Circuit Court for Wicomico County Case No. 22-K-16-000343

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2168

September Term, 2016

JAMES ROBERT SIMPSON, JR.

V.

STATE OF MARYLAND

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

JJ.

Opinion by Zarnoch, J.

Filed: January 4, 2018

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The facts of this case involve the death of five-week old baby, James Robert Simpson, III ("Baby James"), on January 1, 2016. On October 20, 2016, following a threeday trial in the Circuit Court for Wicomico County, the jury returned a verdict convicting appellant James Robert Simpson, Jr. ("Simpson"), Baby James's father, of two counts of first degree child abuse, one count of second degree child abuse, and reckless endangerment. On November 29, 2016, Simpson was sentenced to thirty years' incarceration.

On appeal, Simpson asks us to decide three issues, which we have reworded as follows: (1) whether the trial court abused its discretion in responding to a question from the jury by declining to provide definitions of the terms "cruel," "inhumane," and "malicious"; (2) whether the trial court abused its discretion in determining that a postmortem photograph of Baby James's body was properly authenticated; and (3) whether the trial court abused its discretion testimony of a law enforcement officer regarding his perception of Simpson's behavior.

For the reasons explained below, we affirm.

BACKGROUND AND PROCEDURAL HISTORY

On the evening of December 30, 2015, Simpson and [B]aby James's mother, Jessica Cruzado, drove to Simpson's cousin's house to drop Cruzado off to get her hair done around 7:00 p.m. Simpson testified that he left his cousin's house with Baby James and drove straight to his and Cruzado's apartment. Cruzado stayed at the cousin's house until about 10:30 p.m., when she left to go to a friend's house in Delaware. Officer Kevin

McCahill, who spoke with Simpson at the hospital, testified that Simpson said that he fed baby James around 8:00 p.m., the baby slept for three or four hours.

Simpson testified that later in the evening, he became upset with Cruzado when he found out that she had gone to a friend's house in Delaware and would be out later than he expected. At some point, Simpson was unable to get in touch with Cruzado, and he posted on Facebook at 11:15 p.m. a message to Cruzado, which indicated that he had attempted to call her six times. Simpson said that, sometime before midnight after getting in touch with Cruzado, he woke baby James, dressed him and put him in a car seat, drove to the Cook Out restaurant and went through the drive-through, arriving at approximately 12:13 a.m. Video surveillance showed Simpson's vehicle entering his apartment complex at 12:29 a.m. Simpson testified that he had been on the phone with his sister during the entire drive, and that he remained on the phone call, he said that he carried Baby James's car seat and the food inside. Simpson explained that when he went over to Baby James to take him out of his car seat, he found that he was unresponsive, and called 911.

Lauren Curtis, a nurse and EMT who lived in Simpson's apartment complex, was the first to respond to Simpson's apartment. She testified that Baby James was lying on the floor in the back bedroom, was not breathing, did not have a pulse, and felt cold to the touch. Curtis performed CPR on Baby James assisted by Simpson. While she performed CPR, Simpson told her that Baby James had not woken up at 11:00 p.m. as usual, and that when he attempted to wake him, Simpson discovered that he was not breathing. Curtis continued to perform CPR on the infant until more help arrived. Once Baby James was -Unreported Opinion-

taken down to the ambulance, Curtis was finally able to feel a pulse. Baby James was taken to a local hospital, Peninsula Regional Medical Center (PRMC) and later transferred to Children's National Medical Center (CNMC) in Washington, D.C. Baby James ultimately died at PRMC on January 1, 2016.

Dr. Tanya Hinds, a physician and expert in child abuse pediatrics who treated Baby James at CNMC, diagnosed him with abusive head trauma. She testified that Baby James was critically ill and had sustained life-threatening injuries before he arrived at CNMC. She said that "[h]e was unable to effectively breathe on his own" or "contract his heart muscles to maintain a normal pulse," and that his condition affected the oxygen that could be delivered to his brain and other organs. In Dr. Hinds's opinion, the infant's conditions were consistent with "a force that is typically a vigorous force, repetitive force as opposed to a single impact," stating that "the mechanism is vigorous, repetitive shaking trauma with or without impact." Because of the color of some of the blood in Baby James's brain, Dr. Hinds believed the injury was recent. Further, she stated that his injuries suggested that he would have become "immediately and persistently ill."

Dr. Robert Mitchell, the Chief Medical Examiner in Washington, D.C., testified at trial as an expert in forensic pathology. Aided by photographs taken during the autopsy, he noted that there was a recent bruise on the underside of the infant's scalp that had not yet risen to the surface of the skin. Further, he explained that there was increased pressure in the infant's skull, bleeding inside of his skull cavity, blood and swelling on his brain, blood in his spinal column, and retinal hemorrhages and optic nerve sheath hemorrhages. Like Dr. Hinds, Dr. Mitchell testified that all of these conditions were consistent with "[b]lunt force trauma of the head," which could include shaking with or without impact.

