UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1082

September Term, 2015

WILFREDO HERNANDEZ-MERINO

v.

STATE OF MARYLAND

Krauser, C.J.,
Wright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: September 27, 2016

On May 20, 2014, Detective Edgardo Lopez of the Prince George's County Police Department responded to a call for an assault at a McDonald's. After arriving at the scene, Detective Lopez was informed that there had also been a report of a robbery across the street. The alleged victim of the robbery was appellant, Wilfredo Hernandez-Merino. Appellant was taken to a police station and placed in an interview room where he gave a written statement claiming to be the victim of a robbery. Detective Lopez then advised appellant of his *Miranda* rights[1] and began an oral interrogation. During the interrogation, Detective Lopez accused appellant of being the perpetrator of the assault at the McDonald's, and that he had made up the story about being robbed. Throughout the interrogation, appellant maintained that he had been robbed and had no involvement with the assault. Appellant was subsequently charged with first-degree assault, two counts of second-degree assault, and carrying a dangerous weapon with the intent to injure. Prior to trial, appellant moved to suppress the statements he made while in custody. The motions court suppressed his written statement, but found the majority of appellant's oral statements to be admissible. A jury trial was held in the Circuit Court for Prince George's County. At trial, appellant contradicted his original statements and admitted involvement in the assault, but argued that he had acted in self-defense. At the conclusion of the trial, appellant was acquitted of the assault charges, but convicted of the weapons offense and given a sentence of time served.

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

Appellant appealed, and now presents two questions for our review:

1. Did the trial court err in declining to suppress all of appellant's statements made after he was advised of his Miranda rights?

2. Did the trial court err in giving Maryland Criminal Pattern Jury Instruction 3:18 (Statement of Defendant)?

For the following reasons, we answer no to both questions and affirm the judgments of the circuit court.

BACKGROUND

Two witnesses to the crime testified at trial, the victim, Victor Alvarez, and his friend, Fredi Rosales. Alvarez testified that he had known appellant for about four years from working on various construction jobs together. Alvarez claimed that they were on good terms prior to the night of the incident. On May 20, 2014, appellant and Alvarez spent the day drinking beer with a few other men in a wooded area behind a KFC restaurant. At some point that night, appellant and Alvarez got into an arm wrestling match. Alvarez claimed that appellant behaved strangely after they arm-wrestled and attacked him with two broken glass bottles. Alvarez admitted that he picked up a stick in response, but claimed that he did not use it against appellant. Alvarez received a cut on his hand from the attack. Alvarez then ran off to a nearby McDonald's and called for an ambulance, losing consciousness at some point.

Rosales was with both Alvarez and appellant during the fight, and told a slightly different story on the witness stand. According to Rosales, Alvarez got angry after appellant beat him in a card game, and the two started fighting. The fight was broken up

and Alvarez left momentarily. When Alvarez returned with a stick, appellant attacked him with the glass bottles.

Detective Lopez responded to the scene after receiving a call for a cutting at the McDonald's. After arriving, Detective Lopez was made aware of a second call that had been made to the police for an individual being robbed across the street from the McDonald's. When Detective Lopez crossed the street to respond to the robbery, he encountered appellant who was claiming to be the victim of the reported robbery. Detective Lopez took appellant to the police station to be interviewed.

The interview that followed is the focus of the instant appeal. Detective Lopez entered the interview room at 10:04 p.m. After getting appellant's background information, Detective Lopez handed him a piece of paper and told him to "write me exactly what happened now for me." Detective Lopez then left the room as appellant wrote out a statement. Appellant's written statement said that he "was attacked by black people with an intent to rob and kill and part of my left hand was cut with a knife." Detective Lopez returned to the interview room about thirty minutes later and read appellant his *Miranda* rights. Appellant indicated that he understood his rights and wanted to make a statement. Before continuing with the interview, Detective Lopez left the room and returned with a female officer to take pictures of appellant. The officers asked appellant about past injuries that were visible on his body, but did not ask about any injuries sustained that night. After the officers left, Detective Lopez returned again with a male officer and asked appellant a few questions about one of his tattoos, before

leaving again. Detective Lopez returned once more and took a picture of appellant. After he left, a different male officer entered the room and began questioning appellant. This series of questions focused on appellant's background, his possible gang affiliations, and his hand injury. He explained to the officer that he injured his hand when he was robbed.

