Circuit Court for Montgomery County
Case No. 125040

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 182

September Term, 2015

CLEMENT REYNOLDS

v.

STATE OF MARYLAND

Woodward, C.J.,
Kehoe,
Nazarian,

JJ.

Opinion by Woodward, C.J.

Filed: November 8, 2017

On April 14, 2014, appellant, Clement Reynolds, was arrested at John F. Kennedy International Airport ("JFK Airport") in New York City in connection with a Montgomery County cold case murder from 2002. Appellant was subsequently charged with first degree murder, conspiracy to commit first degree murder, and use of a handgun in the commission of a crime of violence. On January 13, 2015, after a seven-day jury trial in the Circuit Court for Montgomery County, appellant was convicted of all charges. Appellant received a sentence of life imprisonment for the first degree murder conviction, a concurrent life sentence for conspiracy to commit first degree murder, and a consecutive twenty years imprisonment for the handgun conviction.

Appellant challenges his convictions on appeal and presents four issues for our review, which we have rephrased as questions:[1]

1. Did the trial court err in permitting any portion of either custodial statement to be used at trial and in denying appellant's motion

[1] Appellant's issues, as stated in his brief, are as follows:

1. Whether the trial court erred in permitting any portion of either custodial statement to be introduced to the jury and erred in denying appellant's motion for a mistrial as a result of such instruction[.]

2. Whether the trial court erred in admitting a voicemail that had not been properly authenticated and did not meet an exception to the hearsay rules[.]

3. Whether the trial court erred in denying appellant the opportunity to introduce a statement of the daycare worker and Smith as rehabilitation evidence under Rule 5-616(c)(4)[.]

4. Whether the trial court erred in admitting expert testimony that lacked the necessary foundation that the expert's opinion was formed to a reasonable degree of scientific certainty[.]

for a mistrial as a result of such use?

2. Did the trial court err or abuse its discretion in admitting the voicemail on a cellphone found at the crime scene?

3. Did the trial court err in denying appellant the opportunity to introduce a statement of the daycare worker and Simone Smith as rehabilitation evidence under Rule 5-616(c)(4)?

4. Did the trial court err in admitting on rebuttal the testimony of the State's expert on call mapping and network operations?

For the reasons stated below, we affirm the judgments of the circuit court.

BACKGROUND

On November 18, 2002, Wesley King ("Wesley") was shot and killed outside of his apartment in Silver Spring, Maryland. A warrant for "Kevin Reynolds[,]" also known as "Clement Reynolds[,]" sat unserved from March 25, 2003 until 2014 when it was discovered that appellant was using the name "Dennis Graham." On April 14, 2014, appellant tried to leave the United States using a passport under the name of "Dennis Graham." He was arrested at JFK Airport on the outstanding warrant for Wesley's murder. Upon his arrest, appellant was taken to a New York City precinct and questioned by two cold case detectives from Montgomery County. On April 30, 2014, appellant was taken to Montgomery County where he was interviewed a second time by the same detectives.

On May 29, 2014, appellant was indicted on charges of first degree murder, conspiracy to commit first degree murder, and use of a handgun in the commission of a crime of violence. A motions hearing was held on October 20, 2014, in circuit court. At the hearing, defense counsel sought the suppression of the statements made by appellant to the detectives during interviews that took place on April 14, 2014 ("April 14 interview")

and April 30, 2014 ("April 30 interview"). The trial court ruled that a majority of the April 14 interview was inadmissible for violating *Miranda*, but that the statements were made voluntarily and were thus admissible for impeachment purposes at trial. Regarding the April 30 interview, the State conceded that, although the statements in that interview were made voluntarily, they were obtained in violation of *Miranda*. The trial court disagreed with the State's voluntariness argument and ruled that the statements in the April 30 interview were involuntary and thus inadmissible, except for appellant's answers to pedigree or booking questions.

A seven-day jury trial was conducted in the circuit court from January 5-13, 2015. Wesley's daughter, Nickesha King ("Nickesha"), who was eleven years old at the time of the murder, testified that she was with her father walking outside of their apartment on the evening of November 18, 2002. Wesley and Nickesha were approached by two men dressed in black around 11:00 p.m. One man pulled Nickesha aside while the other man, who she identified as "Clement," shot Wesley. As Wesley fell down, the two men then ran to a white van and drove off. Wesley eventually passed away. Nickesha called her mother and told her that "Clement killed Daddy." At trial, Nickesha identified appellant as the shooter. She stated that she knew appellant, because he had stayed with her family in the summer of 2002. She testified that there was no doubt in her mind that appellant was the man who shot and killed Wesley.

Detective James Drewry testified that he recovered a cell phone at the murder scene, and eventually traced its phone number to a salon located in Brooklyn, New York. The salon was run by a woman named Simone Smith, who was appellant's wife at the time of

the murder. Detective Scott Sube was called by the State to testify as an expert on call mapping and network operations. He presented a detailed chart that tracked which towers registered pings from the subject cell phone on the day of the murder. The chart showed that pings from a call at 5:18 p.m. registered with towers in Manhattan, New York. Subsequent pings from cell phone calls were registered with towers indicating that the phone traveled down the I-95 corridor from New York, through New Jersey and Baltimore. Another chart displayed three cell phone calls being made between 10:10 p.m. and 10:43 p.m. The final call made at 10:43 p.m., just seventeen minutes before the murder occurred, pinged off a Silver Spring tower located .54 miles from the murder scene.

At trial, appellant asserted an alibi defense that he was in New York during the time of the murder, and presented three witnesses, including Smith, who testified that they saw appellant in New York on the night of the murder. Appellant also took the stand and testified in his own defense. He claimed that, when he learned that he was a suspect in the murder, he changed his name from "Clement Reynolds" to "Dennis Graham" and left the area. With his new alias, appellant went undetected until his apprehension at JFK Airport in April 2014. The State used portions of appellant's April 14 interview to impeach him on cross-examination.

On January 13, 2015, appellant was convicted by a jury on all counts. On March 31, 2015, appellant was sentenced to life-imprisonment for first degree murder, life imprisonment for conspiracy to commit first degree murder, to run concurrently with the first sentence, and twenty years imprisonment for use of a handgun in a crime of violence,

to run consecutive to the other sentences with the first five years without the possibility of parole. Appellant noted this appeal on that day.

DISCUSSION

I. Admissibility of Appellant's Custodial Statements

A. Standard of Review

> In reviewing the denial of a motion to suppress, we consider only those relevant facts produced at the suppression hearing that are most favorable to the State as the prevailing party on the motion. While we accept the factual findings of the trial court, unless those findings are clearly erroneous, we make our own independent constitutional appraisal as to whether an action was proper by reviewing the law and applying it to the facts of the case.

Wimbish v. State, 201 Md. App. 239, 249 (2011) (citations and internal quotation marks omitted), *cert. denied*, 424 Md. 293 (2012).

B. April 14 Interview

1. Did the questions asked before appellant was given his *Miranda* warnings violate *Miranda*?

On April 14, 2014, appellant was apprehended and arrested by U.S. Marshals at JFK Airport and was taken to a New York City precinct in Manhattan to meet with two cold case detectives from Montgomery County, Detectives Sean Riley and Frank Colbert. Detective Colbert began the interview by asking appellant the following questions:[2]

Detective Colbert: Dennis, we're up here from Maryland.

