UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1464

September Term, 2015

PHILLIP MICHAEL JOHNSON

v.

STATE OF MARYLAND

Krauser, C.J.,
Graeff,
Kehoe,

JJ.

Opinion by Graeff, J.

Filed: May 19, 2016

On September 10, 2012, a jury in the Circuit Court for Baltimore City convicted Phillip Johnson, appellant, of attempted first degree murder and related crimes involving a shooting on April 25, 2015.[1] The court sentenced appellant to life on the conviction of attempted murder, and it imposed a sentence of 20 years, consecutive, for the conviction of use of a handgun in the commission of a crime of violence. All other convictions were merged for sentencing purposes.

On appeal,[2] appellant presents one question for this Court's review:

> Did the circuit court err in denying appellant's motion to suppress his statement to law enforcement for lack of voluntariness?

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

FACTUAL AND PROCEDURAL BACKGROUND

Because the sole issue on appeal involves the circuit court's ruling on appellant's motion to suppress the statement he gave to the police, at trial, our discussion of the facts will be limited to the record of the August 27, 2012, suppression hearing. *See Coley v. State*, 215 Md. App. 570, 573 (2013) ("On appeal of a court's decision not to suppress evidence, our review is confined to the record of the suppression hearing."). *Accord Lewis*

[1] In case no. 111136042, Phillip Johnson, appellant, was convicted of attempted first degree murder (Count 1); use of a handgun in the commission of a felony or crime of violence (Count 5); wearing, carrying, or transporting a handgun (Count 6); reckless endangerment (Count 7); and possession of a firearm by a person convicted of a disqualifying crime (Count 8). In case no. 111136043, appellant was convicted of conspiracy to commit murder (Count 1); conspiracy to commit first degree assault (Count 2); conspiracy to use a handgun in the commission of a felony or crime of violence (Count 3); and conspiracy to wear, carry, or transport a handgun (Count 4).

[2] Appellant failed to note a timely appeal, but the circuit court granted him post-conviction relief in the form of a belated appeal.

v. State, 398 Md. 349, 358 (2007) (when this Court reviews a trial court's denial of a motion to suppress, "we ordinarily consider only the information contained in the record of the suppression hearing, and not the trial record").

On April 25, 2011, at approximately 1:35 p.m., Durant Dowery was shot outside his residence in Baltimore, Maryland. Both Mr. Dowery and his girlfriend, who was present at the time of the shooting, subsequently identified appellant, Mr. Dowery's cousin, as one of the shooters.

On April 27, 2011, at approximately 6:30 p.m., appellant was arrested for the attempted murder of Mr. Dowery and brought to the local precinct to be interviewed. At approximately 7:30 p.m., Detective Christopher Wade, a member of the Baltimore City Police Department, provided appellant with an "Explanation and Waiver of Rights Form" and read appellant his *Miranda* rights.[3] When asked whether he was under the influence of drugs or medication, appellant told Detective Wade that he had smoked four marijuana "blunts" at approximately 1:00 p.m. that day.[4] Detective Wade checked the box on the waiver form indicating that appellant was under the influence of drugs. After completing the waiver form, Detective Wade left the interview room.[5]

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

[4] Detective Christopher Wade testified that a "blunt" is cigar containing marijuana. There is no evidence in the record indicating how much marijuana was contained in the four blunts purportedly smoked by appellant.

[5] Although evidence with respect to the timeline of events that occurred at the police station on April 27, 2011, is sparse, Detective Wade testified that, at 7:30 (continued . . .)

When Detective Wade returned to the interview room and began to question appellant about the April 25, 2011, shooting, appellant initially denied that he had any involvement in the incident, or even knew Mr. Dowery. Appellant later admitted that he knew Mr. Dowery, his cousin. The entire interview ended after approximately seven to eight minutes, when appellant asked for a lawyer. The interview was not recorded, but Detective Wade prepared notes later that night describing what had occurred.

Prior to trial, the court addressed the admissibility of appellant's statement to the police.[6] Detective Wade testified that he was a 27-year-veteran of the police department, who had spent time in the narcotics unit. When asked why there are questions about drugs and alcohol on the waiver of rights form, Detective Wade explained that, if someone is "drunk out of his mind or stoned out of his mind," the police would not ask any questions. If, however, the person "appears to be okay, [he would] continue talking to him." Detective Wade stated that his ability to evaluate whether someone is capable of intelligently answering his questions was based on "years of talking to people and interviewing them." He did acknowledge, however, that it was possible that a person could

(. . . continued) p.m., he read appellant the Explanation of Waiver of Rights, that appellant was in "the box" for a while by himself, the "actual speaking portion of the interview" was between seven and eight minutes, and the interview concluded at 9:36 p.m. We infer from this testimony that Detective Wade read appellant his rights at 7:30 p.m., left appellant alone in the interview room for approximately two hours, returned to the interview room at approximately 9:28 p.m., and interviewed appellant until 9:36 p.m.