When that officer had finished his questioning of appellant, he left and Detective Lopez returned. It was at this point, approximately an hour and a half after appellant had made his written statement, that Detective Lopez began his interview of appellant. Detective Lopez began questioning Appellant about what had happened with Alvarez. Although Detective Lopez repeatedly accused him of lying, appellant continued to deny any involvement in Alvarez's assault and stuck to his story about being robbed by a group of black men. When asked directly, appellant declined to even admit that he knew Alvarez.

Detective Lopez concluded his questioning of appellant and was replaced by another officer in the interview room. During his interview with the other officer, appellant continued to maintain that he was robbed that night and was never with Alvarez.[2]

In connection with the assault on Alvarez, appellant was charged with first-degree assault, two counts of second degree assault, and openly carrying a dangerous weapon

[2] Appellant was further questioned regarding the events of that night, however, the remainder of his statements were suppressed by the motions court due to an improper promise made by the interrogating officer.

with intent to injure. Prior to trial, appellant moved to suppress the statements he made to police on the night of the incident.

On May 29, 2015, a hearing was held on appellant's motion to suppress. Appellant argued that his written statement should be suppressed because it was made before he was advised of his rights, and that his subsequent oral statement should be suppressed because it was an unconstitutional "two-step" interrogation under *Missouri v. Seibert*, 542 U.S. 600 (2004). Appellant also argued that his statements were involuntary; a claim that the motions court rejected. The motions court agreed that appellant's written statement should be suppressed, but concluded that the taint from the first statement did not carry over to the second statement. The court found that the written statement was

> not a substantial statement in terms of what it says. It's inconsistent with what was said afterwards, but it certainly is not inculpating. It really is—its not, but the Court does not find that the nature of the taking of the statement and the giving of the statement prior to the advice of rights is such that it presents a taint that would cause the Court to suppress statements given after the advice of rights on the basis of that violation.

At trial, defense counsel abandoned appellant's story about being robbed in favor of a self-defense argument. The State did not introduce appellant's oral statement, but did elicit testimony from Detective Lopez regarding the interrogation. Specifically, Detective Lopez testified that appellant told him that he been robbed by a group of black males and that appellant denied being with Alvarez on the day of the incident.

At the conclusion of a two-day jury trial, the jury returned a verdict of not guilty on the counts of first and second degree assault, but found appellant guilty of carrying a dangerous weapon with the intent to injure. Appellant received a sentence of 360 days of incarceration, with credit for the 360 days he had already served.

DISCUSSION

I. Appellant's Post-*Miranda* Statement

When reviewing a court's ruling on a suppression issue

> We view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion, here, the State. We defer to the motions court's factual findings and uphold them unless they are shown to be clearly erroneous. We, however, make our own independent constitutional appraisal, by reviewing the relevant law and applying it to the facts and circumstances of this case.

Robinson v. State, 419 Md. 602, 611-12 (2011) (Citations and internal quotation marks omitted).

The admissibility of appellant's post-*Miranda* statement hinges on whether Detective Lopez used an improper "two-step" interrogation technique to elicit the statement from appellant. In *Seibert*, the Supreme Court addressed whether a confession given after *Miranda* warnings was admissible when it was made immediately after a prior confession in which no *Miranda* warnings were given. 542 U.S. at 604. The Court was split, with the plurality stating that the "threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." *Id.* at 611-612. The

plurality acknowledged that "when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Id.* at 613-14 (Internal quotation marks omitted). The plurality then identified several factors that would bear on whether the midstream *Miranda* warnings were effective, including the detail of the first statement, overlap between the two statements, the amount of time between the two statements, and whether the interviews were treated as continuous. *Id.* at 615. The plurality came to the conclusion that the warnings given did not serve their purpose, thus the defendant's statements were inadmissible. *Id.* at 617.

Justice Kennedy filed a concurrence in which he agreed with the plurality for the most part, but found their holding to be too broad. *Id.* at 621-22. Instead, Justice Kennedy suggested a test that focused on whether the police deliberately employed the two-step technique. *Id.* at 622. Specifically, Justice Kennedy concluded that

> The admissibility of postwarning statements should continue to be governed by the principles of [*Oregon v.*] *Elstad* [, 470 U.S. 298 (1985)] unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn.

> Alternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient.