Officer Edward Fissel of the Salisbury Police Department, who was assigned to the Child Advocacy Center task force, was assigned to investigate a potential child abuse incident and responded to PRMC. Officer Fissel questioned both Cruzado and Simpson regarding the timeline of events and Baby James's injuries. During his interview with Simpson at the hospital, Simpson took two Cook Out restaurant receipts from his pocket and offered them to Officer Fissel. Officer Fissel testified that one receipt indicated the time of payment and the other appeared to be taken from the top of the food box.

At trial, Simpson denied shaking, dropping, throwing, or hurting Baby James in any way. The jury began its deliberations on the morning of October 20, 2016, and returned a verdict by the end of the day. During its deliberations, the jury asked the trial judge questions relevant to its instructions on the charge of first and second degree child abuse. By the end of the day, the jury returned a verdict finding Simpson guilty of child abuse in the first degree -- death; child abuse in the first degree -- severe physical injury; child abuse in the second degree -- household family member on family member; and reckless endangerment. The jury found Simpson not guilty on the remaining counts of first degree murder, second degree murder, first degree assault, and second degree assault. Simpson was sentenced to thirty years in prison on November 29, 2016.

DISCUSSION

Simpson's appeal to this Court asks us to reverse and remand for a new trial based on three challenges to the circuit court's rulings. As we explain below, all three issues

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relate to decisions typically left within the trial court's discretion. The first issue relates to the trial court's supplemental jury instruction, which was prompted by a question from the jury. The second and third issues challenge the trial court's admission of certain evidence and testimony. Simpson's arguments, however, suffer from a lack of preservation, as well as merit. We, therefore, affirm the decision of the circuit court.

I. Whether the Trial Court Abused Its Discretion in Declining to Provide Supplemental Definitions is Not Preserved, and the Plain Error Doctrine Does Not Apply.

Simpson argues that the trial court erred by "failing to propound a helpful, clarifying, or accurate response to the jury's questions concerning key terms of the child abuse offenses." We "review[] for abuse of discretion a trial court's decision as to whether to give a jury instruction." *Hall v. State*, 437 Md. 534, 539 (2014); *see also Stabb v. State*, 423 Md. 454, 465 (2011) (Citation omitted). Also within a trial court's discretion is whether to provide a particular supplemental instruction in response to a question from the jury after its deliberations have commenced. *See Appracio v. State*, 431 Md. 42, 57 (2013); *see also Holmes v. State*, 209 Md. App. 427, 449 (2013) (quoting *Lovell v. State*, 347 Md. 623, 657 (1997)) ("Whether to give a jury supplemental instructions in a criminal case is within the discretion of the trial judge."). We will not disturb a trial court's discretionary decision "except on a clear showing of . . . discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Jarrett v. State*, 220 Md. App. 571, 584 (2014) (quoting *Bazzle v. State*, 426 Md. 541, 549 (2012)).

Before we can address whether the trial court abused its discretion, however, we must determine whether the issue is preserved for our review. Pursuant to Md. Rule¹ 4-325(e), "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." A party challenging the trial court's instructions to the jury is charged with raising potential "inadvertent omissions or inaccuracies." *Austin v. State*, 90 Md. App. 254, 265 (1992).

At the end of the trial, the circuit court gave the following instructions to the jury:

Now I will tell you more specifically about child abuse. You will see that's -- child abuse in the first degree, count 3, is as follows. In order to convict the defendant of first degree child abuse, the State must prove: that he **caused physical injury to James Robert Simpson, III, as a result of cruel or inhumane treatment or a malicious act**; that at the time of the conduct James Robert Simpson, III was under 18 years of age; that at the time of the conduct, the defendant was a parent of James Robert Simpson, III; as a result of the defendant's conduct, James Roberts Simpson, III's, health or welfare was harmed or threatened; and the defendant's conduct resulted in his death or caused severe physical injury to him.

Severe physical injury means brain injury or bleeding within the skull, starvation, physical injury that creates a substantial risk of death, causes permanent or protracted serious disfigurement, or causes the loss or impairment of a member or organ of the body or its ability to function properly.

A parent may use reasonable physical force to discipline or safeguard a child, but a parent may not use physical force simply to inflict pain upon a child. In addition, a parent may . . . not use physical force that is inhumane or cruel.

In determining whether the physical force by a parent was reasonable, you look at all the surrounding circumstances including such factors: as age, physical and mental health

¹ All references to "Rules" herein refer to the Maryland Rules.

condition of the child; the behavior that led to the use of physical force; the extent and duration of the physical contact with the child; and the impact or injury to the child, if any, resulting from the use of force.

You may not consider the charge of first degree child abuse unless you have found the defendant guilty of second degree child abuse before then.

And I'm going to now tell you what second degree child abuse is, physical abuse. It would involve physical injury to a child under 18 years of age caused by a parent.

In order to convict the defendant of second degree child abuse, the State must prove: that the defendant caused physical injury -- I'm going to instead of saying his name out, I'm just going to refer to James Robert Simpson, III, as the child -- that the defendant caused physical injury to the child as a result of cruel or inhumane treatment or malicious act; that at the time of the conduct, the child was under 18 years of age; and that at the time of the conduct, the defendant was a parent of the child; and that as a result, the child's health or welfare was harmed or threatened.

Again, a parent may use reasonable force to discipline or safeguard a child but may not use force that is inhumane or cruel.

