393 Md. 502, 507 (2006)). *Accord Steward v. State*, 218 Md. App. 550, 566-67, *cert. denied*, 441 Md. 63 (2014). Appellate review based on plain error is "a rare, rare, phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003), *cert. denied*, 380 Md. 618 (2004). We decline to exercise our discretion to review this claim for plain error.[13]

[13] We do note that some of the questions to which appellant objects involved the prosecutor trying to establish whether he made certain statements to Sergeant McCoy. In *Parker v. State*, 189 Md. App. 474, 500 (2009), we stated that there was a "difference between: (1) the permissible 'do you dispute . . .' question—which does not ask the witness to read someone else's mind, and (2) the improper 'was that witness lying . . .' question, which is both impossible to answer and unfair when employed *ad nauseam*." (quoting Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 1303 (3d ed. 1999)).

IV.

Questioning the Jury Foreperson and the *Allen* Charge

Appellant next argues that he "is entitled to a new trial because the [c]ircuit [c]ourt, *sua sponte*, questioned the jury foreperson about the necessary length of deliberations and later gave an *Allen* charge with editorial comments under circumstances in which no such questioning or comments was appropriate or warranted."[14] Appellant asserts that the "net effect was that the [c]ircuit [c]ourt 'forced or helped to force an agreement which would not otherwise have been reached except for the intimidating or coercive effect of the charge upon some jurors.'" (quoting *Fletcher v. State*, 8 Md. App. 153, 155 (1969))."

The State argues that appellant's claims are not properly preserved because he failed to object to the trial court's actions. "Even if preserved," the State argues, "the court properly exercised its discretion in its communications with the jury."

A.

Proceedings Below

Toward the end of the fifth day of trial, after the jury had been deliberating for close to four hours, the trial court noted that it was Friday night, and it did not want interfere

[14] In *Kelly v. State*, 270 Md. 139, 140 n.1 (1973), the Court of Appeals explained:

> The term "Allen charge" is derived from *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). This case approved the use of an instruction in which the jury was specifically asked to conciliate their differences and reach a verdict. Since that case, the exhortation used there has been presented employing diverse language, which is why [the courts often refers] refer to such an instruction or one merely reminding the jury of its responsibilities, as an 'Allen-type' charge.

with the jurors' lives by requiring them to stay late into the evening. The court told counsel that it would be best to release the jury until the following Monday, whereupon they would resume deliberations. The prosecution objected, arguing that the court should not interrupt the jurors and send them home until they asked when they were going to go home. Moreover, she was concerned about losing jurors if the case continued to the following week. Defense counsel stated that he did not object to the plan to send they jury home for the weekend.

The court agreed to ask the jury about their preference. Defense counsel then expressed his concern that the court not make the jury "feel pressured to have a verdict this evening," explaining that "we want them to take as much time as they need obviously."

When the jury arrived in the courtroom, the judge stated the following:

> All right, ladies and gentlemen of the jury, you have been deliberating now for almost 4 hours. And I know that you have been giving it your all and been working diligently and I certainly appreciate it. It's now getting later into the evening and it is Friday night. And I know that you have families and other concerns. So what my intent is, at least until I hear from you, my intent is to send you home and have you come back on Monday to continue deliberating at 9:30. The question and the concern that was raised, and what I'd like you to do and let's, I think the best way to do it is this. If there is anyone who has an irrevocable conflict so that you could not come back on Monday morning, could you just raise your hand?

Juror Number 2, the jury foreperson, raised his hand, indicating that he had a conflict. He approached the bench and explained that he had a potential conflict with work responsibilities. The following then occurred:

THE COURT: Okay. You are the foreperson for the jury.

JUROR NO. 2: Um-hmm.

THE COURT: **And I'm not going to hold you to this but I just want to get a general sense, do you think that in another hour or something that you'd be able to, that the jury is going to reach a verdict at this point? Or is there still a lot more to go?**

JUROR NO. 2: I feel that in the last half an hour or so we have made some progress. I can't promise that we would come to a verdict. I don't know what the objections from them would be at this point because I know some of them have kids and I doubt --

THE COURT: Yes.

JUROR NO. 2: But our concern, because we had talked about this too, was that we went so far that we don't know how different we're going to feel on Monday. I would say at this point that we would take another 20 minutes to a half an hour to discuss and kind of see where -- I don't know. It's been quite a 4 hours so that's really a no[n]-answer but—

THE COURT: Okay. Well no, no, no. I mean, once again I'm not asking you to tell me exactly where you were, just to give me a sense of where they are at this point.

* * *

[PROSECUTOR]: Your Honor, may we ask the Juror to step back so that I can address the Court?

THE COURT: Sure, absolutely. . . .

* * *

[PROSECUTOR]: Maybe we should have them all decide back in the jury room whether they want to stay for another hour or 2 if they think they're going to make a decision or if they want to go home. And I think we should let them decide.

