UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0564

September Term, 2015

MICHAEL I. COLEMAN

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Berger, J.

Filed: March 8, 2016

Michael I. Coleman, appellant, was convicted by a jury sitting in the Circuit Court for Kent County of possession of heroin with the intent to distribute, and three counts of possession: heroin, marijuana, and paraphernalia.[1] Appellant asks the following four questions, which we have reordered and rephrased:

> I. Did the suppression court err when it failed to hold a *Franks* hearing[2] so appellant could show that the search warrant affidavit contained misleading information?
>
> II. Did the trial court err when it admitted text messages from the cell phone seized during execution of the search warrant?
>
> III. Did the trial court err when it declined to give appellant's requested customized Maryland Pattern Jury instruction on possession of heroin with the intent to distribute?
>
> IV. Did the suppression court err when it twice used the "in the light most favorable to the State" standard to support its conclusion that appellant's statements were not taken in violation of *Miranda*[3]?

For the reasons that follow, we shall affirm the judgments.

FACTS

The facts elicited at appellant's trial were not largely disputed. Around 4:55 a.m. on May 23, 2014, the police executed a search and seizure warrant for appellant and his

[1] The court sentenced appellant to 20 years of imprisonment for possession with intent to distribute and a concurrent one year sentence for possession of marijuana. The court merged his remaining convictions.

[2] *Franks v. Delaware*, 438 U.S. 154 (1978).

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

residence at 5882 Williams Street, a one-story house in Rock Hall, Maryland. Upon entering the house, the officers proceeded down a hallway and entered a bedroom where they found appellant and his girlfriend, Jacqueline Kendall, in bed. They were arrested, and appellant was handcuffed and taken to the living room where Deputy Sheriff First Class Sean Maloney of the Kent County Sheriff's Office read him *Miranda* rights from an advice of rights card.

The police searched the bedroom and recovered from under the mattress two PVC pipes. One pipe was empty but the other contained 14 bags of a substance later determined to be heroin. From under the bed the police recovered three bags of heroin held together by a small rubber band. The police also recovered two loose bags of heroin from the top of the bedroom dresser. In the night stand next to the bed, the police recovered a bag of marijuana and three cell phones. Recovered from the bedroom were two straws with what was later determined to be heroin residue on the ends. Appellant's driver's license, $667 in U.S. currency, and mail addressed to him at the house were also found in the bedroom.

The search was completed around 7:15 a.m., at which time appellant was taken to the police station. Around 7:35 a.m., Deputy Maloney placed appellant in an interview room where the deputy reminded appellant, and appellant acknowledged, that he had been earlier advised of his *Miranda* rights. Around 8:00 a.m., Deputy Maloney questioned appellant about his drug activities. Appellant said that he sold heroin to support his habit and explained that he drove to Philadelphia every two days to buy seven to ten bundles of heroin

that he then brought back to Rock Creek to sell. Appellant also told the deputy that if the police had executed the warrant later that day, they would not have found any heroin because he was consuming what he was buying.

The police obtained a search warrant for the three phones recovered from the bedroom. Deputy Maloney downloaded the information on them. One phone was of particular interest and fifty pages of text messages were downloaded from it. The deputy testified that the downloaded messages contained numerous drug-related text messages between appellant and multiple people. He then testified to several messages that occurred around the time appellant was arrested.

Deputy Maloney testified that at 9:19 a.m. the day before the search warrant was executed, appellant texted someone named "Peanut": "Yo bro. You working?" Peanut texted back: "At 1." Appellant responded: "I'm pulling out now[,]" and Peanut responded: "Cool." Appellant texted back: "7. Be there 12:30 in waiting, I hope." The deputy explained that the text messages showed appellant arranging a meeting with Peanut to sell him seven "bundles" of heroin. The deputy explained that a bundle generally contains 10 to 13 individual bags of heroin and each bag contains 1/10 of a gram of heroin. The deputy testified that a common packaging method was to use a small rubber band to hold the bundle together.