Appellant: Could I get a bottle of water?

[2] The transcript of the interview lists Detective Riley as the one conducting the interview, but it was actually Detective Colbert asking the questions, as clarified during the motions hearing.

Detective Colbert:	I don't know if we have any – you guys got any water? Appreciate it. **So we're up here from Maryland and we just want to talk to you about a few things. Do you go by any other names? No? Nothing else? I'm sure you're wondering what the heck is going on, right?** You're getting ready to go out of the country, is that right? Where were you heading to?
Appellant:	(Unintelligible.)
Detective Colbert:	We need to do some housekeeping stuff. So what's your last name?
Appellant:	Graham.
Detective Colbert:	How do you spell that?
Appellant:	G-R-A-H-A-M.
Detective Colbert:	G-R-A-H-A-M? And your first name, spell that for me.
Appellant:	D-E-N-N-I-S.
Detective Colbert:	One N? And do you have a middle name?
Appellant:	(Unintelligible.)
Detective Colbert:	Okay, what's your date of birth?
Appellant:	May 26, '84.
Detective Colbert:	I'm sorry, one more time?
Appellant:	May 26, '84.
Detective Colbert:	Are you in good physical condition[] right now? Any health problems, broken bones or anything like that?

Appellant:	No.
Detective Colbert:	Okay, so how about your sobriety? You good on that?
Appellant:	(Unintelligible.)
Detective Colbert:	And how far did you go in school?
Appellant:	I went to high school.
Detective Colbert:	You went to high school in America? So what grade did you complete? 10th? 11th?
Appellant:	9th.
Detective Colbert:	Today is the 14th. Do you speak any other languages other than English?
Appellant:	No.
Detective Colbert:	Okay, so like I said, you're probably wondering why we're here. **You got any ties to Maryland at all?**
Appellant:	**No.**
Detective Colbert:	**No? You ever been to Maryland?**
Appellant:	**I've been through Maryland.**
Detective Colbert:	Been through Maryland? Okay.

(Emphasis added).

Appellant challenges two questions in particular as being violative of *Miranda*: (1) Did he go by any other name, and (2) Had he ever been to Maryland. Appellant contends that the questions and answers "should have been suppressed from the State's case-in-chief."

The importance of implementing procedural safeguards for defendants in a custodial interrogation was established by the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966).

> In its *Miranda* opinion, the Court concluded that in the context of "custodial interrogation" certain procedural safeguards are necessary to protect a defendant's Fifth and Fourteenth Amendment privilege against compulsory self-incrimination. More specifically, the Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Those safeguards included the now familiar *Miranda* warnings—namely, that the defendant be informed "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires"—or their equivalent.

Rhode Island v. Innis, 446 U.S. 291, 297 (1980) (internal citations omitted).

For *Miranda* warnings to be required, the defendant must be both in custody and subject to an interrogation, *i.e.* custodial interrogation. *See id.* In the instant case, there is no argument that appellant was in custody at the time of the interview, given that he was arrested and transported to a police station. The issue before this Court is whether the questions challenged by appellant on appeal constitute an "interrogation" for *Miranda* purposes. The term "interrogation," for purposes of *Miranda*, refers to "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are *reasonably likely to elicit an incriminating response* from the suspect." *Id.* at 301 (footnotes omitted) (emphasis added).

"Miranda does not apply to 'administrative questioning,' the routine questions asked

of all arrestees who are 'booked' or otherwise processed." *Vines v. State*, 285 Md. 369, 376 (1979). "In order for this exception to apply, however, the questions must be directed toward securing 'simple identification information of the most basic sort;' that is to say, only questions aimed at accumulating 'basic identifying data required for booking and arraignment' fall within this exception." *Hughes v. State*, 346 Md. 80, 94-95 (1997). Typical booking questions include questions about "the suspect's name, address, telephone number, age, date of birth, and similar such pedigree information." *Id.* at 95. "[Q]uestions that are designed to elicit incriminatory admissions do not fall within the narrow routine booking question exception." *Id.* (internal quotation marks omitted). "Even if a question appears innocuous on its face, however, it may be beyond the scope of the routine booking question exception if the officer knows or should know the question is reasonably likely to elicit an incriminating response." *Id.*

The State contends that the two questions at issue fall under the routine booking question exception to *Miranda*. Appellant responds that these questions are not exempt from *Miranda*, because they were "designed to elicit incriminating admissions," and thus they should have been inadmissible in the State's case-in-chief. *See id.* at 100.

The first question challenged by appellant was whether he went by any names other than the one he provided to the police. Upon his arrest, appellant, whose real name is Clement Reynolds, identified himself using his false identity, Dennis Graham. During the interview later that day, Detective Colbert asked: "Do you go by any other names? No? Nothing else?" As established in *Hughes*, questions regarding a suspect's name fall under the routine booking exception. *See id.* at 95. Appellant argues that such exception does

not apply to this particular instance, because Detective Colbert believed appellant was concealing his true identity under an assumed name; therefore, he was trying to elicit an incriminating response when he asked appellant whether he went by any other names.

Even if we assume that the identity question was not within the booking question exception, it was harmless beyond a reasonable doubt because there was no unfair prejudice to the appellant. *See Dorsey v. State*, 276 Md. 638, 648 (1976) ("In those circumstances where a violation of a right protected by the Federal Constitution occurs, the Supreme Court, as the ultimate arbiter in interpreting and implementing constitutional guarantees, has declared such error to be 'harmless,' where, upon a review of the evidence offered the '[C]ourt [is] able to declare a belief that it was harmless beyond a reasonable doubt.'") (citation omitted) (alterations in *Dorsey*). Here, appellant did not give an incriminating response. In fact, according to the transcript of the interview, he did not respond at all to that specific question. Without an incriminating statement, there can be no unfair prejudice or harm. The trial court correctly concluded that there was no *Miranda* violation flowing from the asking of this specific question.

The second question challenged by appellant was Detective Colbert's question concerning whether appellant had ever been to Maryland. Appellant responded, "I've been through Maryland." Appellant contends that the question, "Have you ever been to Maryland?" does not fall under the booking exception to *Miranda*. At the motions hearing, Detective Colbert acknowledged that asking appellant if he had ever been to Maryland was not a booking question, and agreed that he was in the process of interrogating appellant at that point. Based on the fact that appellant was being questioned about a murder occurring

in Maryland, appellant argues that the question was purposefully posed to elicit an incriminating response. Even if true, appellant did not give an incriminating statement in response to the second question. Appellant simply said, "I've been through Maryland." His statement does not connect him to the crime in any meaningful way and instead suggests that he had not spent significant time in Maryland, because he had only "been through" it. With no incriminating response, there is no harm for this Court to remedy. *See Dorsey*, 276 Md. at 648.

2. Is this a *Seibert* Issue?

Appellant contends that statements made after he was given his *Miranda* warnings on April 14, but before he invoked his right to silence, should have been excluded in accordance with the United States Supreme Court's *Missouri v. Seibert* decision. 542 U.S. 600 (2004). In *Missouri v. Seibert*, the suspect was interrogated for 30-40 minutes until she confessed, given a short break, read her *Miranda* rights where a waiver was signed by her, and interrogated for a second time that elicited the same confession as previously obtained. *Id.* at 604-05. The trial court suppressed the prewarning statement but admitted the responses given after the *Miranda* recitation. *Id.* at 606. The Supreme Court held that the police tactics undermined *Miranda* and that the second confession was inadmissible based on

> the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615.