[DEFENSE COUNSEL]: I'm just concerned that if we say, would you like to stay another hour or 2 that they'll cram their decision into an hour or 2 before they go home.

[PROSECUTOR]: We don't have to give them time. We could say, would you prefer to stay tonight or would you rather go home and start fresh on Monday morning? I think we should let them decide. I don't --

THE COURT: I could ask them that right now.

[PROSECUTOR]: That's fine. It sounds like they've made progress --

THE COURT: Yes, I know.

[PROSECUTOR]: -- and I'm, you know, we interrupted them. They didn't ask to be interrupted. And that concerns me.

THE COURT: I understand that. All right, I'll ask them.

[PROSECUTOR]: Thank you.

(Bench conference concluded.)

THE COURT: All right. Ladies and gentlemen, once again, I do want to be guided by you somewhat. And I guess the question is, could we see by a show of hands how many of you would prefer to stay and try to work it out tonight?

Okay, that's certainly a very strong showing there. Okay.

All right, it is now about a quarter to 7. All right. Okay, we will send you back to continue your deliberations and we'll check in with you later in the evening. All right? Unless we hear from you otherwise. All right, thank you.

(The jury retired to deliberate.)

[THE COURT:] All right?

[PROSECUTOR]: Thank you, Your Honor.

[DEFENSE COUNSEL]: Thank you, Your Honor.

(emphasis added).

After some deliberations, the court received a note from the jury informing the court that they could not reach a verdict on the final charge. The parties and the trial court agreed to return a note to the jury stating: "Please continue the deliberations."

After more deliberations, the court received a second note from the jury:

THE COURT: . . . The note reads as follows, we still cannot come to a decision on one count. We've continued to deliberate and unless additional evidence is submitted we do not see this changing. What do we do at this point?

And then there's a secondary section which says, specifically we want to review [Sergeant] McCoy's testimony.

What I'm going to do is I'm going to bring the jury back in. I am going to read to them the jury duty to deliberate again, which is the instruction they were previously given which is the Maryland version of the Allen charge. I'm going to ask them to redouble their efforts. I'm also going to tell them that they must rely on their own memory of [Sergeant] McCoy's . . . testimony. And that they have everything they need to reach a decision. And then we'll send them back and see what they can do.

(The jury entered the courtroom.)

[THE COURT:] Thank you. Have a seat please. All right. Ladies and gentlemen of the jury, you have given me another note and I've just read it on the record to counsel. One of the things that you noted in there is that it says specifically we want to review [Sergeant] McCoy's testimony. I need to tell you that we cannot replay that testimony or give it to you in any other form. You are to rely on your own memory of Sergeant McCoy's testimony.

The other part of your note is, we still cannot come to a decision on one count. We have continued to deliberate and unless additional evidence is submitted we do not see this changing. What do we do at this point? Well, ladies and gentlemen, what we do at this point is I'm going to read you one of the jury instructions that we had previously given you and ask you to redouble your efforts to come to some verdict. You've spent a lot of time on this case already and I do believe that everything you need to come to a verdict has been presented to you by both sides in this case.

And here is the instruction. The jury's duty to deliberate. The verdict in this case must be the considered judgment of each of you. In order to reach a verdict all of you must agree. In other words, your verdict must be unanimous. You must consult with one another and deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself but do so only after

an impartial consideration of the evidence with your fellow jurors. During deliberations do not hesitate to reexamine your own views. You should change your opinion if you're convinced you are wrong but do not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.

So ladies and gentlemen, I am going to send you back and ask you to redouble your efforts and see if you can get a verdict in this case. All right.

(The jury retired to deliberate.)

[THE COURT:] Okay?

THE CLERK: All rise. Court stands to recess.

(Recess)

B.

Preservation

The State contends that appellant's "complaints are not preserved for review as he failed to object to the trial court's actions." We agree.

The court specifically advised counsel regarding what he intended to do, and counsel at no time expressed any complaint about the court's actions.[15] The first time appellant objected to the court's actions was in his post-trial motion for a new trial. Under these circumstances, appellant's claim of error in questioning the jury foreperson and giving an *Allen* charge is not preserved for our review. *See Mouzone v. State*, 50 Md. App. 81, 91-92 (1981) ("[N]o objection was made . . . at trial and the issue was first raised at

[15] Although counsel did say, at the beginning of the discussion, that he did not want the jury to "feel pressured to have a verdict this evening," he never subsequently indicated that any of the court's particular actions were objectionable.

appellant's motion for a new trial. As a result, the trial court was deprived of any opportunity to take such remedial steps to correct the prejudice, if it did in fact exist. The failure to object has not preserved this issue for appellate review."), *rev'd on other grounds*, 294 Md. 692 (1982). Because appellant's contention in this regard is not preserved for review, we will not address it.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.