Ten days before appellant was arrested he texted someone named "Scoot": "Yo bro. Bout to pull out. Have a G. What you give me for that?" Scoot responded: "9." Appellant

responded: "Okay. On way, bro. See you in two hours." The deputy explained that appellant was arranging to meet a heroin distributor named Scoot to purchase nine bundles of heroin for $1,000. Deputy Maloney testified that later that night, appellant texted Scoot: "Why you do me like that, bro? That shit weak as hell. Already got people wantin' money back." Scoot responded: "How it weak when a couple people to tell me this shit hard?" Appellant responded: "Bro, every time I'm bout to get on top, this shit crushes me and I have to start over." The deputy explained that appellant was complaining to Scoot that the heroin he had purchased earlier was weak, that customers were not satisfied with its potency.

About a week before appellant was arrested a person named Betsy texted appellant: "Can you stop by house at lunch? I got 50. Need 2." Appellant responded, "Yeah. Don't forget the 2 dime from other day." Deputy Maloney testified that Betsy wanted to buy two bags of heroin for $50, and appellant was reminding her that she owed him $20, explaining that a "dime" was street slang for a single, $10 bag of heroin. On the morning of, but after appellant's arrest, appellant received a text message from Dwayne who wrote: "Can you bring me one with you? I'll me[e]t you at the job."

Sergeant Steven Linz of the Kent County Sheriff's Office was qualified as an expert in the field of narcotics, specifically the amount and usage sufficient to indicate an intent to distribute. He testified that a "dime" is a single bag of heroin and costs $10; that a "bundle" is 13 to 15 bags of heroin, and a "log" is usually 10 bundles of heroin. He further testified that a $20 bill was the most common denomination of currency used in the street sale of

narcotics. It was elicited that the money seized from the bedroom was in the denominations of one $50, twenty-four $20's, eight $10's, ten $5's, and seven $1's. The sergeant opined that drug dealers often have multiple phones to keep their business lives separate from their private lives. He opined that the text messages showed that appellant was dealing heroin, explaining that the amount of heroin appellant was buying every couple of days, between seven and ten bundles, was "clearly beyond an amount that would exceed personal use." He also opined that fourteen bags of heroin found in the bedroom was sufficient to show appellant was distributing, although he also testified that someone could consume nine bags in a day, and he had known of someone who consumed nine bags twice a day.

Appellant and his girlfriend, Kendall, testified for the defense. Kendall testified that she plead guilty to possession of heroin, explaining that she was an addict and that all the drugs in the house belonged to her. She explained that she bought the drugs from Dwayne, a friend of hers and appellant. Appellant denied selling drugs. He explained that he had been an addict but had quit a few weeks before he was arrested. He denied making any incriminating statements to Deputy Maloney about buying or selling heroin. He explained that he would not have made those incriminating statements because he was on parole after spending several years in jail, and he did not want to go back to jail.

DISCUSSION

I.

Prior to trial, defense counsel filed an omnibus motion challenging the search warrant for the house, arguing that the affidavit in support of the warrant contained deliberate or reckless falsehoods that if excised left the affidavit without sufficient probable cause. Defense counsel, however, made no specific allegation about what in the affidavit was false. At the subsequent suppression hearing, defense counsel told the motions court that he wanted to cross-examine the affiant officer "about what his actual observations are and compare that with what" was in the written warrant application. He stated "I can't prove anything until I put on evidence," and proffered that if he could cross-examine the affiant he would show that "the application was somewhat misleading[.]" The suppression court denied the request.

Appellant argues on appeal that the suppression court committed reversible error when it denied him a *Franks* hearing. He argues that he was entitled to the hearing because he proffered a sufficient "good faith basis" to show that the warrant affidavit contained reckless or deliberate falsehoods and lacked probable cause. He circuitously argues, as he did below, that without a *Franks* hearing he was denied the ability to establish that the warrant affidavit contained false or misleading information. The State argues that the court did not err because appellant "did not come close" to satisfying the standard for obtaining

a *Franks* hearing, i.e. a substantial preliminary showing of intentional or reckless falsehood in the affidavit.