That takes us down to count 6, which is first degree assault. Before you can find first degree assault, you must find second degree assault. That's count 7. That works the same way that child abuse does.

Child abuse in the second degree must precede child abuse in the first degree. If you can't find the second degree, you can't find the first degree.

(Emphasis added).

After instructing the jury on each count, the trial judge asked the parties, "Are there

any additions or exceptions to the Court's instructions?" Counsel for Simpson responded,

"None from the defense, Your Honor." The parties gave their closing arguments, and the

jury began its deliberations.

Thereafter, the jury sent a note to the trial judge asking for "a list typed out of the exact definition requirements for each charge." Both parties agreed, and the judge sent the jury "a copy of the instructions for the substantive charges," which, as the trial judge explained to the parties, recited the pattern instructions that he read while instructing the jury. Sometime later, the jury sent another note to the judge requesting a dictionary. After conferring with the parties, the trial judge wrote a response that read, "You must confine your verdict to the evidence. If you have a question about the meaning of a certain charge or a certain word, please submit it in writing."

The jury returned the judge's note with three words written at the bottom: "Cruel,

inhumane, malicious." The trial judge discussed the issue with the parties:

THE COURT: Now I'm certainly not going to attempt to define those words for them, and there is really no reason for me to even attempt it. I am going to ask the jury to come back in. I'm going to tell them they have to just decide what those things mean, and there is nothing else we could do. Do all of you agree with that assessment?

[DEFENSE COUNSEL]: Yes, Your Honor.

THE COURT: [Counsel for the State].

[THE STATE]: Yes. It doesn't matter to me whether it's by note or bringing them back, but I agree with your response.

THE COURT: Well, maybe I should just do it -- I think they want lunch, too. That's another problem.

[THE STATE]: Okay.

The judge brought the jury into the courtroom and explained the following:

We have your question. With respect to those three words, apparently, one if not more of you want a definition.

I cannot -- I'm not permitted to give you a definition. You are the jury. You decide what those words mean. They're part of everyday common usage. So it's going to be up to you to figure out what they mean, and what you decide they mean is entirely up to you.

And we don't have to know. You just have to render a verdict based upon what you have heard in court and what the evidence is and what my legal instructions are.

Before directing the jury to resume its deliberations, the court asked the parties, "Is there anything else that needs to be said by counsel?" Simpson's defense counsel responded, "No, Your Honor." Several hours later, the jury returned its verdict.

A. Whether the Trial Court Should Have Given a Different Response to the Jury's Request for Definitions is Not Preserved.

Simpson argues that he should be granted a new trial, because the trial judge failed to "inform the jury of the conduct required to establish 'abuse'" in responding to the jury's request for definitions of "cruel," "inhumane," and "malicious." As explained above, Simpson's counsel agreed with the trial judge's decision not to provide particular definitions for the three terms when the judge conferred with the parties prior to responding to the jury's note. After the trial judge responded to the jury's question, he asked the parties whether there was "anything else that needs to be said by counsel," to which neither party expressed any concern. Simpson concedes that his defense counsel did not raise the alleged error before the trial court, and instead, affirmatively agreed with the court's proposed course of action.

Nevertheless, Simpson argues that the trial court erred and should have provided an instruction related to "cruel or inhumane treatment or a malicious act" given by the trial court in *Bruce v. State*, 96 Md. App. 510, 522-23 (1993). In *Bruce*, the trial court instructed the jury prior to closing arguments primarily by reading from MPJI 4:07, but it added the

following additional explanation: "*Cruel or inhumane treatment or a malicious act means* conduct or force beyond that which is reasonable or appropriate for the child when considering all the surrounding circumstances." *Id.* at 522–23 (Emphasis added). There, the defense excepted to the instructions, arguing that a "willful and malicious desire' was necessary to the crime." *Id.* at 523. In response, the court added the following paragraph:

When considering all of the surrounding circumstances, the defendant must have intended in inflicting the physical injury as a result of cruel or inhumane treatment, his actions. In other words, he must have intended what he did.

Id. at 523. Again, the defense counsel in *Bruce* "excepted on the basis that the intention must be 'malicious and evil." *Id.* The trial court declined to add any further instruction. On appeal, we held that the trial court's instructions, "that the defendant must have intended to inflict the physical injury as a result of cruel or inhumane treatment," constituted "a correct statement of the law," and that it was not error to decline to add that the defendant's intention must be "malicious and evil." *Id.* at 524. Simpson now relies on our holding in *Bruce* to argue that the trial court in this case should have defined the terms with the supplemental instructions given in *Bruce* -- that "the defendant must have intended in inflicting the physical injury as a result of cruel or inhumane treatment, his actions. In other words, he must have intended what he did." *Id.* at 523.

In this case, however, defense counsel did not except to the court's response to the jury's request for definitions. *See* Md. Rule 4-325(e). Particularly where a party affirmatively indicates having no exceptions or objections to a trial court's jury instructions, "no issue concerning the jury instructions [is] preserved for appellate review."

