UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0131

September Term, 2016

RYAN WAYNE HUFFER

v.

STATE OF MARYLAND

Wright,
Reed,
Friedman,

JJ.

Opinion by Wright, J.

Filed: February 24, 2017

This appeal arises out of the criminal charges, jury trial, and guilty verdict following the February, 2014 death of an infant boy, Logan Luaces ("Logan").

Logan's father, appellant, Ryan Wayne Huffer, was tried by a jury in the Circuit Court for Frederick County for charges stemming from his death. A jury was sworn in on December 14, 2015, and on December 21, 2015, Huffer was convicted of first-degree child abuse, second-degree child abuse, and second-degree assault.

At the sentencing hearing on February 24, 2016, all of the convictions were merged into first-degree child abuse, and Huffer was sentenced to 40 years with all but 20 years suspended, followed by a five-year period of probation.

On March 7, 2016, Huffer appealed.

For the following reasons, we affirm the decision of the circuit court.

QUESTIONS PRESENTED

We have reworded Huffer's questions for clarity, as follows:[1]

[1] In his brief, Huffer asks:

> 1. Did the trial court commit reversible error by allowing the introduction of evidence by the State derived from the search and seizure of Appellant Huffer's cell phone?
>
> A. Did the trial court err by denying Appellant Huffer's Motion to Suppress all evidence derived from his cell phone where that cell phone was seized by law enforcement without a warrant and without exigency?
>
> B. Assuming *arguendo* that the seizure of Appellant Huffer's cell phone was constitutional, did the trial court err by denying Appellant Huffer's Motion *in Limine* and various objections during trial to the State's use of piecemeal evidence derived from no less than four (4) forensic examinations performed by two (2) law enforcement jurisdictions as unreliable and improperly manipulated?

2. Did the trial court commit reversible error by denying Appellant Huffer's motion for mistrial after a sworn juror was found to have been hiding communications with outside parties about Appellant Huffer's guilt during the jury *voir dire* process?

3. Did the trial court commit reversible error by denying Appellant Huffer's Motion to Suppress and Motion *in Limine* To Exclude various statements made to law enforcement on the date of Logan Luaces' death?

A. Did the trial court err by failing to suppress all statements made by Appellant Huffer to law enforcement at the Picnic Woods Road address?

B. Did the trial court err by failing to suppress all statements made by Appellant Huffer to law enforcement at Frederick Memorial Hospital?

C. Did the trial court err by denying Appellant Huffer's motion to exclude all statements made to anyone prior to leaving Frederick Memorial Hospital on the morning of Logan's death?

4. Did the trial court commit reversible error by refusing on various occasions to allow Appellant Huffer to introduce evidence or testimony related to birth and pre-natal records which showed that the victim's mother abused alcohol and tobacco during her pregnancy?

A. Did the trial court err by sustaining the State's objections to Appellant Huffer's efforts at using pre-natal records related to drinking and smoking during her pregnancy to impeach the victim's mother's testimony that she did not discuss potential birth complications with any pre-natal physicians?

B. Did the trial court err by refusing to allow Appellant Huffer to develop testimony related to the relevance of prenatal smoking and drinking by improperly limiting Appellant Huffer's expert to rebuttal answers?

5. Did the trial court commit reversible error by denying Appellant Huffer's Motion *in Limine* and various objections to the testimony of State witnesses related to medical theories of "abusive head trauma" and/or "shaken baby syndrome?"

A. Did the trial court err by allowing the State's forensic pathologist to testify regarding a biomechanical theory for which he was not qualified?

B. Did the trial court err by allowing State medical experts to testify regarding medical theories which are no longer generally accepted theories and are discontinued by the relevant medical community?

C. Did the trial court err by allowing the State's forensic pathologist to give opinions based on the notes, photographs, and findings of an autopsy performed by another forensic pathologist and in violation of Appellant Huffer's Confrontation Clause rights?

6. Did the trial court commit reversible error by denying Appellant Huffer's Motion *in Limine* and various objections to the State's introduction of gruesome and prejudicial photographs of the victim at trial, despite the jury's express request to take some of them down?

A. Did the trial court err by admitting a photograph of the victim at Children's Memorial Hospital on the day he died with various tubes and other medical equipment coming out of him?

B. Did the trial court err by admitting various gruesome photographs of the victim's autopsy over Appellant Huffer's objection which had very little probative value and which were clearly prejudicial to the jury?

C. Did the trial court err by denying Appellant Huffer's objection to the State's use of pictures of other, unrelated children with extreme macrocephaly as comparative evidence to refute quantitative measurements of Logan's macrocephaly?

7. Did the trial court commit reversible error by allowing the jury to decide the case and to ultimately convict Appellant Huffer based on the woefully insufficient evidence actually presented by the State at trial?

8. Did the trial court commit reversible error by responding to a jury note during deliberations with different definitions of pertinent legal terms than those conveyed to the jury moments earlier during Jury Instructions?

9. Did the trial court commit reversible error by refusing on various occasions to allow Appellant Huffer to use evidence related to a memorial for the victims of child abuse which included Logan Luaces' name, and which was erected in downtown Frederick prior to Appellant Huffer's trial

I. Did the trial court err by admitting evidence gathered from Huffer's cell phone?

II. Did the trial court abuse its discretion by denying Huffer's motion for a mistrial based on juror third party communication during *voir dire*?

III. Did the trial court err by denying Huffer's motion to suppress statements he made on the date of his son's death?

IV. Did the trial court err by excluding evidence related to birth and pre-natal record related to the victim's mother's use of alcohol and tobacco during pregnancy?

V. Did the trial court abuse its discretion in admitting the State's medical experts' testimony?

VI. Did the trial court abuse its discretion in the admittance of various photographs?

VII. Was the evidence sufficient to allow the jury to decide the case and to convict Huffer?

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by a coalition of public and private entities including the Frederick County Sheriff's Office, the Frederick County State's Attorney's Office, and a private, local company owned and operated by the Assistant State's Attorney Lindell K. Angell, the lead prosecutor on this case?

10. Did the trial court commit reversible error by denying Appellant Huffer's Motion to Suppress physical evidence seized by law enforcement at various times at the Picnic Woods Road address?

A. Did the trial court err by failing to suppress all physical evidence seized by law enforcement at the Picnic Woods Road address as fruits of the poisonous tree created by the warrantless entry of that residence without exigency?

B. Assuming *arguendo* that the warrantless entry of the residence was justified, did the trial court err by failing to suppress or exclude evidence seized by Frederick County Sheriff's Deputy McDowell and taken to Frederick Memorial Hospital prior to the execution of a search warrant at the Picnic Woods Road address?

VIII. Did the trial court abuse its discretion in responding to jury questions during deliberations?

IX. Did the trial court err in excluding evidence related to the Healing Garden memorial?

X. Did the trial court err in denying Huffer's motion to suppress evidence taken from the Picnic Woods Road address?

FACTS

Logan's Birth

Logan was born on October 29, 2013, at Frederick Memorial Hospital ("FMH"). His mother, Melissa Luaces ("Luaces"), attended all of her prenatal appointments and experienced no complications during her pregnancy. Logan was delivered via C-section because his heart rate was dropping during contractions, and he was monitored in the Neonatal Intensive Care Unit ("NICU") after birth for possible ingestion of fecal matter during delivery. Dr. Michelle Ghim, a pediatric emergency room physician at FMH, testified that all of the issues that arose during birth would have been resolved by the time Logan was released from the NICU, and she saw none of those conditions present when Logan was three months old. Dr. James Lee, Logan's pediatrician, testified that Logan was healthy and up to date on all his vaccines. Dr. Lee stated that Logan's head size was larger than the normal projections, which he was monitoring, but that he had not diagnosed Logan with macrocephaly,[2] and Logan did not have any of the symptoms related to macrocephaly.

[2] "Macrocephaly refers to an overly large head in infants. Not all cases of macrocephaly are cause for alarm. However, it is often a sign of other complications or

Huffer and Luaces were not in a romantic relationship at the time Logan was conceived or at any time during Logan's life. Huffer took care of Logan for several weekends and overnights prior to the weekend of Logan's death. With the exception of the final weekend, Huffer was watching Logan overnight with help from Ana Long, Huffer's off-and-on girlfriend who Luaces knew, at Long's house.

