E-FILED
Gregory Hilton, Clerk,
Supreme Court of Maryland
7/8/2024 2:58 PM

IN THE
SUPREME COURT OF MARYLAND

SEPTEMBER TERM, 2024

NO. 7

MOIRA E. AKERS,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF MARYLAND

BRIEF AND APPENDIX OF PETITIONER MOIRA E. AKERS

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STATEMENT OF THE CASE

The State of Maryland charged Petitioner Moira E. Akers in the Circuit Court for Howard County with the murder of her newborn at birth and child abuse resulting in death. (E 5).[1] The jury convicted Ms. Akers of second-degree murder and child abuse resulting in death. (E 19). The trial court (Hon. Timothy J. McCrone, presiding) sentenced Ms. Akers to 30 years of imprisonment for murder and a concurrent 20 years of imprisonment for child abuse resulting in death. (E 6, 21). On direct appeal, the Appellate Court of Maryland ("ACM"), affirmed in an unreported decision. *Moria E. Akers v. State*, CSA-REG-0925 (Jan. 30, 2024) (App 1). This Court granted certiorari review.

QUESTION PRESENTED

Whether evidence of a pregnant woman's forgoing prenatal care and Internet searches about terminating the pregnancy are irrelevant as a matter of law to show the woman's intent to kill the newborn at birth, or if marginally relevant, unfairly prejudicial?

STATEMENT OF FACTS

1. Introduction.

Moira E. Akers gave birth alone in her Columbia, Maryland home on November 1, 2018. (E 392). She was the sole witness to the delivery, which she consistently reported as a stillbirth. (E 375-76, 381, 384, 392-93). Ms. Akers did not seek medical intervention

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[1] Petitioner adopts the following transcript references: E refers to the joint record extract; App refers to the appendix to Petitioner's brief; T1 refers to the trial date of April 19, 2022; T2 refers to April 20, 2022; T3 refers to April 21, 2022; T4 refers to April 22, 2022; T5 refers to April 25, 2022; T6 refers to April 26, 2022; and T7 refers to April 27, 2022.

because the newborn did not move, breathe, or cry, and she had not felt the fetus moving inside of her for several days before the delivery. (E 399).

Ms. Akers had initially disclosed the pregnancy to her husband, Ian Akers. (E 382). They decided to terminate the pregnancy. (E 397). They already had two young children. (E 406). However, Ms. Akers did not have the abortion. (E 382). She planned to give the child up to a "safe haven for newborns" for adoption.[2] (E 393, 405). She told her husband that the pregnancy was ectopic and that it had ended. (E 396). She did not tell her parents about the pregnancy because their religious views were opposed to abortion, and they would not support her adoption plan either. (E 405). She did not tell her sister about the pregnancy because her sister was undergoing treatment for cancer and may not be able to have children of her own. (E 382). Ms. Akers did not seek obstetric prenatal care because she wanted to hide the pregnancy from her family. (E 398-99).

On November 1, 2018, Ian Akers found Ms. Akers in their bathroom bleeding profusely, and he called 911. (E 384). Ms. Akers' husband and their two young children were present when the emergency responders came to her home and transported her to Howard County General Hospital. (E 92). Ms. Akers did not divulge the delivery or the stillbirth to the first responders in front of her husband and children. (E 371-72, 381). Once at the hospital, Ms. Akers asked the staff not to share her medical information with her husband

[2] The "safe havens for newborns" statute provides that a person who leaves an unharmed newborn with a responsible adult within ten days after the newborn's birth will have immunity from civil liability or criminal prosecutions. Md. Code Ann., Cts. & Jud. Proc. § 5-641(a)(1).

or family. (E 158, 225, 378). When questioned by the emergency department's physician about the apparent umbilical cord, Ms. Akers admitted to delivering a stillborn at home, which she wrapped in a towel and placed in a closet. (E 381).

First responders and police officers returned to Ms. Akers' home. (E 98). There was blood throughout the upstairs hallway, bathroom, and bedroom. (E 155-56). Firefighter Thomas Sullivan located the stillborn wrapped in a towel in a bag in the bedroom closet, as Ms. Akers had stated. (E 109, 372). There was no pulse and no breathing. (E 111, 372). Rigor mortis was present. (E 119). The stillborn was pronounced dead. (E 372). The sex of the baby was male. (E 116, 373). The house was immediately treated as a crime scene. (E 137).

Ms. Akers consistently stated that the child was stillborn to (1) nurses and a physician in the hospital's emergency department (E 375-76, 381), (2) a detective with the Howard County Police Department, and a Department of Social Services Child Protective Services ("CPS") social worker (E 393), and (3) the hospital's perinatal social worker and psychiatrist. (E 384). Ms. Akers reported that the fetus was not moving, crying, or breathing following the delivery. *Id.* She thought it was too late for medical intervention because she had not felt the fetus moving inside of her for several days before the delivery and concluded "it had already passed." (E 204, 384, 399, 414). Ms. Akers explained that she hid the pregnancy from her husband because they planned to end the pregnancy. (E 397). She planned to take the baby to a "safe haven" for newborns. (E 393). Ms. Akers was both steadfast and emotional when she recounted the full circumstances of the pregnancy and stillbirth. (E 384, 386-430).

2. The Circumstances of the Stillbirth.

Ms. Akers explained that her pregnancy ended in stillbirth after several days when she did not feel the fetus moving inside of her. (E 204). She explained that she experienced a stillbirth alone at her home. (E 206). Ms. Akers related that she had not slept well the night before the delivery because she had contractions. (E 388). She continued to have contractions throughout the day of her delivery and realized she was in labor. (E 199, 388-89). At the start of the day, Ms. Akers dressed her son, made him breakfast, and packed lunch for him before resting with her daughter. (E 199, 384, 389). Her stomach began hurting, and she took a bath to try to make herself feel better. (E 384, 390). Later in the day, she made lunch for her daughter and put her down for a nap. (E 199, 384, 391). She then began to rest, but the contractions started getting heavier, and her water broke. (E 391). She felt like she had to go to the bathroom, and after trying to go to the bathroom for a long time, she delivered the baby into the toilet. (E 199, 384, 392).

Ms. Akers said she grabbed a nearby towel and immediately retrieved the stillborn from the toilet. (E 199, 384, 393, 415). Consistent with her not feeling the fetus move for a few days before the delivery, she detected no sign of life in the fetus, which was not moving, breathing, or crying. (E 205-06, 381, 384, 399, 414, 417). She was sad that the fetus was stillborn. (E 416). She wrapped the lifeless fetus in the towel. (E 203). She carried the stillborn from the bathroom to the bedroom. *Id.* Still, she heard no crying and saw no movement in the stillborn. (E 205-06). She cut the umbilical cord using cuticle scissors. (E 203, 384).

Ms. Akers did not know what to do. (E 203, 384). She did not ask for help because she thought it was too late. (E 400). She felt panicked, overwhelmed and scared. (E 198, 384). Because she did not hear any noises or detect movement, she placed the stillborn in a nearby plastic clothing bag and put the bag in the closet under a blanket. (E 198, 384, 393-94). Ms. Akers struggled to speak with the social worker about the delivery, who noted Ms. Akers to be extraordinarily overwhelmed and scared, at times speaking through tears. (E 192, 384). She wanted the baby to have a good life. (E 403-04, 413-14). She denied having done anything to cause the stillbirth. (E 419-20).

Ms. Akers recounted that "she had not felt the baby move for a few days and yesterday she started cramping and contracting." (E 384). The cramping and contracting started in the morning, and Ms. Akers "figured she was in labor." (E 384). Ms. Akers relayed the following events about the delivery:

> She explains feeling like she had to go to the bathroom, where she went and subsequently delivered the baby in the toilet, she immediately retrieved the baby, but reports that the baby was not crying. Pt explains she did not know what to do at this time, but reports wrapping the baby in the towel she used following her bath earlier, then walking to her room, cutting the cord with cuticle scissors, placing the wrapped baby in a clothing storage plastic bag and placing a blanket on top of the bag in her closet. Pt struggled to explain the events following delivery and reports she was overwhelmed and scared.

(E 384; *see also*, E 199, 203). Ms. Akers reported to her that the baby was not living. (E 200).

Although Ms. Akers' husband was home throughout the day; at the time of the delivery, he was meeting their son at the school bus stop. (E 199, 376, 384). Their daughter

was still napping in her crib. (E 199, 384). Ms. Akers was cleaning up the blood in the bathroom when her husband found her. (E 384). Ms. Akers did not tell him that she delivered the baby. (E 200, 384). He called 911 because he saw the blood and was overwhelmed. (E 200, 384).

3. The Circumstances at the Hospital.

At 4:55 PM, Ms. Akers arrived at Howard County General Hospital in an ambulance for treatment of "spontaneous vaginal bleeding." (E 374). Nurse Lynn Canade testified that Ms. Akers arrived in clothing and that she and a second nurse removed the clothing to perform a head-to-toe assessment. (E 155). Blood had saturated the clothing. (E 156). Nurse Canade saw the umbilical cord protruding from the vagina. (E 164). Ms. Akers disclosed that she had a confirmed pregnancy months prior, that she did not receive any prenatal care, and that she delivered a stillborn infant at home. (E 157, 161, 163-64, 376). The emergency room physician, Dr. Igor Kukelyansky, was present as the nurses were preparing to take Ms. Akers to the Labor and Delivery unit ("LD") to deliver the placenta and repair vaginal tears. (E 157, 170).

Once Ms. Akers was in the LD unit, the obstetrician, Dr. Carol Goundry, delivered the placenta and sent it to pathology for closer examination. (E 376-77). Dr. Goundry relied "heavily" on the pathologist's assessment of the placenta, which occurred after she noted the placenta was intact with an umbilical cord inserted "a little off to the middle." (T2 171-72). Ms. Akers reported to Dr. Goundry that she did not feel the fetus move for several days and did not hear the baby cry when it was born. *Id.* Dr. Goundry testified that Ms. Akers received a local anesthetic and a narcotic (Dilaudid) intravenously, but she still

could not tolerate the vaginal examination. (T2 182). Dr. Goundry transferred Ms. Akers to an operating room, and an anesthesiologist administered intravenous sedation, including fentanyl, propofol, and versa. (T2 186). Dr. Goundry surgically repaired two second-degree vaginal lacerations that went through the skin to the level of the perineal body. (T2 175). The surgery ended at 8:36 PM. (T2 186).