The Fourth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, provides that "no Warrants shall issue, but upon probable cause[.]" The Maryland Constitution, Article 26, is *in pari materia* with the Fourth Amendment. *Holland v. State*, 154 Md. App. 351, 384-85 (2003) (citation omitted). Absent certain exceptions not relevant here, the police must obtain a search warrant before conducting a search, and the warrant must be based upon probable cause "to justify its issuance as to each person or place named[.]" *Id*. at 385 (quotation marks and citations omitted). When reviewing an issuing judge's approval of an application for a search warrant, a court ordinarily is limited to the "four corners" of the affidavit supporting the warrant. *Abeokuto v. State*, 391 Md. 289, 338 (2006). The "four corners" doctrine is firmly established and rigorously applied. *Fitzgerald v. State*, 153 Md. App. 601, 639 (2003), *aff'd*, 384 Md. 484 (2004).

The United States Supreme Court in *Franks v. Delaware*, however, created an exception to the four corners doctrine. In *Franks*, the Supreme Court set out the following procedure when a defendant can stray beyond the four corners of a warrant application to examine live witnesses to establish that a warrant application was tainted by falsehoods or a reckless disregard of the truth.

> [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.

438 U.S. at 155-56 (emphasis added). The Supreme Court added:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Id. at 171-72 (footnote omitted) (emphasis added).

Appellant failed to make a substantial preliminary showing of an intentional or reckless falsehood in the warrant affidavit. Appellant failed to offer any supporting reasons or point to specific portions in the affidavit that he claimed to be false. Further, he failed to provide affidavits or otherwise reliable statements of witnesses as to the falsities or give a satisfactory explanation for their absence. Under the circumstances, we are persuaded the motions court did not err when it denied appellant's motion for a *Franks* hearing.

II.

Appellant's next claims of error center around the text messages downloaded from the cell phone found in his bedroom. Appellant argues that the trial court erred when it admitted a printout of the text messages stored on the cell phone because the printout was not properly authenticated and did not satisfy the best evidence rule. He also argues that the trial court erred in allowing Deputy Maloney to testify as to his interpretation of the "street language" and the meaning of some of the text messages found on the cell phone, because the deputy was not qualified as an expert. The State responds that appellant's first argument is without merit and his second is unpreserved. We agree with the State.

A. Authentication and Best Evidence Rule

Md. Rule 5-901(a) sets forth the requirements for authentication and provides generally: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The Rule goes on to list, by way of illustration and

not limitation, several ways to authenticate evidence, including: "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be." Md. Rule 5-901(b)(1). "[T]he burden of proof for authentication is slight, and the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so." *Dickens v. State*, 175 Md. App. 231, 239 (2007) (quotation marks, citation, and emphasis omitted). When a proponent makes a prima facie showing that a proffered document is genuine, then an item "comes in, and the ultimate question of authenticity is left to the jury." *Gerald v. State*, 137 Md. App. 295, 304 (quotation marks and citation omitted), *cert. denied*, 364 Md. 462 (2001). We review a trial court's decision to admit such evidence for an abuse of discretion. *Id*. at 305.

Md. Rule 5-1002 sets forth the "best evidence rule" and provides that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Md Rule 5-1001(c) defines "original" to include, among other things, any printout of data stored in a computer where the printout is "shown to reflect the data accurately[.]"

"It is well established . . . that the admission of evidence is committed to the considerable discretion of the trial court." *Sifrit v. State*, 383 Md. 116, 128 (2004) (citing *Merzbacher v. State*, 346 Md. 391, 404 (1997)). We have said that an abuse of discretion occurs where "no reasonable person would take the view adopted by the [trial] court." *Fontaine v. State*, 134 Md. App. 275, 288 (quotation marks and citations omitted) (brackets

in original), *cert. denied*, 362 Md. 188 (2000). "Thus, where a trial court's ruling is reasonable, even if we believe it might have gone the other way, we will not disturb it on appeal." *Id*.