Morning of Logan's Death

On the night of February 15-16, 2014, Huffer was alone with Logan in his bedroom at his grandmother's house on Picnic Woods Road ("Picnic Woods home"). Text messages show that Long and Huffer were arguing on the evening of February 15, 2014, and that Logan was fussy. Logan had vomited several times, and he had diarrhea, which necessitated a bath and a change of Huffer's sheets.

On the morning of February 16, 2014, Huffer called 911 to report that Logan was not breathing and did not have a heartbeat. Huffer administered CPR under the dispatcher's instruction.

First responders transported Logan to FMH. Upon arrival, he did not have a heartbeat. FMH took a CT scan of Logan's head, which showed subdural hematomas on both sides of his brain. Logan was taken by medevac to Children's Memorial Medical Center ("Children's Hospital") in Washington, D.C.

Logan never regained consciousness and died less than 24 hours later. The cause of death was cardiac arrest due to anoxia.

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conditions in the brain." http: //www.healthline.com/heath/macrocephaly (last visited on February 14, 2017).

Prior to his departure to travel to Children's Hospital, deputies told Huffer they were going to take his phone. Huffer initially resisted, indicating that the police would need to arrest him or obtain a warrant. The officers responded that they were not going to arrest him, but that he could turn his phone off before handing it over to be put into evidence, and that it would be searched after a warrant was secured. Huffer turned off the phone and turned it over to the police.

Huffer's Statements

Throughout the day, Huffer made a series of statements to first responders, police, family, and hospital personnel about what happened to Logan. Huffer told a responding paramedic that he was lying in bed listening to Logan breathe when Logan suddenly stopped breathing. Huffer told Luaces that he woke up and discovered that Logan was not breathing.

At FMH, Huffer told Detective Romeril that Logan was up crying like usual, he got him to settle down, then he laid Logan on the bed to check his diaper, and Logan began gasping for air. Huffer initially told Det. Romeril that he performed CPR after he called 911, but later said he began performing CPR in his bedroom and then called 911. When asked if Logan had fallen, Huffer told Det. Romeril that Logan slipped and hit his head in the bathtub the previous evening.

Huffer told the medevac nurse that Logan was propped up in bed with him when Logan coughed, choked, and quit breathing. In the car with his father on the way to Children's Hospital, Huffer contacted Deputy Sisson who was still at the Picnic Woods home in order to make a statement. Huffer then told Deputy Sisson that Logan was

crying at 7:00 a.m., he picked Logan up and walked across the room with him when he tripped and fell over a blanket that was coming off the bed. Huffer stated that he was not sure whether Logan's head hit the floor, but that he then laid Logan on the bed where he began gasping for air.

At Children's Hospital, Huffer told Dr. Sean Terjiram that the previous night, he fell with Logan in his arms and that Logan hit the floor first.

Investigation & Trial

Two days after Logan's death, an autopsy was performed by Dr. Joseph Pestaner of the Office of the Chief Medical Examiner for the District of Columbia ("D.C."). Dr. Roger Alan Mitchell, Jr., the chief medical examiner for the D.C. Office of the Chief Medical Examiner, ordered an ophthalmology report, a neurological microscopic report, and a forensic investigation. As a result, the autopsy report was not finalized for months after the dissection as the cause of death was being investigated.

At trial, Dr. Mitchell testified concerning his autopsy report and conclusions. Dr. Mitchell noted the subdural hematomas, swelling of the brain, and fresh and extensive retinal hemorrhages of the optic nerves in both eyes. Dr. Mitchell ruled out Terson's Syndrome, the Balance Error Scoring System, ("BESS"), any indication that Logan was macrocephalic, and a birth injury. Two tests ruled out glutaria aciduria. Dr. Mitchell testified that all of Logan's medical records were reviewed in a forensic report prepared for the final autopsy report, and that he personally reviewed Logan's birth and pediatric medical records and maintained his opinion that Logan's death was caused by non-accidental head trauma.

Dr. Nathan Dean, the medical director of neocritical care at Children's Hospital, testified that Logan did not have a stroke caused by a clot, BESS, Terson's Syndrome, or hydrocephaly.

Dr. Robert Chabon, Huffer's expert witness, testified that he believed Logan's larger-than-normal head size was due to Logan developing macrocephaly, that there may have been an underlying condition that was causing the macrocephaly to develop, and that this undiagnosed underlying condition may have contributed to his death.

The jury convicted Huffer of first-degree child abuse, second-degree child abuse, and second-degree assault.

Additional facts will be provided as they become relevant to our discussion.

DISCUSSION

I. Seizure of Huffer's Cell Phone and Related Evidence

Huffer avers that the trial court committed reversible error by allowing the introduction of evidence from the search and seizure of Huffer's cell phone, because the search and seizure was unlawfully conducted without a warrant and without exigency, or in the alternative, because the court erred in denying Huffer's motion *in limine* to suppress the evidence as unreliable and improperly manipulated.

In reviewing the suppression court's ruling, we view the facts in the light most favorable to the State, and extend great deference to the trial court's finding of fact, but make our own *de novo* constitutional evaluation by applying the law to those facts. *Brewer v. State*, 220 Md. App. 89, 99 (2014).

A. Search and Seizure

The Fourth Amendment protects citizens from unreasonable government searches and seizures of their person, houses, papers, and effects. *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993). The "seizure" of physical property occurs when that property is taken by law enforcement. *See U.S. v. van Leuwen*, 397 U.S. 249 (1970). Because the ultimate touchstone of the Fourth Amendment is reasonableness, the warrant requirement is subject to certain exceptions. *Redmond v. State*, 213 Md. App. 163, 177 (2013) (citing *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)). Generally, law enforcement may only seize physical property as evidence without a warrant in very limited circumstances, including but not limited to (1) where exigent circumstances exist, or (2) where the owner of the property consents to its seizure. *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984).

Although he handed the phone over to police, Huffer avers that he did not consent to the seizure, and the State does not assert that there was consent. Thus, we turn to review the trial court's denial of Huffer's motion to suppress based on the court's finding of exigent circumstances.

Exigent circumstances justifying a warrantless search or seizure include the "imminent destruction and removal of evidence." *Gorman v. State*, 168 Md. App. 412, 422 (2006) (citation and quotation marks omitted). Among the factors to be considered in determining whether exigent circumstances exist are "the gravity of the underlying offense, the risk of danger to police and the community, the ready destructibility of the

evidence, and the reasonable belief that contraband is about to be removed." *Id.* (citation omitted).

"Where there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without[t] prior judicial evaluation." *Roaden v. Kentucky*¸ 413 U.S. 496, 505 (1973) (citations and footnote omitted). "Where a warrantless search is based upon the destruction or removal of evidence the surrounding circumstances must present a specific threat to known evidence." *Stackhouse v. State*, 298 Md. 203, 213 (1983).

Here, the trial court found that there were exigent circumstances for the seizure of Huffer's cell phone for two reasons: (1) Huffer was leaving the jurisdiction with the phone to go to Children's Hospital in the D.C.; and (2) the information on the phone could easily be erased, deleted, or destroyed before a search warrant could be obtained.

Huffer avers that these findings were in error because no criminal investigation was ongoing at the time of the seizure, the police were unable to articulate any specific suspicion about the existence of potential evidence on the phone or the potential for destruction of said evidence, and because the officers had no reason to suspect that Huffer would not return from D.C. to Maryland. For the following reasons, we disagree.

First, the lack of an official ongoing criminal investigation is not a basis for denying the existence of exigent circumstances or specific concern regarding potential evidence. The fact that Huffer was not arrested until the autopsy report was completed does not lessen the potential for destruction of the information on the phone on the day in question, and Huffer offers no law to support the argument that it should.

Next, although Huffer states that "it was clear that not one single law enforcement official could articulate any specific suspicion about the existence of any potential evidence on that phone," he offers no evidence to support this conclusion. To the contrary, Det. Romeril testified that in his experience, cell phones often include valuable information including timeframes and evidence.[3] Det. Romeril further testified that, at the time he told Huffer that he was going to take the phone, he had already made a determination that he was going to apply for a search warrant for the phone. The knowledge that Huffer was alone with Logan in the hours before the child's medical emergency, and the suspected presence of text messages and calls to support or dispute a timeframe as proffered by Huffer, is adequate to meet the State's burden that evidence existed on the phone.