Id. (Citations omitted).[3]

The Court of Appeals adopted Justice Kennedy's concurrence as the controlling precedent in *Wilkerson v. State*, 420 Md. 573, 594 (2011). The Court stated that this was "[c]onsistent with the principle that when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Id.* The Court also acknowledged that a majority of other courts have also held that Justice Kennedy's concurring opinion controls a *Seibert*-type analysis. *Id.* The Court conceded that officers would not likely admit that they deliberately tried to circumvent *Miranda*, therefore, "absent such an admission, courts look to the totality of the objective and subjective evidence surrounding the interrogations in order to determine deliberateness, with a recognition that in most instances the inquiry will rely heavily, if not entirely, upon objective evidence." *Id.* at 600 (Internal quotation marks omitted). The Court went on to state that such objective evidence would involve an assessment of the factors set forth by the plurality in *Seibert*:

> "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

[3] *Oregon v. Elstad*, 470 U.S. 298 (1985) stood for the proposition that a post-*Miranda* statement was admissible as long as it was voluntary. At trial, appellant did not challenge the voluntariness of his statements.

> continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first."

Id. at 600-01 (quoting *Seibert*, 542 U.S. at 615).

Appellant contends that "the detectives deliberately delayed informing [him] of his rights in order to have him continue talking to them," which allowed them to pin him to a story and then harken back to it after advising him. Appellant further argues that Detective Lopez took no curative measures in order to save the post-warning statements from suppression. The State counters that under the factors established in *Seibert* and adopted by the *Wilkerson* Court, the police did not employ a deliberate two-step *Miranda* process; therefore, the statement was properly admitted.

The first factor is "the completeness and detail of the questions and answers" in the first interrogation. *Seibert*, 542 U.S. at 615. In this case, the first "interrogation" was very short. After asking several background questions, Detective Lopez gave appellant a piece of paper and told him to "write me exactly what happened." Detective Lopez then left the room as appellant wrote his statement. Detective Lopez did not ask appellant any questions about either the alleged robbery or the assault on Alvarez. Instead, he simply told appellant to write down what had happened. Appellant's entire written statement reads as follows:

> I was attacked by some black people at the 7 Eleven of Oxon Hill.
> I came to change a lottery ticket and when I left I was attacked.
>
> That is all.

> And the truth is I don't know why you have me here. I have to work[.]
>
> I was attacked by black people with intent to rob and kill and part of my left hand was cut with a knife[.]
>
> $420 Dollars[.]

This brief statement did not even address the assault on Alvarez that appellant would later be charged with. Accordingly, in terms of "completeness and detail," this first round of "questions and answers" contained very little substance.

As for the second factor, "overlapping content of the two statements," there was overlap in appellant's answers, however, the focus of the two interviews was noticeably different. *Id.* The focus of the first interview was solely the alleged robbery of appellant. Appellant's written statement claimed that he was robbed and made no reference to the fight with Alvarez. Conversely, Detective Lopez's questions during the second interview were almost entirely about the assault on Alvarez. The only overlap in the statements was appellant's insistence that he had been robbed and had nothing to do with hurting Alvarez. Although he would later change his story at trial, in neither part of this "two-step" interrogation did appellant ever confess to any involvement in the assault. It is also worth noting that appellant gave a consistent statement prior to his interrogation at the police station. When Detective Lopez arrived at the scene, appellant told him that he had been robbed. As he was not in custody at the time, there were no *Miranda* implications for appellant's initial statement. Thus, appellant had already established the robbery story before he made the custodial statements at issue in this appeal.

The third factor is the timing and setting of the interviews. *Id.* Both interviews occurred in the same interview room of the police station. However, there was a significant gap in time between the two statements. Detective Lopez asked appellant to give his pre-*Miranda* written statement around 10:04 p.m. Detective Lopez did not begin the post-*Miranda* interview until approximately 11:41 p.m. Therefore, there was approximately an hour and a half between the two statements. Detective Lopez clearly did not elicit a non-*Mirandized* statement from appellant and then immediately follow it up with a *Mirandized* statement. Instead, he had appellant give a written statement, read appellant his rights, and then waited about ninety minutes before interrogating him. This rather lengthy delay between statements suggests a lack of deliberateness on the part of the detective to circumvent appellant's *Miranda* rights.

The fourth factor, continuity of police personnel, is more of a neutral factor. *Id.* Detective Lopez did conduct both interviews, but during the lengthy interval between the two statements appellant was visited by a variety of other police officers coming in and out of the interview room to take pictures and question him. As the State has asserted, there was an "overall disjointed nature" to the interrogation, which "supports the conclusion that the police did not act deliberately in this case."

The final factor is "the degree to which the interrogator's questions treated the second round as continuous with the first." *Id.* Although appellant continued to insist that he had been robbed, at no point in the second interview did Detective Lopez make any clear references to appellant's written statement. Moreover, Detective Lopez spent

nearly the entire interview trying to get away from the robbery story that appellant had detailed in his written statement. Detective Lopez tried to get appellant to talk about Alvarez and repeatedly accused appellant of lying when he denied his involvement. Detective Lopez's attempts to steer the conversation away from the alleged robbery lends further support to the State's contention that these were not treated as continuous rounds of questioning.