At 9:25 PM, less than an hour after Ms. Akers awakened from the general anesthesia (T3 117), Corporal Tambra Weigman, a detective assigned to the Family Crimes Division of the Howard County Police Department (T3 51), questioned her in the labor and delivery unit. (T3 53, 65). Detective Weigman was in Ms. Akers' room with Joel Page,[3] a Child Protective Services ("CPS") social worker. (T3 65). Detective Weigman recorded Ms. Akers' interview, including the advisement of Ms. Akers' rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). (T3 67). The prosecutor played the entire 56-minute recording of Ms. Akers' interview (T3 72, State's Exhibit 38) and published a transcript of the interview to the jury. (T3 69; E 386-430, State's Exhibit 39, Transcript).

a. Ms. Akers' Statement to the Detective and CPS Social Worker.

Ms. Akers told the detective and CPS social worker that, in May 2018, she believed she had an ectopic pregnancy. (E 395). She was experiencing a lot of pain, she was not gaining much weight, and she was not showing. (E 395-96). She told her husband that

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[3] The transcript reflects "Jill Paige" (T3 65), "Mr. Joel Paige" (T1 25), and "Joel Page" (T3 121).

she was pregnant, and they decided to terminate the pregnancy. (E 397). They wanted to remain focused on their two young children. (E 403-04). Later in May, Ms. Akers saw her doctor to confirm the pregnancy, and the doctor told her that the pregnancy was normal and that she was 15 weeks pregnant. (E 395). Ms. Akers recounted that when she saw her obstetrician at Dr. Moore's office in May 2018, she was told it was too late to terminate the pregnancy. (E 395). Ms. Akers did not have a second-trimester abortion. (E 396). She told her husband that she had an ectopic pregnancy and that the pregnancy had ended. (E 396). Still, she decided to give the child up for adoption. (E 397).

Ms. Akers explained to the detective that she failed to tell her husband that she did not have the abortion for two reasons. (E 397, 404). First, she had decided to give up the newborn for adoption instead of undergoing a second-trimester abortion. *Id*. Second, she was in denial of the pregnancy and hoped it would naturally resolve itself. *Id*. Ms. Akers told Detective Weigman that she "[a]lmost" hoped something would happen so that the pregnancy would go away. (E 397). Still, she never did anything to assist in trying to make the pregnancy go away. (E 398). She did not take any medications for anxiety. (E 405). She said that she was sad about the stillbirth, that she did not want the infant's death to happen, and that she wanted the baby to have a good life. (E 403). Ms. Akers also related to the detective that she did not tell her family about the pregnancy because they are Catholic, and she would be stigmatized for considering an abortion or adoption. (E 405). For these reasons, Ms. Akers decided to use a safe haven for newborns instead of giving "up the baby officially through adoption." (E 393, 405). Ms. Akers did not seek

obstetric prenatal care to maintain the privacy of the pregnancy. (E 398-99). Ms. Akers did not drink alcohol, smoke, or abuse any drugs. (E. 380).

b. Ms. Akers' Statements to Social Worker Alison Tiedke and Dr. Micula-Gondek.

The following day, Ms. Akers also had a long, detailed discussion with Alison Tiedke, the hospital's licensed clinical, perinatal social worker, in Ms. Akers' room. (E 190-91, 384). The prosecution called Ms. Tiedke to testify about their conversation. (E 189). Ms. Tiedke recounted Ms. Akers' statements about the beginning of her pregnancy and what led up to the delivery at home. (E 192, 384). The social worker described her as sad, overwhelmed, and scared. (E 192). She was also emotional and tearful. (E 220). The social worker wrote in her report that Ms. Akers was emotional and "at times speaking through tears." (E 384), and that Ms. Akers "struggled emotionally to relay events on the day of delivery." *Id*.

Ms. Akers told the social worker that she realized in late April 2018 that she may be pregnant and spoke to her husband about it. (E 192, 384). Their plans at that time did not include a new pregnancy, and they discussed not continuing with it. (E 182, 384). Ms. Akers saw her obstetrician in May to confirm the pregnancy, but it was too late to terminate it. (E 192, 384). Ms. Akers told her husband the pregnancy was ectopic and that it had ended. (E 194, 384). Her pregnancy was not showing, and none of her family and friends knew that she was pregnant. (E 197, 384). The social worker reported that Ms. Akers "identified significant denial and guilt in managing [the] pregnancy from June through delivery yesterday, but explains her plan at delivery was to bring the baby to the hospital or

fire department as a 'Safe Haven.'" (E 197, 384). The social worker did not ask any follow-up questions about Ms. Akers' "Safe Haven" plan. (E 201).

Also, on the day following the birth, Ms. Akers presented, tearfully and emotionally, in a consultation with the Hospital's psychiatrist, Dr. Weronika Anna Micula-Gondek. (E 382). Dr. Micula-Gondek noted:

> Pt presented tearful and emotional. She told me that she took a pregnancy test in May because she was having abd pain and spotting and found out that she was pregnant. She had to wait for her ob appointment x 2 weeks and at the appointment found out that it was too late to terminate pregnancy. She told me that both her and her husband felt that this is not a good time for them to have another child. She told husband that she had an ectopic pregnancy and was given medication. She told me that she was in denial. She told me that throughout the pregnancy she was not showing at all and that only contributed to her denial of being pregnant. She did not tell her family or friends and no one knew that she was pregnant. Today pt reported that she feels mad and dissappointed [sic] with herself that she "made stupid decisions". She is worried that her family will reject her because her sister is undergoing treatment for melanoma and may not be able to have children at all.

(E 382).

4. The Motion in Limine and the Trial Court's Ruling Regarding Ms. Akers' Contemplation of an Abortion and Lack of Prenatal Care.

Before trial, Ms. Akers asked the Circuit Court to exclude evidence about abortion and the lack of prenatal care as irrelevant and unfairly prejudicial. (E 33). Specifically, Ms. Akers moved to exclude evidence about her Internet search history regarding methods for terminating a pregnancy and that she sought an abortion from her obstetrician. (E 34). The prosecutor confirmed that she would seek to introduce evidence from Ms. Akers' visit

to her obstetrician in May of 2018, "at which time she inquired about terminating her pregnancy." (E 39). According to the prosecutor, the "testimony would be that not only did she inquire but was provided with two referrals for obtaining an abortion, in terms of clinics that do that type of procedure." (E 39). The prosecutor also confirmed that:

> The other piece of evidence that the State would be seeking to introduce is that from March of 2018 through May of 2018, the Defendant performed internet searches on her phone and visited websites relating to how to cause a miscarriage and abortion. The searches began in March, in terms of different websites that she visited, and continued through May of 2018. And there were inquiries regarding medicine for causing an abortion.

(E 39). Moreover, the prosecutor sought to introduce that Ms. Akers "provided information [on November 4th and 2nd of 2018] to Howard County General personnel that it was too late for her to obtain an abortion." (E 40).

Ms. Akers maintained the evidence about abortion and forgoing prenatal care was irrelevant and unduly prejudicial. (E 33). Ms. Akers also noted that, under Maryland law, the State may not interfere with a woman's decision to abort a non-viable fetus.[4] (E 35). Moreover, Ms. Akers argued that abortion is a federal constitutional right under *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and

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[4] Md. Code Ann., Health Gen. § 20-209 provides:

> (b) Except as otherwise provided in this subtitle, the State may not interfere with the decision of a woman to terminate a pregnancy:
> (1) Before the fetus is viable[.]

Id.

the State may not prove guilt by introducing evidence a person contemplated exercising a constitutional right.[5] (E 35). Regarding forgoing obstetric prenatal care, Ms. Akers argued that there is no legal obligation to seek prenatal care and that a pregnant woman cannot be prosecuted for failure to act with regard to her own fetus. (E. 35).

The prosecutor argued that abortion and the lack of prenatal care were "highly relevant and probative of the elements" of the charges of murder and first-degree child abuse. (E 40).

> We must prove, Your Honor, that the Defendant intended to kill her baby. And to prove the child abuse, we must prove that the Defendant caused serious injury or death and that it was intentional, either to commit the acts of abuse or failure to act. *The fact that she was seeking to end her pregnancy is most highly relevant to proving her intent to kill the baby once it was born, and her intentional failure to obtain care for her child after the child was born*.

(E 40) (emphases supplied). Also, the prosecutor argued that abortion and the lack of prenatal care were relevant to Ms. Akers' credibility:

> Your Honor, additionally, after denying her pregnancy and the birth of her baby to EMTs and then to hospital personnel on November 1st, the doctors observed the umbilical cord and placenta. At which time, the Defendant provided statements that the baby was stillborn. Your Honor, she advised hospital personnel that she had been told it was too late to seek an abortion in May of 2018.
>
> *The evidence regarding her prior seeking of an abortion and the searches about abortion go to prove directly to her credibility, with respect to the information that she provided, and*

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[5] The Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022) after Ms. Akers' trial.

> *her intent at the time she committed these acts.* Where, as here, Your Honor, you have the only witness to the birth as the Defendant, and she says the baby is stillborn. The evidence that she is lying certainly is relevant and probative, regarding her ability and wish to terminate her pregnancy. And, you know, she had that ability to do so, legally, and chose not to do so in May of 2018. So, all of that goes to the relevance of what her intent was when she delivered this child in November of 2018, and then, as we are seeking to prove to the jury, killed that child.

(E 40-41) (emphases supplied).

The trial court denied Ms. Akers' request to exclude the evidence of abortion and lack of prenatal care, ruling that "both the researching the abortion issue and the lack of prenatal care, once the Defendant understands that she is expecting, are relevant to the issue of intent that the State's required to prove for their suggestion that it was a killing." (E 50). Also, the trial court "[did] not find that its prejudicial effect outweighs its probative value." (E 50-51).

5. The State's Evidence and Arguments of Ms. Akers' Contemplation of an Abortion and Lack of Obstetric Prenatal Care

At trial, the prosecutor introduced Ms. Akers' Internet searches between March 14, 2028, and May 4, 2018, which occurred nearly six to eight months before the delivery. (E 248, 433-47). The State called Detective Joshua Lapier as an expert in cell phone analysis and extraction. (E 243, 245). The search history included between March and May 2018 the following terms:

> A. "rue tea for abortion" on March 14th, 2018 at 7:34 PM, (Ex 52, p. 4) (E 436);
>
> B. "does Rue extract cause you to miscarry" on March 4th, 2018 at 7:33 PM, (Ex 52, p. 3) (E 435);

C. "over-the-counter pills that cause miscarriage" on March 4th, 2018 at 11:17 AM, (Ex 52, p. 3) (E 435);

D. "miscarriage at seven weeks" on March 8th, 2018, at 11:49 AM, (Ex 52, p. 2) (E 434);

E. "miscarriage at seven weeks do I need a D&C" on March 18th, 2018 at 1:22 PM (Ex 52, p. 2) (E 434)

F. "how to treat ectopic pregnancy naturally" on May 4th, 2018 at 7:16 PM, (Ex 52, p. 2) (E 434)

G. "how to end a ectopic pregnancy" on May 4th, 2018 at 7:14 PM, (Ex 52, p. 2) (E 434).

The expert also testified that Ms. Akers visited a website titled "woman resort to over-the-counter remedies to end pregnancy" on March 14, 2018, at 11:49 AM. (E 260). Ms. Akers additionally visited a website following her search for "over-the-counter pills that cause miscarriage" on March 14, 2018, at 11:17 AM. (E 260-61). The State introduced the records of these searches as well as additional searches in State's Exhibits 52 and 53, including "misoprostol in mid-trimester termination of pregnancy, both oral and vaginal[,]" (E 445), "planned parenthood" (E 438), and "scheduling an abortion". (E 437).