Finally, even assuming that Huffer would return to Frederick, his cell phone nevertheless was subject to being discarded, erased, or destroyed before he returned, thereby destroying the evidence the police were seeking to preserve. Huffer fails to address this issue or the ease of destruction of the cell phone or evidence contained therein.

Based on the likelihood that evidence existed on the phone, which Huffer was planning to take outside of the jurisdiction where the evidence could easily be destroyed,

[3] In *State v. Payne & Bond*, 440 Md. 680, 691 (2014), the Court of Appeals noted that "[u]nderstanding the significance of cell phone use in varying contexts extends far beyond merely placing and receiving phone calls, into e-mailing, photographing and internet browsing, the potential retrievable information from cell phone use is extensive." (Internal citation omitted).

we find no error in the trial court's conclusion that exigent circumstances existed to justify the warrantless seizure.

Huffer concedes that the phone was seized but not searched until a warrant was received. The phone was turned off when Huffer gave it to the police, and it was held until the warrant was issued, based on probable cause. The only issue raised is whether the seizure itself was unreasonable. We hold that the seizure was not unreasonable due to exigent circumstances, and because a warrant was obtained prior to the search of the phone. Therefore, there was no violation of Huffer's Fourth Amendment rights and no error in the denial of Huffer's motion to suppress the evidence seized on the grounds asserted by Huffer.

B. Presentation of Evidence

Huffer next avers that even if the search and seizure of the phone was constitutionally permissible, for a number of reasons, the trial court erred by failing to exclude all evidence derived from the phone. The court denied Huffer's motion to suppress, as well as Huffer's motion *in limine* to exclude text messages retrieved from the phone.

Before responding to the merits, the State contends that these issues are not preserved on appeal for two reasons. First, the State asserts that Huffer did not object to the admission of some text messages from the extraction, notably those which seemed to be favorable to the defendant, so he cannot challenge that other texts from the same extraction are now objectionable. Second, the State asserts that the issue is unpreserved because Huffer now argues for suppression based on arguments not raised at trial. We

will discuss the State's preservation argument as it applies to the following three issues raised by Huffer.

Probative Value Outweighed

Huffer first avers that the State's "artistic" presentation of the cell phone evidence had little probative value as to Huffer's mindset and they were unduly prejudicial. Huffer asserts that the inclusion of this evidence was in error because the "State had improperly manipulated and cajoled an unrealistic set of text messages as the sole motive evidence" presenting the text messages in Universal Time Coordinated (UTC"), formerly known as "Greenwich Mean Time."

Maryland Rule 5-403 provides that relevant "evidence may be excluded 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."

Whether evidence is relevant under Md. Rule 5-403 is reviewed for abuse of discretion. *Brooks v. State*, 439 Md. 698, 708-09 (2014). "Abuse of discretion" has been said to occur "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." *Nash v. State*, 439 Md. 53, 67 (2014) (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994)). A ruling reviewed for an abuse of discretion will not be reversed "simply because the appellate court would not have made the same ruling." *Norwood v. State*, 222 Md. App. 620, 643 (2015) (citations omitted). Rather, a trial court's "decision is an abuse of discretion when it is well removed from any center mark imagined by the

reviewing court and beyond the fringe of what that court deems minimally acceptable." *Id.* (citations and quotations omitted).

Although Huffer claims that the text messages at issue have "little probative value," he also inadvertently recognizes that they were highly probative because they "constituted the sole motive evidence" presented by the State. *Jackson v. State*, 87 Md. App. 475, 486 (1991) ("According to the Maryland Evidence Handbook, 518 (E)(1) at 186, 'although motive is neither an element of the crime nor a defense to it, absence of a motive is circumstantial evidence of innocence, and the presence of motive is circumstantial evidence of guilt.'")

Huffer also fails to identify why the text messages were *unfairly* prejudicial. Evidence that simply hurts a party's case is not unfairly prejudicial. *Odum v. State*, 412 Md. 593, 615 (2010). The texts were not unfairly prejudicial nor did the presentation of the texts, color coded by sender and presented in UTC, so substantially change the evidence so as to make it unduly prejudicial. The trial court did not abuse its discretion in admitting the text messages under Md. Rule 5-403 analysis.

Best Evidence Rule

Huffer next avers that the text message presentation was a violation of the "best evidence rule" because the text messages are "writings," therefore, requiring that the original be submitted as opposed to a duplicated copy.

This question was not raised at trial in either Huffer's motion to suppress or his motion *in limine*. Typically, on appeal, we "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court."

Washington v. State, 191 Md. App. 48, 69 (2010); Md. Rule 8-131(a).[4] Accordingly, we decline to address the issue. Md. Rule 8-131(a).

However, it must be stated that Huffer's interpretation of the Best Evidence Rule is fatally flawed and would seemingly require every electronic communication to be presented to a jury *via* its original electronic device. This is clearly not the rule of law as printed copies of e-mails, texts, and other electronic documents are regularly admitted into evidence by trial courts in every jurisdiction of which we are aware.

Reliability of the Evidence

Finally, Huffer avers that the information from the phone should have been suppressed due to the lack of reliability of the evidence because of the extraction process.

We again decline to address this, as Huffer waived the right to raise this issue by allowing the admission of some evidence without objection. Specifically, prior to entering a text-messaged photo of Logan which Huffer sent, the trial court asked defense counsel if there was any objection, which was answered in the negative. We agree with the State that Huffer cannot selectively pick and choose which electronic data from the extraction is allegedly unreliable.

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[4] Md. Rule 8-131(a) provides in full:

> The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. 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, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

II. Juror Communication during *voir dire*

After the jury was selected, the trial court recessed for lunch. When the court reconvened, defense counsel stated that he had uncovered some social media posts that allegedly showed that Juror 31, a seated juror, may have been discussing Huffer's guilt with other prospective jurors during *voir dire.*

Juror 31 was summoned to the bench where she stated that, while she was in the courthouse, but before she entered the courtroom for *voir dire* in this case, she received a private instant message via Facebook from someone she knew, stating that Huffer's trial was scheduled to begin that day and asking her to let another identified prospective juror know that Huffer is guilty. The prospective juror identified in the message was not seated in the case. Juror 31 first stated that she had ignored the message. When shown the communication, she agreed that she had replied with "gotcha." Juror 31 stated that she was "joking," she meant "whatever," and that she considered the sender a "blowhard," to whom she did not listen. Juror 31 further stated that she was aggravated by the message, did not relay it to the other juror, and that she deleted "the whole thing" from her phone.

When asked whether she discussed the message with any of the selected jury panel, Juror 31 replied, "Oh God, no." Juror 31 also stated that the message had not affected her ability to be fair, and that she had not made up her mind about Huffer's guilt or innocence, because she did not know the facts of the case.

When asked why she had not reported the instant message during *voir dire,* Juror 31 reminded the trial court that she had affirmatively responded to the question as to

whether anyone had heard anything about Logan's death. She had approached the bench and stated that she had heard people thought Huffer had hurt Logan. Defense did not move to strike her for cause at that time.

At trial, upon discovery of the communication, Huffer moved for a mistrial, arguing that he had no other remedy. The State responded, and the trial court denied the motion finding "[t]here is no evidence whatsoever that the balance of the panel has been tainted in any way[.]"

Defense counsel then moved to strike Juror 31 for cause. The State deferred to the court, and the court granted the motion to strike Juror 31.

Next, defense counsel stated, "I don't think we can do the whole jury, but could we speak with [Juror] 32[?]" It had been determined during *voir dire* that Jurors 31 and 32 knew each other but could make independent decisions. The trial court asked Juror 32 whether she and Juror 31 had discussed the case in any way. Juror 32 said that there had been no conversation, and defense counsel declined to move to strike Juror 32. Huffer now states that these questions to Juror 32 did not "relate directly to bias or prejudice and thus, have no relevance to this appeal."

On appeal, Huffer avers that the trial court erred first by failing to comprehensively question the entire sworn jury to determine whether any members were prejudiced by the outside communication, and the court erred a second time by denying Huffer's motion for a mistrial without first establishing a clear record of lack of prejudice to the jury.

