UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 342

September Term, 2016

TERRENCE PACKER

v.

STATE OF MARYLAND

Arthur,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: April 4, 2017

After Terrence Packer had a physical altercation with his estranged girlfriend, the police converged on his house. When they arrived, Mr. Packer was in the doorway, wielding a shotgun. Mr. Packer was shot when he emerged from the doorway and pointed the shotgun at the officers.

The State charged Mr. Packer with attempted first-degree murder, first-degree assault, and reckless endangerment of his ex-girlfriend; four counts of first-degree assault against four separate police officers; reckless endangerment of the officers; and openly carrying a dangerous weapon with an intent to injure another person. A Charles County jury convicted Mr. Packer of first-degree assault of three police officers, second-degree assault of his ex-girlfriend, reckless endangerment both of his girlfriend and the officers, and one count of openly carrying a dangerous weapon with intent to injure another person. The court sentenced Mr. Packer to a total term of 30 years' imprisonment: seven and one-half years for the second-degree assault of the ex-girlfriend and three, consecutive seven and one-half year terms for the first-degree assault of the three officers.

In Mr. Packer's timely appeal, he complains of four evidentiary rulings and a jury instruction. Finding that the circuit court did not err, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Mr. Packer was a civilian employee of the Department of Defense. He lived in Waldorf, in a house that he owned. He has four children, including three from a prior marriage.

In February 2014, Mr. Packer began dating Shawn Harris, a cyber-intelligence analyst with a defense contractor. In November of that year the two began living together in Mr. Packer's house in Waldorf. At some point their relationship became strained, and Ms. Harris decided to move out.

Late in the evening of February 24, 2015, Mr. Packer and Ms. Harris had some kind of altercation. Their accounts differ markedly, and the jury appears to have credited little of Ms. Harris's account.[1]

Ms. Harris testified that, earlier that day, she had searched the photos and the browsing history on a cell phone that she had given Mr. Packer to use. She claimed to have found pornographic photos and evidence that Mr. Packer had visited pornographic websites where the women looked like young girls. She sent the pornographic photos to Mr. Packer's mother. She also sent an email or text-message to Mr. Packer, saying that he "may as well have been a pedophile" and that she "understood now why God didn't allow him to raise his kids." Mr. Packer had lost custody of his three minor children when his ex-wife, who was in the military, was transferred to Colorado.

When Ms. Harris arrived at Mr. Packer's house that evening, he was at a gala in Washington, D.C. She testified that after falling asleep (in the guest bedroom) she heard

[1] The jury had reason to view Ms. Harris's account with skepticism. She admitted that on the day after the altercation she used Mr. Packer's Facebook password to send a direct message to one of his Facebook friends, in which she pretended to be him and said, "I just tried to kill my girlfriend, please don't mention it to anyone." She also admitted that she used Mr. Packer's email password to impersonate him in an email message to another woman.

"something that sounded like glass breaking." She left the bedroom and, she claimed, saw Mr. Packer throwing her belongings down the stairs. According to Ms. Harris, Mr. Packer told her that he wanted all of her things out of his bedroom that night. Because the dressers in his bedroom belonged to Ms. Harris, she pushed everything that was on the top of them onto the floor and dumped Mr. Packer's clothes onto the floor.

At that point, Ms. Harris testified, the confrontation escalated. She claimed that Mr. Packer bumped her shoulder, threw her onto the floor on her back, punched her leg, and tried to head-butt her. Eventually, however, he let her go. At that point he told her that he had nothing else to lose, that she had no right to call his mother, that she had ruined his life, and that she was a "bitch" because of the comments that she had made about his minor children. Ms. Harris claims to have responded that he should not have put his hands on her and that now he really had nothing to lose, because she was going to call the police.

Ms. Harris testified that she left the master bedroom and that Mr. Packer followed her to the guest bedroom, where she had been sleeping. According to Ms. Harris, Mr. Packer threw her to the floor and began to choke her, telling her that she should stop fighting and die, that he was not going to jail, and that he was going to kill her and kill himself. She claimed to have temporarily lost consciousness, but to have regained it when she felt his tears on the back of her neck and heard him apologizing. Although the struggle resumed when she tried to remove his arm from around her neck, she said that Mr. Packer abruptly announced that he was going to get a gun and kill them both.

According to Ms. Harris, Mr. Packer went back to the master bedroom and took a rifle out of a case. She claimed to have grabbed the weapon and retreated to the guest bedroom, but then to have realized that he had other guns in the house. Upon that realization, she claimed to have fled from the house, running past Mr. Packer, who, she said, was holding a handgun and a box of shells. She got to her car, called Mr. Packer's sister (who patched in his mother), and then called 911.

Mr. Packer's account of the altercation was a bit different. Testifying in his defense, he said that when he arrived home, at about 10:00 or 10:30 p.m., the house was in disarray, because Ms. Harris was packing. She had emptied out one of the dressers in the master bedroom, dumping some of his clothes onto the floor, where they lay with some of hers. Her clothes were on his bed, and boxes were everywhere. He said that he began to move some of her possessions out of the bedroom, but he denied breaking or throwing anything.

According to Mr. Packer, Ms. Harris emerged from the guest bedroom and ordered him not to touch her belongings. He claimed to have responded that he was just trying to make room to sleep. He said that she persisted in issuing orders and that he persisted in ignoring her and moving her belongings.

Mr. Packer testified that the confrontation escalated when she demanded that he get his possessions out of the dresser, which belonged to her, and proceeded to empty the dresser drawers, tossing his cufflinks, rings, and jewelry around the room. At that point, he "reached out and wrapped [his] arms around her" and told her to calm down. He

claimed that they began to wrestle and that they tripped over something and fell, but he denied that he threw her to the floor. He wound up straddling her and holding her hands to the floor while she made a number of insulting comments about him. After he stood up, he claimed that she made another cutting comment about the loss of his children.