The prosecutor also introduced Ms. Akers' discussion with her obstetrician about the termination of the pregnancy and the lack of prenatal care. (E 229-30). According to Ms. Akers' obstetrician's medical records and Dr. Danielle Waldrop's testimony, Ms. Akers had one visit with her obstetrician on May 14, 2018. (E 431-32). Ms. Akers discussed the termination of the pregnancy with Dr. Waldrop. (E 232, 431). According to Dr. Waldrop's notes, Ms. Akers was very emotional during her obstetrics appointment on May 14, 2018. *Id*. The history stated, "She was very emotional and unable to complete

the exam. She cried repeatedly and needed to be consoled and was going to return for a pap smear." *Id*. Dr. Waldrop ordered an ultrasound, and the medical record indicates, "Ultrasound Complete (> 14 wks) (In-House)". (E 432). The due date for the pregnancy of December 2, 2018, was based on the gestational age derived from Ms. Akers' last menstrual period. (E 233, 431-32). According to Dr. Waldrop, the history indicated that the office gave Ms. Akers "info for local clinics to complete what's stated as second trimester termination." (E 233-34, 432).

The prosecutor's narrative through the trial was that Ms. Akers' contemplation of abortion and lack of prenatal care showed that she intended to kill the child at birth and was untruthful about her "safe haven" plan. (E 62-72, 287-309). The prosecutor began her opening statement by asserting that Ms. Akers' contemplation about abortion revealed her choice not to let the newborn live:

> *She chose to not let that baby live.*
>
> As early as March of 2018 when she would have been approximately five weeks along, she at least suspected she was pregnant. *She made Internet searches for brew extracts that would cause termination. She Googled atopic* [sic] *pregnancies. And she waited until May 14th of 2018 to go see her OBGYN.* At that time she was fifteen weeks along. She went to see her doctor at that time are [sic] having waited those ten weeks, to discuss termination.
>
> …
>
> She has six months from that time of her appointment until the time of his birth to think about what she was going to do when he came into this world. To think about alternative ways that he could live. That she did not want him, but that others would. Six months of choices.

(E 63) (emphases added). In closing argument, the prosecutor told the jury that Ms. Akers wanted to terminate the pregnancy, and that contemplating abortion was proof of her later intent to kill a child:

> THE STATE: May it please the Court, Counsel. Court's indulgence, Your Honor. Perfect, beautiful Baby Boy Akers was born and died on November 1st, 2018. He lived only a few moments, taking a few breaths, before his mother, the defendant, snuffed out his life. Why? *Because she didn't want another child. She wanted to terminate this pregnancy and when she chose not to, she took matters into her own hands upon his birth that afternoon at around 3:30 on November 1st of 2018.*

(E 287-88) (emphases added).

The prosecutor emphasized that "*She intended his death, ladies and gentlemen. She had a plan to terminate the baby*." (E 308) (emphases added).

In the rebuttal closing argument, after detailing the State's position on the controversies between the medical experts, the prosecutor finished by returning to the opening theme that played off biases against women who consider an abortion or fail to display appropriate emotion over a stillbirth:

> Now, ladies and gentlemen, I told you at the very beginning that this baby was perfect. Doctor Mourtzinos told you that this baby was perfect. *His only imperfection was being born to a mother who didn't want him.* She never intended for him to leave that second floor of that house alive. If she intended for him to go to a safe haven, she would have checked to see if he was alive. *If she had intended for him to go to a safe haven, she would have been devastated.* She did not intend any of that. She intended for him to die and that is what he did.

(E 369) (emphases added).

The Petitioner will discuss additional facts below as necessary to the argument.

SUMMARY OF ARGUMENT

Contemplation of an abortion is the consideration of terminating a pregnancy. It is not the contemplation to kill a person. A woman's consideration of abortion early in her pregnancy is neither contemplation of murder at birth nor impeachment of her desire to put a baby up for adoption once it is born. Neither is a woman's failure to obtain obstetric prenatal care an attempt to murder a person. Still, the prosecutor, in this case, connected Ms. Akers' early contemplation of abortion and her forgoing obstetric prenatal care with intent and motive to kill a newborn child and credibility. The prosecutor's specious inferences about intent and credibility are rooted in the false and inflammatory assumption that a woman's consideration of an abortion and forgoing obstetric prenatal care demonstrate an intent to *kill* a *baby*.

Evidence of a woman's contemplation to terminate a *pregnancy* is plainly not evidence of an intent to kill a *person* and, therefore, is irrelevant as a matter of law. Likewise, a woman's forgoing of obstetric prenatal care for a fetus does not equal an intent to kill a person, nor does it reflect on one's obligation to provide medical care after birth for a living baby if such care becomes necessary. Neither is the lack of obstetric prenatal care impeachment evidence of a woman's plan for adoption. A decision in this case that equates a woman's mere contemplation of abortion or a lack of obstetric prenatal care with an intent to kill a newborn at birth would constitute a profoundly pro-life belief that abortion equals murder, in a pro-choice state. It would confer fetal personhood that is inapposite to Maryland's precedents and our State's expressed public policy for a woman's right to be free from the State's interference with her decision to terminate a pregnancy. This Court should

forcefully reject the State's argument that abortion equals murder and forgoing obstetric prenatal care equals an intent to kill.

Moreover, to further the statutory protection of a woman's right to an abortion, the Court should hold that evidence of a woman's contemplation of an abortion is irrelevant as a matter of law to an intent to kill or to impeach the woman's credibility. The prosecutor's use of the irrelevant and inflammatory matters of Ms. Akers' Internet research about terminating her pregnancy and forgoing obstetric prenatal care denied her the opportunity for a fair trial. The Court should not invite prosecutors in future cases to use a pregnant woman's consideration of an abortion and lack of obstetric prenatal care to prove a later intent to harm, abuse, or neglect the newborn from the same pregnancy.

Even if there is minimal relevance to such evidence—which there is not—it is substantially outweighed by the danger of unfair prejudice. It is indisputable that evidence of abortion and the forgoing of prenatal medical care are highly charged pieces of evidence that can stir a jury's passion, at least since *Roe v. Wade*, 410 U.S. 113 (1973), a half-century ago. *See also*, *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). Unquestionably, the divisive issue of abortion triggers unconscious biases that shape the inferences a person draws about a woman who contemplates an abortion or forgoes prenatal care. Yet the trial court failed to adequately address and balance the heightened concerns of hypothetical relevance against the real and extremely unfair prejudice of abortion and forgoing obstetric prenatal care in a case where the scientific evidence of a live or still birth was vigorously contested by the parties throughout multiple pretrial hearings and at trial. The trial court abused its discretion because it failed to demonstrate an exercise of

discretion in balancing the theoretical probative value of the evidence against the genuine and substantial danger of its unfair prejudice.

The Court should reverse the ACM's judgment and remand for a new trial in the Circuit Court for Howard County.

ARGUMENT

I. EVIDENCE OF A WOMAN'S INTENT TO TERMINATE A PREGNANCY AND FORGOING OBSTETRIC PRENATAL CARE IS NOT RELEVANT TO AN INTENT TO KILL A PERSON OR A WOMAN'S CREDIBILITY REGARDING ADOPTION.

A. Standard of Review

The trial court, over a defense objection, found that "both the researching the abortion issue and the lack of prenatal care, once the Defendant understands that she is expecting, are relevant to the issue of intent that the State's required to prove for their suggestion that it was a killing." (E 50).[6] This Court reviews the trial court's decision that the evidence of abortion and lack of prenatal care is relevant under the de novo standard. *See*, *State v. Simms*, 420 Md. 705, 725 (2011) ("[W]e test for legal error" when reviewing whether evidence is relevant[.]"); *Portillo Funes v. State*, 469 Md. 438, 478 (2020) ("An appellate court reviews de novo a trial court's determination as to whether evidence is relevant."); *Pearson v. State*, 182 Md. 1, 13 (1943) (noting that "the rule [of discretion] will not be extended to facts obviously irrelevant as well as prejudicial to the defendant").

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[6] The ACM affirmed that ruling, holding that such evidence was probative of Ms. Akers' intent to kill and credibility. (App 20, 22).

B. Evidence is Irrelevant Unless it is Logically Related to a Material Issue and has Probative Value.

Maryland Rule 5-402 "makes it clear that the trial court does not have discretion to admit irrelevant evidence[.]" *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 619 (2011) (*citing*, Md. R. 5-402 ("Evidence that is not relevant is not admissible.")). To be relevant and, therefore, admissible, the evidence must be related to a material issue in the case and have a "tendency to make the existence of [a] fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See*, Md. R. 5-401; *Williams v. State*, 342 Md. 724, 736 (1996) ("Evidence is relevant when it tends to establish or disprove a fact at issue in the case."); *see*, *e.g.*, *Simms*, 420 Md. at 724 (redacted alibi notice was not relevant because it did not make the defendant's guilt more probable). Therefore, evidence is generally inadmissible at a criminal trial unless it is relevant evidence, *i.e.*, offered to prove a material fact and probative of that fact. *Dorsey v. State*, 276 Md. 638, 643 (1976) ("[O]ur predecessors stated it to be 'an elementary rule that evidence, to be admissible, must be relevant to the issues and must tend either to establish or disprove them.'") (citations omitted) (emphases supplied).[7]

To be sure, in a murder and child abuse resulting in death case, a defendant's intent is an issue that could affect the outcome of the trial. Still, the evidence of a defendant's intent to kill must be "material," *i.e.*, it must have a logical connection to the defendant's

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[7] These governing principles of relevance and the admissibility of evidence were incorporated into the later enacted Md. R. 5-401, 5-402, and 5-403 (effective July 1, 1994). *Williams*, 324 Md. at 736, n.2.

state of mind at the time of the alleged crime. *See generally*, *State v. Joynes*, 314 Md. 113, 119-20 (1998) ("Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case."). Moreover, the evidence of intent to kill must satisfy the second aspect of relevance, *i.e.*, probative value, "which is the tendency of evidence to establish the proposition that it is offered to prove." *Joynes*, 314 Md. at 119-20. Evidence must have probative value, meaning it must have the ability to make a fact more or less probable than it would be without the evidence. *Id.* ("Evidence which is thus not probative of the proposition at which it is directed is deemed 'irrelevant.'") (citation omitted). Although "relevance is generally a low bar[,] … it is a legal requirement nonetheless." *Simms*, 420 Md. at 727.