We review the trial court's ruling on a mistrial motion under the abuse of discretion standard. *Nash,* 439 Md. at 66-67. Trial courts are vested with wide discretion in ruling on a motion for mistrial because "a mistrial is an extreme remedy not to be ordered lightly." *Id.* at 68-69. In reviewing the denial of a motion for a mistrial for juror misconduct, "[w]e will 'reverse a decision . . . if we are unable to discern from the record that there was an analysis of the relevant facts and circumstances that resulted in the *exercise* of discretion.'" *Wardlaw v. State,* 185 Md. App. 440, 454 (2009) (quoting *Maddox v. Stone,* 174 Md. App. 489, 501 (2007)) (emphasis in original).

Huffer avers that when he moved for mistrial, the record was inadequate to determine whether or not Juror 31 had created any bias or prejudice to the rest of the jurors, and that the trial court cannot leave the record inadequate, but rather has a *sua sponte* obligation to create an adequate record by inquiring of the remainder of the sworn jury.

In *Nash,* the Court of Appeals summarized Maryland law regarding *voir dire* requirements prior to denying a motion for a mistrial for juror misconduct, and stated:

> When a party moves for a mistrial based upon the conduct of jurors, we impose on trial judges the duty to conduct *voir dire sua sponte,* prior to ruling on the motion, in two sets of circumstances. The first circumstance occurs when a juror's actions constitute misconduct sufficient to raise a presumption of prejudice that must be rebutted before a mistrial motion may be denied. *See Jenkins [v. State],* 375 Md. [284], 327-30, [(2003)]; *see also Wardlaw v. State,* 185 Md. App. 440, 453-54, 971 A.2d 331, 339 (2009). The second, ancillary circumstance occurs when a material and relevant fact regarding a juror's conduct is unknown or obscure and must be resolved before a trial judge has "sufficient information to determine whether the presumption of prejudice attached to the [conduct] or to rule on [the] motion for a mistrial." *Dillard [v. State],* 415 Md. [445], 457 [(2010)].

Id. at 69.

In *Wardlaw*, on which Huffer heavily relies, a juror shared independently conducted internet research with the jurors during deliberation. 185 Md. App. at 444-46. The trial judge denied a motion for a mistrial and instead gave a curative instruction reminding the jury to rely only on the evidence admitted. *Id.* at 453. We vacated the conviction and remanded the matter for a new trial because "the trial court did not *voir dire* the jury in the instant case, the presumption of prejudice was not rebutted and the trial court denied the motion without exercising its discretion." *Id.* at 453-54 (citations omitted).

Huffer also cites to *Remmer v. United States*, where the Supreme Court stated that in a criminal case:

> any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . [and] the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

347 U.S. 227, 229 (1954).

However, Huffer fails to persuade us that Juror 31's communication established either presumptive prejudice, or that the judge had insufficient information to determine if prejudice attached in order to exercise discretion and rule on the motion for a mistrial.

First, it must be noted that the communication between Juror 31 and the outside party was both prior to when she was selected for the jury and prior to being sworn in. The communication did not occur *during* the trial. Huffer does not allege any

communication during the trial, or even during the period after Juror 31 was selected but before the jury was seated. Further, Juror 31 did affirmatively respond to the *voir dire* question asking if any jurors had "read or heard anything about the facts of the case prior to coming into the courtroom[.]" Juror 31 stated that she "had heard that they thought [Huffer] may have hurt the baby." She then stated that what she had heard would not affect her ability to be impartial, stating "I have not made up my mind personally." Huffer did not move to strike her at that time. The external communication was prior to *voir dire,* adequately covered Juror 31's disclosure, and thus resolved. However, we shall nonetheless turn to the merits of Huffer's question regarding prejudice and the sufficiency of the record.

A. Presumption of Prejudice

Huffer contends that here, like in *Wardlaw,* reversal is warranted because "the trial court did not *voir dire* the jury in the instant case, the presumption of prejudice was not rebutted" but Huffer fails to first establish a presumption of prejudice.[5] 185 Md. App. at 453.

In the seminal cases on which Huffer relies, the juror misconduct at issue inherently affected another party and therefore created a presumption of bias. In *Wardlaw,* it was undisputed that the juror shared external information with the entire

[5] Huffer's questions and argument focus on whether the trial court erred in failing to *voir dire* the jury to sufficiently develop the record regarding a potential for bias or prejudice. However, he raises cases such as *Wardlaw* and *Remmer,* seemingly for the proposition that Juror 31's conduct was presumptively prejudicial. As such, we address that question briefly here.

jury. 185 Md. App. at 444-46. Likewise, in *Jenkins*, a juror and a witness communicated externally, elevating the issue to involve more than a single juror involved in the external communication. 375 Md. at 323-24. Finally, in *Johnson v. State*, 423 Md. 137, 141 (2011), the entire jury had contact with the external information on an admitted cell phone which they improperly turned on during deliberation.

Conversely, here, only one juror had any involvement with the external communication, and, as the trial judge stated, no evidence was presented to indicate that the jury had been tainted beyond Juror 31. There was no evidence that Juror 31 shared the contents or sentiment of the message with any other jurors. Rather, Juror 31 stated that she had not shared the contents of the message. Therefore, there is no presumption of prejudice, and the trial judge was not required to *voir dire* the entire jury under the first circumstance set out by *Nash.*

As we stated in *Nash,* "[b]ecause the presumption does not apply to the facts of the present case, the burden of proof as to the mistrial motion did not shift from [Huffer], and, thus, the trial judge did not inherit the responsibility to conduct a *voir dire sua sponte* (in the absence of a request for *voir dire* from either of the parties)." *See* 439 Md. at 79. However, "a *voir dire* of the jurors would not have been [necessarily] improper under the present circumstances . . . . to the extent *voir dire* could have been useful in ferreting-out and resolving any potential prejudice, the burden was on [Huffer] to request it. Because [he] failed to request *voir dire* at the time of his motion for a mistrial, the trial judge did not abuse [his] discretion, on presumption of prejudice grounds, by refraining from conducting *voir dire sua sponte*." *See id.* at 79-80 (footnote omitted).

B. Unresolved Factual Issue in the Record

Huffer next avers that at the time he moved for a mistrial, the record was inadequate to determine whether Juror 31's conduct created any bias to the rest of the jurors. As stated in *Nash*, *voir dire* must be conducted where "a material and relevant fact regarding a juror's conduct is unknown or obscure and must be resolved before a trial judge" may rule on a motion to dismiss. 439 Md. at 69 (citation omitted).

Huffer fails to recognize that the trial court resolved any question of unknown bias by speaking with Juror 31 prior to ruling on the motion to dismiss. Juror 31 was brought to the bench and questioned regarding the communication.

Huffer now asserts that the juror had "arguably perjured" herself in the conversation at the bench, and therefore, "whether we can believe Juror 31 that she did not prejudice the rest of the jury is irrelevant." We disagree.

"Our task . . . is to determine whether the route the trial judge traveled 'does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective,' and, thus, constituted an abuse of discretion." *Nash*, 439 Md. at 87 (quoting *Alexis v. State*, 437 Md. 457, 478 (2014)). In doing so, "we must remember the trial judge's unique role and distinct advantage in evaluating questions of prejudice to a criminal defendant." *Id.* "The [trial] judge is physically on the scene, able to observe matters . . . [and] is able to ascertain the demeanor of witnesses and to note the reaction of the jurors . . . ." *State v. Hawkins*, 326 Md. 270, 278 (1992).

Huffer bases his conclusion that Juror 31 "perjured" herself on her statement that she "ignored" the message although she did, in fact, respond with a one word answer.

Huffer repeatedly refers to this as a "lie." However, to conclude that this was a lie requires an interpretation of "ignored" to mean that she did not respond; this is one possible understanding, but not the only. Alternatively, Juror 31 meant that she disregarded the statement, an equally accepted definition of ignored, and one that her statements in the record support.

The trial judge, who was physically present and able to observe her demeanor, found Juror 31 to be credible. Her statements provided adequate record on which the trial judge could rule. The trial judge concluded from her testimony that there was no evidence to raise concern about the contamination of the remainder of the jury, and the judge reasonably found the record to be adequate for a ruling on Huffer's motion to dismiss.