Mr. Packer testified that Ms. Harris left the master bedroom and walked toward another bedroom. Angered by her comment, he followed her. He grabbed her elbow and asked her what she was talking about. He said that she swung around as if to hit him and that they began to wrestle again. Mr. Packer, a former wrestler, said that he put her in what he called a "Gator Hold," which, he said, was not a chokehold, but did involve placing his arms around her neck. He was behind her, and it appears from his account that they were both down on one knee. He claims to have told her that he loved her and that this was not what he wanted, and eventually to have let her go.

At that point Mr. Packer said that he "zoned out." He testified that he was overwhelmed by emotion as a result of what Ms. Harris had said about his children. He walked out of the room, went back to the master bedroom, and got his rifle out of a case, intending to kill himself. Ms. Harris followed him back to the bedroom, grabbed the rifle, and moved away. Mr. Packer claimed to have been unconcerned about where she went with the rifle: he also had a shotgun in the case.

Mr. Packer testified that he took the shotgun out of the case and went downstairs to find ammunition. Again, he claimed not to know where Ms. Harris had gone.

After finding the ammunition, Mr. Packer testified that he returned to his bedroom, called his children to tell them that he loved them (and to tell the oldest to protect the others), and called his mother to tell her that he was sorry because he was about to hurt himself. When the calls were finished, he sat for a while before he walked downstairs to his front door.

Meanwhile, Charles County Sheriff's Officer Charles Garner had received a report of a "domestic situation involving a weapon." Officer Garner drove to Mr. Packer's house, where he met Officer Ronald Walls, and the two approached the house on foot. Officer Garner noticed that the front door was ajar. Officer Walls continued toward the open door, but had to step back quickly because he saw a man, later identified as Mr. Packer, holding a shotgun pointed at him. Officer Walls spent five to ten minutes imploring Mr. Packer to "put the gun down," but he did not respond. Officer Walls retreated and joined several other officers who were stationed in the next driveway.

At approximately the same time, Master Corporal Richard Heishman, stationed near the front of the house, was yelling for Mr. Packer to "put the gun down" and to "come out with his hands up." Corporal Heishman saw Mr. Packer, who was standing "within the doorjamb" of the front door, point the shotgun out of the door two or three times. Finally, Mr. Packer stepped out of the front door and pointed the shotgun in the direction of Corporal Heishman and two other officers, David Walker and Samuel Hooper.

Officer Hooper, who was armed with a rifle and positioned near the front of the house, fired seven shots at Mr. Packer. Mr. Packer went down. He was hit twice in the upper right thigh and once in the right side of his abdomen.

Even after he was shot, Mr. Packer continued to hold onto his gun. Consequently, a K9 officer released his dog, which attacked Mr. Packer's arm and bit one of his legs. The animal's efforts allowed the officer to get the gun away from Mr. Packer. The officers restrained him, attended to his wounds, and had him transported to the University of Maryland Shock Trauma Center in Baltimore for treatment.

We shall introduce additional facts in the discussion of the questions that Mr. Packer has raised.

QUESTIONS PRESENTED

Mr. Packer presents five questions on appeal, which we have rephrased as follows:[2]

[2] Mr. Packer phrased the questions as:

1. Did the trial court err by denying Appellant's motion to suppress his involuntary statement to law enforcement?

2. Did the trial court commit error in failing to instruct the jury as to the involuntariness of Appellant's statements to police?

3. Did the trial court err by admitting entirely irrelevant hearsay and double hearsay testimony that implicated Appellant in other bad acts?

4. Did the trial court err in permitting irrelevant and highly prejudicial testimony?

5. Did the trial court err in excluding evidence that one of the alleged victims was not peaceful?

1. Did the trial court err in denying Mr. Packer's motion to suppress statements he made to the police?

2. Did the trial court err in refusing Mr. Packer's requested jury instruction on the voluntariness of his statements to police?

3. Did the trial court err in admitting alleged hearsay testimony regarding a prior domestic altercation involving Mr. Packer?

4. Did the trial court err in admitting testimony suggesting that Mr. Packer visited certain pornographic websites?

5. Did the trial court err in excluding evidence that one of the victims, a police officer, was connected to several other police-involved shootings?

For reasons that follow, we answer all questions in the negative and affirm the judgment of the circuit court.

DISCUSSION

I. Admissibility of Mr. Packer's Statements to Law Enforcement Officers

Mr. Packer argues that the court erred when it denied his motions to suppress statements he made at the scene to Officer Walls and Officer Kevin Makle. Mr. Packer maintains that at the time the statements were made, he "had just been subjected to life threatening injuries." He contends that the court also erred when it denied his motion to suppress statements he made to Corporal Jonathan Rager while in the hospital because he "was heavily medicated" and "in and out of sleepiness." Mr. Packer asserts that under the circumstances, none of his statements could have been considered voluntary and that the court should have excluded them.

The State argues that all of the statements were "unsolicited blurts" (*see generally Ciriago v. State*, 57 Md. App. 563, 573-76 (1984)) and "not subject to a voluntariness analysis." Even if such an analysis were appropriate, the State maintains that the court properly admitted the statements because Mr. Packer "was not coerced by law enforcement into making any of the statements" and "was lucid and aware of what he was saying."

1. Statement to Officer Walls

While questioning Officer Walls, the State asked if Mr. Packer had said anything to him. Defense counsel objected, and the court excused the jury. After the jury left the courtroom, the prosecutor stated that he wanted to ask the officer "some questions" based on the understanding that defense counsel was moving "to suppress the statement." The court agreed to follow that procedure.