In the case at hand, the prosecution's evidence of Ms. Akers' contemplation of abortion and forgoing obstetric prenatal care is neither material nor probative. It is not material evidence because Ms. Akers' Internet searches about terminating the pregnancy between six and nearly eight months before delivery have no logical connection to an intent to kill the newborn at birth or the credibility of her safe haven plan. Moreover, the evidence has no probative value. Ms. Akers' mere contemplation of a protected right to terminate a pregnancy six to nearly eight months before delivery does not make the later existence of a specific intent to kill the newborn or an adoption plan more or less probable. Likewise, Ms. Akers' forgoing of obstetric prenatal care—especially since she did not drink, smoke, or take drugs—is neither material nor probative of an intent to kill the newborn or her credibility about a safe haven plan. The trial court erroneously admitted the evidence, and the Court should reverse the judgment below and remand for a new trial.

C. Ms. Akers' Contemplation of Terminating the Pregnancy and Forgoing Obstetric Prenatal Care are Neither Material nor Probative Pieces of Evidence to Prove Motive or Intent to Kill or to Impeach a Safe Haven Plan for Adoption.

The prosecutor argued that abortion and forgoing prenatal care were "*highly relevant and probative of the elements*" of the charges of murder and first-degree child abuse resulting in death and that "*[t]he fact that she was seeking to end her pregnancy is most highly relevant to proving her intent to kill the baby once it was born, and her intentional failure to obtain care for her child after the child was born.*" (E 40). The prosecutor argued that Ms. Akers' "*seeking of an abortion and the searches about abortion to prove directly to her credibility, with respect to the information that she provided, and her intent at the time she committee these acts.*" (E 41). The trial court did not inquire how Ms. Akers' Internet searches for information about "*legally*" terminating a pregnancy six to nearly eight months before the delivery were at all logically related to an intent or motive to kill the newborn. (E 41). Neither did the trial court articulate how evidence of abortion and forgoing prenatal care were logically related to the prosecutor's claim that Ms. Akers purportedly failed "*to obtain care for her child after the child was born*." (E 40).

It is revealing of the absence of a logical relationship between the evidence of abortion and forgoing obstetric prenatal care on the one hand and an intent to kill and failure to obtain medical care for a newborn on the other that the State switched up its argument on the ACM. In the intermediate appellate court, the State argued that the prosecutor did *not* offer Ms. Akers' contemplation about abortion "to support an inference that Akers only decided to kill the baby after it was born alive." (State's Brief to the ACM, p. 25). "The State's point was not to suggest that Akers wanted an abortion and therefore must have

decided to kill her baby. Rather, the point was that Akers knew she could terminate the pregnancy, opted not to do so, and somewhere during her pregnancy, formulated a plan to kill her baby *if* he was born alive." *Id.* Regarding Ms. Akers' lack of prenatal care, the State expanded its argument in the ACM to include that it was relevant proof "that she did not intend to let the baby live, and thus saw no need to ensure his health prior to delivery." (State's Brief to the ACM, p. 26).

The State's spurious connection between Ms. Akers' exercise of a protected right long before delivery and her forgoing obstetric prenatal care and the fact of consequence of her mental state at delivery is, at best, illogical. Rather than being offered as evidence logically connected to Ms. Akers' state of mind at delivery (which it is not), it is far more likely that the prosecutor's purpose with the evidence was to provoke an " 'emotional reaction that is engendered in many people when the subject of abortion surfaces in any manner.' " *Nichols v. American Nat. Ins. Co.*, 154 F.3d 875, 885 (8th Cir. 1998) (*quoting*, *Nickerson v. G.D. Searle & Co.*, 900 F.2d 412, 418 (1st Cir. 1990)). Notably, the prosecutor told the jury "*What we do when we look back at the things that happened before [the delivery] is to show what her intent and her plan and her perhaps her motive are.*" (E 292). The prosecutor emphasized that "*She intended his death, ladies and gentlemen. She had a plan to terminate the baby.*" (E 308). The prosecutor's final words to the jury were that "*I told you at the very beginning that this baby was perfect … [h]is only imperfection was being born to a mother who didn't want him … [s]he intended for him to die and that is what he did.*" (E 369).

The State's arguments that Ms. Akers' Internet searches for abortion methods and forgoing obstetric prenatal care are logically connected to an intent to kill cannot withstand scrutiny, and the Court should reject them.

1. Ms. Akers' Contemplation of Terminating the Pregnancy is Neither Material nor Probative Evidence of an Intent to Kill or Credibility of an Adoption Plan.

It is undisputed that Ms. Akers' Internet searches for information about terminating the pregnancy occurred well within the time frame when she would have been able to secure abortion services in Maryland legally. *See*, Md. Code Ann., Health Gen. § 20-209(b)(1) ("[T]he State may not interfere with the decision of a woman to terminate a pregnancy . . . before the fetus is viable[.]"). The predicate fact (lawfully contemplating the termination of a pregnancy) does not support the inferences advanced by the State regarding intent, plan, or motive to kill a *person*. Ending a pregnancy does not mean "killing" a pregnancy, and terminating a pregnancy does not mean terminating a *baby*. The divide is too vast between a woman's protected right to contemplate terminating a pregnancy six to nearly eight months before delivery and forming an intent to kill a newborn. There is no logical connection between these distinct and unrelated concepts.

Moreover, the prosecution's use of a woman's research about her protected right to seek termination of a pregnancy as proof of an intent to kill a newborn will chill the free exercise of the right. Precisely for that reason, the admission of Ms. Akers' contemplation of abortion is contrary to Maryland's expressed public policy not to interfere with a woman's decision to terminate a pregnancy. Md. Code Ann., Health Gen. § 20-209(b)(1). Such a decision can only be informed if a woman can access information and resources to

educate her choice. Internet searches are the most basic, readily available, and accessible ways a woman can learn about pregnancy options.

Other states recognize that a woman's contemplation of termination of a pregnancy is not relevant to a specific intent to kill a newborn of the same or different pregnancy. A leading case is *Stephenson v. State*, 31 So.3d 847 (Fla. Dist. Ct. App. 2010), where the State of Florida charged a mother with manslaughter from neglect in the death of her thirteen-month-old daughter. The prosecutor questioned the mother about her considering an abortion and seeking prenatal care late in her pregnancy. In closing argument, the prosecutor argued that "she admitted at first she was ambivalent about whether or not she wanted this baby at all." *Id*. at 849. Even though the defendant's attorney did not object to the prosecutor's statements, the Florida appellate court reversed the conviction, explaining that a fundamental error occurred:

> [N]ot only is there no *permissible* relevance to the mother's consideration of abortion to the legal issues at hand, but its only *arguable* relevance makes its admission all the more inappropriate: it is apparently the thought that a person who considers abortion is more likely to have killed the child not aborted. This makes the familiar issue of the admission of prior convictions, which is precluded because the jury may (probably correctly) conclude that one who has been convicted before is guilty now, pale into insignificance. Simply put, the evidence that Stephenson, considered aborting her pregnancy did not tend to "prove or disprove a material fact," [citation omitted]; it tended to prove only a very harmful immaterial one.

Id. at 851 (emphasis in original). The *Stephenson* court emphasized that:

> The cases tell us—as if we needed to be told—that "abortion is one of the most inflammatory issues of our time," *Cook v. State*, 232 Ga.App. 796, 503 S.E.2d 40, 42 (1998), and, more

> important, that one who takes or even approves of this course is very adversely regarded by many in our society.

Stephenson, 31 So.3d at 849; *See also*, *Wilkins v. State,* 607 So.2d 500, 501 (Fla. Dist. Ct. App. 1992) (calling evidence that the defendant and his wife considered having an abortion of the baby-victim "excludable ... as ... an impermissible assault on the defendant's character and was otherwise irrelevant and inflammatory")

In addition to Florida, decisions by appellate courts in Arkansas reach this result in similar contexts. *See*, *e.g.*, *Bynum v. State*, 546 S.W.3d 533, 542-44 (Ark. Ct. App. 2018) (reversing conviction for "concealing a birth" because the admission of evidence that defendant sought a prior abortion and took labor-inducing drugs to end the pregnancy early and induce labor was irrelevant, highly prejudicial, and in fact prejudiced the defendant; it was also irrelevant to motive).

The recent decision in *Houselog v. State*, -- S.W.3d --, 2024 Ark. App. 393 (Ark. Ct. App. 2024), also speaks of the irrelevance of abortion evidence. There, the state charged a minor woman as an adult with abuse of a corpse following her delivery of a live baby after ingesting "Plan C" abortion medication. *Id.* The minor sought a transfer of the case to juvenile court because the evidence was insufficient to support the filing of adult criminal charges. *Id.* The state argued that the minor's ingestion of abortion-inducing chemicals was evidence of "violence and premeditation with respect to the alleged abuse-of-a-corpse crime." *Id.* at 9. The court held that "[e]vidence of planning to terminate a pregnancy is not evidence of planning to abuse a corpse. Whether a person medically induces an abortion is irrelevant to the charges outside that action." *Id.* at 18.

The fundamental point that these authorities support is that there is no permissible relevance to a pregnant woman's consideration of abortion to the legal issue of an intent to kill or harm a child at birth from the same pregnancy.

2. Ms. Akers' Lack of Obstetric Prenatal Care is Neither Material nor Probative Evidence of an Intent to Kill or Credibility of an Adoption Plan.

There is no statutory obligation for a woman to seek obstetric prenatal care, and a woman's forgoing to seek such care is not a crime in Maryland. *See generally*, Md. Code Ann., Crim. Law § 2-103(f) (prohibiting application of murder or manslaughter of viable fetus statutory offense to a pregnant woman's act or failure to act); *see also*, *Kilmon v. State*, 394 Md. 168 (2006) (rejecting application of reckless endangerment statute to a woman accused of ingesting cocaine while pregnant). In *Kilmon*, this Court delved into the legislative history of the reckless endangerment statute, Md. Code Ann., Crim. Law § 3-204(a)(1), to answer the question of whether it applied to the effect of a pregnant woman's use of unlawful controlled substances on the newborn. *Kilmon*, 394 Md. at 177.