Johnson v. State, 310 Md. 681, 689 (1987); *see also Thomas v. State*, 143 Md. App. 97, 116 (2002) (citing Md. Rule 4-325(e)) ("By failing to object after the court had instructed the jury, appellant failed to preserve his contention for appellate review."). The rule requiring a challenging party's prompt exception "was designed to afford the trial judge an opportunity to correct inadvertent omissions or inaccuracies in a charge." *Austin*, 90 Md. App. at 265 (quoting *Canter v. State*, 220 Md. 615, 617 (1959)). "So compelling" is this policy "that we have deemed the issue of instructional error not to have been adequately preserved even where objections had been made, but had been made too late for the judge to act upon them." *Id.* at 266.

Again, both the prosecutor and Simpson's counsel affirmatively agreed with the court's decision not to provide the jury a particular definition for each of the terms. Simpson's counsel did not request that the trial court add an instruction defining the terms as requiring "intentional conduct" or any other explanation of any term after the court responded to the jury's question. Accordingly, any objection to the trial court's supplemental instruction is not preserved for our review.

B. We Have No Discretion to Notice Plain Error Where We Cannot Conclude Error Exists.

Despite his defense counsel's silence, Simpson argues that "the error in failing to accurately and helpfully respond to the jury's request for guidance is so grave that it requires recognition and reversal" -- in other words, that we should recognize the court's response as "plain error." In some cases, we may decide to exercise our discretion, "on [our] own initiative or on the suggestion of a party," to "take cognizance of any plain error

in the instructions, material to the rights of the defendant, despite a failure to object." Md. Rule 4-325(e). However, "[p]lain error review is reserved for errors that are 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Yates v. State*, 429 Md. 112, 130–31 (2012) (citing *Savoy v. State*, 420 Md. 232, 243 (2011)). Furthermore, "'[t]he plain error hurdle, high in all events, nowhere looms larger than in the context of alleged instructional errors." *Martin v. State*, 165 Md. App. 189, 198 (2005) (quoting *United States v. Sabetta*, 373 F.3d 75, 80 (1st Cir. 2004)).

The greatest obstacle to our discretion to review for plain error, however, is that the circuit court's instructions did not contain error. See Savoy, 420 Md. at 245 ("Review for plain error requires as an initial step that the instruction contain error."). As we have explained, repeatedly, "[r]eversible error . . . is assumed, as a given, before the purely discretionary decision of whether to notice it even comes into play." Morris v. State, 153 Md. App. 480, 513 (2003) (quoting *Perry v. State*, 150 Md. App. 403, 436 (2002)). In fact, "[i]n all of the numerous instances where a Maryland appellate court has declined to notice plain error, it was, at the very least, assumed that some plain and material error has actually occurred." Morris, 153 Md. App. at 511-12 (2003). Even if we elected to apply the "framework for plain error review," see State v. Rich, 415 Md. 567, 578 (2010), we would not pass the most basic step of the analysis: "First, there must be an error or defect-- some sort of '[d]eviation from a legal rule'-- that has not been intentionally relinquished or abandoned" Yates v. State, 202 Md. App. 700, 721 (2011), aff'd, 429 Md. 112 (2012) (quoting *Rich*, 415 Md. at 578).

A trial court may respond to a question asked by the jury after it has begun its deliberations by giving a supplemental instruction. *See id.*; *see also* Md. Rule 4-325(a) ("The court shall give instructions to the jury . . . and may supplement them at a later time when appropriate."). In *Appraicio*, the Court of Appeals explained:

When the jury asks such a question, "courts must respond with a clarifying instruction when presented with a question involving an issue central to the case." *Cruz v. State,* 407 Md. 202, 211, 963 A.2d 1184 (2009). Trial courts must avoid giving answers that are "ambiguous, misleading, or confusing." *Battle v. State,* 287 Md. 675, 685, 414 A.2d 1266 (1980) (quoting *Midgett v. State,* 216 Md. 26, 41, 139 A.2d 209 (1958)).

431 Md. at 51.

In addition, the trial court's supplemental instruction, when given, must be responsive to "the confusion evidenced by the query." *See State v. Baby*, 404 Md. 220, 263 (2008). The trial court's decision to provide supplemental instructions, however, "and the extent of supplementation are matters left to the sound discretion of the trial judge, whose decision will not be disturbed on appeal in the absence of a clear abuse of discretion." *Howard v. State*, 66 Md. App. 273, 284 (1986) (Citations omitted).

Consistent with the absence of an exception from either party after the trial court gave its initial instructions, there is no dispute that the trial court's initial instructions provided a thorough and proper explanation of each charge. First, the court recited, almost verbatim, the Maryland Criminal Pattern Jury Instructions (MPJI-Cv) for first and second degree child abuse. *See* MPJI-Cv 4:07 and 4:07.1.² "[W]e say for the benefit of trial judges

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The MPJI for second degree child abuse, in pertinent part, reads as follows:

generally that the wise course of action is to give instructions in the form, where applicable, of our Maryland Pattern Jury Instructions." *Johnson v. State*, 223 Md. App. 128, 152, *cert. denied*, 445 Md. 6 (2015) (quoting *Green v. State*, 127 Md. App. 758, 771 (1999)); *see also Minger v. State*, 157 Md. App. 157, 161 n. 1 (2004) (Citation omitted) ("Appellate courts in Maryland strongly favor the use of pattern jury instructions.").