During the ensuing examination, Officer Walls testified that Mr. Packer "said something" and that none of the officers had asked him any questions before he made that statement. Officer Walls also testified that Mr. Packer had "two rifle holes in his leg" at the time and that he did not "know [Mr. Packer's] pain level." Officer Walls acknowledged that Mr. Packer was "in bad shape" and "in distress." The officer had just removed Mr. Packer's belt and put it on his thigh as a makeshift tourniquet.

The court denied the motion to suppress, finding that Mr. Packer's statement was not the product of a custodial interrogation, but was a "voluntary," "unsolicited statement." After the jurors re-entered the courtroom, the State again asked Officer

Walls whether Mr. Packer said anything to him. Officer Walls responded that Mr. Packer stated, "Why ain't y'all kill me? You should have just shot me in the head."

During cross-examination, defense counsel asked Officer Walls about the circumstances surrounding Mr. Packer's statement. Defense counsel asked if people are sometimes suicidal when they are silent and holding a gun. The State objected, and the court sustained the objection. The following colloquy ensued:

> [DEFENSE COUNSEL]: [Y]ou testified that when you and the other officers approached [Mr. Packer] after he was shot at 7 times, [he] said the following "Why didn't you kill me?," right?
>
> [OFFICER WALLS]: Right.
>
> [DEFENSE COUNSEL]: "You should have just shot me in the head;" is that right?
>
> [OFFICER WALLS]: Right.

Defense counsel proceeded to ask Officer Walls if Mr. Packer said what he said because he wanted to die. The State objected (presumably on the ground that the officer could not read Mr. Packer's mind), and the court sustained the objection.

The defense offered no other evidence and made no argument in support of the motion to suppress.

2. Statements to Officer Makle

Later, the State called Officer Kevin Makle as a witness. Defense counsel moved to suppress statements that Mr. Packer made to Officer Makle at the time of the shooting. The court agreed to hear the motion, and the jury was excused.

Officer Makle testified that when he arrived on the scene, he observed Mr. Packer, lying on the ground. He "immediately provided medical attention" to Mr. Packer, including applying a tourniquet and pressure to the wounds. As he did so, Mr. Packer said to "just shoot him in the head" because "it hurts too much." When the officer helped transport Mr. Packer to an ambulance, Mr. Packer exclaimed, "I fucking hate y'all" and "fuck you." Officer Makle testified that neither he nor any other officer asked Mr. Packer any questions before he made those statements. He also testified that Mr. Packer was "in pain" and "in and out of consciousness" at that time.

The court denied the motion to suppress, finding "no indication that the officers said anything to [Mr. Packer] that would have been intended to elicit an incriminating statement." After the jury returned to the courtroom, the State began its examination of Officer Makle, who recounted Mr. Packer's statements.

During cross-examination, defense counsel asked Officer Makle about the circumstances surrounding Mr. Packer's statements:

> [DEFENSE COUNSEL]: The first statement he says "just shoot me in the head," correct?
>
> [OFFICER MAKLE]: Yes.
>
> [DEFENSE COUNSEL]: "This hurts too much," he says that, right?
>
> [OFFICER MAKLE]: Yes.
>
> [DEFENSE COUNSEL]: . . . He wants to be killed, correct?
>
> [OFFICER MAKLE]: I believe so, yes.
>
> * * * *

> [DEFENSE COUNSEL]: Okay. Now, in regards to the second statement, which was I 'f'n' hate you all, you don't know the context to that statement, right?
>
> [OFFICER MAKLE]: No.
>
> [DEFENSE COUNSEL]: It's not like he would say "love you guys, thanks for . . . shooting me and sicking a dog on me," right?

Defense counsel put on no other evidence in support of the motion to suppress. She argued that the statements may have been reflexive and that they were made in the "functional equivalent" of a custodial interrogation.

3. Statement to Corporal Rager

The State also called Corporal Jonathan Rager as a witness. The court again excused the jury, and Corporal Rager testified about the circumstances surrounding another statement that Mr. Packer sought to suppress.

Corporal Rager testified that he had been assigned to guard Mr. Packer while he was being treated at the hospital after the shooting. The two were in the same hospital room: Mr. Packer was lying in a hospital bed, and Corporal Rager was sitting in a chair.

Corporal Rager testified that he stayed with Mr. Packer for approximately eight hours and that the two "made small talk about a variety of things," such as "what was on television" and "life in general." During their conversation, Mr. Packer asked Corporal Rager about being a police officer and the use of force. Corporal Rager replied that he did not believe that "most police officers given the choice would ever use force if they didn't have to." Mr. Packer responded, "But I didn't give them any choice in my

incident." Corporal Rager testified that he did not direct any questions to Mr. Packer regarding the investigation and that when he first arrived at the hospital, he informed Mr. Packer that he "had nothing to do with the investigation" and "didn't want to know anything about it." He also testified that Mr. Packer, while appearing "uncomfortable" and "heavily medicated at the time," seemed "coherent" and "alert" when he made the statement.

The court denied the motion to suppress, finding that the statement was "not in response to interrogation" and was "voluntary," because Mr. Packer "was lucid, he was aware, [and] he was alert." After the jury returned to the courtroom, Corporal Rager testified about his interaction with Mr. Packer and Mr. Packer's statement regarding the use of force in this case.

4. Legal Standard

"A confession may be admitted against an accused only when it has been determined that the confession was (1) voluntary under Maryland non-constitutional law, (2) voluntary under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article 22 of the Maryland Declaration of Rights, and (3) elicited in conformance with the mandates of *Miranda*." *Smith v. State*, 220 Md. App. 256, 273 (2014) (internal citations, quotation marks, and footnote omitted), *cert. denied*, 442 Md.