Kilmon soundly rejected such a statutory construction, observing that it could quickly lead to the policing of pregnant women through the criminalization of a "whole host of intentional and conceivably reckless activity[,]" including the failure to obtain "proper and available prenatal medical care" among other things, such as failing to maintain a "proper and sufficient diet" and "failing to wear a seat belt while driving," or "exercising too much or too little, indeed to engaging in virtually any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the

child …. [s]uch ordinary things as skiing or horseback riding could produce criminal liability." *Id.* at 177-78. Given the extensive legislative history of consistently rejecting proposals that could encourage the policing of pregnancy by those who seek to control the conduct of pregnant women, it would be anomalous for the Court to give credence to the notion that a woman's failure to obtain obstetric prenatal care is logically related to a specific intent or motive to kill the newborn.

A woman's failure to obtain obstetric prenatal care is not logically related to a specific intent or motive to kill the newborn of the same pregnancy. Moreover, the evidence lacks probative force for the proposition the State offered it to support. It neither makes the existence of a specific intent or motive to kill more or less likely. Still, the prosecutor suggested that the evidence highlighted Ms. Akers' efforts to avoid detection of the pregnancy and showed her negative feelings about it that were probative of her intent to kill the newborn. (E 63, 287, 292). On direct appeal, the State argued that Ms. Akers' lack of prenatal care was relevant to proof of motive because the jury could infer that she was in denial of the pregnancy and avoided dealing with it until the baby came. (State's Brief to the ACM, p. 26). Alternatively, "the jury could infer that she did not intend to let the baby live, so there was no need to ensure his health prior to delivery." *Id*. Still, Ms. Akers' forgoing obstetrics prenatal care is wholly unrelated to intent or motive to kill the newborn to make these contentions more or less likely to exist.

II. EVEN IF MINIMALLY RELEVANT, EVIDENCE OF ABORTION AND LACK OF OBSTETRIC PRENATAL CARE IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

A. Standard of Review.

Even if the Court concludes the evidence is legally relevant, it will consider under the abuse of discretion standard of review whether the trial court appropriately balanced the probative value of the evidence against the danger of unfair prejudice. *See*, Md. R. 5-403; *Simms*, 420 Md. at 725 ("During the first consideration, we test for legal error, while the second consideration requires review of the trial judge's discretionary weighing and is thus tested for abuse of that discretion."). An abuse of discretion exists "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." *Alexis v. State*, 437 Md. 457, 478 (2014) (citations omitted). "A proper exercise of discretion involves consideration of the particular circumstances of each case." *Gunning v. State*, 347 Md. 332, 352 (1997). A failure to exercise this discretion, or a failure to consider the relevant circumstances and factors of a specific case, "is, itself, an abuse of discretion[.]" *101 Geneva LLC v. Wynn*, 435 Md. 233, 241 (2013). Here, the record in the case demonstrates that the trial court's perfunctory balancing test did not adequately consider the probative force of the evidence of abortion and forgoing obstetric prenatal care or its extreme potential to provoke unfair prejudice. (E 50-51). Therefore, the trial court abused its discretion.

B. The Balancing Test Weighs Heavily Against Admission of Evidence of Abortion and Forgoing Obstetric Prenatal Care.

A finding by the trial judge that a particular piece of evidence is relevant does not mean that the evidence is automatically admissible. Even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading or distraction of the tier of fact, or waste of time. *Smith v. State*, 371 Md. 496, 504 (2002) (even if a party has "opened the door" to rebuttal evidence and thus made "relevant what was irrelevant[,]" the trial court may still exclude the rebuttal evidence if its probative value is substantially outweighed by any of the Md. R. 5-403 considerations); *Hunt v. State,* 321 Md. 387, 425 (1990); Lynn McLain, 5 MD. EVID., § 403.1, at 297 (1987); *cf.*, *Hannah v. State*, 420 Md. 339, 347 (2011) ("Although it has often been stated that the 'abuse of discretion' standard or review is applicable to the issue of whether the trial court failed to impose reasonable limits on cross-examination, the trial court does not have discretion to permit cross-examination that is harassing, unfairly prejudicial, confusing, or unduly repetitive.").

As a general matter, neither a woman's contemplation to terminate a pregnancy nor her failure to obtain obstetric prenatal care are probative pieces of evidence to show that she intends, plans, or desires to *kill* the *child* once *born* or cause physical injury or fail to render aid to the child after birth resulting in the child's death. The predicate fact (termination of a pregnancy) does not support the inferences advanced by the State regarding intent, plan, or motive to kill a *person*. Furthermore, contemplating termination of a pregnancy, and choosing not to terminate it, does not support any inferences advanced by the

State, particularly where the woman rejects an abortion and continues the pregnancy. The admission of Ms. Akers' contemplation of abortion portrayed her negatively, and gave the jury a basis from which to conclude that she had a propensity to murder her newborn or fail to render aid at birth. This danger was acute given the prosecutor's emphasis on Ms. Akers' "series of choices and a series of decisions." (E 288, 292).

For the reasons discussed in Argument I *supra*, the evidence of Ms. Akers' contemplation of abortion and lack of obstetric prenatal care is irrelevant. The evidence does not logically connect her consideration of terminating the pregnancy and forgoing obstetric prenatal care with an intent to kill the newborn from the same pregnancy. Neither does it logically impeach her plan to give the child up for adoption or to a safe haven.

If any minimal probative value of the evidence existed, it is further undermined because the General Assembly expressly prohibits the State from interfering with a woman's decision to obtain an abortion. *See* Md. Code Ann., Health Gen. § 20- 209(b)(1) ("[T]he State may not interfere with the decision of a woman to terminate a pregnancy . . . before the fetus is viable[.]"). Additionally, a woman's failure to seek prenatal care is not a crime in Maryland. *See* Md. Code Ann., Crim. Law § 2-103(f) (prohibiting application of murder or manslaughter of viable fetus statutory offense to a pregnant woman's act or failure to act); *see also*, *Kilmon*, 394 Md. 168. Still, even if the evidence has some marginal probative value to show intent to kill or for impeachment (which it does not), it is substantially outweighed by the evidence's unfair prejudice.

C. The Unfair Prejudice of Evidence of Abortion and Lack of Prenatal Care.

In *King v. State*, 407 Md. 682 (2009), this Court stated: " 'Evidence is prejudicial when it tends to have some adverse effect … beyond tending to prove the fat or issue that justified its admission….' " *Id.* at 704 (*quoting*, *State v. Askew*, 716 A.2d 36, 42 (Conn. 1998)). Here, the trial court abused its discretion because it failed to adequately assess the hypothetical probative value of the evidence and balance it against the substantial danger that the jurors would use that evidence improperly to conclude that Ms. Akers was not entitled to a favorable verdict. *See*, *e.g.*, *Beales v. State*, 329 Md. 263, 273 (1993) (trial court did not adequately conduct a balancing of unfair prejudice to defense by admission of a defense witness's theft conviction against the probative value of the conviction upon the witness's truthfulness); *see also*, *Arca v. State*, 71 Md. App. 102, 106, *cert denied*, 310 Md. 276 (1987) (Wilner, J.) (trial court abused its discretion in self-defense case by admitting a sanitized "mug shot" of defendant because the implication "remained strong" that the defendant had prior police contact and may be "consequently a bad person."); *Banks v. State*, 84 Md. App. 582, 592 (1990) (Robert Bell, J.) (unfairly prejudicial effect of a photo of the defendant holding a gun in a case involving the distribution of cocaine far outweighed its probative value). The unfair prejudice indisputably generated by the evidence of Ms. Akers' contemplation of abortion and forgoing of obstetric prenatal care vastly outweighed the minimal probative value of the evidence.

In the trial court, the State conceded that "abortion is a highly charged issue." (E 41). Still, the State insisted that the probative value outweighed the unfairly prejudicial

effect of the evidence. The trial court's ruling to admit the evidence was egregiously wrong, as recognized by numerous courts in Arkansas, Florida, Georgia, Illinois, Michigan, Nevada, Oregon, and West Virginia. *See*, *e.g.*, *Billett v. State,* 877 S.W.2d 913, 914-15 (Ark. 1994) (recognizing the controversial nature of abortion, and approving decision not to allow evidence of witness's prior abortions and defendant's condemnation of her to show bias, where bias had otherwise been shown and "any probative value was clearly outweighed by the danger of unfair prejudice"); *Hudson v. State,* 745 So.2d 1014, 1016 (Fla. Dist. Ct. App. 1999) (concluding "that the inflammatory evidence of two prior abortions certainly contributed to Hudson's conviction" and thus should not have been admitted); *Wilkins v. State,* 607 So.2d 500, 501 (Fla. Dist. Ct. App. 1992) (calling evidence that the defendant and his wife considered having an abortion of the baby-victim "excludable ... as ... an impermissible assault on the defendant's character and was otherwise irrelevant and inflammatory"); *Brock v. Wedincamp,* 558 S.E.2d 836, 842-43 (Ga. Ct. App. 2002) (observing "even if evidence of the decedent's abortions and adoptions and sex life were somehow relevant, courts must consider whether 'its probative value is substantially outweighed by the risk that its admission will create substantial danger of undue prejudice or of confusing the issues or of misleading the jury' "; the evidence of abortion did not rebut character of being a good mother) (cleaned up); *People v. Ehlert*, 654 N.E.2d 705, 710 (Ill. App. Ct. 1995), *aff'd*, 811 N.E.2d 620 (Ill. 2004) (finding that the prejudicial effect of evidence about prior abortions and failure to seek prenatal care far outweighed its probative value and that "abortion with all its involvement is a particularly fertile field for preconceived notions and prejudices") (cleaned up); *People v. Morris*, 285 N.W.2d 446, 447-48

(Mich. Ct. App. 1979) (it was reversible error for a trial court to admit evidence of defendant's prior abortions because "[t]he existing strong and opposing attitudes concerning the issue of abortion clearly make any reference thereto potentially very prejudicial"); *Collman v. State,* 7 P.3d 426, 436 (Nev. 2000) (agreeing that information about abortion "was a collateral matter and the minimal value of it was 'overwhelmingly outweighed' by the danger of unfair prejudice, confusing the issues, and misleading the jury"); *Schneider v. Tapfer,* 180 P. 107, 108 (Or. 1919) (testimony that defendant had approved of abortion held irrelevant to issues involved and "was simply evidence which tended to debase and degrade the defendant.... [C]ertainly none could have been offered which was more likely to inflame and prejudice the minds of the jury against the defendant"); *Andrews v. Reynolds Mem. Hosp.*, 499 S.E.2d 846, 855 (W. Va. 2007) (evidence of the mother's prior elective abortion was correctly excluded at trial because of the high prejudicial impact); *cf. People v. Harris,* 633 P.2d 1095, 1099-1100 (Colo. Ct. App. 1981) (concluding that admission of evidence that defendant suggested that wife's pregnancy be aborted (in trial for son's murder) was not sufficiently prejudicial to warrant retrial but acknowledging "it would have been better to exclude some of such evidence").