Second, the trial court's initial instructions covered the essential statutory elements

of first and second degree child abuse. Pursuant to Md. Code, Crim. Law I ("CL") (2002,

2012 Repl. Vol., Supp. 2016), § 3-601(b)(1), first degree child abuse occurs when

[a] parent, family member, household member, or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor . . . cause[s] abuse

The defendant is charged with the crime of child abuse in the second degree. Child abuse is physical injury of a child under 18 years of age caused by [a parent] [a family member] [a member of the household of the child] [a person with permanent or temporary care, custody, or responsibility for the supervision of the child]. In order to convict the defendant of second degree child abuse, the State must prove:

⁽¹⁾ that the defendant caused physical injury to (name) as a result of cruel or inhumane treatment or a malicious act;

⁽²⁾ that at the time of the conduct, (name) was under 18 years of age;

⁽³⁾ that at the time of the conduct, the defendant was [a parent] [a family member] [a member of the household] [a person with permanent or temporary care, custody, or responsibility for the supervision] of (name)]; and

⁽⁴⁾ that as a result, (name's) health or welfare was harmed or threatened.

MPJI-Cv 4:07.

to the minor that: (i) results in the death of the minor; or (ii) causes severe physical injury to the minor.

"Abuse" is defined as "physical injury sustained by a minor as a result of cruel or inhumane treatment or as a result of a malicious act under circumstances that indicate that the minor's health or welfare is harmed or threatened by the treatment or act." CL § 3-601(a)(2). Second degree child abuse requires virtually the same elements as first degree child abuse, including that the defendant caused "abuse to the minor," but it may be proven in the absence of the death of or severe physical injury to the minor. *See* CL § 3-601(d)(1).

With these foundational instructions to guide the jury's deliberations, the trial court decided, with the approval of both parties, not to give the jury "exact"³ definitions for the terms "cruel," "inhumane," or "malicious." The court did, however, provide further clarification by instructing the jurors to rely on the "everyday common usage" and to apply that understanding alongside the court's original "legal instructions." The original instructions contrasted "reasonable physical force to discipline or safeguard a child" with the use of "physical force simply to inflict pain upon a child" and force that "is inhumane or cruel." Further, the court explained the jury's task of "determining whether the physical force by a parent was reasonable," by "look[ing] at all the surrounding circumstances including" factors such as "the extent or duration of the physical contact with the child" and "the impact or injury to the child, if any, resulting from the use of force."

³ The jury asked the court, in a preceding question, for "a list typed out of the exact definition requirements for each charge," which was followed by the jury's requests for a dictionary.

Although it may have provided further clarification, the supplemental instruction added in *Bruce*, which explained that the defendant "must have intended what he did," would not have been responsive to the jury's request for definitions of "cruel, "inhumane," and "malicious." Instead, the additional paragraph in *Bruce* responded to the defense counsel's argument that a "willful and malicious desire' was necessary to the crime." *Id.* at 523. Certainly, our holding in *Bruce* -- that the trial court's instruction was a "correct statement of law" on the charge of child abuse, *see id.* at 524 -- did not render that particular language or its substance mandatory in subsequent jury trials.

As we have explained in the past, "the trial judge is in the best position to determine whether, and which, additional instructions should be given and, therefore . . . [the trial judge's] judgment is entitled to great weight." *Howard*, 66 Md. App. at 284–85 (citing *Kelly v. State*, 270 Md. 139, 143 (1973)). Although the jury may have requested a definition for these three terms for any number of reasons, the court clarified for the jury that they should rely on the "everyday common usage," rather than a particular legal definition. Given the jury's request for a list of the "exact definition requirements," and then for a dictionary, it was within the trial court's discretion to clarify that the jury should apply a layperson's understanding of the terms as they are commonly used.

Simpson was not permitted to "wait and see" whether the trial court's decision not to provide the jury with particular definitions of "cruel," "inhumane," or "malicious" worked in his favor, and then contend on appeal that the trial court's course of action constituted error. This is particularly true where an appellant cannot contend that the trial court's initial instructions were insufficient as to any essential element of the charge. As we reasoned in *Austin*,

[i]f trial counsel here felt that this part of the charge needed correction or amplification they could have called it to the court's attention. Apparently they did not think that it did, for no objection was made. But now we are asked to consider that portion of the charge to have been clear error, even though competent and experienced counsel at the time did not so consider it

90 Md. App. at 265 n. 1 (quoting Anderson v. State, 12 Md. App. 186, 203 (1971)).

Here, Simpson never raised before the trial court the argument that the trial court should have defined "cruel," "inhumane," or "malicious," or specified that "intentional conduct" was required. Moreover, there was no error to facilitate our discretion to review for plain error. Therefore, "we are under no obligation even to examine the merits of the contention, for the merits are not properly before us," and "even if the contention had been properly preserved, we would find no merit in it." *Stockton v. State*, 107 Md. App. 395, 398 (1995).

II. Any Error in Admitting State's Exhibit 16, a Postmortem Photograph, was Harmless.

The second issue Simpson raises on appeal is that the trial court erred by admitting one of the postmortem photographs of Baby James's body, State's Exhibit 16 ("S.E. 16"). Simpson contends that no witness provided the proper foundation to authenticate the photograph, and that the admission of S.E. 16 was not harmless.