196 (2015). Mr. Packer challenges the court's ruling under Maryland non-constitutional (or common) law.[3]

"Under Maryland non-constitutional law, a confession must be freely and voluntarily made at a time when the defendant knew and understood what he was saying." *Buck v. State*, 181 Md. App. 585, 631-32 (2008) (internal citations and quotation marks omitted). In making this determination, a court should assess whether "the defendant was mentally capable of making a confession." *Hoey v. State*, 311 Md. 473, 481 (1988). A confession is involuntary "when the defendant, at the time of his confession, is so mentally impaired that he does not know or understand what he is saying." *Id.* at 482.[4]

[3] Under federal and Maryland state constitutional law, a statement is involuntary if it is "the result of police conduct that overbears the will of the suspect and induces the suspect to confess." *Lee v. State*, 418 Md. 136, 159 (2011). In this case, Mr. Packer does not allege that his statements were the result of any wrongdoing on the part of the police. Therefore, any analysis of the constitutional voluntariness of his statements is unnecessary. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986) ("coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment"); *see also Hoey v. State*, 311 Md. 473, 480 & n.2, 484-86 (1988) (stating the privilege against self-incrimination in Article 22 of the Maryland Declaration of Rights "is deemed to be in *pari materia*" with the Fifth Amendment); *Bey v. State*, 140 Md. App. 607, 617 (2001) ("[i]n determining whether a confession is voluntary under . . . the Maryland Declaration of Rights, we look to the decision of the Supreme Court in *Colorado v. Connelly*"). Nor do the provisions of *Miranda* apply, as Mr. Packer was not subject to interrogation at the time the statements were made. *See Paige v. State*, 226 Md. App. 93, 107 (2015).

[4] Maryland common law also requires that a confession not be induced by force, undue influence, threats, or improper promises. *Rodriguez v. State*, 191 Md. App. 196, 224 (2010). Mr. Packer does not allege that any such inducements occurred in this case.

5. Standard of Review

When a defendant moves to suppress evidence, a suppression hearing is typically held before trial. In this case, however, no such hearing was held, as Mr. Packer did not express an interest in suppressing the statements until shortly before jury selection and did not make any of his motions until the trial had begun.

In response to the motions, the court held mini-hearings, during which it heard testimony, and after which it issued its rulings. Our review is based on the evidence taken during the mini-hearings. *Sellman v. State*, 152 Md. App. 1, 7-8 (2003) (discussing the applicability of the "suppression hearing" standard of review when a motion to suppress is made and decided during trial).

In our review, we extend great deference to the court's first-level findings of fact and conclusions as to credibility, and we must uphold those findings and conclusions unless they are clearly erroneous. *See Daniels*, 172 Md. App. 75, 87 (2006); *Sellman*, 152 Md. App. at 14; *accord Smith v. State*, 414 Md. 357, 361 (2010). "As the State was the prevailing party on the motion, we consider the facts as found by the [court], and the reasonable inferences from those facts, in the light most favorable to the State." *Cartnail v. State*, 359 Md. 272, 282 (2000). Finally, "[w]e review the trial judge's ultimate decision on the issue of voluntariness *de novo*." *Rodriguez v. State*, 191 Md. App. 196, 223 (2010); *accord Smith*, 414 Md. at 361.

6. Analysis

Turning to the case at hand, we hold that the trial court was not clearly erroneous in finding that Mr. Packer's statements were voluntary.

Mr. Packer's made his statements to Officer Walls ("Why ain't you kill me?", and "You should have just shot me in the head") and Officer Makle ("just shoot [me] in the head"; "I fucking hate y'all"; and "fuck you") without any prompting. Although both officers testified that Mr. Packer appeared to be in distress, the evidence did not compel a conclusion that that he was in such distress that he did not know or understand what he was saying. To the contrary, each of the statements shows an awareness of what was happening at the time – he had been shot, and he was upset that that he had not been killed.

As for Mr. Packer's statement to Corporal Rager ("I didn't give them any choice" not to use force), the corporal testified that Mr. Packer was "coherent" and "alert" when the statements were made. Corporal Rager had told Mr. Packer that he had nothing to do with the investigation and that he did not want to know anything about his case. When Mr. Packer made the statement, the two were engaged in "small talk," during which Mr. Packer broached the subject of officer-involved shootings. When Corporal Rager remarked that most police officers would not use force if given the choice, Mr. Packer responded, again without provocation or solicitation, "I didn't give them any choice."

In challenging the ruling regarding the statement to Corporal Rager, Mr. Packer argues that he had just been shot and was in pain or heavily medicated when the statements were made. Mr. Packer relies on *Mincey v. Arizona*, 437 U.S. 385 (1978). His reliance is misplaced.

In *Mincey* the Supreme Court concluded that the defendant had been denied due process (*id*. at 402) by the introduction of statements obtained when the police persisted in "relentlessly" interrogating him (*id.* at 401) while he was in intensive care (*id.* at 398), intubated, drugged, and catheterized (*id.* at 396), after he had been shot in a drug raid. Because Mincey was unable to talk, he responded to the detective's questions in writing (*id.*), and "some of his written answers were on their face not entirely coherent." *Id.* at 398-99. Although the detective had given him *Miranda* warnings, the questioning continued even after "Mincey clearly expressed his wish not to be interrogated," wrote "'This is all I can say without a lawyer,'" and made no fewer than two, subsequent requests for a lawyer. *Id.* at 399. "He was, in short, 'at the complete mercy' of [the detective], unable to escape or resist the thrust of [the] interrogation." *Id.* In the circumstances of this custodial interrogation, the Supreme Court concluded that Mincey's answers were involuntary because he "was weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious, and his will was simply overborne." *Id.* at 401-02.