Here, Deputy Maloney testified that he obtained a search warrant for the phones and downloaded information from them. As to the process, he explained that "a machine . . . extracts all data off of a cell phone and then puts . . . it on paper. So all the text messages are spelled out. All of the contact names and their phone numbers any pictures that might have been on the phone, all that data is captured and then extracted from the phone so it can be nicely presented, printed out on paper." The officer testified that the information from the cell phones was copied "to a flash drive" which is then plugged into a computer that generates a printout. While holding the printout, the officer testified that it contained "[t]he data that was captured from the cell phone itself[.]" Deputy Maloney's testimony satisfied the authentication and best evidence rules. We are therefore persuaded that the trial court did not abuse its discretion when it admitted the printout of the text messages.

B. The deputy's testimony interpreting the cell phone messages

Appellant also argues that the trial court erred in permitting the State to elicit from Deputy Maloney his interpretation of the text messages because he was not qualified as an expert. Appellant argues that he lodged a timely general objection below and so has preserved his argument for our review. Even if we believe he has not preserved his argument, he contends that we should nonetheless reverse his convictions because his

counsel was ineffective. As shown below, appellant has not preserved his argument for our review and we decline to review his claim under the guise of ineffective assistance of counsel.

Md. Rule 4-323(a) sets forth the contemporaneous objection rule that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Evidence coming in either earlier or later without objection fails to preserve the objected to evidence for review on appeal. *Williams v. State*, 131 Md. App. 1, 17, *cert. denied*, 359 Md. 335 (2000). *See also Tichnell v. State*, 287 Md. 695, 716 (1980) ("[I]t is not reversible error when evidence, claimed to be inadmissible, is later admitted without objection.") (citations omitted).

With the law concerning preservation in mind, we turn to Deputy Maloney's testimony about the seized cell phone. The deputy first testified about how the printout was generated.[4] Eventually, the State asked the trial court for permission to ask the deputy to read the text messages. When the court asked defense counsel if had an objection to that, defense counsel stated: "Reading . . . reading the text messages? What do you mean? He's

[4] We note that defense counsel objected when the deputy testified about how the printout was generated, arguing that the printout was not the best evidence. The court overruled that objection, stating that the officer could testify as to what he downloaded. Interestingly, defense counsel replied, "I can understand the [c]ourt, if a proper foundation is laid, allowing that . . . those text messages in" and "[]once they're in evidence, I guess he can comment about it." (ellipses in transcript) (emphasis added).

. . . are you going to read from the text messages? No. I . . . I do have an objection to that." Defense counsel also stated, "I believe, additionally, an insufficient foundation has been laid." The court overruled the objection. The following colloquy transpired:

> [THE STATE]: What . . . can you read . . . read what . . . what noteworthy messages you discovered?
>
> [WITNESS]: Absolutely.
>
> [DEFENSE COUNSEL]: Objection for the record, Your Honor.
>
> THE COURT: Overrule.
>
> [DEFENSE COUNSEL]: Can I have a continuing objection so as not to interrupt?

The court granted the continuing objection.

The officer then went on to read several of the text messages and then interpreted those messages. Specifically, the officer read and gave his interpretation of the text messages between appellant and Peanut, a text message from Dwayne, and text messages between appellant and Scoot. When the State asked the deputy what the similar messages in the 50 pages of downloaded messages "appear[ed] to be portraying," defense counsel objected and asked that the State "put a time on what we're talking about, dates and – [.]" The court agreed and sustained the objection. The deputy then read the text messages between appellant and Scoot and provided his interpretation of it. It was only then that defense counsel objected to the deputy interpreting the messages, arguing: "This is his interpretation of it. They can read the messages themselves." The court overruled the

objection, stating that the deputy "has latitude within which to interpret the street language that's contained in a text as in this case."