The totality of the evidence leads this Court to the conclusion that Detective Lopez did not deliberately employ a "two-step" technique to circumvent the protections of *Miranda*. At no point during the interrogations was there a confession followed by an advice of rights, which was then followed by a repeated confession. In fact, appellant never confessed to the crime at all. This is not to say that appellant's oral statement was completely harmless. As appellant argues, even though the statements were "not facially inculpatory," they could be seen as "reflective of consciousness of guilt," as appellant did present a contradictory story to the robbery claim at trial. Nevertheless, nothing said during the interview suggests that Detective Lopez was attempting to pin appellant to his robbery story. On the contrary, Detective Lopez repeatedly tried to get appellant to change his story, but to no avail. Unlike a typical *Seibert* case, the detective was not attempting to get the suspect to give him the same statement twice. Instead, Detective Lopez tried to get appellant to change his story post-*Miranda* warnings. Such an approach is the opposite of a *Seibert* "two-step" technique. Accordingly, the motions

court properly concluded that there was no deliberate "two-step" technique and the "taint" from the first statement did not carry over to appellant's second statement.

II. Jury Instruction

Appellant also challenges the jury instruction given regarding his statement. Included among the instructions given to the jury at the conclusion of the trial was Maryland Criminal Pattern Jury Instruction 3:18 (Statement of Defendant). The instruction, as read to the jury, provides:

> You've heard evidence that the defendant made a statement to the police about the crime. 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 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 or threat or promise or offer in obtaining the 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 or promise 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, one, the conversations, if any, between the police and the defendant; two, whether the defendant was advised of his rights; three, the length of time that the defendant was questioned; four, who was present; five, the mental and physical condition of the defendant; six, whether the defendant was subjected to force or threat of force by the police; seven, the age, background and experience, education,

> character and intelligence of the defendant; eight, whether the defendant was taken before a District Court Commissioner without unnecessary delay following arrest; nine, 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.

After the court finished reading the instructions to the jury, appellant's counsel objected, stating, "I would just object to 3:18, statement. I didn't think—just because it's about voluntariness, I didn't think that was an issue that was raised."[4]

Maryland Rule 4-325(c) provides that "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. . . . The court need not grant a requested instruction if the matter is fairly covered by instructions actually given." "A Maryland appellate court reviews a trial court's refusal or giving of a jury instruction under the abuse of discretion standard." *Stabb v. State*, 423 Md. 454, 465 (2011).

> We consider the following factors when deciding whether a trial court abused its discretion in deciding whether to grant or deny a request for a particular jury instruction: (1) whether the requested instruction was a correct statement of the law; **(2) whether it was applicable under the facts of the case**; and (3) whether it was fairly covered in the instructions actually given.

Id. (Emphasis added).

[4] The discussion regarding the jury instructions prior to them being read to the jury was held off the record. Therefore, there is no record of whether appellant's trial counsel objected to the instruction before it was given.

Appellant's appeal focuses on the second factor. Appellant contends that the jury instruction was given in error, because appellant never raised the issue of voluntariness with his statements; therefore, the instruction was not applicable under the facts of this case. Appellant argues that the instruction was superfluous, and unfairly prejudiced appellant by denying him the right to present the defense of his choice.

The State counters that the instruction was generated by the evidence because voluntariness is always an issue when statements are introduced. The State argues that even if it was a superfluous instruction, any error derived from it was harmless.

The Court of Appeals addressed the issue of when a voluntariness instruction is appropriate in *Hof v. State*, 337 Md. 581 (1995). In *Hof*, the defendant appealed the trial court's refusal to propound his request for a more detailed instruction on voluntariness. *Id.* at 591. The Court noted that Rule 4-325(c) "has been interpreted to require that a requested instruction be given only when there is evidence in the record to support it." *Id.* at 612. The Court went on to hold:

> that **to merit a jury instruction on voluntariness**, one that does more than advise the jury that the State must prove voluntariness, it is not enough that the trial court, at a pretrial hearing, triggered by the defendant's motion to suppress, has considered and resolved the issue against the defendant; rather **the issue must be generated before the jury**.

Id. at 617 (Emphasis added). The Court added that "this requires . . . that there be evidence *at trial* from which the trier of fact could conclude that the confession was involuntary." *Id.* (Emphasis in original). The Court further stated that, "unless the issue

is pursued at trial, there is absolutely no reason for it to be even submitted to the jury." *Id.* at 617-18.