Mincey bears little resemblance to this case. Mr. Packer was not subjected to a custodial interrogation, much less one that continued after he repeatedly requested an

attorney and asked to end the questioning. Instead, it is undisputed that Mr. Packer volunteered his statement in the course of a casual conversation, in which Mr. Packer himself had raised the subject of officer-involved shootings. It is also undisputed that, although Mr. Packer was "heavily medicated," he seemed "coherent" and "alert" when he made the statement. Mr. Packer was in a far different situation than Mincey, who was "barely conscious" (*id.* at 401) and whose statements were "not entirely coherent." *Id.* at 399.

In contrast to *Mincey*, the State cites *Gorge v. State*, 386 Md. 600, 622 (2005). In that case, the Court of Appeals upheld the trial court's finding that the defendant made a free and voluntary confession during a custodial interrogation in his hospital room (*id.* at 621), while he was medicated, "with stitches on his neck 'from ear to ear'" (*id.* at 605) after he had unsuccessfully attempted to commit suicide by slitting his own throat. A detective testified that the defendant was "calm, alert, quiet, and subdued" during the interrogation (*id.* at 606), and the defendant presented no "direct evidence of involuntariness." *Id.* at 621. On that record, the Court of Appeals had little difficulty in concluding that the circuit court did not err in rejecting the conclusion of involuntariness. *Id.* at 621-22.

As in *Gorge*, the only evidence before the circuit court was that the defendant, although hospitalized with a serious injury, made a voluntary statement while he was coherent and alert. In fact, the evidence of voluntariness is even stronger in this case, because Mr. Packer did not make his statement during a custodial interrogation, but

volunteered it in the course of casual conversation on a subject that he had broached. Moreover, Mr. Packer presented no evidence at the suppression hearing establishing what effect, if any, his injuries and subsequent medical treatment had on his mental state. *See Ringe v. State*, 94 Md. App. 614, 621 (1993) (statements by defendant were voluntary, in part, because "there was no evidence presented at the suppression hearing that [the defendant] did not understand what he was saying"). Accordingly, we hold that the trial court did not err in denying Mr. Packer's motions to suppress his statements to police. The circuit court did not err in admitting the statement that Mr. Packer made at the hospital, or any of the other statements to the officers.

II. The Jury Instruction

Mr. Packer complains that the trial court erred in declining to give Maryland Criminal Pattern Jury Instruction 3:18 (Statement of Defendant) in its totality. In full, that instruction reads as follows:

> You have heard evidence that the defendant made a statement to the police about the crime charged. [You must first determine whether the defendant made a statement. If you find that the Defendant made a statement, then you must decide whether the State has proven] [The State must prove] beyond a reasonable doubt that the statement was voluntarily made. A voluntary statement is one that under all circumstances was given freely.
>
> [[To be voluntary, a statement must not have been compelled or obtained as a result of any force, promise, threat, inducement or offer of reward. If you decide that the police used [force] [a threat] [promise or inducement] [offer of reward] in obtaining defendant's statement, then you must find that the statement was involuntary and disregard it, unless the State has proven beyond a reasonable doubt that the [force] [threat] [promise or inducement] [offer of reward] did not, in any way, cause the defendant to make the statement. If you do not exclude the statement for

one of these reasons, you then must decide whether it was voluntary under the circumstances.]]

In deciding whether the statement was voluntary, consider all of the circumstances surrounding the statement, including:

(1) the conversations, if any, between the police and the defendant;

(2) [whether the defendant was advised of [his] [her] rights;]

(3) the length of time that the defendant was questioned;

(4) who was present;

(5) the mental and physical condition of the defendant;

(6) whether the defendant was subjected to force or threat of force by the police;

(7) the age, background, experience, education, character and intelligence of the defendant;

[(8) whether the defendant was taken before a district court commissioner without unnecessary delay following arrest and, if not, whether that affected the voluntariness of the statement;]

(9) any other circumstances surrounding the taking of the statement.

If you find beyond a reasonable doubt that the statement was voluntary, give it such weight as you believe it deserves. If you do not find beyond a reasonable doubt that the statement was voluntary, you must disregard it.

Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 3:18 (2d ed. 2013).

The Notes on Use for MPJI-Cr 3:18 explain that the bracketed portions of the instruction should not be given in every case:

> The initial bracketed language in the first paragraph should only be given if there is an issue as to whether the defendant actually made a statement. The instructions in the second paragraph should be given if there is an

> issue, generated by the evidence, about whether force, or a promise, threat, or offer of reward compelled or produced a statement. Factor (2) in the third paragraph should be given in those cases in which a person in custodial interrogation was entitled to be informed of his rights, although in pre-custodial settings, the failure of police officers to advise a person of what rights he might have can be considered under the other factors, especially factors (7) and (9). Factor (8) should only be given if there is an issue concerning the promptness of presentment before a judicial officer after arrest.

Rather than read the instruction in its totality, the court gave a shortened and modified version:

> You have heard testimony that the defendant made statements to the police about the crime charged. You must first determine whether the defendant made any such statement. The State must prove beyond a reasonable doubt that the statement was made.

The court's instruction omitted any reference to the voluntariness of the defendant's statement, to the means of assessing whether a statement was voluntary, and to the consequences of a finding that the statement was involuntary. The court omitted those portions of the instruction because it reasoned that they apply only to statements made in response to police interrogation. The court concluded that Mr. Packer had "not generated" evidence sufficient to justify the remaining portions of the instruction and that those portions "would be confusing to the jury."

Maryland "Rule 4-325(c) 'requir[es] the trial court to give a requested instruction under the following circumstances: (1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case [*i.e.*, it is generated by some evidence]; and (3) the content of the requested instruction was not

fairly covered elsewhere in the jury instruction actually given.'" *Atkins v. State*, 421 Md. 434, 444 (2011) (quoting *Thompson v. State*, 393 Md. 291, 302-03 (2006)).