On appeal, appellant argues that his general objection preserved his argument on appeal that the trial court erred in permitting the deputy to interpret the text messages because he was not qualified as an expert. We disagree. The record reflects that appellant made a general objection to the deputy *reading* the text messages, not to the deputy interpreting the text messages. When the State asked the deputy to interpret the text messages, the transcript from the trial reflects that appellant did not object until many pages later.

In an effort to maneuver around this problem, appellant argues that he should be excused from the contemporaneous objection rule because the reason the trial court gave for overruling appellant's objection was incorrect. Appellant explains that even if he had objected contemporaneously, the error would not have been cured because the court clearly believed that the deputy could testify as to his interpretation of the text messages, even though he was not qualified as an expert. While appellant's argument may have some superficial appeal, it is without merit. Appellant is not entitled to a forgiveness of the preservation requirement by assuming unilaterally that the trial court would have ruled the same seven pages earlier. Under the circumstances, we decline to presume how the trial court would have ruled had the objection been brought to his attention many pages earlier. *Cf. Williams v. State*, 131 Md. App. 1, 38-40 (2000) (declining to forgive the lack of a

timely objection where appellant argued that the trial court allegedly could not have cured the error even if he had timely objected).

In the event we are persuaded that appellant has failed to preserve his argument for our review, appellant cites *Testerman v. State*, 170 Md. App. 324 (2006), *cert. dismissed*, 399 Md. 340 (2007) and argues that his counsel was ineffective for not objecting sooner. "We have consistently held that the desirable procedure for determining claims of inadequate assistance of counsel, when the issue was not presented to the trial court, is by way of the [Maryland Uniform] Post Conviction Procedure Act." *Walker v. State*, 338 Md. 253, 262 (quotation marks and citation omitted) (brackets added), *cert. denied*, *Walker v. Maryland*, 516 U.S. 898 (1995). This is because the post conviction setting provides the opportunity for taking testimony and receiving evidence to make factual findings regarding the challenge to counsel's competence. *Id*. This is particularly true where the claim does not involve a legal question but centers more on resolving factual questions, *i.e.*, why defense counsel acted in a certain manner. *See Mosley v. State*, 378 Md. 548, 558-72 (2003). Given the secretive nature of trial tactics, direct review of ineffective assistance of counsel claims will be rare. *Johnson v. State*, 292 Md. 405, 435 n.15 (1982) (declining to address ineffective assistance of counsel claim on direct appeal where facts regarding counsel's performance were neither clear nor undisputed).

This is not a rare case where review of the ineffective assistance claim would be appropriate on direct appeal. Appellant's claim is fact-centered, *i.e.*, why did counsel act in

a certain way, and resolution requires a fact-finding proceeding. This is in contrast to *Testerman v. State*, *supra*, where the unpreserved issue was a question of statutory interpretation, not one of trial strategy, and the facts underlying the question of legal sufficiency were fully conceded at trial.

III.

Appellant argues that the trial court abused its discretion when it declined to give his requested modified jury instruction on possession of heroin with the intent to distribute. The State argues that the trial court did not abuse its discretion because the instructions given fairly covered the issues at trial. We agree with the State.

Defense counsel requested the following instruction be given for the crime of possession of heroin with the intent to distribute:

> The Defendant possessed controlled dangerous substance with the intent to distribute some or all of it that was seized. The issue is not whether he had possessed and intended to distribute controlled dangerous substance that he had had at an earlier time, even a very short earlier time, but whether the controlled dangerous substance that the State alleges he possessed when they seized it, that that was intended to be distributed by him.

The trial court, however, gave the following instruction instead.

> The Defendant also is charged with the crime of possession of heroin with intent to distribute. In order to convict the Defendant, the State must prove: (1) that the Defendant possessed heroin; and (2) that the Defendant possessed heroin with an intent to distribute some or all of it.