As the decisions by other state courts demonstrate, the balancing is lopsided against the admission of abortion evidence because it has such an enormous potential to cause unfair prejudice. Notwithstanding the highly provocative nature of this evidence, the trial court here undertook a bare bone balancing that is itself an abuse of discretion. Considering the vast potential for unfair prejudice and the minimal, at best, probative value of the evidence, the trial judge should have articulated the basis for his decision. The trial court

should have undertaken a careful assessment of the probative value of the evidence of the Internet searches and the forgoing of obstetric prenatal care and balanced that against the exceptional potential for unfair prejudice that the admissibility of such evidence would create. The trial court abused its discretion both in the outcome and by failing to provide an explanation on the record about the relative balance of the probative value of the Internet searches and the forgoing of prenatal care against the extreme potential for these pieces of evidence to provoke unfair prejudice in this case.

Without the trial court's assessment of these factors in the record, the appellate court cannot meaningfully review whether the trial court adequately balanced the heavy weight of the passion and emotions that the topic of abortion generates and how abortion is widely viewed as a reflection of a woman's bad character. Moreover, the Court cannot know whether the trial court appropriately acknowledged the gender stereotypes associated with forgoing prenatal care, which also reflects on a person's character and others' expectations of what a pregnant woman should do or how she should behave during pregnancy. Likewise, the Court cannot know if the trial court recognized the potential for confusion about the issues between terminating a pregnancy and intent to kill and between forgoing prenatal care during pregnancy and failing to provide medical care after birth to a living child.

The potential for the abortion and forgoing obstetric prenatal care to mislead and confuse the jury was particularly high in this case. At trial, the parties hotly contested whether the findings from the autopsy established a live birth or stillbirth. (E 347-50, 367-69). The Assistant Medical Examiner who supervised the autopsy, Dr. Nikki Mourtzinos, concluded that a live birth occurred, citing, among other findings, some aeration in the

lungs and a lack of fetal decomposition in utero. (T5 157-59). Dr. Mourtzinos also testified that it was not important for her to know medical facts about the mother, such as obesity, high blood pressure, and gestational diabetes. (T5 142-43). On the other hand, Dr. Gregory J. Davis, a board-certified pathologist called by Ms. Akers, testified that the cause of death was undeterminable, considering the partial aeration of the lungs that can occur in still-births, Ms. Akers' risk factors, and the infections in the placenta, the membranes surrounding the placenta (chorioamnionitis) and umbilical cord (funisitis). (T5 223, 227-28, 231).

Ms. Akers also presented the testimony of Richard Margolis, M.D., a board-certified physician in obstetrics and gynecology and a practicing clinician for over 50 years. (T6 63-67). Dr. Margolis delivered an estimated 50 stillbirths in his career. (T6 101-02). Notably, Dr. Mourtzinos (the former Assistant Medical Examiner) had testified that diagnosing a placenta abruption was outside the scope of a pathologist's expertise and required a clinician to evaluate. (T5 93). Dr. Margolis testified precisely to that point as a highly experienced clinician. (T6 79). Dr. Margolis explained that the autopsy finding of clotted blood over approximately 30% of the placenta indicated a partial abruption. (T6 79). Moreover, Dr. Margolis explained that the partial placenta abruption, in conjunction with the acute infections and severe inflammatory processes in the umbilical cord, placenta membranes, and placenta, would likely decrease oxygen flow to the fetus and lead to a stillbirth. (T6 79).

Considering the battle of the experts both before and during trial, the trial court should have carefully evaluated the hypothetical probative value of the abortion and forgoing prenatal care evidence against the genuine risk of unfair prejudice likely to flow from

the provocative evidence. There was a real risk of the jury in this case deciding the expert controversy based on the highly charged evidence of abortion and forgoing of obstetric prenatal care. Indeed, that is precisely what occurred here to shift the balance of advantage to the prosecution. The trial court's token consideration of the essential factors under Md. R. 5-403 caused that unfair advantage and constitutes a failure to exercise discretion, that is, itself, an abuse of discretion.

CONCLUSION

The Court should reverse the ACM's judgment and remand this case to the Circuit Court for Howard County for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief contains 10,896 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ *Isabelle Raquin*

ISABELLE RAQUIN

PERTINENT AUTHORITY

Md. Code Ann., Crim. Law, § 2-103
§ 2-103. Viable fetuses

"Viable" defined

(a) For purposes of a prosecution under this title, "viable" has the meaning stated in § 20-209 of the Health--General Article.

Murder or manslaughter of viable fetus

(b) Except as provided in subsections (d) through (f) of this section, a prosecution may be instituted for murder or manslaughter of a viable fetus.

Intent

(c) A person prosecuted for murder or manslaughter as provided in subsection (b) of this section must have:
(1) intended to cause the death of the viable fetus;
(2) intended to cause serious physical injury to the viable fetus; or
(3) wantonly or recklessly disregarded the likelihood that the person's actions would cause the death of or serious physical injury to the viable fetus.

Right to terminate pregnancy

(d) Nothing in this section applies to or infringes on a woman's right to terminate a pregnancy as stated in § 20-209 of the Health--General Article.

Liability of medical professionals

(e) Nothing in this section subjects a physician or other licensed medical professional to liability for fetal death that occurs in the course of administering lawful medical care.

Act or failure to act of pregnant woman

(f) Nothing in this section applies to an act or failure to act of a pregnant woman with regard to her own fetus.

Personhood or rights of fetus

(g) Nothing in this section shall be construed to confer personhood or any rights on the fetus.

Repealed

(h) Repealed by Acts 2013, c. 156, § 3, eff. Oct. 1, 2013.

Md. Code Ann., Crim. Law, § 3-204
Formerly cited as MD CODE Art. 27, § 12A-2
§ 3-204. Reckless endangerment

Prohibited

(a) A person may not recklessly:
(1) engage in conduct that creates a substantial risk of death or serious physical injury to another; or
(2) discharge a firearm from a motor vehicle in a manner that creates a substantial risk of death or serious physical injury to another.
Penalty
(b) A person who violates this section is guilty of the misdemeanor of reckless endangerment and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding $5,000 or both.

Exceptions

(c)(1) Subsection (a)(1) of this section does not apply to conduct involving:
(i) the use of a motor vehicle, as defined in § 11-135 of the Transportation Article; or
(ii) the manufacture, production, or sale of a product or commodity.
(2) Subsection (a)(2) of this section does not apply to:
(i) a law enforcement officer or security guard in the performance of an official duty; or
(ii) an individual acting in defense of a crime of violence as defined in § 5-101 of the Public Safety Article.

Md. Code Ann., Health-Gen., § 20-209
State interference with abortions

Viable defined

(a) In this section, "viable" means that stage when, in the best clinical judgment of the qualified provider based on the particular facts of the case before the qualified provider, there is a reasonable likelihood of the fetus's sustained survival outside the womb.

In general

(b) Except as otherwise provided in this subtitle, the State may not interfere with the decision of a woman to terminate a pregnancy:
(1) Before the fetus is viable; or
(2) At any time during the woman's pregnancy, if:
(i) The termination procedure is necessary to protect the life or health of the woman; or
(ii) The fetus is affected by genetic defect or serious deformity or abnormality.

Regulations

(c) The Department may adopt regulations that:
(1) Are both necessary and the least intrusive method to protect the life or health of the woman; and
(2) Are not inconsistent with established clinical practice.

Liability

(d) The qualified provider is not liable for civil damages or subject to a criminal penalty for a decision to perform an abortion under this section made in good faith and in the qualified provider's best clinical judgment in accordance with accepted standards of clinical practice.

Md. Code Ann., Cts. & Jud. Proc., § 5-641
Safe havens for newborns[8]

In general

(a)(1) A person who leaves an unharmed newborn with a responsible adult within 10 days after the birth of the newborn, as determined within a reasonable degree of medical certainty, and does not express an intent to return for the newborn shall be immune from civil liability or criminal prosecution for the act.
(2) If the person leaving a newborn under this subsection is not the mother of the newborn, the person shall have the approval of the mother to do so.

Persons left with newborns

(b)(1) A person with whom a newborn is left under the circumstances described in subsection (a) of this section as soon as reasonably possible shall take the newborn to a hospital or other facility designated by the Secretary of Human Services by regulation.
(2) A hospital or other designated facility that accepts a newborn under this subsection shall notify the local department of social services within 24 hours after accepting the newborn.

Hospitals or designated facilities which accept newborns

(c) A responsible adult and a hospital or other designated facility that accepts a newborn under this section and an employee or agent of the hospital or facility shall be immune from civil liability or criminal prosecution for good faith actions taken related to the acceptance of or medical treatment or care of the newborn unless injury to the newborn was caused by gross negligence or willful or wanton misconduct.
Regulations
(d) The Secretary of Human Services shall adopt regulations to implement the provisions of this section.

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[8] Pending amendment effective October 1, 2024, see, 2024 Maryland Laws Ch. 366 (S.B. 873).

Rule 5-401. Definition Of “Relevant Evidence”

“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.

Rule 5-402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

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.

Rule 5-403. Exclusion Of Relevant Evidence On Grounds Of Prejudice, Confusion, Or Waste Of Time

Although 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.

Circuit Court for Howard County
Case No. C-13-CR-19-000367

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0925

September Term, 2022

MOIRA E. AKERS

v.

STATE OF MARYLAND

Shaw,
Ripken,
Tang,

JJ.

Opinion by Ripken, J.

Filed: January 30, 2024

The State of Maryland charged Appellant, Moira E. Akers ("Appellant") with multiple offenses arising from the death of her newborn child ("Baby A") in November of 2018. Following a series of pretrial hearings, in April of 2022 a jury in the Circuit Court for Howard County found Appellant guilty of second-degree murder and first-degree child abuse. The court imposed an aggregate sentence of 30 years of incarceration, and Appellant noted a timely appeal. In addition, If/When/How: Lawyering for Reproductive Justice ("Amicus"), a non-profit advocacy organization, submitted an *amicus* brief arguing that Appellant's convictions should be overturned. For the reasons to follow, we shall affirm.