Generally, "'[w]e review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard.'" *Page v. State*, 222 Md. App. 648, 668 (2015) (quoting *Thompson v. State*, 393 Md. at 311). "The threshold determination of whether the evidence is sufficient to generate the desired instruction is," however, "a question of law for the judge." *Bazzle v. State*, 426 Md. 541, 550 (2012) (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)); *accord Page*, 222 Md. App. at 668. Consequently, "'[t]he task of this Court on review is to determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired.'" *Bazzle v. State*, 426 Md. at 550, quoting *Dishman v. State*, 352 Md. at 292-93; *accord Page*, 222 Md. App. at 668-69.

It is not at all clear that Mr. Packer's unprompted exclamations even qualify as "statements" within the meaning of MPJI-Cr 3:18. Had he uttered substantially the same words to an EMT, a nurse, or a physician, it is unlikely that anyone would think to ask the court to read MPJI-Cr 3:18 to the jury. In the case of a statement (really, an admission) to an EMT, a nurse, or a physician, one might ask whether Mr. Packer was in such pain or was so heavily medicated that his words had no probative value, or that their probative value was substantially outweighed by the danger of unfair prejudice. But one

would probably not contend that the jury should be instructed to evaluate whether the statements were involuntary and to disregard them if it found them to be "involuntary."

Nonetheless, because Mr. Packer made his unprompted statements to law enforcement officers, we assume for the sake of argument that some kind of instruction on voluntariness might have been in order. We also assume, again for the sake of argument, that Mr. Packer generated some evidence about whether his statements were truly voluntary. When he made several of the statements, he was in excruciating pain and, arguably, at the edge of consciousness: he had just been shot three times and attacked by a police dog; he was bleeding profusely from a wound that, one officer thought, might have affected the major artery in his leg; he reported that he was having trouble breathing; and the officers were taking steps to prevent him from going into shock. One of his statements ("I fucking hate y'all") might have been a reflexive response to the pain rather than a product of conscious thought. His hospital statement was made when he was drugged and physically incapacitated. Each of the statements may have been less than fully conscious, deliberate, and intentional.

In view of this evidence, it might have been appropriate for the court to read the third sentence of the first paragraph of the instruction in its entirety ("If you find that the Defendant made a statement, then you must decide whether the State has proven . . . beyond a reasonable doubt that the statement was *voluntarily* made") rather than to modify it, as the court did, to eliminate any reference to voluntariness ("If you find that the Defendant made a statement, then you must decide whether the State has proven

beyond a reasonable doubt that the statement was made"). It might also have been appropriate for the court to read the first sentence of the second paragraph of the instruction ("A voluntary statement is one that under all circumstances was given freely").

Mr. Packer, however, did not confine his request to those portions of the pattern instruction. Rather, he took a maximalist approach and requested that the court read the entire instruction, most of which pertains to the voluntariness of statements made during a custodial interrogation, during which police questioning might have overborne the defendant's will.

The court correctly perceived that the great bulk of the instruction has nothing to do with this case. This case does not involve a statement that arguably was "compelled or obtained as a result of [a] force, promise, threat, inducement or offer of reward." Nor does it not involve a custodial interrogation in which the defendant was or should have been "advised of his rights." Furthermore, because the case does not involve a custodial interrogation, the "the length of time" of any questioning has no bearing on the case. Nor does it matter "who was present" during the interrogation, "whether the defendant was subjected to force or threat of force by the police" during the interrogation, or "whether the defendant was taken before a district court commissioner without unnecessary delay following arrest." We agree with the circuit court that Mr. Packer generated no evidence to justify these aspects of the instruction and that, if given, the requested instruction would probably have confused the jury because of its irrelevance to the issues at hand.

The circuit court had no obligation to edit the pattern instruction in a manner that Mr. Packer did not request and to read the additional portions that might bear on the voluntariness of his statement. He requested that the court read the instruction as a whole, but he did not generate evidence to require the court to read the instruction as a whole, because he did not make his statements during a custodial interrogation. The court, therefore, did not err in declining to give the instruction that Mr. Packer requested.[5]

Even if the court erred in declining to give the instruction in its entirety, we would find any error to be harmless beyond a reasonable doubt. *Dorsey v. State*, 276 Md. 638, 659 (1976). Mr. Packer did not deny that he made the statements or claim that he was unaware of what he was saying. To the contrary, Mr. Packer appeared to rely on, and thus tacitly admit to, the validity of the statements as part of his defense. For instance, when cross-examining Officers Walls and Makle about the statements that Mr. Packer made in the aftermath of the shooting, defense counsel used Mr. Packer's statements to establish that he was suicidal, an argument that defense counsel reiterated during closing. Similarly, when Mr. Packer testified about the statement that he made to Corporal Rager while he was hospitalized, he did not expressly state, or even imply, that he spoke involuntarily. To the contrary, Mr. Packer testified that the statement was "more of a . . .

[5] In an older case that neither party cited, this Court held that a circuit court did not err in refusing to give a "voluntariness instruction" when the defendant had made a "spontaneous utterance" that was not the result of a custodial interrogation. *See Tisdale v. State*, 30 Md. App. 334, 346 (1976) (disavowed on other grounds by *White v. State*, 300 Md. 719 (1984)). The *Tisdale* opinion does not disclose any of the language of the instruction that the defendant unsuccessfully requested in that case.

question to [him]self" and that he was "thinking out loud." In short, Mr. Packer's current contention, that his statements were involuntary, is at odds with the position that he took at trial; therefore, the error, if any, in refusing to give the requested instruction resulted in no prejudice to Mr. Packer.