> Distribute means to sell, exchange or transfer possession of the substance or to give it away. No specific quantity is required for you to find the intent to distribute. There is no specific amount below which the intent to distribute disappears and there is no specific amount above which the intent to distribute appears.
>
> You may consider the quantity of the controlled dangerous substance along with all other circumstances in determining whether the Defendant intended to distribute the controlled dangerous substance.

The instruction given by the trial court is virtually identical to the Maryland Criminal Pattern Jury Instructions (MPJI-Cr) 4:24.1. After the trial court instructed the jury, defense counsel objected, arguing that his instruction was better tailored to the facts of the case. The trial court disagreed and declined to give his proposed instruction.

Md. Rule 4-325(c) provides:

> The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

In sum, three determinations must be made in deciding whether the trial court was required to give a requested instruction: (1) whether the requested instruction constituted a correct statement of the law; (2) whether it was applicable under the facts and circumstances of the case; and (3) whether it had been fairly covered in the instructions actually given. *State v. Martin*, 329 Md. 351, 356-57 (1993), *cert. denied*, 510 U.S. 855 (1994).

We review a trial court's refusal to give an instruction under the abuse of discretion standard. *Bazzle v. State*, 426 Md. 541, 548 (2012). We review the jury instructions in their entirety to determine if reversal is required. "The jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate." *Fleming v. State*, 373 Md. 426, 433 (2003). We are mindful that "[a] defendant is not entitled to a particular worded jury instruction where jury instructions given cover the substance of the requested jury instruction." *Id*. at 432.

Appellant argues that the jury instruction given was ambiguous because it used the past tense "possessed" when referring to the heroin which, he argues, could suggest to the jury that his guilt could be based on "some past possession with a past intention to distribute[.]" Appellant cites *Arthur v. State*, 420 Md. 512, 525 (2011) in support of his argument. We disagree and find *Arthur* easily distinguishable.

The central argument at trial was whether appellant intended to sell the drugs found in the bedroom or whether they were for personal use. The instruction given adequately covered the facts elicited. We agree with the State that appellant essentially sought to use his propounded jury instruction to advance his argument of the case that the drugs found in his home were for personal use and not distribution. The trial court recognized as much when it denied appellant's requested instruction, telling appellant that he was free to make that argument in closing, which he did.

Arthur involved the pattern jury instruction for resisting a warrantless arrest, which requires that the officer had "reasonable grounds" to believe that the defendant was committing or had committed a crime. *Arthur*, 420 Md. at 519-20 n.3. Arthur asked for an instruction on his right to resist an unlawful arrest. The trial court declined to give that instruction, believing that it was already covered by the instruction given. The Court of Appeals disagreed and reversed. The Court reasoned that the "reasonable grounds" language includes two different standards: probable cause and reasonable articulable suspicion. *Id*. at 527. The Court believed that the reasonable grounds language, in the context of the facts elicited at trial, inadequately communicated to the jury that the officer needed probable cause, not reasonable articulable suspicion. *Id*. at 528. The Court also noted the commentary to the jury instruction for resisting a lawful arrest recognized that modification of the instruction may be appropriate where probable cause is an issue. *Id*.

Here, there is no commentary suggesting modification of any kind to the pattern jury instruction for possession with an intent to distribute. Additionally, the instruction given did not create an ambiguity because the instruction referred to the heroin appellant possessed, which were the 14 bags of heroin found in the room. We note that the State argued in closing: "when you look at [the evidence] back there and you consider it together, you're gonna come to the conclusion that he's selling heroin, *the heroin he had, he was starting to run out, but that was for sale*." (emphasis added). Likewise, the defense made clear in its closing argument that the charge of possession with intent to distribute was based on the 14

bags of heroin found in the bedroom. Lastly, we are mindful that Maryland appellate courts "strongly favor" the use of the pattern instructions. *Minger v. State*, 157 Md. App. 157, 161 n.1 (2004). Under the circumstances presented, we find no abuse of discretion by the trial court in declining to give the requested jury instruction.