We are able to discern from the record that "that there was an analysis of the relevant facts and circumstances that resulted in the exercise of discretion."[6] *Maddox*, 174 Md. App. at 502. Prior to ruling on Huffer's motion for mistrial, the trial judge adequately developed the record by speaking with Juror 31 so as to determine that no

[6] Beyond the conversation with Juror 31, the record reflects that the judge exhibited due concern with providing Huffer a fair and impartial jury, which included repeatedly expressing a sentiment to defense counsel instructing him to avoid asking substantive questions to Juror 32 which could inadvertently cause a taint. These comments demonstrate an ongoing process of weighing of the relevant factors, and an active determination of how to best fulfill the duty of providing a fair and impartial jury in a relatively small jurisdiction and considering that this was a relatively high profile case.

prejudice to the jury was created. Striking Juror 31 removed any further threat of contamination.

The trial court did not abuse its discretion in denying Huffer's motion for a mistrial.

III. Statements to Law Enforcement

Huffer avers that numerous statements to numerous people should have been suppressed for various reasons.

A. Statements Made to Law Enforcement at Picnic Woods Home

Huffer avers that all statements made to law enforcement at the Picnic Woods home are "fruits of the poisonous tree" created by a "warrantless entry of that address by law enforcement."

Deputy McDowell was the first deputy to arrive at the Picnic Woods home after Huffer called 911. When Deputy McDowell arrived, he witnessed an EMT carrying Logan to an ambulance. Deputy McDowell then entered the home.

Huffer asserts that this entrance was an unlawful warrantless home entry in violation of Huffer's Fourth Amendment rights, and as such, all statements made to Deputy McDowell at the home should have been suppressed.

The State responds that Huffer's statement to Deputy McDowell was not the result of an illegal entry, because Deputy McDowell legally entered the home during Logan's ongoing medical emergency, which is permitted by the community caretaking exception to the warrant requirement. We agree.

In *Stanberry v. State*, 343 Md. 720 (1996), the Court of Appeals first recognized the warrant exception of the "community caretaking function" and noted the pivotal distinction "between assessing police behavior when the police are 'acting in their criminal investigatory capacity' and assessing police behavior when they are 'acting to protect public safety pursuant to their community caretaking function.'" *State v. Brooks*, 148 Md. App. 374, 382 (2002) (quoting *Stanberry*, 343 Md. at 742-43). The community caretaking exception "embraces an open-ended variety of duties and obligations that are not directly involved with the investigation of crime." *Id.* at 383. "When the police cross a threshold not in their criminal investigatory capacity but as part of their community caretaking function, it is clear that the standard for assessing the Fourth Amendment propriety of such conduct is whether they possessed a reasonable basis for doing what they did." *Alexander v. State*, 124 Md. App. 258, 276-77 (1998) (internal footnote omitted).

At the suppression hearing, Deputy McDowell testified that he was responding to the 911 call for an infant in cardiac arrest and that emergency medical personnel were still inside the house when he entered. He further testified that, at the time, he did not know the cause, and he did not consider the home to be a crime scene. Deputy McDowell also testified that it is the practice of the Sherriff's Department to respond to such emergencies.

Once in the home, upon learning that Huffer was the father of the child, Deputy McDowell ask Huffer for his name, the baby's mother's name, and the baby's name. Deputy McDowell also asked what happened.

The suppression court ruled that Deputy McDowell did not make an unreasonable entry and that he was lawfully on the property. The court noted that the officer was responding to the 911 call, emergency medical personnel were still in the house, and that he entered through an open door. The court further found that the questions asked of Huffer "were really innocuous" and were not related to "investigating a crime at that point."

We agree that Deputy McDowell entered the home under the community caretaking exception, and that he had a reasonable basis for his actions based on his knowledge at the time. *Alexander,* 124 Md. App. at 276-77. Therefore, the statements made to Deputy McDowell at the Picnic Woods home were lawfully obtained and not in violation of Huffer's Fourth Amendment rights.

Huffer next avers that if legally obtained, the trial court erred in failing to exclude the statements as too prejudicial to be probative for the purpose intended by the State. Md. Rule 5-403. Huffer offers no explanation as to how these statements were *unfairly* prejudicial, or any support for his assertion that the evidence should have been excluded. *Odum,* 412 Md. at 615.

The trial court did not err in admitting Huffer's statements to Deputy McDowell at the Picnic Woods home because his entrance was lawful and not in violation of Huffer's constitutional rights.

B. Statements Made to Law Enforcement at Frederick Memorial Hospital

Huffer avers that all statements made to law enforcement at FMH should have been suppressed because they were made prior to him being read his *Miranda* rights and while Huffer was in custodial interrogation.

"[C]ustodial interrogation [refers to] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (footnote omitted). An individual is in custodial interrogation and is entitled to notice of his *Miranda* rights when a reasonable person would believe he is not free to ignore them and go about his business. *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

Huffer asserts that when he made statements to "several law enforcement officials at FMH, he was objectively reasonable in believing that he was not free to ignore police and go about his business."

Huffer made statements to Det. Romeril at FMH in the hallway of the hospital, about 25 feet from the trauma room where Logan and Huffer's family were congregated. Det. Romeril explained to Huffer that it was customary for the police to be involved, and that he needed to know what happened. Huffer spoke with the officer and then returned to the trauma room. The two spoke again after the decision was made to medevac Logan to Children's Hospital. Det. Romeril asked Huffer if he was willing to speak with him at the station, and in the alternative, offered to give him a ride to Children's Hospital. Huffer replied that he would think about it.

In the FMH parking lot, Det. Romeril and Corporal Dewees approached Huffer and asked him if he considered riding with them. Huffer responded that he did not want to speak with them, and that he was riding with his father. Huffer then left.

Huffer fails to meet his burden of demonstrating that he was in custody while he was questioned at FMH. Rather, he did, in fact, leave the conversations and even left the hospital. Huffer cannot now reasonably maintain that he believed he could not leave or that he had no choice in speaking with the police officers, when he first stated he would consider speaking with them and when he did, in fact, leave without speaking with them.

The court did not err in admitting statements made, as no *Miranda* violation occurred because Huffer was not in custodial interrogation at FMH.

C. Statements Made to Anyone Prior to Leaving Frederick Memorial Hospital

Finally, in a true scattershot approach, Huffer asks if the trial court erred by denying Huffer's motion *in limine* to exclude all statements made by Huffer to anyone prior to leaving FMH on the day of Logan's death. In his brief, Huffer avers that even if the statements made to law enforcement were not in violation of his Fourth Amendment rights, the court still erred by failing to exclude those statements as to prejudicial to be probative for the purposes intended by the State.

Huffer describes the State's use of the "various statements" as follows:

> [T]he State entered various statements made by Appellant to law enforcement, EMTs, paramedics, and at least one nurse prior to arriving at [Children's Hospital]. The State used that evidence solely for the purpose of characterizing Appellant's statements as inconsistent and using that inconsistency to evidence guilt. Given the sparse evidence and scientific problems with the State's case . . . this characterization of Appellant's

> statements was highly prejudical [sic] to the jury. The problem with that prejudice is that the various statements made prior to leaving FMH have limited probative value related to the State's intended use. All of the statements made that morning were made in a stressful environment to various officials, none of whom testified that he or she was able to obtain a complete, unrushed statement from Appellant. The initial statement to Deputy McDowell ended quickly when Appellant rushed to FMH. The statement to Deputy Romeril at FMH was interrupted by Deputy McDowell's accusations . . . . All other statements were either made in an emergency context or were interrupted by the stress and confusion of that day. It was not until the ride to [Children's Hospital] that Appellant Huffer was able to collect his thoughts and make a comprehensive statement, which he did to Deputy Sisson. The rushed and incomplete statements made earlier than that are too prejudicial to have been used by the State for the purpose of evidencing an effort to hide a crime.

(Internal citation omitted).

The State first responds that these issues are unpreserved and inadequately briefed, and the State asks that we decline to consider Huffer's claim of error with respect to these statements. Before turning to the merits, we first examine the preservation issues.

Huffer classifies his motion *in limine* as a motion to "exclude statements made to anyone prior to leaving FMH on the day of Logan's death." However, the motion refers to "at least one of the EMTs on the scene at the Picnic Woods Road address, (b) Deputy McDowell while at the Picnic Woods Road address, (c) Detectives Romeril and Deputy McDowell at Frederick Memorial Hospital . . . ."

At trial, Huffer failed to object when the statements were admitted. "[W]here a motion *in limine* has the effect of admitting evidence at trial, failure to object results in the non-preservation of the issue for appellate review." *Brown v. State*, 373 Md. 234, 242 (2003) (internal quotation marks and citation omitted).