ISSUES PRESENTED FOR REVIEW

Appellant presents the following issues for our review:[1]

I. Whether the circuit court abused its discretion in admitting expert testimony concerning the hydrostatic float test.

II. Whether the circuit court erred in admitting evidence that Appellant did not seek prenatal care, and evidence of Appellant's internet searches related to abortion.

III. Whether the circuit court erred in concluding that Appellant's statements to a law enforcement officer were voluntary.

IV. Whether the evidence was sufficient to sustain Appellant's convictions.

[1] Rephrased from:

1. Did the hearing court err in admitting expert testimony regarding the lung floatation test?
2. Did the court err in denying Ms. Akers' motion in limine to preclude testimony about computer searches concerning abortion and testimony about a lack of pre-natal care?
3. Did the court err in denying Ms. Akers' motion to suppress her statements?
4. Was the evidence sufficient to convict Ms. Akers?

FACTUAL AND PROCEDURAL BACKGROUND

In November of 2018, first responders were dispatched to a Howard County residence due to a report that a thirty-seven-year-old woman was experiencing severe vaginal bleeding. Upon arrival, an EMT, Thomas Sullivan ("EMT Sullivan") found Appellant sitting in her living room with her husband and two children. Appellant reported that she had been experiencing heavy vaginal bleeding for the past several hours. When EMT Sullivan asked Appellant if there was any chance that she was pregnant, she replied, "no." Appellant provided no explanation for the bleeding, although her husband noted that she recently had an ectopic pregnancy.[2] EMT Sullivan asked Appellant if she wanted to be transported to a hospital and she replied, "yes." Once at the hospital, Appellant was transitioned into the care of a nurse.

At the hospital, Appellant spoke to a nurse and a doctor, but did not initially disclose that she had been pregnant. However, after a doctor observed a severed umbilical cord protruding from her vagina, Appellant indicated that she had delivered an infant in her home prior to being transported to the hospital, but that the baby was "not alive" and was "in a closet at home in a Ziploc bag." In response to medical inquiries, Appellant also stated that she had confirmed that she was pregnant in May of 2018, but at no point had she received any prenatal care. At the time of the discussion, Appellant was "calm and answering questions" from hospital staff. Although Appellant was aware her husband was present in the hospital's waiting room, Appellant declined to allow him to enter her room.

[2] This was inaccurate; admitted evidence demonstrated that at 11 weeks gestational age, Appellant's pregnancy had been diagnosed as normal.

Hospital staff notified emergency medical services of Appellant's statements, and EMT Sullivan was directed to return to Appellant's home in an effort to recover the baby. Upon arriving at the home, EMT Sullivan and a law enforcement officer discovered blood throughout the upstairs bathroom, hallway, and bedroom. Inside a closed bedroom closet, EMT Sullivan discovered a large plastic bag filled with bloodied towels; under the towels in the bag was an infant who showed no signs of life. EMT Sullivan confirmed the baby was deceased by checking the pulse and using a cardiac monitor; no CPR or other artificial ventilation of the lungs was performed.

Following a medical procedure, Appellant was interviewed by Detective Weigman of the Howard County Police Department ("Det. Weigman"). During that interview, Appellant stated to Det. Weigman that she had delivered a stillborn child, which she placed in a bag in the closet. Additional facts will be incorporated as they become relevant to the issues.

DISCUSSION

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING EXPERT TESTIMONY REGARDING THE HYDROSTATIC FLOAT TEST.

A. The Pretrial Motion to Exclude Expert Testimony

Prior to trial, the State noted its intent to introduce the testimony of Doctor Nikki Mourtzinos ("Dr. Mourtzinos"), the Attending Medical Examiner who conducted the autopsy of Baby A and concluded that the cause of death was homicide due to asphyxia. Appellant made a motion *in limine* seeking to preclude Dr. Mourtzinos from discussing the results of one of the tests conducted during the autopsy, the hydrostatic float test ("HFT").

The court conducted two hearings focusing on the reliability and scientific value of the HFT in the context of the autopsy results.[3] The circuit court examined the admissibility of evidence under Maryland Rule of Evidence ("Md. Rule") 5-702, which requires a court to determine, in relevant part, "whether a sufficient factual basis exists to support the expert testimony."

During the hearings, the State presented the testimony of Dr. Mourtzinos, who conducted the autopsy and determined that Baby A was born alive. The State also called Doctor David Fowler ("Dr. Fowler") who, at the time the autopsy was performed, was the Chief Medical Examiner for the State of Maryland. Both doctors were certified as experts in forensic pathology without objection, and both testified that the HFT was a test that should be used and considered under the circumstances of the case. Appellant asserted that the HFT was not reliable evidence and presented the testimony of her own expert in forensic pathology, Doctor Gregory Davis ("Dr. Davis").

Dr. Mourtzinos, the state's primary witness, testified that the HFT, also known as the "flotation test" or "lung float test," is a commonly employed test in forensic pathology used to determine if an infant's lungs had at any point been aerated. Dr. Moutzinos opined that when in utero, a fetus's lungs are filled with liquid, not air; as the child is born and

[3] During the pendency of the litigation, the Supreme Court of Maryland decided *Rochkind v. Stevenson*, 471 Md. 1 (2020), which necessitated an additional hearing. *See id*. at 5, 38 (adopting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) for the purposes of applying Md. Rule 5-702 and replacing the previous standard under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and *Reed v. State*, 283 Md. 374 (1978)). At the second hearing, the parties agreed to, and the court did, incorporate the testimony from the prior hearing. The court gave the parties the opportunity to present additional arguments and testimony due to the newly applicable *Rochkind-Daubert* standard.

breathes, the lungs become aerated and inflate. The aeration of the lungs is an "important data point" in determining if a child has been born alive, as under Maryland law, a child who takes even one unassisted breath after being completely expelled or extracted from the mother's body is considered to have been born alive. *See* § 4-201(n) of the Health - General Article ("HG") of the Maryland Code.

The HFT involves removing the lungs, ensuring that air has not been artificially introduced into them, and placing them in water. The analysis is—if the lungs float, they have been aerated; if the lungs sink, they have not been aerated. There are slight differences in how the test may be performed—it can be conducted with either complete lungs, or pieces of lung tissue. A practitioner will generally also submerge the liver or spleen, both of which are solid organs that do not float under normal circumstances, as a control.

Dr. Mourtzinos testified that the HFT results only show if the lungs were aerated and will not conclusively prove if the child did take a breath or not. This is because lungs can be aerated via other means, such as via CPR or decomposition. She stated that in forensic pathology, the HFT, or indeed any test, should not be and is not used exclusively to determine if a child was born alive; instead, practitioners look for concordance across a variety of tests. In this case, Dr. Mourtzinos testified that the results of the HFT indicated that the lungs had been aerated, and that there was no evidence of air being introduced by means other than breathing, and that those results were consistent with a variety of different

tests which in her opinion were also indicative of live birth.[4]

Testifying for the State, Dr. Fowler discussed a 2013 peer-reviewed German study which evaluated the efficacy of the HFT. The study determined that out of a sample size of 208 babies, all of whom were delivered by medical professionals, the lungs of every stillborn baby sank—there we no cases where the lungs of a stillborn baby floated. The test had an accuracy rate of 98 percent, with two "false negatives," where the lungs of a non-stillborn baby sank.[5]

Nevertheless, the State's experts agreed that the HFT is "controversial" in the medical community. Both experts agreed the bulk of the scientific literature, even while advocating for the use of the HFT, noted that the HFT should be conducted alongside other tests. Both experts also agreed that the test is of very limited value for determining live birth if the lungs were aerated by other means, such as CPR or decomposition. The State's experts testified that the HFT was appropriate in this case, where there was no indication CPR or other artificial aeration had been attempted on the victim, and there was no sign of decomposition in the victim's body. Additionally, at no point did either Dr. Mourtzinos or Dr. Fowler assert that the HFT results alone were sufficient to result in a determination of

[4] In the process of completing her investigation and report, Dr. Mourtzinos also performed other tests and analyzed other data to determine if the baby died in utero, or after being born alive. These included but were not limited to examining the baby's body via x-ray, conducting a visual and tactile examination of the lungs, checking for maceration, and searching for abnormalities, infection, and bacterial invasion in the baby's body and in the placenta. All of Dr. Mourtzinos' other findings during the autopsy were consistent with the results of the HFT, and collectively, in her view, indicated live birth.

[5] This is not the situation which occurred in this case, where the lungs of the victim floated.

live birth.

The defense expert, Dr. Davis, opined that several experts in the field of forensic pathology do not advocate for the use of the HFT, and believed it and other test results were inconclusive in this case. Dr. Davis also testified that in addition to breathing, CPR, or decomposition, air can enter a baby's lungs through the birthing process itself, or via the mishandling of the body after death.[6] Dr. Davis also testified that although he personally does not place any value in the HFT, he both conducts it in his autopsies and teaches it to his forensic pathology students. Dr. Davis further stated that had he performed the autopsy of the victim in this case, he would have performed the HFT, and agreed that it was "generally accepted to do the test[.]"

In ruling on the motion *in limine*, the circuit court noted the breadth of the testing that Dr. Mourtzinos conducted, and that all other test results were consistent with the results of the HFT. The court also noted the testimony of both the State's experts indicated that the HFT was a mandatory test in an autopsy of this nature, although both said that no test should be exclusively used to determine a cause of death. The court referenced the testimony of both experts indicating that the bulk of the scientific literature stated that the test is reliable in circumstances absent the introduction of air into the lungs via CPR or decomposition, and that evidence of neither factor was present in this case. In making the ruling, the court also discussed the 2013 German study, which found the test to be extremely reliable in cases where a baby's lungs floated. The court also noted that Dr.

[6] Dr. Fowler disputed this claim and stated that there were only two publications that theorized such a possibility, and that the theory was "not commonly accepted."

Davis disagreed with the conclusions of the State's experts regarding the reliability of the test, but that the court was unpersuaded by his testimony.

The court examined the evidence presented, discussed each of the ten enumerated *Rochkind-Daubert* factors, and determined that "by a preponderance of the evidence [] the test is reliable[.]" *See Rochkind v. Stevenson*, 471 Md. 1, 35–36 (2020). The court noted that it found "on balance the testimony of Mourtzinos and Fowler more convincing than [that of] Dr. Davis." The court correctly stated that it "need not be satisfied that an opinion is correct, only that it is reliable[,]" and further found that "there are sufficient indicia of reliability and legitimacy that it may be profitably applied by the jury." *See id.* at 33 ("[U]nder this approach to expert testimony, juries will continue to weigh competing, but still reliable, testimony."). At trial, Dr. Mourtzinos presented testimony to the jury that the results of her investigation, which included the use of the HFT, indicated live birth.