IV.

Lastly, appellant argues that the suppression court committed reversible error when it twice "fatally tainted" its ruling by shifting the burden from the State to defendant to prove that his incriminating statements were taken in violation of *Miranda*. Appellant argues that "[t]he effect of this error shifted the onus to [him], as the moving party, to demonstrate that he was entitled to relief even under his opponent's most favorable version of events."

When reviewing the denial of a motion to suppress, the record at the suppression hearing is the exclusive source of facts for our review. *State v. Rucker*, 374 Md. 199, 207 (2003). We extend great deference to the fact finding of the suppression judge and accept the facts as found, unless clearly erroneous. *Carter v. State*, 367 Md. 447, 457 (2002). In addition, we review the evidence in the light most favorable to the prevailing party, in this case, the State. *Cartnail v. State*, 359 Md. 272, 282 (2000). Nevertheless, this Court must make its own independent constitutional appraisal by reviewing the law and applying it to the facts of the case. *Jones v. State*, 111 Md. App. 456, 466, *cert. denied*, 344 Md. 117 (1996) (citing *Ornelas v. United States*, 517 U.S. 690 (1996)).

When a defendant claims a *Miranda* violation, he must first make a prima facie showing that he was subjected to custodial interrogation. *Smith v. State*, 186 Md. App. 498, 520 (2009), *aff'd*, 414 Md. 357 (2010). The State is then required to "establish by a preponderance of the evidence that the statement satisfies the mandates of *Miranda* . . . and, that the statement is voluntary." *State v. Tolbert*, 381 Md. 539, 557, *cert. denied*, 543 U.S. 852 (2004) (citations omitted). A statement is voluntary if it is freely given, not "extracted by any sort of threats, or violence, or obtained by any direct or implied promises[.]" *Id*. at 558 (quotation marks and citation omitted).

When determining whether a defendant should have been re-advised of his *Miranda* rights, the suppression court looks to the following non-exhaustive five factors: 1) the length of time between the giving of the first warnings and the subsequent interrogation; 2) whether the warnings and subsequent interrogation were given in the same or different places; 3) whether the warnings and subsequent interrogation were given by the same or a different police officer; 4) the extent, if any, to which subsequent statements are different from any previous statements; and 5) the intellectual and emotional state of the defendant. *Pryor v. State*, 195 Md. App. 311, 327 (2010). *See also Tolbert*, 381 Md. at 554 (re-advisement not required where two and a half hours passed between advisement of *Miranda* rights and defendant's incriminating statement) and *Harper v. State*, 162 Md. App. 55, 85-87 (2005) (re-advisement not required where two hours passed between advisement of *Miranda* rights and defendant's incriminating statement).

At the pre-trial suppression hearing, Deputy Maloney testified that around 5:05 a.m., shortly after the police entered the house, he advised appellant of his *Miranda* rights using an advice of rights card provided to the Kent County Sheriff's Office. The deputy testified that he did not have the card with him, and the State did not ask him about the specific rights given. The deputy testified that appellant said he understood his rights. The deputy further testified that appellant was calm and did not appear to be under the influence of alcohol or drugs. The deputy denied acting aggressively, threatening appellant in any way, or offering any promise or inducements. He testified that the only question directed at appellant while at the house was whether he had any firearms at the residence, to which he replied that he did not.

Appellant was taken to the police station around 7:21 a.m. and, about 15 minutes later, the deputy escorted appellant into an interview room. Appellant was calm and did not appear to be under the influence of anything. The deputy reminded appellant of the earlier *Miranda* advisements. Appellant acknowledged that his rights had been read to him and agreed to answer questions. Appellant made several incriminating statements as to how he bought and sold heroin. The deputy denied threatening appellant in any way or making any promises or inducements. The interview concluded at 8:15 a.m., and appellant was taken to a district court commissioner at 11:10 a.m.