Huffer did not object when Deputy McDowell testified or when Det. Romeril testified about Huffer's statements to him at FMH. During Det. Romeril's lengthy testimony as to what Huffer told him, defense counsel objected three times, all on other grounds, all of which were sustained. As such, we agree with the State that review of this testimony is not preserved. *Id.*

Huffer failed to object when either EMT Steve Leatherman testified or when EMT Carroll Leatherman testified. Additionally, Huffer's vagueness in his motion *in limine* where he references "at least one EMT" without identification, and continued vagueness and failure to more precisely identify what EMT testimony was at issue, excludes the EMTs' testimony for review as well.

On appeal, it seems that Huffer also asks us to review the inclusion of testimony by paramedic, Nathan Sauser, and nurse, Sarah Chaff Greer, but neither are named in the motion *in limine* and Huffer did not object to their testimony at trial. As such, review of this testimony is not preserved.

Although this issue is not preserved and we decline to review it, we again note that evidence which hurts a party's case and is prejudicial is not automatically excluded as being *unfairly* prejudicial under Md. Rule 5-403. Despite Huffer's assertion that his inconsistent statements were rushed and made under stress, before he had a moment to collect himself and make a complete statement, that is an argument to be made before a jury – the body charged with assigning weight to the given evidence. That a statement

was hurried or made under personal stress[7] is not an adequate basis for a trial court to be forced to exclude it or be reversed on appeal.

IV. Birth and Pre-Natal Records

Huffer next avers that the trial court committed reversible error by refusing to allow Huffer to enter evidence related to the "causal connection between Logan Luaces' pathology, his traumatic birth, and his mother's use of alcohol and tobacco during her pregnancy."

The trial court ruled that this evidence was irrelevant and therefore inadmissible. Md. Rule 5-401;[8] Md. Rule 5-402.[9] The court ruled that it would not be relevant until an expert witness related prenatal substance abuse to the pathology with which Logan presented at the time of his death.

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[7] To the contrary, statements that would be hearsay are excepted where it is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Md. Rule 5-803(b). Huffer's statements, as given, have the requisite *indicia* of trustworthiness concerning the truthfulness of the statement. *State v. Harrell*, 348 Md. 69, 76 (1997) (citation omitted).

[8] Md. Rule 5-401 reads in full:

> "Relevant evidence" means evidence having any tendency 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.

[9] Md. Rule 5-402 reads in full:

> Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible.

The relevance originally proffered by defense counsel was that the "traumatic birth was caused by prenatal substance use and that traumatic birth led to the rapidly enlarging head size which made Logan highly susceptible to subdural hematomas." Huffer asserts that he also intended to use the evidence as impeachment evidence for Luaces's credibility, pursuant to Md. Rule 5-607.[10]

The "standard of review on a relevancy question depends on whether the ruling under review was based on a discretionary weighing of relevance in relation to other factors or on a pure conclusion of law. When the trial judge's ruling involves a weighing, we apply the more deferential abuse of discretion standard." *Parker v. State*, 408 Md. 428, 437 (2009) (citations and quotations omitted). A "trial court does not have discretion to admit irrelevant evidence." *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 620 (2011) (footnote omitted). "The 'de novo' standard of review is applicable to the trial judge's conclusion of law that the evidence at issue is or is not 'of consequence to the determination of the action.'" *Id.* (citation omitted).

A. Limiting Huffer's Expert to Rebuttal Answers

The trial court allowed evidence of Logan's head circumference because the information was made relevant by the FMH pediatrician's testimony that a rapidly enlarging head would have been a concern. The trial court also allowed evidence of the circumstances around Logan's birth.

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[10] Md. Rule 5-607 reads in full:

> The credibility of a witness may be attacked by any party, including the party calling the witness.

Huffer first avers that because the trial court allowed evidence of Logan's traumatic birth as relevant, the defense should have been allowed to inquire about possible reasons for the traumatic birth. Huffer concludes that the "failure to allow that relevant evidence likely prejudiced the jury as it made the jury assume there were no relevant pre-natal issues related to the traumatic birth." Huffer asserts that for the court to allow some "relevant facts without others related to Logan's medical history" was an abuse of discretion and he asks that we vacate the convictions and remand the case. For the following reasons, we disagree.

Huffer attempts to persuade us that evidence related to possible causation of Logan's traumatic birth should have been admitted because at sentencing a report was admitted which "links the pre-natal substance abuse to the traumatic birth which resulted in Logan's rapidly enlarging head size." Huffer further asserts that Logan's rapidly enlarging head size, which Huffer contends was due to the traumatic birth, left him more susceptible to subdural hematomas from small impacts.

However, the trial court did allow the defense to inquire about Logan's head size and Logan's birth conditions. Huffer failed to follow up by producing any expert testimony which related the prenatal activity to the condition at the time of death. *Woods v. Toyota*, 134 Md. App. 512, 518 (2000) ("It is well settled that expert testimony is required 'when the subject of the inference is so particularly related to some science or profession that is beyond the ken of the average layman'") (citation omitted). Rather, he points to the birth condition (traumatic birth), and Logan's large head in the months prior

to his death, evidence of which was indeed admitted at trial, rather than focusing on how the causation of those conditions was relevant.

Finally, Huffer asserts that the trial court erred in finding a discovery violation related to Huffer's expert testimony on this topic. Huffer filed a timely Expert Designation with Dr. Chabon's information. Huffer admits that the Designation failed to include the specific arguments "medically identifying pre-natal substance abuse or macrocephaly because those arguments were not developed until Appellant's receipt of various medical records during trial and the evolution of medical theories during trial." As such, the trial court ruled that Dr. Chabon would be limited to expressing only the opinions set forth in the notice.

Huffer's discovery obligations under the rule were clear, and he admits they were not met. Further, the trial court did grant leeway in Dr. Chabon's testimony and allowed him to testify "in rebuttal to Dr. Mitchell" which was possible due to a scheduling error. He testified that Logan was "becoming" macrocephalic and that the cause was never determined, and that Logan's enlarged head could make him more susceptible to subdural hematomas. Huffer's argument that he should have been allowed to present evidence beyond that for which he gave notice is meritless.

We find no error in the trial court's limitation of expert testimony related to Luaces's prenatal substance use.

B. Huffer's effort to use pre-natal records to impeach the victim's mother's testimony that she did not discuss potential birth complications with any pre-natal physicians

Huffer next avers that pursuant to Md. Rule 5-607, the credibility of a witness can be attacked by any party, and that impeachment evidence can be in the form of questions directed at proving the facts are not as they were testified by the witness.

Huffer intended to use evidence of Luaces's use of alcohol and tobacco during her pregnancy as impeachment evidence, "most notably when Logan's mother testified that she never received any counseling by doctors regarding the effect of prenatal actions on a child's birth."

However, Huffer offers no explanation for how evidence of any prenatal actions would impeach Luaces's testimony as to what information she received about such actions. As such, this argument fails to persuade us that such evidence was relevant, even for the purpose of witness impeachment.

We find no error in the trial court's determination that evidence related to Luaces's prenatal use of alcohol or tobacco was irrelevant.

V. Medical Expert

Huffer raises several arguments as to why Dr. Mitchell's testimony should not have been admitted at trial. However, for various reasons as explained below, we decline to review the merits of the question due to lack of preservation or waiver.

A. Dr. Mitchell's testimony regarding a theory for which he was not qualified

Huffer first avers that Dr. Mitchell was not the appropriate expert to refute defense counsel's arguments related to biomechanics because Dr. Mitchell was qualified by the

court as an expert in forensic pathology only, not biomechanics. The defense theory was "based on several biomechanical studies which theorize that . . . it would take far less force to harm an infant's neck than it would to cause subdural hematomas." The trial court allowed Dr. Mitchell to respond to the defense's theory of the case during cross-examination.

Huffer states, in his brief, that he "filed a Motion *in Limine* requesting that Dr. Mitchell's testimony be excluded in its entirety and during trial, generally objected to Dr. Mitchell's opinions during direct examination."

Huffer's motion *in limine* to exclude Dr. Mitchell's testimony was based on an argument that the prejudicial value of the testimony far outweighed the probative value. No part of the motion addressed Dr. Mitchell's ability to testify as to biomechanical theories.