Pursuant to Md. Rule 5-104(a), "[p]reliminary questions concerning the . . . admissibility of evidence shall be determined by the court, subject to the provisions of

section (b)."⁴ Whether to admit or exclude evidence, including photographic evidence, falls within the discretion of the trial court. *See Donati v. State*, 215 Md. App. 686, 708 (2014) (Citation omitted); *see also Cranford v. State*, 36 Md. App. 393, 403 (1977). Further, we review whether evidence is properly authenticated for abuse of discretion. *See Dep't of Public Safety & Corr. Servs. v. Cole*, 342 Md. 12, 26 (1996).

During the State's direct examination of Cruzado, Baby James's mother, the State sought to introduce a postmortem photograph of Baby James's body from the medical examiner's office. The following exchange occurred:

[THE STATE]: Is that a photograph of baby James?

A. Yes.

Q. Is that how you last saw him?

A. Not looking like that.

[THE STATE]: Request admission of State's 16.

[DEFENSE COUNSEL]: No foundation, Your Honor. I object. She didn't lay a --

THE COURT: It's a photograph.

[DEFENSE COUNSEL]: She didn't say it accurately reflected

THE COURT: She didn't say it. You have got to do that.

Q: Does that accurately depict your son when you saw him at the hospital?

A. He wasn't that bad. He didn't -- that was not the last memory I have of my son.

[DEFENSE COUNSEL]: May we approach, Your Honor.

THE COURT: You may.

⁴ Section (b) of Rule 5-104 deals with conditional relevance.

[DEFENSE COUNSEL]: That has a tag from the Medical Examiner's Office. She didn't see him that day. She can't lay the foundation for that. She can't --

[THE STATE]: She didn't have to have seen him that day. She has to say that that's her son.

THE COURT: Why do you object to this?

[DEFENSE COUNSEL]: I continue my objection for any pictures as a part of the autopsy.

[THE STATE]: She said it was her son.

THE COURT: What [does] OCM even mean?

[THE STATE]: Office of the Chief Medical Examiner.

[DEFENSE COUNSEL]: I continue my objection about any pictures brought in that were taken as part of the autopsy.

THE COURT: This isn't a picture your expert is going to talk about, is it?

[THE STATE]: Well, normally, he would identify that as the way that the baby appeared.

THE COURT: Well, she has identified it as her baby. It's --

[THE STATE]: Yes.

[DEFENSE COUNSEL]: I'm going to continue to make objections as to the entry -- I'm making a record.

THE COURT: All right. I will admit it.

After the admission of S.E. 16, Cruzado stepped down, and the State called Officer

Kevin McCahill, who responded to PRMC where Baby James was taken in the early

morning hours of December 31, 2015. During the State's direct examination, the State

asked Officer McCahill to identify S.E. 16:

Q: I'm just going to ask if you can identify the picture for me.

A: This is a picture of [B]aby James.

Q: Is that a fair and accurate representation of how baby James looked when you -- other than disconnected to medical treatment -- his face and features, is that a fair and accurate representation of the baby?

A: I can't really say. They were constantly working on [B]aby James. EMS from Children's National Center was working on him, also, doctors. So he was hooked up to a lot of different things, but . . .

Q: Do you recognize the person in the picture?

A: Yes, that's [B]aby James.

Immediately prior to calling its next witness, the State introduced a stipulation

("Stipulation 1"), which included undisputed facts regarding the chain of custody and

condition of Baby James's body. Before the trial court admitted Stipulation 1, the State

read the stipulation aloud for the jury:

Following his death, the body of the infant, James Simpson, III, date of birth November 23, 2015 was transported from Children's National Medical Center to the Office of the Chief Medical Examiner for the District of Columbia. The body was in a body bag and was in a condition of having received medical attention.

The body was transported directly to the Office of the Chief Medical Examiner and was in the same condition as when it left the hospital.

The body was not altered in any way between Children's National Medical Center and the Office of the Chief Medical Examiner.

During the State's examination of Dr. Mitchell, the Chief Medical Examiner, the

State introduced State's Exhibits (S.E.) 17 through 21, which were autopsy photos of Baby

James's body prior to examination and his internal injuries.⁵ After the court admitted the

⁵ Simpson's defense counsel objected to Dr. Mitchell's testimony regarding the photographs from the autopsy at the bench prior to the State's questioning on the matter, stating, "I believe that his opinion should be excluded, that there is no foundation for the pictures and whatever -- kind of taking on the previous arguments." The trial court noted the objection.

photographs, Dr. Mitchell used them to explain the injuries to Baby James's head, bleeding and swelling inside his skull, blood in his spinal column, a mark on the underside of his scalp, and other indicia of head and spinal trauma. In particular, Dr. Mitchell explained that S.E. 17 showed Baby James's body after it arrived from CNMC and was prepared for the autopsy "after all of the medical procedure and things [that] were attached to the body had been removed."