III. Ms. Hollingshead's Statement to Detective Austin

The defense called Detective Jack Austin, a homicide investigator for the Charles County Sheriff's Office. Among other things, defense counsel attempted to establish that Detective Austin had interviewed Mr. Packer's ex-wife, Christine Hollingshead, because Ms. Harris had accused him of assaulting Ms. Hollingshead as well. The State objected on hearsay grounds, asserting that the defense was asking the detective to recount Ms. Hollinghead's answer to the detective's inquiry. The defense countered that Ms. Hollingshead had denied the allegation and that her denial, as recounted by the detective, would (somehow) be admissible as a "prior inconsistent statement." The court correctly recognized that Ms. Hollingshead's reported denial could not be a "prior inconsistent statement" *by Ms. Harris*. Accordingly, the court sustained the State's objection.

During the direct examination of Mr. Packer, his counsel asked about Ms. Harris's putative testimony that his ex-wife divorced him because he beat or abused her.[6] Counsel asked whether that testimony was true. Mr. Packer responded that it was not.

[6] We have found no such testimony, and the parties have not cited us to it. On cross-examination, Ms. Harris did volunteer the following comment: "The divorce decree shows why they got divorced. He was cheating on her." A few lines later, she interjected that "God is not going to leave kids in the care of a man who was cheating and abusing

On cross-examination, the State asked Mr. Packer whether he was aware that Detective Austin had spoken to his ex-wife. Mr. Packer responded that he was. At that point, defense counsel objected, and a bench conference ensued.

At the bench, defense counsel asserted, among other things, that the State was about to elicit hearsay (presumably the detective's account of what Mr. Packer's ex-wife had said). The State responded that it was not attempting to elicit hearsay (i.e., it was not trying to prove the truth of the matters asserted). Instead, the State said, it was only trying to impeach Mr. Packer's testimony that he had not abused or beaten his ex-wife. The State added that it would be "left with the answer" that Mr. Packer gave. *See* Md. Rule 5-613(b) (generally prohibiting the use of extrinsic evidence to impeach a witness on a collateral matter). With that, the court overruled the objection.

Mr. Packer's cross examination proceeded as follows:

> [STATE]: So you are aware that your former ex-wife [sic] categorized your divorce as an ugly divorce? You were a great father, but the divorce was ugly. You hated her for leaving you and taking the kids?
>
> [MR. PACKER]: I did.
>
> [STATE]: Okay, you are aware of that?
>
> [MR. PACKER]: Yes.
>
> [STATE]: Okay, now you are also aware, and that's more because you lived there, there was a time period where you and Christina both lived in Germany, correct?
>
> [MR. PACKER]: Yes.

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his, their mother, and who was sleeping around and who is looking at what equates to child pornography."

[STATE]: Okay, and you are also aware that Christina shared probably not the greatest moment of your relationship, but an incident between you and Christina in Germany, Christina shared that to Detective Austin? You are also aware of that?

[MR. PACKER]: What incident are you talking about?

[STATE]: The incident where you guys . . . she wanted to terminate your relationship, and she was not at her home that she was supposed to be at, you went to talk to her, she was at a friend's house, and when you found her you pushed her down and held her down on the bed.

[DEFENSE COUNSEL]: Your Honor, objection.

[MR. PACKER]: No, that didn't happen.

[STATE]: Okay.

[THE COURT]: Wait a minute.

[DEFENSE]: Objection.

THE COURT: Overruled if he asked which incident.

[STATE]: So you're saying that did not happen?

[MR. PACKER]: No.

[DEFENSE COUNSEL]: It didn't happen. That's not what she told us. It's not in there.[7]

On redirect examination, defense counsel revisited the topic, asking Mr. Packer whether his ex-wife told the detective that he never hit her during the 15 years of their marriage. Mr. Packer confirmed that she had.

[7] As will be seen in a moment, counsel's statement, "It's not in there," was incorrect.

Finally, on recross-examination, the State asked Mr. Packer whether he was aware that his ex-wife told the detective that on one occasion he had "'entered the bedroom, pushed her onto the bed, and held her down'?" The defense did not object, and Mr. Packer confirmed that his ex-wife had made that statement.

On appeal, Mr. Packer challenges the court's decision to allow the State to question him about what his ex-wife had told the detective, complaining of double-hearsay. The State responds, in the first instance, that the questions were a proper matter of impeachment.

Assuming that the questions were designed for impeachment, they could have been formulated more precisely than they were. Instead of beginning with a long introduction about Mr. Packer's awareness of what his ex-wife had told the detective, the State could simply have asked whether Mr. Packer had pushed her down and held her down on the bed at a time when their marriage was breaking up. By formulating the questions as it did, the State put unsworn assertions, by Mr. Packer's ex-wife and by the detective, before the jury.[8]

Nonetheless, we are convinced, for several reasons, that the error, if any, in overruling the objection to those questions was harmless beyond a reasonable doubt. *Dorsey v. State*, 276 Md. at 659.

[8] Viewed in this way, the problem with the questions is not so much that they elicited hearsay, as defense counsel asserted, as that they asserted facts that were not in evidence.

First, the question of whether Mr. Packer had assaulted his ex-wife bore only on the charges of attempted first-degree murder, first-degree assault, and reckless endangerment of Ms. Harris. The jury, however, rejected the most serious of those charges, acquitting Mr. Packer of attempted murder and first-degree assault, and convicting him only of the lesser-included offense of second-degree assault and of reckless endangerment. Notably, the jury could have relied on Mr. Packer's testimony alone to find him guilty of second-degree assault and reckless endangerment: he himself testified that he "wrapped his arms around" Ms. Harris after the altercation began in the master bedroom; that he "straddled her" and "held her" when they fell to the floor; that after releasing her, he "grabbed her by the elbow" and "started wrestling" with her "again" when she repeated her comment about why he lost his children; and that he put her in a "Gator Hold," with his arms around her neck. In view of Mr. Packer's own admission about what he did in the altercation with Ms. Harris, as well as the jury's obvious rejection of Ms. Harris's more lurid accusations, it is difficult to imagine how he sustained any prejudice as a result of the brief references to his having allegedly pushed his ex-wife onto a bed and held her down.