In *Cooper v. State*, this Court followed *Seibert* by holding that, if a deliberate two-step, question-first interrogation technique is used by a police officer, post-*Miranda*-warning statements that are related to the substance of pre-warning statements must be excluded unless curative measures are taken before the post-warning statement is made. 163 Md. App. 70, 96 (2005). *See also Seibert*, 542 U.S. at 602, 621.

Despite appellant's assertions to the contrary, this is not a *Seibert* case. There was no two-step interrogation technique used to undermine *Miranda*. The detective did not attempt to elicit a confession to the murder before advising appellant of his *Miranda* rights. Moreover, appellant did not give any statements regarding the offense prior to being given the *Miranda* warnings. Therefore, the court did not err in admitting statements made post-*Miranda* and pre-invocation of silence.

3. Was the statement involuntary?

"The trial court's determination regarding whether a confession was made voluntarily is a mixed question of law and fact. An appellate court undertakes a *de novo* review of the trial judge's ultimate determination on the issue of voluntariness." *Knight v. State*, 381 Md. 517, 535 (2004) (citations and internal quotation marks omitted).

Statements given in violation of *Miranda* are still admissible for impeachment purposes. *See Harris v. New York*, 401 U.S. 222, 226 (1971). Although the evidence cannot be used in the State's case-in-chief, "the shield provided by Miranda is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances." *Oregon v. Hass*, 420 U.S. 714, 722

(1975). In the instant case, the trial court ruled that the majority of the statements made during the April 14 interview were inadmissible due to appellant's invocation of his right to silence, which was not heeded by the detectives. Some of the statements made during the April 14 interview were, however, used to impeach appellant when he testified inconsistently at trial. On appeal, appellant contends that his statements should not have been admissible for impeachment purposes, because they were involuntary under Federal and State Constitutional law, as well as under Maryland common law.

a. Were the statements involuntary under Federal and State Constitutional law?

Except for the two questions regarding appellant's name and connections to Maryland, the interview began with Detective Colbert going through a series of booking questions. Detective Colbert then advised appellant of his *Miranda* rights, and appellant indicated that he understood them. From that point, Detective Colbert proceeded to ask questions about appellant's true identity, specifically if he was "Kevin Reynolds." When appellant continued to deny that his name was "Kevin Reynolds," Detective Colbert informed him that they had overwhelming evidence that appellant had committed a murder in 2002. Detective Colbert told appellant that this was his opportunity to talk, to which appellant replied, "There's nothing I have to say." In response to that, Detective Colbert asked, "You don't know nothing about it?" At the motions hearing, the trial court found appellant's statement, "There's nothing I have to say," to be a clear and unambiguous invocation of his right to remain silent. The court found that, although all statements made up to that point were admissible, the rest of the interview was in violation of *Miranda* and should be suppressed.

Detective Colbert testified at the motions hearing that he interpreted appellant's responses as not invoking his right to silence. Instead, Detective Colbert understood appellant's statement, "There's nothing I have to say," as an attempt "to spin his story and to get [Detective Colbert] to believe something that wasn't what [he] believed" and "divert [the conversation] to a different topic." Detective Colbert further explained that after the second invocation, he felt appellant "was not trying to say I don't want to talk to you because he would talk to me on other topics[.]" According to Detective Colbert, he never felt that appellant was saying that he did not want to talk at all. With that mindset, Detective Colbert continued to question appellant. The trial court noted during the hearing that Detective Colbert "persisted in asking questions . . . because he didn't believe it was an unambiguous request to cease questioning."

From the point of the initial invocation of appellant's right to silence, the transcript continues for another nineteen pages of questioning before the detective concluded the interview.[3] During the continued questioning, Detective Colbert reiterated that there was overwhelming evidence against appellant, to which appellant said, "There's nothing I have to say." Detective Colbert showed appellant photographs of appellant and Wesley together, and appellant continued to deny his identity, knowing Wesley, or shooting Wesley. Detective Colbert proceeded to layout the evidence that pointed to appellant as the perpetrator of the murder, and appellant continued to deny involvement. Detective Colbert then talked through what he called hypothetical scenarios, which consisted of the

[3] There is no timestamp specifying how long the interview was. The transcript of the entire interview is only twenty-four pages.

actual evidence in the case. Again appellant stated, "I don't know. Nothing else to say." When Detective Colbert switched to asking appellant about his job and where he lived, appellant began to answer the questions. Detective Colbert finished the interview with a series of questions about whether appellant was or knew "Clement," if he knew Wesley, if he ever dealt drugs, if he knew Simone Smith, and if he was in Maryland in November 2002. Appellant answered "No" to all of those questions.

After reviewing the transcript of the interrogation, the trial court concluded:

> As for the bad faith issue that's been raised by the defense with respect to the April 14 [interview], the Court finds that there's nothing to indicate that there was any bad faith. The detective is a cold case detective. The detective is called out of an Orioles game because he's advised that there's somebody that's been arrested in New York City on an old case. And as he indicated, he was on his way up to New York, called out of an Orioles game, and at that time of course, he had no way of knowing that they would be swept in the series championship . . . . In any event, the fact of the matter is, he had to drop everything he was doing even though he was off, find somebody to drive him up there. And as he said, as he was driving up there he's going over the case to see what the evidence is against this particular individual who is identifying himself not as Kevin Reynolds, or Clement Reynolds, [f]or whom the warrant has been issued. Rather, he's identifying himself as Dennis Graham, and so the detective may believe that he's attempting to evade or avoid being arrested, and he certainly has a right to inquire about that.
>
> Now, the detective says when [appellant] says, there's nothing I have to say, he asks you don't know nothing about it. We plugged that in with respect to Detective Colbert knowing that he's denying that he's even Kevin Reynolds, and **I just don't find in the context of this particular situation that Detective Colbert is in any way intentionally violating his rights as a matter of bad faith.** I just don't believe that he did that and I think that his, his attempts to continue to question [appellant] about this are legitimate attempts to see if he can bring something out of [appellant]. And I don't believe he is to, to find out whether or not he may have some leads. Is he Clement? Page 9, "Say your name was Clement in 2002, say your

> name was Clement Reynolds, was Clement Reynolds in Maryland shooting somebody?" Mr. Graham, "I don't know that person. You don't know that name, all right. I'm not going to give up on you. Let's just keep rolling for a few minutes, okay. Let me tell you some of the evidence that's in this case."
>
> **I don't find, I don't find in light of the entire transcript of this case, and I don't find in light of [appellant's] answers, that there's anything involuntary about the statement. I do find it was voluntarily made, even though there [w]as indeed a technical violation of Miranda, and I believe and rule that the statement from April 14th, 2014, can be used for impeachment purposes.**

(Emphasis added).