[6] Although defense counsel stated that he was going to ask to suppress the statement, the issue at other times was addressed as the State's motion to admit the statement. Both parties frame the issue on appeal as whether the court erred in denying appellant's motion to suppress the statement, and we shall do the same.

be too intoxicated to knowingly and intelligently submit himself to police questioning while not exhibiting "outrageous symptoms of intoxication."

Detective Wade testified that he did not stop the interview after appellant disclosed that he had smoked marijuana earlier in the day because appellant stated that he had smoked the marijuana approximately five and a half hours before he was arrested. When asked about appellant's "demeanor," Detective Wade testified that appellant "looked fine," he had no questions about the waiver of rights form, and Detective Wade had no trouble "understanding the words that were coming out of [appellant's] mouth during his statement."

On August 28, 2011, the circuit court issued a Memorandum Opinion addressing the voluntariness of the statement. In determining that the statement was voluntary and admissible, the court stated as follows:

> Being under the influence of drugs does not render a statement involuntary per se, but it is a factor to be considered along with all other applicable circumstances. Id. at 597. In Campbell v. State, 240 Md. 59, 60 (1965), a defendant's confession to breaking and entering into a restaurant was held admissible even though he had been shot during the encounter, and was under sedation at a hospital at the time of the confession. In Bryant v. State, 229 Md. 531, 536 (1962), the defendant's confession was held admissible notwithstanding that he was probably under the influence of heroin at the time of the interview, but appeared normal, responded to questions, and gave detail in his answers.
>
> The responsibility of the trial court, upon hearing a motion relating to a defendant's statement, is to assess whether the confession was voluntarily made under the totality of the circumstances to determine if the issue of voluntariness should be presented to the jury. Id. at 605. If the Court finds the statement was voluntary under the totality of the circumstances, the issue becomes one to be ultimately resolved by a jury. Id.

> The factors to evaluate the voluntariness of a statement clearly indicate the voluntariness of the statement. The Defendant knowingly waived his rights. He was questioned for only seven to eight minutes in Det. Wade's office. There is no suggestion that the statement was the product of threats or coercion by the police officer, that he was physically intimidated, or that he was not timely taken before a District Court Commissioner. Although defense counsel alleges that the four marijuana blunts the Defendant smoked earlier that day rendered his statement involuntary, Det. Wade testified that Johnson appeared lucid throughout the interview and had no questions. A twenty seven year veteran of the police force with experience in narcotics enforcement would be able to determine whether a person was under the influence of a substance which would render them unable to answer questions. If Det. Wade had determined Johnson was in such a state, the interview would not have taken place. Finally, the interview stopped immediately once Johnson requested the assistance of an attorney.

DISCUSSION

Appellant contends that the circuit court erred in admitting his initial statement that he did not know his cousin, which he contends was an incriminating statement because it was evidence of consciousness of guilt. He asserts that the statement was involuntarily given because it was made "while he was under the influence of a substantial amount of marijuana, a mind-altering substance."

The State contends that the court properly denied appellant's motion to suppress the statement. It asserts that, "[u]nder the totality of the circumstances, [appellant's] facially exculpatory statement was freely and voluntarily given because the evidence showed that [he] knew and understood what he was saying." It notes that appellant "showed *no* outward signs of being under the influence [of] drugs, much less that he was incapable of knowing or understanding what he said as a result of his drug use."

In any event, the State argues, even if the court erred in admitting the statement, any error was harmless. It asserts that the statement at issue "was merely cumulative of other statements by [appellant] that were properly admitted at trial."

In reviewing the circuit court's decision on a motion to suppress, we are limited to the facts developed at the hearing, *Hill v. State*, 418 Md. 62, 67 n.1 (2011), viewing the evidence in the light most favorable to the prevailing party on the motion. *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. *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:

> 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).[7] *Accord Hill*, 418 Md. at 75.

[7] Both the Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights protect an accused against self-incrimination. The Fifth Amendment provides, in relevant part, that: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. (continued . . .)

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).[8] In assessing the voluntariness of the statement, courts look to "the totality of the circumstances." *Winder v. State*, 362 Md. 275, 307 (2001). The Maryland appellate courts have "explicated the factors relevant to the 'totality of the circumstances' standard" as including:

> [W]here the interrogation was conducted; its length; who was present; how it was conducted; its content; whether the defendant was given Miranda warnings; the mental and physical condition of the defendant; the age, background, experience, education, character, and intelligence of the defendant; when the defendant was taken before a court commissioner following arrest; and whether the defendant was physically mistreated, [or] physically intimidated or psychologically pressured.

Perez, 168 Md. App. at 268 (quoting *Hof v. State*, 337 Md. 581, 596-97 (1995)). *Accord Hill*, 418 Md. at 75.