On appeal, Simpson does not argue that *all* of the autopsy photos were inadmissible. His contention is that S.E. 16 was not admissible because no witness testified that the photograph was a "fair and accurate depiction of the victim's condition." Rule 5-901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Two of several methods for properly authenticating or identifying evidence that conform with subsection (a) are: (1) "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be," *see* Rule 5-901(b)(1); and (2) "[c]ircumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be." *See* Rule 5-901(b)(2). At the heart of the preliminary requirement authenticity is the well-established rule that

> there must be competent extrinsic evidence showing the photograph to be a true representation of the scene or object which it purports to represent at the time when the appearance of such scene or object is relevant to the inquiry in connection with which the photograph is offered.

McLaughlin v. State, 3 Md. App. 515, 523 (1968) (Citation omitted).

Thus, it is true that photographs may be admitted with testimony by a witness with first-hand knowledge, who testifies that the photograph depicts "a correct and accurate representation of what it purports to show." *See Cole*, 342 Md. at 20-21. Circumstantial evidence, however, may also be sufficient to establish authenticity. *See* Rule 5-901(b)(2). As we have previously said, "the burden of proof for authentication is slight, and the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so." *Dickens v. State*, 175 Md. App. 231, 239 (2007) (Citations and internal quotation marks omitted).

Based on our review of the record, we cannot conclude that the trial court abused its discretion in admitting S.E. 16. Simpson's counsel objected to S.E. 16, stating as grounds that he objected to the admission of any photos taken as part of the autopsy,⁶ and argued that S.E. 16 lacked a proper foundation because no witness had testified that the photo was a true and accurate representation of Baby James's condition. As the State points out, Baby James's mother identified the body in S.E. 16 as that of Baby James. The parties stipulated that after Baby James died, his body was transported directly from CNMC to the Office of the Chief Medical Examiner for the District of Columbia. There was no dispute, therefore, that the body "was in the same condition as when it left the hospital" and "was not altered in any way" when it arrived at the medical examiner's office. Additionally, as

⁶ When asked why he objected to the admission of the photograph, Simpson's counsel stated that he objected to the admission of all of the autopsy photos. As we explained in *Johnson v. State*, 303 Md. 487, 502 (1985), however, "we have permitted the reception into evidence of photographs depicting the condition of the victim and the location of injuries upon the deceased" Further, "photographs have also been admitted to allow the jury to visualize the atrocities of the crime." *Id.* (Citation omitted).

Simpson's counsel pointed out to the trial judge, the photograph included a label with a date from the Office of the Chief Medical Examiner. Accordingly, there was "competent extrinsic evidence" for the trial court to conclude that the jury might find the photograph to be a true representation of Baby James's body at the time the photograph was taken. *See McLaughlin*, 3 Md. App. at 523.

Although the State maintains that the trial court properly relied on witness testimony and competent extrinsic evidence to admit S.E. 16, the State asserts that any error in admitting the photograph was harmless. We agree with the State. The erroneous admission of evidence does not require reversal if the error was harmless. *See Yates*, 429 Md. at 124 (holding that the error of admitting certain evidence was harmless where it "did not ultimately affect the jury's verdict given the cumulative nature of the similar statements offered at trial"). In *Carpenter v. State*, we observed that when

the cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded.

196 Md. App. 212, 230-31 (2010) (quoting Ross v. State, 276 Md. 664, 674 (1996)).

S.E. 17, a photograph admitted during the medical examiner's testimony, showed Baby James's body at the medical examiner's office after it was "cleaned and prepared for external examination." Another photograph showed the contusion visible underneath Baby James's scalp, which had not yet become visible on the surface of Baby James's head. Both the Chief Medical Examiner and Baby James's treating physician at CNMC provided in-depth descriptions of the injuries that Baby James sustained to his head and spine. Perhaps most importantly, Simpson's defense was that he had no part in causing Baby James's injuries -- that he had not shaken, dropped, or thrown his son or harmed him in any way prior to finding him unresponsive and calling for help. A guilty verdict on any of the charges required the jury to find that Simpson caused Baby James's injuries. Given the abundant similar evidence relevant to his injuries, therefore, the admission of S.E. 16 could not have reasonably changed the outcome of the trial.

Accordingly, we hold that the trial court did not abuse its discretion in admitting S.E. 16, and even if the court admitted the photograph without the proper foundation, any such error was harmless.

III. Any Error in Permitting a Police Officer to Explain His Own Perception of Simpson's Conduct was Not Preserved.

Simpson's final argument is that the trial court erred in permitting a law enforcement officer to provide lay opinion testimony concerning his perception of Simpson's behavior at the hospital. We note, initially, that the issue is not preserved.

Officer Fissel testified he arrived at the hospital at around 6:00 a.m., and soon thereafter, interviewed Simpson about the circumstances surrounding Baby James's injuries. He said that Simpson indicated that he left his apartment around 11:45 p.m. to go to the Cook Out restaurant. The officer's testimony on direct examination by the State proceeded as follows:

Q: Did he provide you with any item related to that?

A: Yes, he did.

Q: What did he give you or show you?

A: He showed me two receipts from Cook Out that he pulled out of his pocket.

After further questioning, the court admitted State's Exhibit 12, the food order receipt, and State's Exhibit 13, the payment receipt from the Cook Out restaurant, without objection.