A voluntary statement is a statement that is the product of free and rational choice. *See Mincey v. Arizona*, 437 U.S. 385, 401 (1978). To determine whether a statement is the product of free and rational choice, a court must consider the "totality of the circumstances." *Greenwald v. Wisconsin*, 390 U.S. 519, 521 (1968). Determination of whether a statement is involuntary "requires careful evaluation of all the circumstances of the interrogation." *Mincey,* 437 U.S. at 401. Involuntary statements cannot be used at trial for any purpose, including impeachment, because doing so would violate the defendant's due process rights. *See Mincey* 437 U.S. at 397-98. This Court has stated:

> [T]raditional involuntariness invariably contemplates a degree of malevolence and coercive influence that goes beyond the presumptive coercion of custodial interrogation, not something that falls short of it. Thus, for instance, a violation of only *Miranda*'s implementing rule—a "mere *Miranda*" violation—although calling for the suppression of the confession on the merits of guilt or innocence, does not trigger second-level suppression under the "fruit of the poisonous tree" doctrine, or preclude the use of the *Miranda*-violative statement for impeachment purposes. When the unconstitutional cut, on the other hand, goes deep enough to touch the raw central nerve of the undergirding constitutional guarantee

> itself, the offending statement may not be used for any purpose at all.

Reynolds v. State, 88 Md. App. 197, 217 (1991), *aff'd*, 327 Md. 494 (1992) (internal citations omitted).

Appellant argues that the statements made during the April 14 interview were involuntary under federal and state constitutional law because of the actions of the detective during the interview. Specifically, appellant asserts that Detective Colbert acted in bad faith by purposefully disregarding appellant's multiple invocations of silence.

In reviewing the denial of a motion to suppress, "we accept the factual findings of the trial court, unless those findings are clearly erroneous, [but] make our own independent constitutional appraisal as to whether an action was proper by reviewing the law and applying it to the facts of the case." *Wimbish v. State*, 201 Md. App. 239, 249 (2011) (internal quotation marks omitted), *cert. denied*, 424 Md. 293 (2012).

The transcript of the interview, coupled with Detective Colbert's testimony about his subjective beliefs regarding the interview, support the trial court's finding that there was no bad faith on the part of Detective Colbert, and conclusion that the statement was voluntary. We agree with the State that "Detective Colbert's honest belief that [appellant] was not saying that he did not want to speak with him at all, coupled with [appellant's] willingness to speak with the detectives on other topics" supports this conclusion. The trial court found Detective Colbert's testimony to be credible. The trial court determined that Detective Colbert did not view appellant's statements as invocations of his right to silence, and thus he did not intentionally disregard appellant's rights. Detective Colbert's conduct

was not the "malevolence and coercive influence" necessary for an involuntary statement. *See Reynolds*, 88 Md. App. at 217. He held a brief interview with appellant devoid of any traditional coercive tactics.

Furthermore, appellant's answers and demeanor throughout the interview support a finding of voluntariness. Detective Colbert even commented during the interrogation on how calm and collected appellant appeared to be in the face of such a serious charge, saying to appellant, "I'm telling you as a person that you're being charged with a murder that carries the death penalty in Maryland and you're just as calm and as cool as can be." Appellant also never wavered in his answers throughout the entire interview and stuck to his story that he was Dennis Graham. As appropriately noted by the State, appellant "never made a confession and his will clearly was not overborne."

b. Involuntary under Maryland Common Law?

Appellant contends that the statements made during the April 14 interview were also involuntary under Maryland common law, because the detective made improper promises that appellant relied upon in making his statements. Inculpatory statements must be "freely and voluntarily made" and "the product of neither a promise nor a threat." *Hillard v. State*, 286 Md. 145, 151 (1979). "'[I]f an accused is told, or it is implied, that making an inculpatory statement will be to his advantage, in that he will be given help or some special consideration, and he makes remarks in reliance on that inducement, his declaration will be considered to have been involuntarily made and therefore inadmissible.'" *Williams v. State*, 445 Md. 452, 478 (2015) (quoting *Hillard*, 286 Md. at 153). There is a two-pronged test for involuntariness by inducement. *Williams*, 445 Md. at 478. "'We look first to see

if the police made a threat, promise, or inducement. If that prong is satisfied, we look next to see whether there was a nexus between the promise or inducement and the defendant's confession.'" *Id.* (quoting *State v. Tolbert*, 381 Md. 539, 558, *cert. denied*, 543 U.S. 852 (2004)).

Appellant claims that Detective Colbert made improper promises to appellant. Appellant specifically points to the following statements made by Detective Colbert: "So honesty goes a long way with me personally. And you know, also it will go a long way with you as a person, you know, with your character." "[I]f we get through all this and you're not this guy, then it's a good night for you." "[I]t's your time to shine right now. It's your time to speak up about this." Contrary to appellant's assertions, these were not promises or inducements. As the Court of Appeals held in *Williams*, "an appeal to the inner psychological pressure of conscience to tell the truth does not constitute coercion in the legal sense." *Id.* at 480. Therefore, Detective Colbert's appeal to appellant to tell the truth does not constitute a promise or inducement.

Detective Colbert also tried to downplay the severity of the situation by suggesting that the murder may have been a mistake. During the interview, Detective Colbert stated: "So not only do you kill a man that was probably it probably turns out that it was a mistake anyway, because you and him were boys at one time . . . you kill a man probably by accident[.]" This too was not a promise or inducement. In *Williams*, the Court of Appeals held that a detective's characterization of a murder as a robbery gone bad was not an inducement. *Id.* at 481. The Court reasoned that the "presentment of two different ways of characterizing the situation was not an inducement," and that the detective was "merely

advising appellant of the possible legal consequences." *Id.* The same reasoning applies here. Detective Colbert's characterization of the crime as a mistake was not an inducement for appellant to confess.

The second prong of involuntariness is not met as well, because appellant never responded with an incriminating statement. Throughout the interview, appellant maintained his false identity and lack of knowledge about the murder. Because the involuntariness test requires a nexus between the inducement and an inculpatory statement, and there was no such statement here, the second prong cannot be satisfied. Therefore, appellant's statements made during the April 14 interview were not involuntary under Maryland common law.

4. Should the trial court have granted appellant's motion for mistrial?

"Generally, appellate courts review the denial of a motion for a mistrial under the abuse of discretion standard[.]" *Dillard v. State*, 415 Md. 445, 454 (2010). When appellant took the stand at trial, the State used parts of the April 14 interview for impeachment purposes during cross-examination. Defense counsel objected and moved for a mistrial, arguing that the State was improperly using appellant's post-arrest silence against him. The trial court denied the motion.

"Evidence of a person's silence is generally inadmissible[.]" *Grier v. State*, 351 Md. 241, 252 (1998). With regard to silence after *Miranda* warnings have been given, the Supreme Court has said:

> Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required

> to advise the person arrested. Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. **In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.**

Doyle v. Ohio, 426 U.S. 610, 617-18 (1976) (emphasis added) (citations omitted).

When he took the stand at trial, appellant presented an alibi defense that he was in New York at the time of the murder. Appellant claimed that he met with Caroline George about remodeling her basement, after which he returned home where his wife, Simone Smith, and a live-in babysitter, Karlene Gill, both resided. Appellant also testified that he began using the alias "Dennis Graham" shortly after the murder in 2002; that he was a good friend of Wesley; and that he traveled to Maryland regularly to transport marijuana shipments to Montgomery County.