Here, appellant contends that "Detective Wade took advantage of the fact that he was in a compromised mental condition due to the use of drugs - something that

(. . . continued) The Fifth Amendment is made applicable to the States through the Fourteenth Amendment. *Maryland v. Shatzer*, 559 U.S. 98, 103 (2010); *Owens v. State*, 399 Md. 388, 427 (2007), *cert. denied*, 552 U.S. 1144 (2008). Article 22 of the Maryland Declaration of Rights similarly reads that "No man ought to be compelled to give evidence against himself in a criminal case." MD. DECL. RIGHTS, art. 22. "Article 22 is deemed to be in *pari materia* with the Fifth Amendment." *Hoey v. State*, 311 Md. 473, 480 n.2 (1988).

[8] Appellant makes no claim of a violation of *Miranda* or of any improper threats, promises, or inducements making the statement involuntary under Maryland common law.

Detective Wade was fully aware of at the outset of the interrogation." This court has addressed, and rejected, similar claims.

In *Harper v. State*, 162 Md. App. 55, 71 (2005), this Court addressed the argument that Harper's inculpatory statement to police was involuntary "because his intoxicated and sleep-deprived state rendered him so mentally impaired that he did not know or understand what he was saying." Harper told a detective that he had "smoked two 'blunts' and consumed one beer sometime before 5:00 p.m. on the day of his arrest." At the point that Harper was interviewed, he had been at the police station for nearly four hours and "gotten some sleep." *Id.* at 84. The detective who questioned Harper stated that, although Harper "was obviously under the influence of something, he seemed to understand what was being said to him and responded appropriately." *Id.*

In addressing Harper's claim of involuntariness, we explained:

> "[M]ental impairment from drugs or alcohol does not *per se* render a confession involuntary." *Hof v. State*, 337 Md. 581, 620 (1995). "[W]hether the defendant was under the influence of a drug at the time of giving the incriminating statement is a factor to be considered in determining the voluntariness of that statement." *Id*. (citing *Townsend v. Sain*, 372 U.S. 293, 307-08 (1963)). "[A] court may admit a confession into evidence if it concludes that it was freely and voluntarily made despite the evidence of mental impairment." *Id*. at 620-21 (further citing *Dempsey v. State*, 277 Md. 134, 154 (1976) (holding that evidence of the defendant's drinking and intoxication was sufficient to raise a jury question as to the voluntariness of his confession); *Campbell v. State*, 240 Md. 59, 64 (1965) (holding that, while defendant probably was under the influence of narcotics at the time of his confession, that "d[id] not of itself make the confession not free and voluntary"); *Bryant v. State*, 229 Md. 531, 535 (1962) (same)). *See also Wiggins v. State*, 235 Md. 97, 101-02 (1964) (upholding trial court's determination that defendant's confession and statement were voluntary although made while defendant was suffering from alcohol withdrawal, and stating that "[t]he crucial question was not whether he was suffering from the

> effects of withdrawal from excessive alcoholic indulgences when he gave them, but whether his disclosures to the police were freely and voluntarily made at a time when he knew and understood what he was saying"); *McCray* [*v. State*,] 122 Md. App. [598,] 616 [(1998)] (upholding trial court's determination that defendant's statement to law enforcement officer was voluntary, despite defendant's intoxication at the time, when evidence presented at the hearing was sufficient to allow the court to conclude that defendant "understood 'what was going on around her'" and "was mentally capable of understanding what she was saying").

Id. at 83-84 (parallel citations omitted).

Noting that Harper's intoxicated mental state was only "one factor in the totality of the circumstances pertaining to voluntariness," *id.* at 85, we held that,

> [g]iven the evidence of his awareness and understanding of what was said during the interview as reflected by his level of recall; that [Harper] was arrested in the late afternoon, not during normal sleeping hours, as he was sitting in a public place; and that his statement was made within five and one-half hours of his arrest, the hearing judge's finding that [Harper] was mentally aware when he made his statement was not clearly erroneous. We are satisfied that [Harper's] mental state at the time of the interrogation was not such as to have, in and of itself, rendered his statement involuntary.

Id.

Here, Detective Wade, who the circuit court found was "a twenty seven year veteran of the police force with experience in narcotics enforcement," testified that, although appellant stated that he had smoked several blunts, Detective Wade continued to question appellant because appellant had smoked approximately five and a half hours prior to his arrest, appellant "looked fine," he had no questions about the waiver of rights form, and Detective Wade had no trouble "understanding the words that were coming out of [appellant's] mouth during his statement." The circuit court, after noting that, given Detective Wade's experience, he "would be able to determine whether a person was under

the influence of a substance which would render them unable to answer questions," found Detective Wade's testimony that appellant "appeared lucid throughout the interview" credible. This finding was not clearly erroneous. The circuit court properly ruled that the statement was not involuntary, and it properly ruled that the statement was admissible in evidence.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.