Appellant testified in support of his motion to suppress. He admitted that he was originally read his *Miranda* rights not "long after [the police] had . . . cuffed" him. Defense

counsel did not ask about nor did appellant testify about the deputy reminding him of the *Miranda* advisements the deputy had given him at the house. Appellant testified, however, that the post-arrest interview occurred about 11:00 a.m., rather than 7:35 a.m., and he denied making any incriminating statements.

After the above testimony, defense counsel argued that appellant's *Miranda* rights were violated because: 1) there was no evidence as to what advisements were given, and 2) too much time had elapsed between the alleged *Miranda* advisements and the interview. The suppression court rejected both arguments. As to the first argument, the court stated:

> Alright. The . . . the testimony was what was read to [appellant] was the rights as per his . . . the officer's case, which was described as the card where . . . which he normally read rights from. And the Court finds, in the light most favorable to the non-moving party, which would be the State, that would certainly be the rights which the Court has heard in ad nauseam over many, many cases, many, many motions and many, many repetitions by officers, including this one. That would be the right to remain silent, right to ask for an attorney and right to stop the interview at any point in time.

(Ellipses in original). As to the second argument, the suppression court stated:

> [The] State certainly has the burden of proving that he knowingly . . . the Defendant knowingly, intelligently and voluntarily waived his rights, and the Court feels that he's done that. Under Harp[er] versus State, I certainly do have the . . . the ability to use the totality of the circumstances. True, one of the factors was that the rights were given in a place where the arrest was originally made. And I am sure they didn't go in and just say, "Good morning." I'm sure that there were . . .were a number of loud statements yelling and screaming by everybody and perhaps even the Defendant. I don't know. But the way the Officer, who I believe, described the interview, it was quite

> striking to him how the demeanor of [defendant] was extremely calm. I don't think he would have phrased it that way if in fact [defendant] was as [defendant] has described his demeanor. I believe the Officer. I . . . I think that, at this point, the Officer is credible. He certainly stated some things he didn't remember. He didn't embellish, at least not to this Court's view. And I think the five factors that are described in Pryor would certainly weigh heavily in the direction of the State. The Officer was the same Officer. He came in and again asked him if he recalled the rights he was given. The Defendant said he did. The Defendant, by the way, didn't rebut that . . . that exchange in his . . . in his version of the statements. So I accept that. And I think all five fav- . . . factors, except for the factor that the rights were given in two different places, weigh in the direction of the State. I don't think the fact that the rights were given in two different places are such . . . should he given such . . . ascribed such weight that I should just say that the State would lose in this case, again, particularly in the light most favorable to the State. So the Motion to Suppress is denied.

(Emphasis added).

Appellant is correct that the "in the light most favorable to the State" standard is not an appropriate standard at the suppression level. It is the standard by which we review the facts found by the suppression court. *See Cartnail*, 359 Md. at 282 ("As the State was the prevailing party on the motion, we consider the facts as found by the trial court, and the reasonable inferences from those facts, in the light most favorable to the State"). The trial court's recitation of the wrong standard of review, while troubling, is nonetheless not a basis for reversal under the circumstances. As stated above, we defer to the suppression court on its factual findings but review de novo any conclusions of law.

Critically, here the suppression court correctly recognized the standard by which it viewed the issue before it: "[The] State certainly has the burden of proving that he knowingly . . . the Defendant knowingly, intelligently and voluntarily waived his rights[.]" Additionally, the suppression court found the deputy's testimony credible. The trial judge expressly found that based on the Officer's testimony, "I think the five factors that are described in *Pryor* would certainly weigh heavily in the direction of the State." The suppression court applied the wrong standard, *i.e.*, "in the light most favorable to the State," not in arriving at its factual conclusions but in its legal conclusions – that Deputy Maloney in fact read appellant *Miranda* warnings and that re-advisement was not necessary. We have reviewed the trial court's legal conclusions de novo and find no fault with them. Accordingly, we shall affirm the suppression court's denial of appellant's motion to suppress.

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