During its cross-examination of appellant, the State impeached appellant repeatedly with statements he made during the April 14 interview. Such impeachment included the following:

[STATE]:	And you would agree with me that actually what happened in this case is horrific?
[APPELLANT]:	It is horrific.
[STATE]:	And that shooting and killing someone, whether you know the person or not, in front of an 11[-]year[-]old is horrific, correct?
[APPELLANT]:	It is horrific.

[STATE]: But that's not the answer you gave to the police after you [were] arrested, when they asked you about this, is it?

* * *

[STATE]: Isn't it true when you met with the police, you denied even knowing Wesley King?

[APPELLANT]: That's true.

[STATE]: And they show[ed] a picture of him to you, and you said, you didn't know who that was?

* * *

[APPELLANT]: Yes, I did.

[STATE]: [A]nd they showed a picture of you, actually, and you denied that that was you?

[APPELLANT]: Yes, I did.

* * *

[STATE]: [Y]ou said in the interview that in November of 2002, you were in the Virgin Islands, correct?

[APPELLANT]: That's correct.

[STATE]: So, that was a lie?

[APPELLANT]: That was --

* * *

[STATE]: And didn't you also tell the police that you had never been to Maryland more than passing through?

[APPELLANT]: Yes, I did.

[STATE]: So, you didn't tell them what you're telling the jury today, that Wesley King was your great friend and you regularly saw him and shared an apartment with him?

* * *

[APPELLANT]: No, I was uncertain the capacity of Dennis Graham at that time.

[STATE]: So, you were pretending to be somebody else to the police and hoping you could convince them of that?

[APPELLANT]: Right, I was hoping to preserve the identity of Dennis Graham. So, I was answering those questions with that in mind.

* * *

[STATE]: And you told the police that when you first came to the United States, that you worked selling cars with Byron Matamora [ ], correct?

* * *

[APPELLANT]: Yes.

[STATE]: Now Byron Dwyer?

[APPELLANT]: Correct.

[STATE]: Are there two Byrons?

[APPELLANT]: No.

[STATE]: So, which is his correct last name?

[APPELLANT]: His name is Dwyer.

[STATE]: And you didn't work selling cars with him, correct?

[APPELLANT]: I helped him when he was, when I came back to the States in '03, and I was staying with him out in Jersey. I used to help him out, selling cars.

[STATE]: And you also told the police that you were living with a girl named Rose, correct?

[APPELLANT]: Correct.

* * *

[STATE]: And when asked what Ros[e]'s last name was, you said Lopez, correct?

* * *

[APPELLANT]: Correct.

[STATE]: Is Rose Lopez a real person?

[APPELLANT]: Yes, she is.

[STATE]: Who is Rose Lopez?

[APPELLANT]: She was a neighbor of Byron Dwyer that I used to see back then.

[STATE]: And is it someone you've had a relationship with, or was that a lie, too?

[APPELLANT]: I, we had relationships, yes.

[STATE]: **So, instead of telling the police about Caroline George, or Karlene Gill, who could truly alibi you, you started naming Rose Lopez and Byron Matamora, who isn't even a real person?**

* * *

[APPELLANT]: Yes.

[STATE]:	**And just so we're clear, you never said anything about Caroline George or Karlene Gill?**
	* * *
[APPELLANT]:	Like I said, at that time, I was preserving my identity as Dennis Graham. So, I was answering in the capacity of Dennis Graham.
[STATE]:	Because you were hoping the Dennis Graham cover would work first, correct?
[APPELLANT]:	Correct.
[STATE]:	And when the Dennis Graham cover fell through, and we realized that you aren't Dennis Graham, now you create the second cover, which is the alibi, correct?
[APPELLANT]:	I did not create the second cover.
[STATE]:	**But you agree, you've never mentioned the alibi to the police?**

(Emphasis added).

Appellant then objected and moved for a mistrial. Appellant argued that a mistrial should be granted, because the State questioned him about why he did not mention certain alibi witnesses during the April 14 interview. Appellant claimed that such questions constituted the use of silence against him.[4] The State countered that it was not using his silence against him, but rather was impeaching him with the differences between what he

[4] Appellant further argued that the State's lead up questions were also prejudicial for the same reason.

said during the interview and his alibi testimony at trial. The trial court denied the motion, but instructed the State to stay away from the alibi question.

We agree with the State that appellant "has mistakenly applied the prohibition against using post-arrest *silence* as evidence of guilt with the permissible use of voluntary, *inconsistent statements* to impeach a defendant who testifies at trial." Appellant relies primarily on *Grier v. State* for his argument that the mistrial should have been granted. 351 Md. 241 (1998). In *Grier*, the Court of Appeals rejected the proposition that a person's failure to come forward and tell the police his or her version of events was admissible as substantive evidence of guilt. *Id.* at 253-54. The Court found that "such evidence carries little or no probative value" and "is substantially outweighed by the danger of unfair prejudice." *Id.* Unlike this case, however, *Grier* involved the admission of pre-arrest and post-arrest silence as substantive evidence of guilt in a case where Grier did not testify, and the Court of Appeals held that the use of Grier's silence violated due process and was fundamentally unfair. *Id.* at 245, 248, 252-58.

The majority of the State's questions to appellant in this case were classic impeachment, relating to what appellant *said* during the April 14 interview and how it differed from his trial testimony. During the April 14 interview, appellant denied being "Clement Reynolds" and instead claimed to be Dennis Graham; denied knowing the victim; claimed to be in the Virgin Islands at the time of the murder; claimed to have only "been through" Maryland in the past; said he worked with Byron Matamora; and stated that he was in a relationship with Rose Lopez at the time of the murder. At trial, appellant admitted that he was not "Dennis Graham"; worked with Byron Dwyer and that Bryon

Matamora did not exist; was married to Simone Smith at that time; claimed he was in New York instead of the Virgin Islands at the time of the murder; and conceded that he never mentioned Caroline George or Karlene Gill as part of his alibi. By pointing out these discrepancies, the State was not using appellant's silence against him, but instead, was using appellant's own words from the April 14 interview to contradict his in court testimony.

Furthermore, only the questions relating to appellant's alibi witnesses touched on what appellant *did not say* to the detectives. Specifically, the State asked appellant, "And just so we're clear, you never said anything about Caroline George or Karlene Gill?" Although the State was highlighting that appellant did not mention his alibi witnesses during his pre-trial interrogation, the State was not using appellant's silence against him. Instead, the State was contrasting the alibi witnesses named by appellant at trial, George and Gill, with the alibi witnesses that he mentioned in his April 14 interview, Matamora and Lopez. The question focused on the difference in what appellant said in the interview from what he said at trial, not his silence.

The State later asked appellant, "But you agree, you've never mentioned the alibi to the police?" This question also raises the issue of silence; however, appellant did not answer the question. When an objection was made by defense counsel, the trial court told the State to move away from the question, which the State did. Therefore, any potential harm was avoided. We thus see no error by the trial court.