Second, on redirect examination, after the State had asserted (and Mr. Packer had denied) that he had assaulted his ex-wife, defense counsel succeeded in establishing that Mr. Packer's ex-wife had told the detective that Mr. Packer "never hit her during the fifteen years of marriage." This useful testimony mitigated any hypothetical prejudice that Mr. Packer may have sustained as a result of the State's accusation.

Finally, on recross-examination, the State again asked Mr. Packer whether his ex-wife had told the detective that he had pushed her onto a bed and held her down. The defense did not object, and Mr. Packer responded that she had. Thus, Mr. Packer has waived any contention that he was prejudiced by the admission of the statement. *See DeLeon v. State*, 407 Md. 16, 31 (2008) ("[o]bjections are waived if, at another point during the trial, evidence on the same point is admitted without objection").\

IV. Testimony Regarding the Web History on Mr. Packer's Cell Phone

At trial, Ms. Harris testified that Mr. Packer "had been going to pornographic websites for women designed to look like little girls . . . little girls his daughter's age."[9] Defense counsel objected on the ground that the testimony was "prejudicial" and "cumulative." The court overruled the objection, reasoning that the testimony was relevant to why Ms. Harris did what she subsequently did. The court added that Ms. Harris's characterization of the images was simply "her point of view." On appeal, Mr. Packer challenges the admission of that testimony, calling it irrelevant.

Evidence is relevant if it tends to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. A court may admit relevant evidence, but it has no discretion to admit evidence that is irrelevant. *Smith v. State*, 218 Md. App.

[9] Mr. Packer's mother testified that his daughter was 17 years old at the time of the trial.

689, 704 (2014). A ruling that evidence is legally relevant is a conclusion of law, which we review *de novo*. *See id.*

Even if evidence is relevant, a court may exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. We review that decision for abuse of discretion. *See, e.g.*, *Carter v. State*, 374 Md. 693, 705 (2003).

When weighing the probative value of proffered evidence against its potentially prejudicial nature, a court abuses its discretion "where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Webster v. State*, 221 Md. App. 100, 112 (2015) (citations and quotation marks omitted). For the court to have abused its discretion, "[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *King v. State*, 407 Md. 682, 697 (2009). The decision "will not be reversed simply because the appellate court would not have made the same ruling." *Id.*

Here, Ms. Harris's testimony was relevant in explaining her actions on the day of the shooting. After finding the pornographic material on the phone, she sent Mr. Packer a message saying that she was "disgusted" with him that she "understood why God didn't allow him to raise his kids." Later that evening, she referred to the images again when, according to Mr. Packer, she made another wounding comment about why he had lost his

children. Ms. Harris's testimony also had some relevance to Mr. Packer's subsequent conduct, because he testified that her comments caused him to become suicidal, to arm himself, and perhaps even to induce the officers to shoot him.

Ms. Harris's testimony was undoubtedly prejudicial, but the court did not abuse its discretion in implicitly concluding that the danger of *unfair* prejudice did not *substantially* outweigh the testimony's probative force. *See Lucas v. State*, 116 Md. App. 559, 572-73 (1997). Ms. Harris did not testify that Mr. Packer was visiting websites with pornographic images of children, but of "women who were designed to look like little girls." Moreover, in text-messages that were admitted into evidence, Mr. Packer denied Ms. Harris's accusation that he "like[d] underage porn" and countered that she was angrily overreacting simply because he had been "watching porn." Similarly, Mr. Packer's sister, Donna Cusimano, testified that when Harris informed her that Mr. Packer was looking at "kiddie porn," she responded that "nobody on the sites are kids, . . . everybody is over twenty-one . . . , and what's wrong with that?" Ms. Cusimano added that she "thought the whole conversation was stupid." In view of this evidence, we see no reason to disturb the court's exercise of discretion.

IV. Evidence Regarding Officer Hooper's Peacefulness

Mr. Packer asserts that the trial court erred in precluding defense counsel from questioning Officer Hooper, the marksman who wounded Mr. Packer, about his involvement in prior shootings. We disagree.

On redirect, the State asked Officer Hooper why he went to the scene, to which he responded:

> I'm listening to the call on the radio. I can hear what they're saying. Once I hear them say, you know, the man's got, he's, the man's got a, standing at the door with a shotgun, I'm a police officer, I think I can help. I want to get there to be with my fellow officers. If there's something I could do to have a *peaceful* resolution that's what I want.

(Emphasis added.)

On recross-examination, defense counsel attempted to ask Officer Hooper about a situation in 2009 in which he allegedly "shot at somebody." The State objected, arguing that the question was inappropriate. Defense counsel responded that the State opened the door when Officer Hooper testified that he was "peaceful." The court disagreed and sustained the objection:

> I find that he did not put his character at issue, that he was speaking of the situation . . . . He happened to have used the word peaceful to refer to the situation. And so, that is not generated. And the objection is sustained.

Mr. Packer maintains that the "State specifically introduced evidence that Officer Hooper sought to bring about a peaceful resolution of the situation" and, as a result, "the door was opened for the defense to question Officer Hooper about his character for peacefulness."

Mr. Packer is mistaken. The record makes it plain that the State did not offer Officer Hooper's "character for peacefulness" into evidence; the officer merely testified that he wanted the situation to come to "a peaceful resolution." Thus, the court did not

abuse its discretion in precluding this line of questioning, and Mr. Packer's allegation of error is baseless.

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