As appellant has argued, the issue of voluntariness was never raised at trial. Although appellant did raise the issue of voluntariness during the suppression hearing, there needed to be evidence of involuntariness *at trial* in order to warrant a jury instruction. *See id.* at 617. Given that the issue was never generated at trial, we agree with appellant that a jury instruction on voluntariness was not merited. Nevertheless, even though this instruction was superfluous, appellant has failed prove that any prejudice resulted from its inclusion.

This Court previously addressed the issue of excessive jury instructions in *Perry v. State*, 150 Md. App. 403 (2002). In *Perry*, we recognized that "excessive and frequently unnecessary jury instruction[s]" are "unfortunate," but "nonetheless happen all the time." *Id.* at 426. We went on to state that

> [i]t has never been suggested that it is reversible error. A rule requiring a necessary instruction does not forbid an unnecessary instruction. It is under-inclusion that runs the risk of error. Over-inclusion only runs the risk of boredom.
>
> Actually there is some justification for some of the overly inclusive instructions that are frequently given. In doubtful or ambiguous situations, the discreet thing to do is to tell the jury more than it needs to know rather than run the risk of denying the jury necessary knowledge. When in doubt, it is better to err on the side of over-inclusion rather than under-inclusion. That is why over-inclusion has never been made the occasion for reversible error.

Id. at 427.

The Court of Appeals has since restricted this rather broad approach to superfluous jury instructions in *Brogden v. State*, 384 Md. 631 (2005). In *Brogden*, the defendant was charged with first-degree burglary, malicious destruction of property, and wearing, carrying or transporting a handgun. *Id.* at 632. During jury deliberations, the jury sent a note to the trial judge asking whether the State had the burden of proving that the defendant did not have a license to carry a handgun. *Id.* at 635. The trial court instructed the jurors that it was the burden of the defendant to prove the existence of the license, not the State. *Id.* at 639. The defendant appealed the instruction on the basis that he never raised the defense of having a license. *Id.* The *Brogden* Court reversed the defendant's convictions, holding that the trial court erred by providing this instruction, because "there was absolutely no reason for the trial judge, over objection, to instruct the jury as to the law of handgun licenses and its effect on the burden of proof." *Id.* at 644. The Court found that

> The supplemental jury instructions at issue here were simply not "appropriate" under Md. Rule 4-325 in that they did not state the "applicable law" as to the issues relating to the handgun charge then properly before the jury for deliberation. At the point the supplemental instruction was given, the entire burden of proving the commission of that particular crime rested with the State. Petitioner had presented no defense. The jury had already been correctly instructed. To then inform the jury that petitioner had the burden of establishing the existence of a license in order to prevail on a defense that petitioner had never raised, was to impose a burden on petitioner that he never had. Under these circumstances it could not have been harmless.

Id. The Court went on to note its departure from the *Perry* case, explaining:

> We disagree with the intermediate appellate court's assessment [in *Perry*] of the breadth of Md. Rule 4-325(c). We believe that the intermediate appellate court paints with too broad a brush in its conception that a superfluous jury instruction can never amount to error. We recognize in the case *sub judice* that sometimes it can. This is especially so when the unnecessary instruction purports to place a burden of proof on a defendant to prove a defense that the defendant never raised.

Id. at 645 n. 6.

Thus, there are circumstances where a superfluous jury instruction can be reversible error, such as in *Brogden*. This case, however, is not such an instance. By giving the jury instruction in *Brogden*, the trial court "impose[d] a burden on [the defendant] that he never had." *Id.* at 644. Conversely, the instruction in this case placed an additional burden on the State, not on appellant. As the State has argued, "[i]t is thus unclear how [appellant] could have been prejudiced by an instruction that did nothing more than provide the jury with a legally-sanctioned mechanism for disregarding [appellant's] statement." Furthermore, although appellant claims that "injecting the issue of voluntariness into the minds of jurors . . . infringed upon [his] right to present the defense of his choice," appellant provides no explanation for how the instruction on voluntariness hampered his self-defense argument. The issue of whether appellant's statement was voluntary is entirely separate from whether he acted in self-defense. Again, we do not mean to discount the relevance of appellant's statement about the robbery, as it clearly contradicted his defense at trial, and, as the State concedes, tended to show consciousness of guilt on his part. Nevertheless, we fail to see how an instruction placing an additional burden on the State could have prejudiced appellant.

Accordingly, we hold that the superfluous instruction on voluntariness was harmless error.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.