C. April 30 Interview

Detective Colbert conducted a second interview with appellant on April 30, 2014. At the beginning of the interview, appellant immediately invoked his right to counsel, stating: "I would love to talk to counsel before we talk. I'd like to exercise that right." Despite this invocation, Detective Colbert proceeded with the interview and attempted to elicit information about appellant's general background. After appellant repeatedly invoked his right to counsel, Detective Colbert made contact with appellant's lawyer by phone. Appellant was given the phone and told his lawyer that the detectives wanted his background information. Detective Colbert also talked to the lawyer and told him that he was trying to get appellant's background information. After both appellant and Detective Colbert finished talking with appellant's lawyer, Detective Colbert proceeded to ask appellant again for his background information. At that point, appellant answered the detective's questions. Detective Colbert then read appellant his *Miranda* rights. When Detective Colbert tried to interrogate appellant further, appellant repeatedly asserted his right to counsel. Detective Colbert ignored the requests and continued with the interview.

At the hearing on appellant's motion to suppress the statement, Detective Colbert admitted that he purposefully ignored appellant's repeated requests for counsel in an attempt to obtain information to be used either in the investigation or for impeachment purposes. The trial court found Detective Colbert's conduct to be egregious and ruled that the statement was involuntary and inadmissible. The court, however, did find that the general booking information was still admissible.

Detective Colbert testified that the booking questions were asked as they were trying to fill out the processing form that would be used to place appellant in jail. As detailed above, Detective Colbert made contact with appellant's attorney and explained the situation to him before asking appellant the booking questions. Routine booking questions fall outside the protections of *Miranda* and are admissible even when a suspect's *Miranda* rights are violated. *See Pennsylvania v. Muniz*, 496 U.S. 582, 601-02 (1990). Thus the trial court did not err in finding that those statements were admissible. More importantly, the State never used the booking information from the April 30 interview at trial. Therefore, there is no harm to appellant to be addressed.

II. Voicemail Evidence

At trial, the State introduced and played a recording of a voicemail that was left on the cell phone recovered at the murder scene. The voicemail was from a woman, Sharina, asking to speak with appellant. The recording included a timestamp of 11:08 a.m. on November 18, 2002, the day of the murder, and included the following message:

> Hello [Clement], this is Sharina. I need to talk to you. This is very important. Let me talk to you. Thank you. (Unintelligible [ ]) you can call me back. (Unintelligible [ ]) around 3 o'clock, then call me back. Okay? All right.

On appeal, appellant argues that admitting the voicemail in this case was error on the part of the trial court, because the voicemail was not properly authenticated and contained inadmissible hearsay.

A. Was the voicemail properly authenticated?

The general provision of Maryland Rule 5-901(a) states: "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." "Whether there is sufficient authenticating evidence to admit [ ] proffered [evidence] is a preliminary question to be decided by the court" that is reviewed for abuse of discretion. *Carpenter v. State*, 196 Md. App. 212, 230 (2010) (internal quotation marks and citation omitted).

Appellant contends that "there was no evidence presented or testimony by a witness with knowledge that demonstrated definitively that this voicemail was accessed through a phone number and passcode linked with the target phone number, or what the process was to obtain it." We disagree and hold that the trial court did not abuse its discretion by ruling that the voicemail at issue was sufficiently authenticated.

The voicemail was authenticated through the testimony of two State witnesses, Detective Kevin Pugh and Ricardo Leal, Sprint's Custodian of Records. Detective Pugh testified that he prepared the search warrant for the voicemail. He explained that back in 2002 voicemails were saved on the telephone company's servers; therefore, he needed Sprint to provide an access number to reach the server and a passcode to access the specific mailbox. Sprint responded to the warrant by providing Detective Pugh with those two numbers. He accessed the mailbox and recorded the voicemail on a cassette. Detective Pugh's notes detailing the steps that he took to obtain the voicemail were also entered into evidence.

Leal testified as Sprint's Custodian of Records. Leal stated that he started working at Sprint as a subpoena analyst and confirmed that the warrant in this case was typical of

the demands that he regularly received. He also confirmed that Detective Pugh's testimony regarding the procedure for accessing a voicemail in 2002, which was a combination of an access number and a passcode, was accurate and that Sprint's regular practice was to provide both of those numbers in response to a search warrant. Although Leal was not the individual who responded to this specific search warrant in 2002, after consulting with his staff in his position as custodian of records, he was able to confirm that Sprint's records had a case number for this search warrant and that Sprint had complied with the warrant by providing the codes to the authorities.

The State correctly summarized the above evidence: "The combined testimony of Detective Pugh and Leal was that a search warrant was issued for the voicemail, it was received by Sprint, Sprint provided the access number and passcode in the regular course of business, and Detective Pugh entered the access number and passcode provided by Sprint to access the voicemail." Accordingly, there was sufficient evidence for the trial court to conclude that the voicemail was what the State claimed it to be and thus was properly authenticated.

B. Was the voicemail inadmissible hearsay?

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). "[H]earsay is not admissible" unless an exception to the hearsay rule set forth in the rules applies or unless permitted by applicable constitutional provisions or statutes. Md. Rule 5-802. One of those exceptions is what is referred to as the "residual" exception found in Rule 5-803(b)(24).

Maryland Rule 5-803(b)(24), the residual exception, states:

> Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

"[A] circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. Whether evidence is hearsay is an issue of law reviewed *de novo*." *Bernadyn v. State*, 390 Md. 1, 8 (2005). "Moreover . . . to ensure that such decisions [regarding the residual exception] by trial judges receive meaningful appellate review, thereby assuring that uniformity and predictability are present in this new and developing area of the law, we will apply a *de novo* review of whether the trial judge erred as a matter of law." *Walker v. State*, 107 Md. App. 502, 517-18 (1995) (footnote omitted), *aff'd*, 345 Md. 293 (1997).

"Neither the Rule nor case law, however, require[ ] that a trial court procedurally make findings as to each factor of the Rule in excluding the admission of a hearsay statement. Rather, the Rule and case law mandate *only* that a trial court procedurally address each factor when it *admits* the hearsay statement." *Wood v. State*, 209 Md. App. 246, 331 (2012) (emphasis added), *aff'd on other grounds*, 440 Md. 276 (2013).

Accordingly, the trial court must make five findings with regard to admissibility of evidence under the residual exception. "The first prerequisite to admissibility under the Maryland residual exception, and the one that is determinative in this case, is that there be 'exceptional circumstances.'" *Walker*, 345 Md. at 325. "Exceptional circumstances" are "new and presently unanticipated situations[.]" *Id.* Second, "the statement must not be specifically covered by any of the other exceptions[.]" *Id.* at 318. Third, "it must have "equivalent circumstantial guarantees of trustworthiness[.]" *Id.* at 319. The Court in *Walker* noted that the language of "exceptional circumstances" must not be ignored and that "[t]he fact that the evidence at issue may have equivalent, or even superior, circumstantial guarantees of trustworthiness does not alone suffice to warrant admission under the Maryland residual exception." *Id.* at 326. Fourth, the court must determine that:

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Md. Rule 5-803(b)(24); *Walker*, 345 Md. at 319. Fifth, and finally, "the proponent of the statement has given the requisite advance notice of its intention to use the statement[.]" 345 Md. at 319.