The State continued to ask Officer Fissel about the moment Simpson offered the receipts to him. Officer Fissel stated that Simpson took both receipts out of his right front pants pocket, and the State asked, "Did anything stick out about that to you?" Officer Fissel responded, "Yes" and started to explain, "I thought it was odd -- " before Simpson's counsel interjected, and the following exchange occurred:

[DEFENSE COUNSEL]: Objection, it calls for speculation.
THE COURT: What was the question again?
[THE STATE]: I asked what he thought was relevant about those receipts. Or what stuck out to him about those receipts.
THE COURT: Within the scope of his investigation –
[THE STATE]: Yes.
THE COURT: -- as a law enforcement officer, did it have any relevance? That's the first question.
Did it have any relevance, the receipt?
[OFFICER FISSEL]: As far as the criminal investigation
THE COURT: Or whatever your lawful or your legal function was at the time, did it have any relevance?
OFFICER FISSEL]: At the time, yes. I thought he was trying to --

THE COURT: All right. Go ahead and answer the question, so the jury can hear it.

Without objection, Officer Fissel answered, "I thought it was odd because he really seemed

like he wanted me to know he was at Cook Out to try to provide an alibi." Simpson's

defense counsel did not move to strike Officer Fissel's testimony regarding his perception

of Simpson when Simpson offered the receipts, and the State continued its direct examination.

As we explained above, we will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). Rule 4-323(c) governs methods of properly objecting at trial, and provides in pertinent part:

An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs. The court shall rule upon the objection promptly.

Pursuant to 4-323(c), therefore, an objecting party is not required to state the basis for an objection, unless the court requests it. "Where a party asserts specific grounds for an objection," however, "all other grounds not specified by the party are waived." *Thomas v. State*, 183 Md. App. 152, 177 (2008), *aff'd*, 413 Md. 247 (2010) (citing *Klauenberg v. State*, 355 Md. 528, 541 (1999)).

Here, the State asked Officer Fissel, "Did anything stick out about that to you?" and Simpson's defense counsel objected after Officer Fissel started to answer that he thought it was odd. Simpson's counsel's stated grounds were that the question "calls for speculation." In response, the trial judge attempted to remedy Simpson's counsel's concern and clarified that the question was whether the receipt had any relevance to Officer Fissel's "lawful or . . . legal function at the time." Officer Fissel responded that he believed it had relevance at the time, and the court permitted Officer Fissel to continue his answer.

Simpson's counsel did not request any further relief during Officer Fissel's testimony on this subject.

Although Simpson's counsel initially objected to the State's question as calling for speculation, the record does not indicate that Simpson's counsel objected to the court's rephrased question. Any objection to the speculative nature of the question, therefore, was waived. "The strict rule that an objection made at an inappropriate time will waive the objection, however, will give way when the question is unobjectionable, but the answer includes inadmissible testimony which was unforeseeable from the question." Bruce v. State, 328 Md. 594, 627 (1992) (Citations and internal quotation marks omitted). Even assuming Simpson's counsel could not have foreseen that the trial court's questions would call for the same answer as the State's original question, Simpson's counsel did not move to strike any portion of Officer Fissel's testimony immediately thereafter. See Clermont v. State, 348 Md. 419, 429 (1998) ("The object of the motion to strike, which is usually accompanied by a request for an instruction to the jury to disregard certain evidence, is to remove matters which have not been properly admitted as evidence from the jury's consideration.").

Simpson's Counsel did not request an explicit ruling on his objection after the court's clarifying questions, and even assuming the trial court overruled his objection, Simpson's counsel did not move to strike Officer Fissel's answer. As is well-established, and particularly where the trial court makes a distinct effort to cure the problem raised by an objecting party, our "review should be limited to the basis on which the trial court decided the matter." *See Thomas*, 183 Md. App. at 178. Without any further objection --

or request for a curative measure after Officer Fissel answered -- the trial court could properly assume that it had satisfied Simpson's defense counsel's concern that the form of the question would elicit inadmissible testimony.

This rule of preservation applies with even greater force to Simpson's contention that the trial court abused its discretion by permitting inadmissible lay opinion testimony. Simpson's counsel never raised this argument before the trial court at any point during Officer Fissel's testimony. We therefore reject Simpson's contention that the trial court "elicited the fact that [Officer Fissel's opinion] was based on [his] experience as a law enforcement officer," and therefore, that "the court's decision to allow a non-expert to offer this interpretation of Mr. Simpson's actions is . . . an issue 'decided by' the lower court."

The trial court asked Officer Fissel to indicate whether the circumstances of Simpson offering the receipts to Officer Fissel at the hospital had any relevance to his investigation or "legal function . . . at the time." The court's questions were in response to Simpson's defense counsel's concern that his answer would be impermissibly speculative. Once Officer Fissel answered in the affirmative, the trial court permitted Officer Fissel to continue responding to the State's line of questioning. There is no indication in the record that Simpson's counsel raised the issue of whether Officer Fissel's testimony constituted inadmissible lay opinion testimony before the trial court. The issue, therefore, was not "raised in or decided by the trial court." Md. Rule 8-131(a).

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