Huffer states that he then "generally objected" during Dr. Mitchell's testimony. The record shows that Huffer objected to Dr. Mitchell testifying about photographs that Dr. Mitchell did not take. Huffer did not question the scope of Dr. Mitchell's testimony based on his expertise until this appeal. As this issue was not raised in, or decided by the trial court, the argument is unpreserved for appeal and we decline to address it. *Washington,* 191 Md. App. at 91; Md. Rule 8-131(a).

B. Medical theories that are no longer accepted

Huffer next avers that the trial court erred by allowing Dr. Mitchell to testify that Logan died as the result of "non-accidental head trauma," because that medical theory is

synonymous with "shaken baby syndrome," and is no longer a generally accepted theory appropriate for medical testimony.

Maryland courts adhere to the *Frye-Reed* standard that an expert may only testify regarding opinions which are generally accepted by the relevant medical community. *Clemons v. State*, 392 Md. 339, 363 (2006). The standard of appellate review related to *Frye-Reed* decisions of the trial court is *de novo* and Maryland appellate courts are not limited to the record. *Id.* at 359. Huffer reminds us that we "can and should take notice of law journal articles, articles from reliable sources that appear in scientific journals, and other publications which bear on the degree of acceptance by recognized experts." *Id.* (citations omitted). Rather than present us with such evidence to consider, Huffer requests that we "conduct independent research on this current debate in the medical community and the reaction of many courts nationwide."

A *Frye-Reed* claim is generally resolved prior to trial, out of the presence of the jury, and will involve taking evidence, including witness testimony. *Montgomery Mut. Ins. Co. v. Chesson*, 399 Md. 314, 328 (2007). The trial court performs a "gatekeeping function" by holding a hearing to determine whether the basis for the scientific opinion is generally accepted as reliable within the expert's field. *Phillips v. State*, 226 Md. App. 1, 17-18 (2015), *aff'd on other grounds*, ___ Md. ___, No. 7, Sept. Term, 2016 (Jan. 20, 2017).

Here, Huffer failed to present this argument or any evidence to support this position in a *Frye-Reed* hearing. Thus, the trial court did not perform the gatekeeping function in this case. Although Huffer is correct in his statement of our standard of

review for a *Frye-Reed* hearing, he fails to note that this Court has "never subjected evidence to *Frye-Reed* when not conducted or requested" below. *Addison v. State*, 188 Md. App. 165, 181 (2009). As this issue is first being raised on appeal, we decline to subject the expert's testimony to a *Frye-Reed* analysis now. Md. Rule 8-131(a).

C. Did allowing opinions based on notes and photographs of another forensic pathologist violate Huffer's Confrontation Clause rights?

At trial, the Chief Medical Examiner, rather than the performing doctor, testified as to the autopsy report. Huffer avers that this violated the Confrontation Clause, as well as the best evidence rule.

Huffer concedes that an autopsy report may be prepared by a medical examiner who did not perform the autopsy. However, he avers that the exception does not defeat objections to whether the testimony itself violates the Confrontation Clause, and he asserts that testimonial statement may not be introduced into evidence through admission or testimony without the in-court testimony of the declarant, unless the declarant is unavailable, and the defendant had a prior opportunity to cross-examine. *See Bullcoming v. New Mexico*, 564 U.S. 647, 657 (2011).

At no time, prior to or during the trial, did Huffer object to Dr. Mitchell's testimony on the basis of a confrontation clause argument. This issue is, therefore, unpreserved for appellate review. Md. Rule 8-131(a).

Huffer also avers that Dr. Mitchell's testimony violates the best evidence rule. Again, at no time, prior to or during the trial, did Huffer object to Dr. Mitchell's

testimony on the basis of a best evidence argument. This argument is also, therefore, unpreserved for appellate review. *Id.*

VI. Photographs

Huffer next avers that the trial court committed reversible error by allowing the State's introduction and use of various photographs. Huffer specifically raises questions regarding a photograph of Logan at Children's Hospital on the day he died with various tubes and other medical equipment coming out of his body, photographs of Logan's autopsy, and the State's use of pictures of unrelated children with extreme macrocephaly as comparative evidence. Huffer asks that we vacate the convictions and remand the matter with instruction to exclude all photographs of Logan for the purposes used at trial by the State.

It is within the discretion of the trial court to weigh the degree of relevance against any unfair prejudice which might arise from the admission of the photographs. Md. Rule 5-403. The Court of Appeals has "consistently held that whether or not a photograph is of practical value in a case and admissible at trial is a matter best left to the sound discretion of the trial judge." *Johnson v. State,* 303 Md. 487, 502 (1985) (citations omitted). "A court's determination in this area will not be disturbed unless plainly arbitrary." *Id.* (citations omitted). Similarly, a trial court's determination that unfair prejudice does not substantially outweigh probative value is reviewed for abuse of discretion. *Brooks,* 439 Md. at 708-09.

A. Hospital Photos

Huffer first avers that the trial court erred by allowing the State to present a photograph of Logan at Children's Hospital on a large projector screen.[11] Huffer asserts that the State used this photograph for "no other purpose than to clarify with Dr. Siems that this was how the victim looked when she began treating him at [Children's Hospital]."

Huffer objected to the admittance of the photograph at trial on the grounds that the photograph was too prejudicial. The State responded, and the court overruled the objection, stating "I don't know what she's gonna use it to show. But I don't see it's prejudicial."

Huffer now quotes the judge, seemingly asking that we infer that because the judge was not certain of the photograph's intended use, the photograph had no probative value. However, the record reflects a discussion about the photograph as possibly being used to show Logan's head size, and the State's allusion that it would not be used solely for that purpose.

Huffer states in his brief that, after the photograph was admitted, "the State never again asked Dr. Siems to discuss the pictures or anything related thereo." However, the record does not reflect this position. Rather, the State first asks the witness to "explain

[11] The photograph was marked as State's Exhibit 19 and provides a view of the top of Logan's head. He is wearing a neck brace and is intubated.

for the . . . jury . . . what's depicted in this [photograph]?" The witness then responds and describes various medical devices in the photograph and their purpose in relation to his condition. The witness also states that "this is how he arrived."

The photograph was displayed during all of Dr. Siems's testimony and through most of the testimony of the following witness. Juror 51 sent the following note: "Out of respect for all parties involved, and to ensure that neither side . . . receive an advantage, can all photos of the deceased be removed from screen unless being specifically used for questioning?" [12] The note was written from one juror, and there was no allegation or evidence that the opinion had been discussed or shared with other jurors. Upon receiving the note, the judge instructed that the photograph be removed.

Huffer avers, assuming *arguendo* that the photographs had little to no probative value, that this note is evidence that the jury was "prejudiced" by the photograph. Huffer concludes that, therefore, the trial court abused its discretion by allowing the entry of the hospital photo and/or the autopsy photographs because it is clear that "some or all of those photographs actually prejudiced the jury in this case."

The State now responds that the photograph was probative on the issue of whether Logan's head was unusually large in size, and the photograph portrayed his condition when he arrived at Children's Hospital. The trial testimony of the witness does not discuss the size of Logan's head in the photograph, but does describe the medical devices

[12] The note was showed to the parties at the time it was received, but read into the record later after the jury was removed. The quotation excerpt is from the trial transcript.

being used in the photograph, and displays Logan's condition at the time of his arrival at Children's Hospital.

Although perhaps graphic in nature, on appeal, appellate courts have:

> permitted the reception into evidence of photographs depicting the condition of the victim and the location of injuries upon the deceased . . . ; the position of the victim's body at the murder site . . . ; and the wounds of the victim . . . . On certain occasions, photographs have also been admitted to allow the jury to visualize the atrociousness of the crime—a circumstance of much import where the factfinder must determine the degree of murder.[13]

Johnson, 303 Md. at 502-03 (internal citations omitted).

The State used the photograph to demonstrate Logan's condition at the time he arrived at Children's Hospital, and the witness referenced it while explaining the condition in which he arrived. The photograph, therefore, has probative value as to Logan's medical condition on the morning of his death.

At trial, Huffer stated that the photographs were too prejudicial, but offered no argument as to how or why they were unfairly prejudicial so as to warrant exclusion. *Odum*, 412 Md. at 615. Therefore, Huffer fails to persuade us that the judge acted in a way that no reasonable person would, or without reference to guiding principles. *Nash*, 439 Md. at 67. We find no abuse of discretion in the trial court's admittance of the hospital photograph.