The trial court stated that the voicemail was hearsay, but determined that it fell within the residual hearsay exception. The court stated: "I think [the voicemail] falls into an exception of the hearsay rule, and I also think that it's reliable[,]" and that "it seems to me it's far more reliable than the average amount of hearsay. And I think there's a catch-

all exception to the hearsay rule, anyway, that says if something's inherently reliable, you know, then it's an exception anyway." Appellant argued at trial that the requirements of the residual exception were not met, while the State argued that the voicemail was not hearsay, because it was being offered for "the effect on the hearer."

On appeal to this Court, appellant argues that the voicemail was inadmissible hearsay and did not fall under the residual exception. The State counters that the voicemail was not hearsay; rather, it "was circumstantial crime scene evidence."

We agree with appellant that the requirements of the residual exception to the hearsay rule were not met here. Although the trial court found the voicemail to be "inherently reliable[,]" the court did not make any of the five findings required by Rule 5-803(b)(24) for the voicemail to be admissible under the residual exception. For that reason alone, we determine that the trial court erred.

Nonetheless, we conclude that the voicemail was admissible as non-hearsay. As previously stated, Detective Drewry recovered the subject cell phone at the scene of the murder. The truth of the matter asserted by the State at trial was not that Sharina called appellant and stated the words contained in the voicemail; rather, the State's intended use was to show, circumstantially, that appellant was the owner or possessor of the phone and that appellant was present at the time and place of the murder. Such circumstantial evidence was relevant, because appellant argued at trial that he was robbed of the phone on November 15, 2002, making it impossible that he was in possession of the phone at the time and location of the murder.

This Court's recent opinion in *Darling v. State* addressed the same issue as presented here. 232 Md. App. 430, *cert. denied*, 454 Md. 655 (2017). In *Darling*, a cell phone service receipt was recovered from the police search of a van driven by the appellant at the time of his arrest. *Id.* at 441-42. The cell phone service "receipt memorialize[d] a transaction on July 25, 2014, in which $30 worth of minutes was bought for cell phone number 760-774-5871." *Id.* at 457. Cell phone records for such cell phone number "show[ed] that between 4:07 a.m. and 4:50 a.m. [on the day after the victim was kidnapped], that cell phone was in the area where [the victim's] body was later found." *Id.* at 444. This Court determined that the cell phone receipt was not inadmissible hearsay, because it was not used "to assert that [the] appellant's phone number was the number on the receipt. Rather, the State used the receipt to link [the] appellant to the phone to establish [the] appellant's whereabouts and cell communications with [a State's eyewitness] before, during, and after the murder." *Id.* at 460. This Court concluded that, "[b]ecause there was no assertion 'to prove the truth' of any matter contained in the receipt, the receipt was properly admitted into evidence as non-hearsay evidence."[5] *Id.* at 460.

Just like the cell phone receipt in *Darling* was used to link the appellant to the cell phone, the voicemail in this case was used to link appellant to the cell phone found at the murder scene. The cell phone records in *Darling* indicated that the appellant was in the vicinity of the victim's body the day after the victim was kidnapped, whereas here, the

[5] We also held that appellant did not preserve this issue for appellate review, "because he did not object to the admission of the receipt at trial." *Darling v. State*, 232 Md. App. 430, 457 (2017).

abandoned cell phone with its voicemail indicated that appellant was present at the crime scene at the time and place of the murder.[6] There was no assertion to prove the truth of any matter contained in the voicemail found on the cell phone recovered at the crime scene. The voicemail was used as circumstantial evidence to link appellant to the cell phone. Thus the voicemail was not hearsay evidence.

For the foregoing reasons, we conclude that, although the trial court erred by admitting the voicemail under the residual exception to the rule against hearsay, such voicemail was circumstantial crime scene evidence and thus non-hearsay evidence. Accordingly, its admission was not error.

III. Rehabilitation Evidence

At trial, the State argued that appellant picked up his daughter from her day care center in New York at approximately 5:00 p.m. on the day of the murder. Appellant testified, however, that he picked his daughter up at 6:00 p.m. that day. The time difference was important, because the cell phone found at the murder scene was tracked to the Holland Tunnel in New York at 5:40 p.m. Appellant argues in this appeal that, if he picked up his daughter at 6:00 p.m., he "could not have been the [one] with the [cell] phone" in the Holland Tunnel at 5:40 p.m. Therefore, according to appellant, someone else was in possession of the cell phone that was tracked from New York to a location near the scene of the murder in Montgomery County.

[6] As stated above, the evidence at trial also showed that (1) the cell phone's number belonged to a salon in New York City run by appellant's wife; and (2) the cell phone traveled from New York City to the murder scene in Maryland on the day of the crime.

At trial, appellant attempted to elicit from Detective Drewry that, when he spoke to Simone Smith and a day care worker in 2002, they confirmed appellant's story. The trial court prohibited the question on hearsay grounds. Appellant contends that the court erred by excluding testimony that was being offered as rehabilitation evidence under Maryland Rule 5-616(c)(4),[7] specifically that Smith and the day care worker told Detective Drewry that appellant picked his daughter up from day care around 5:30-6:00 p.m. We do not reach the merits of this issue, because it has not been preserved for appeal.[8]

Detective Drewry testified twice at trial, once in the State's case-in-chief and again in the State's rebuttal case. During the State's case-in-chief, Detective Drewry testified on cross-examination that he did speak with Simone Smith and day care personnel when he went to New York in 2002. The court did not permit defense counsel to ask Detective Drewry if Smith had "confirmed that [appellant] had picked his daughter up" on the day of the murder. As pointed out by the State, "defense counsel did not proffer that he wanted to elicit from the detective that Smith told the officers *when* [appellant] picked up their daughter."

Detective Drewry was called to testify in the State's rebuttal case solely to provide the address of the day care center, which was used to show that appellant's cell phone

[7] Maryland Rule 5-616(c) provides in part that "[a] witness whose credibility has been attacked may be rehabilitated by . . . [o]ther evidence that the court finds relevant for the purpose of rehabilitation."

[8] Maryland Rule 8-131(a) states in part: "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . ."

pinged off of cell towers in the vicinity of the day care center before it traveled from New York to Maryland. Such evidence was relevant to rebut appellant's claim that he had nothing to do with the cell phone found at the murder scene. On cross-examination, defense counsel asked: "Detective Drewry, when you went [to the day care center], it was for purposes of confirming that [appellant] had picked up his daughter at day care, as [ ] Smith had told you, correct?" The State objected and the trial court sustained the objection. During the ensuing bench conference, defense counsel told the court: "I think the testimony is also admissible to rehabilitate under 5-616." The court disagreed that such testimony could be used to rehabilitate appellant.

"The preservation rule applies to evidence that a trial attorney seeks to develop through cross-examination. . . . [W]hen challenged, counsel must be able to describe the relevance of, and factual foundation for, a line of questioning." *Peterson v. State*, 444 Md. 105, 125 (2015). At no point did defense counsel ask Detective Drewry *when* appellant was at the day care center, nor did defense counsel proffer to the court that he sought to elicit that testimony. Because the issue of *when* appellant went to the day care center to pick up his daughter was never raised at the trial level, it was not preserved for our review. *See* Md. Rule 8-131(a).

IV. Expert Witness Testimony

A. Standard of Review

The Court of Appeals has set forth the standard of review for the admissibility of expert testimony:

> [T]he admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal. It is well settled, however, that the trial court's determination is reviewable on appeal, and may be reversed if founded on an error of law or some serious mistake, or if the trial court has clearly abused its discretion.

Gutierrez v. State, 423 Md. 476, 486 (2011) (quoting *Raithel v. State*, 280 Md. 291, 301 (1977)).

B. Analysis

As discussed above, the location of appellant's cell phone on the day of the murder was a key part of the State's case. Detective Scott Sube was called in the State's rebuttal case to counter appellant's testimony that he had nothing to do with the cell phone found at the murder scene. On appeal, appellant argues that the trial court erred in admitting such rebuttal expert testimony, because Detective Sube "could not testify to a reasonable degree of scientific certainty that the calls originated in the specific locations reflected [in] the exhibits."

Detective Sube was originally called in the State's case-in-chief as an expert in call mapping and network operations. Detective Sube described his call mapping process as follows:

> What I would do is take records provided from the carrier with proper legal orders, look at the information that they've given us. In addition, we get cell tower records from the carrier showing us the actual locations of the individual towers.
>
> So I'll . . . match the call detail records and the towers that are liste[d] in those call detail records, the tower and the facing, or the side of the tower, with the carrier's records as to the location on the ground where that particular cell tower is located, and plot that onto a map.

Detective Sube described network operations as:

> How the phones work. How a handset generally talks to a tower, how that works. You know, whether it's depending on the technology. There are two major technologies used by the cellular industry. One's GSM and one is CDMA, so the difference between those two, the handsets communicate differently. So we look at that information and the nearest tower or the best available signal, how the headsets communicate with that, and that gives us the towers that the carriers give us from the records, from the call detail records.

He further elaborated:

> So essentially what it is, it is understanding the technology as to how the cell phone communicates with a tower, how the cell phone transfers from one tower, basically, to another one as it moves along in its path, and how that call is completed through the path. So from the tower, to the switching center, to the public telephone network, back to either the same switching center or another carrier's switching center--learning that path as well and understanding how that works.

Detective Sube was accepted as an expert in both call mapping and network operations.[9] He could not give an exact range for how close a cell phone needs to be to ping off of a specific tower, but described the range of cell towers "[i]n an urban environment" as "three to five miles possibly, depending on whether it's raining, whether it's snowing, summertime, wintertime, a lot of buildings around."

Detective Sube then plotted the calls made by the cell phone on November 18, 2002, from 5:18 p.m. through 10:43 p.m., by locating on a map each cell tower that the cell phone

[9] Defense counsel did not object to Detective Sube being accepted as an expert in network operations. Defense counsel did not believe that call mapping was an area of expertise. During Detective Sube's voir dire, defense counsel asked if call mapping was "taking your two sets of records, extracting the data from the record, and putting it on a chart?" To which Detective Sube answered, "Yes, sir."

pinged off of during that time frame. The complete call records and map showed that the phone pinged off of a cell tower in Manhattan, New York at 5:18 p.m. The cell phone pings then proceeded to move down I-95, registering with cell towers in New Jersey, Delaware, and Maryland, before registering its final call off a cell tower in Silver Spring, Maryland at 10:43 p.m.

Detective Sube's testimony during the State's case-in-chief concerned only calls made after 5:18 p.m. on the day of the murder. After appellant took the stand and testified that he was not in possession of the cell phone on the day of the murder, Detective Sube was called by the State as a rebuttal witness to testify that, in the hours prior to the phone traveling down the I-95 corridor to the murder scene, the cell phone pinged off of towers in the vicinity of appellant's home and appellant's daughter's day care center.

The State had Detective Sube plot calls on maps just as he had done during his earlier testimony, but this time for pings prior to 5:18 p.m. The first map depicted appellant's home with rings drawn around it displaying distances of half a mile, one mile, and one and a half miles. In addition, the map identified cell towers in the vicinity of appellant's home that the cell phone had pinged off of on the day of the murder prior to 5:18 p.m. The second map depicted the day care with similar distance rings drawn around it and labels identifying cell towers that the cell phone had been pinged off of that day.

When asked about the location of the cell phone during this time frame, Detective Sube began to answer "[t]here's a fair chance that the phone could be within this juncture[,]" at which point defense counsel objected and moved to strike. The court

sustained the objection. A bench conference ensued where after a brief discussion on what Detective Sube was going to testify to, the court asked the State:

> COURT: And how can you show the cell locations, if he's not going to say it to a reasonable degree of his -- within a reasonable degree of his expertise --
>
> [STATE]: He's already --
>
> COURT: -- that the cell phone was in that area?
>
> [STATE]: He's already testified prior [during State's case-in-chief] that it's usually within a certain amount of miles. I forget what he said. So, he's already done that on his direct testimony. So, we are just going to ask him --
>
> * * *
>
> COURT: If he's going to testify within a reasonable degree of his area of expertise, that at these times, there is already testimony that's come in, with the phones pinged down 95, all the way in to Silver Spring, I think.
>
> If he's going to testify that before they plotted those calls, that there were other calls that were plotted in this area, I don't have any problem with that.
>
> [STATE]: That's his testimony.
>
> COURT : I think he's already testified as to 95, so.
>
> * * *
>
> COURT: I'm going to allow the exhibit in for him to testify that he plotted anything that's within this area. If you want to ask him questions about, you know, is it possible it could have been pinging from 20 miles away, you know, you can ask him that question. **But he's already testified as to tracking the cell phone down this area, when your client says he**

didn't have the cell phone, and they obviously want to put in that the cell phone was in the vicinity of New York City in the very vicinity of the day care center.

* * *

[DEFENSE COUNSEL]: All right, just so the record is clean then. We object to it, and we would strike all of his testimony on the grounds that we stated before. That it is not proper rebuttal, and now that there's not a proper foundation laid for him to offer the testimony that they propose to offer in this matter.

COURT: Well, as I understand it, he's been qualified as an expert in this area, and I understand it he is at one, two, three -- I'm still confused as to where the cell phone towers are. Are there like six cell phone towers?

[STATE]: Yes.

* * *

COURT: Okay, so what's he saying? That these calls, when they were made, pinged off towers that were in --

[STATE]: **The general vicinity of where (unintelligible) is and [the day care] is, and where [appellant's] home is.**

COURT: Yes, I think he's qualified to say that. The objection's overruled.

(Emphasis added).

The substance of Detective Sube's rebuttal testimony did not differ significantly from that which he testified to previously. He plotted calls on a map according to the cell towers that the cell phone had pinged off of, just as he had done before, only this time it

was for calls made earlier in the day prior to 5:18 p.m. Appellant argues that the testimony should not have been allowed, because Detective Sube "could not testify to a reasonable degree of scientific certainty that the calls originated in the specific locations reflected in the exhibits." We note that the specific location of the cell phone was not the subject of Detective Sube's testimony. As pointed out by the State, "the location of the cell towers and network operations were the subjects of his expertise, not the precise location of the cell phone." Detective Sube's expert testimony during the State's case-in-chief and rebuttal case was limited to mapping which cell towers were pinged off of by the cell phone at specific times. Furthermore, during his rebuttal testimony, the trial court sustained defense counsel's objection when Detective Sube began to opine on the location of appellant's cell phone, and instructed the jury to disregard his answer. Therefore, Detective Sube never went beyond the scope of his expertise of call mapping and network operations.

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