[13] Huffer was charged with, but found not guilty of, first-degree assault.

B. Autopsy Photographs

Next, Huffer avers that the trial court again erred by allowing the State to use autopsy photographs of Logan during Dr. Mitchell's testimony. Huffer asserts that the State used these photograph for "no other purpose than to show the existence of internal brain bleeds . . . which were not refuted by the defense . . . ." Huffer concludes that because he was not refuting the pathological evidence at trial, the autopsy photographs showing pathology had no probative value.

Huffer filed a motion *in limine* to exclude all autopsy photos. At trial, the autoposy photos were marked State's Exhibits 29-39, and there was a lengthy bench conversation regarding the use of the various photos. Huffer answered in the negative when asked if there was any objection to the admittance of State's Exhibit 29. Huffer objected to multiple photos showing the brain, on the grounds that they were irrelevant. The State conceded one photo as duplicative. Huffer then conceded that State's Exhibit 39 was relevant, but again objected on the ground that it was too prejudicial to warrant admittance.

During Dr. Mitchell's testimony, the State presented Exhibits 29 - 36, 38, and 39 for admittance. Huffer renewed his objections throughout the testimony.

Huffer now avers that despite receiving the before referenced note from Juror 51, the trial court still allowed the State to show the autopsy photographs during Dr. Mitchell's testimony on the following day, and this admittance was in error.

The State responds that the photographs were necessary to assist the jury in understanding Dr. Mitchell's testimony. The State notes that the prosecutor culled the

photographs to those she believed were necessary, and that the trial court carefully reviewed each one before deciding which ones were relevant to each phase of the autopsy.

The record reflects that Dr. Mitchell referenced the photographs often throughout his testimony. The trial court also required prompt removal of a photograph on one occasion, ensuring that it was not displayed for longer than necessary when the testimony moved to the autopsy examination itself rather than the evidence displayed in the photograph.

As the State notes, the record reflects careful consideration by the trial court as to each photograph. Again, Huffer offered no support for his conclusion that the photographs were unfairly prejudicial, including in his motion *in limine* which simply stated that "it should be uncontroverted that pictures of the autopsy of a dead infant are both inflammatory and prejudicial . . . ."

Again, Huffer fails to persuade us that the judge acted in a way that no reasonable person would, or without reference to guiding principles. *Nash,* 439 Md. at 67. We find no abuse of discretion in the trial court's admittance of the autopsy photograph.

C. Macrocephaly as Comparative Evidence

Although Huffer raised the issue of the use of photographs of children with extreme macrocephaly in his questions presented, he did not address the issue in his brief or at oral arguments.

We decline to review this issue on account that it is insufficiently briefed. *Van Meter v. State,* 30 Md. App. 406, 407-08 (1976). "[A]ppellant is required to provide

argument in his brief to support his position." *Id.* at 407. "We cannot be expected to delve through the record to unearth factual support favorable to appellant and then seek out law to sustain his position." *Id.* at 408 (citing *Clarke v. State*, 238 Md. 11, 23 (1965)).

VII. Sufficiency of the Evidence

Huffer avers that the trial court committed reversible error by allowing the State's case to go to the jury, and then a second time by allowing the jury's verdict of guilty to stand. He asks that we review the sufficiency of the evidence, and find that there is no legally sufficient evidence or inference reasonably drawn therefrom on which a jury could have found the defendant guilty beyond a reasonable doubt. *Williams v. State*, 5 Md. App. 450, 458 (1968). Huffer filed a motion for judgment of acquittal, and we now turn to the merits of his argument. *Id.* at 458 (requiring that a defendant file a motion for judgment with specificity in order to preserve an appeal for sufficiency of the evidence).

In reviewing the merits of a claim relating to the sufficiency of evidence, the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). In assessing the sufficiency of the evidence presented at trial, the limited question before us is not "whether the evidence *should have* or *probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Allen v. State*, 158 Md. App. 194, 249 (2004) (citation omitted) (emphasis in original), *aff'd*, 387 Md. 389 (2005). Appellate review

should not involve undertaking "a review of the record that would amount to a retrial of the case." *Winder v. State*, 362 Md. 275, 325 (2001) (citation omitted).

Huffer asserts that there is neither "evidence nor inferences" which can be drawn to indicate how Logan died, let alone whether or not Huffer was intentionally responsible for his death beyond a reasonable doubt. Huffer avers that instead, the State was on a "'shaken baby' witch hunt," and that this case is indicative of a national judicial issue where cases are being tried with "a selective amount of emergency medical testimony, (2) an Autopsy Report, and (3) law enforcement with tunnel vision are put before a jury in a piecemeal and incomplete fashion" to convict a person in the death of a toddler.

Huffer asks that we find that the evidence was insufficient to convict him because no single witness was able to testify that he or she had comprehensively reviewed all records and information and concluded that there are no reasonable alternatives to the opinion that Logan died from "non-accidental trauma." He asserts that no State expert was able to quantitatively refute alternative medical theories of Logan's death, and that the "medical community is losing more and more faith" in the science on which the State convicted Huffer. Huffer further attempts to persuade us that the State law enforcement failed to adequately pursue alternative theories of Logan's death, and that there was inadequate communication between the medical professionals involved to "determine if any alternative medical theories existed to explain the sudden death" of the baby.

Huffer's many assertions before us reargue his defense at trial and fail to persuade that there was insufficient evidence. These arguments all go to the weight of the evidence and conflicts in the evidence, which are issues to be resolved by the jury.

Although Huffer seems to ask us to find that one witness must be able to definitely make a case on independent testimony, and that the prosecution must present evidence that all alternative theories have been ruled out, these conclusions are simply not the law, nor do they recognize the proper standard of review. Rather, three expert medical witnesses testified that the cause of Logan's death was non-accidental head trauma. This evidence, viewed in the light most favorable to the prosecution, was sufficient to support the jury's verdict.

Finally, to support his position, Huffer avers that it is "hard to reconcile the jury having determined [that Huffer was] guilty of first degree child abuse, but not guilty of first degree assault without some confusion in their midst." However, juror "confusion" does not show that the evidence was legally insufficient, but rather it appears that Huffer is also attempting to raise an inconsistency argument. Although we are uncertain of his intent, assuming *arguendo* that he is raising an inconsistency concern, that issue was waived by his failure to timely object. *Givens v. State,* 449 Md. 443, 472-73 (2016).

VIII. Jury Questions

Huffer next asks whether the trial court committed reversible error by "substantively answering a question from the jury" regarding definitions already included in the jury instruction. On this issue, Huffer includes three sentences and no citation to law. We decline to review this issue on account that it is insufficiently briefed. *Van Meter,* 30 Md. App. at 407-08.

However, it must be noted that after the trial court answered the jury's questions, the following exchange occurred:

> THE COURT: No, counsel, I want counsel to approach and make sure I didn't leave anything out. So counsel approach.
>
> . . .
>
> THE COURT: [Counsel], is the Defense satisfied?
>
> Defense Counsel: Yes, Your Honor.

As such, it is clear that this issue is also unpreserved for appeal, as defense counsel not only failed to object, but affirmatively approved of the instruction given in response to the jury's questions. Therefore, any complaint was not only waived, but any error was also invited. *See State v. Rich*, 415 Md. 567, 575 (2010) ("where a party invites the trial court to commit error, he cannot later cry foul on appeal") (citation omitted).

IX. Healing Garden Memorial Evidence

Huffer next asks whether the trial court committed reversible error by refusing to allow Huffer to enter evidence related to a memorial for victims of child abuse in downtown Frederick, which included Logan's name. On this issue, Huffer again fails to adequately brief the issue, as he includes only two sentences and no citation to law or the record. Again, we decline to review this issue on account that it is insufficiently briefed. *Van Meter*, 30 Md. App. at 407-08.

X. Evidence from Picnic Woods Home

Finally, Huffer asks whether the trial court committed reversible error by denying his motion to suppress evidence seized by law enforcement officials on "various occasions" at the Picnic Woods home. On this issue, Huffer includes no argument. Because Huffer fails to identify any legal support for his inquiry into whether the court erred, and fails to identify even the evidence and dates in particular that he requests that

we review, we decline to address the merits of this issue. *Van Meter,* 30 Md. App. at 407-08.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.