B. The Standard of Review

In *Rochkind*, the Supreme Court of Maryland outlined the standard of review for the admission of expert testimony under *Daubert* and Md. Rule 5-702:

> "[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute ground for reversal." *Roy v. Dackman*, 445 Md. 23, 38–39 (2015). When the basis of an expert's opinion is challenged pursuant to Maryland Rule 5-702, the review is abuse of discretion. *Blackwell v. Wyeth*, 408 Md. 575, 618 (2009).

471 Md. at 11–12, 26 (adopting the standard outlined in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) as the test for determining admissibility under Md. Rule 5-702). An abuse of discretion occurs when "the trial court's decision [is] well

removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Devincentz v. State*, 460 Md. 518, 550 (2018) (internal quotation marks and citation omitted). The Court has also noted that in the context of a *Rochkind-Daubert* analysis specifically, a court also abuses its discretion when it admits expert evidence "where there is an analytical gap between the type of evidence the methodology can reliably support and the evidence offered." *Abruquah v. State*, 483 Md. 637, 652 (2023). Moreover, the Supreme Court of the United States has explained that "the law grants a [trial] court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999) (emphasis in original); *see also Rochkind*, 471 Md. at 38 (incorporating *Kumho Tire* into the Maryland standard).

C. The Parties' Contentions

Appellant asserts that the trial court committed reversible error by admitting Dr. Mourtzinos' expert testimony regarding the HFT. Appellant contends that the HFT is scientifically unreliable, and as Dr. Mourtzinos' expert opinion was "based to a great extent" upon the HFT results, the court should have precluded her from testifying. Appellant argues that each of the *Daubert* factors point to the unreliability of the HFT.[7]

The State disagrees and asserts that the circuit court properly exercised its discretion

[7] As Appellant's *Rochkind-Daubert* motion, objection at trial, and appellate brief challenged only the reliability of the HFT, and not the other scientific tests Dr. Mourtzinos employed during her autopsy, we confine our review to assessing the court's ruling as to the admissibility HFT. We discuss the other factors Dr. Mourtzinos considered only in the context of her use of the HFT.

in determining that the results of the HFT were reliable and admissible under the *Rochkind-Daubert* standard. In the alternate, the State argues that if the HFT was admitted erroneously, the error was harmless, as Dr. Mourtizinos' testimony and conclusion were based on the results of a multitude of tests other that the HFT which all produced consistent results.

D. The *Rochkind-Daubert* Analysis

Under the *Rochkind-Daubert* framework, expert testimony is evaluated by a "flexible inquiry into an expert's reliability, focusing on the expert's principles and methodology as opposed to their conclusions." *Covel v. State*, 258 Md. App. 308, 329 (2023). *Rochkind* identified ten factors which the Supreme Court found persuasive in evaluating the reliability of expert testimony. 471 Md. at 35–36. These factors are:

> (1) whether a theory or technique can be (and has been) tested;
>
> (2) whether a theory or technique has been subjected to peer review and publication;
>
> (3) whether a particular scientific technique has a known or potential rate of error;
>
> (4) the existence and maintenance of standard and controls; . . .
>
> (5) whether a theory or technique is generally accepted[;]
>
> (6) whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of litigation, or whether they have developed their opinions expressly for the purposes of testifying;
>
> (7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
>
> (8) whether the expert has adequately accounted for obvious alternative

explanations;

(9) whether the expert is being as careful as [they] would be in [their] regular professional work outside of [their] litigation consulting; and

(10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Id. at 35–36.

The Court noted that the list was not exhaustive, that no single factor was determinative, and that trial courts were not required to apply all, or indeed any, of the factors in reaching an ultimate reliability determination. *Id.* at 37. Additionally, the *Rochkind-Daubert* reliability analysis does not "upend [the] trial court's gatekeeping function. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *State v. Matthews*, 479 Md. 278, 312 (2022) (internal quotation marks and citations omitted).

Here, the circuit court did not abuse its discretion. In determining that Dr. Mourtzinos' testimony related to the HFT was admissible, the court considered each of the *Rochkind-Daubert* factors in turn, before ultimately determining that "on balance . . . the test is reliable." In making its determination, the court cited evidence which included the testimony of Drs. Mourtzinos and Fowler, multiple peer-reviewed studies and books on the topic of forensic pathology which accept the use of the HFT, the 2013 German study that did not identify any error that would apply to the results in this case, that the body was handled and the autopsy was performed by trained individuals, and noted that Dr. Fowler did not observe evidence of decomposition or CPR. The court also found that the test was

generally accepted as valid in these circumstances but emphasized that it would be for the jury to determine *how* the air got into Baby A's lungs. The court determined that the test was conducted in accordance with Dr. Mourtzinos' training, in the regular scope of her employment, and in making her findings, she considered alternate explanations for the test results. In so deciding, the court permissibly exercised its discretion in determining that the preponderance of the evidence showed that the HFT was sufficiently reliable for admission under Md. Rule 5-702. *See Crane v. Dunn*, 382 Md. 83, 92 (2004).

We also emphasize that neither the State's experts, nor the court, stated that the results of the HFT were, or could be, dispositive as to the question of whether a child was born alive. To the contrary, the circuit court noted Dr. Mourtzinos' testimony that "no single test was adequate to determine the cause of death," and stated that "each of the tests including the [HFT], provide assistance cumulatively informing her determination" of live birth. It is clear from the record that the State presented the HFT, and the court admitted it, not as a test which itself conclusively answers the question of whether a child was born alive, but as one which determines if the lungs of an infant were aerated. Aeration of the lungs is *consistent* with life, but aeration can nevertheless occur for reasons other than breathing. As the circuit court noted, the *cause* of the aeration of the lungs is a matter for the factfinder to decide.

Here, due to the circuit court's diligent application of the evidence to the *Rochkind-Daubert* factors, and that the HFT was used to show aeration of the lungs, and not definitive proof of life, the court's discretion was not exercised "in an arbitrary and capricious manner, or . . . beyond the letter or reason of the law." *Jenkins v. State*, 375 Md. 284, 295–

96 (2003). Nor was there an "analytical gap between the data and the opinion proffered." *Matthews*, 479 Md. at 308 (internal quotation marks omitted).[8] Thus, the court did not abuse its discretion in permitting Dr. Mourtzinos' testimony under Rule 5-702.

II. THE COURT DID NOT ERR IN ADMITTING EVIDENCE OF APPELLANT'S LACK OF PRENATAL CARE AND PRIOR INTERNET SEARCH HISTORY RELATED TO ABORTION.

A. The Evidence at Issue

Appellant contends that the circuit court erred in denying her Motion to Suppress Evidence and subsequent objections which sought to exclude two categories of evidence: Appellant's statements that she did not receive prenatal care during her pregnancy, and her prior internet search history related to terminating a pregnancy at home. Regarding the first category, Appellant informed a nurse at the hospital that she had not received any prenatal care, despite knowing that she was pregnant. Appellant repeated this claim when she was interviewed by a police detective. In the same interview, she stated that she had received prenatal care during her two previous pregnancies, and both of those children were delivered by medical professionals.

As for the evidence of Appellant's search history, at the suppression hearing, the State indicated the intent to introduce records of Appellant's internet history related to pregnancy termination. Specifically, the State sought to introduce internet searches including but not limited to: "rue tea for abortion[,]" "does Rue extract cause you to

[8] To be sure, nothing in our decision today precludes a trial court from excluding an expert's report which relies *exclusively* on the HFT, and an expert's conclusion that a child was born alive predicated entirely on the HFT could represent an impermissible analytic gap between the data and the opinion proffered. *See Matthews*, 479 Md. at 308.

miscarry[,]" "over-the-counter pills that cause miscarriage[,]" "miscarriage at seven weeks[,]" "how to treat ectopic pregnancy naturally[,]" "how to end an ectopic pregnancy[,]" "misoprostol in mid-trimester termination of pregnancy, both oral and vaginal[,]" and navigation to a website titled "woman resort to over-the-counter remedies to end pregnancy[.]"

At trial, the State introduced evidence, over objection, that between March of 2018 and May of 2018, Appellant performed the searches listed above using her phone. Notably, during the time frame in which the searches were made, and for several weeks after, Appellant would have been able to legally secure abortion services in Maryland. *See* Md. Code HG § 20-209(b)(1) ("[T]he State may not interfere with the decision of a woman to terminate a pregnancy . . . before the fetus is viable[.]").

At the time the court admitted the search history evidence, other evidence which demonstrated Appellant's consideration of abortion services had already been admitted into the record without objection from Appellant. Prior to presenting evidence of Appellant's search history, the State called Doctor Danielle Waldrop ("Dr. Waldrop"), Appellant's obstetrician and gynecologist ("OBGYN"), as a witness. Dr. Waldrop testified that Appellant had visited the office in May of 2018 when Appellant was at least 11 weeks pregnant. Medical records of this visit, introduced without objection at trial, indicated that Appellant "came to discuss termination" of the pregnancy. Additionally, Dr. Waldrop testified, and the medical records confirmed, that Appellant was "given info for local clinics to complete . . . second trimester termination." Dr. Waldrop confirmed on cross examination that Appellant received referrals for pregnancy termination. At no point

during Dr. Waldrop's testimony did Appellant make any objection or motion to strike.[9]

The medical records introduced through the testimony of Dr. Waldrop conflicted with Appellant's statements to Det. Weigman. During the interview in the hospital, Appellant stated that at the OBGYN appointment she had been informed that she was 15 weeks pregnant, which was too late in the pregnancy to seek an abortion. That Appellant was 15 weeks pregnant is contradicted by the medical records that indicate that when Appellant visited the OBGYN in May of 2018, the gestational age of her fetus was approximately 11 weeks from the last menstrual period.

The medical evidence further contradicts Appellant's statement that it was too late to seek an abortion as both Dr. Waldrop's testimony and the medical records indicate that Appellant was provided referrals for abortion services at the appointment.

As noted, in Appellant's statement to Det. Weigman, Appellant indicated that she had "planned to terminate if was a normal [pregnancy]," but did not do so because the doctor informed her it was "too late." The referrals for termination of pregnancy given to Appellant at the time of the medical appointment suggest that when Appellant received confirmation of her pregnancy, it was not too late to receive an abortion contrary to her statement to the detective in the hospital interview.

In the same interview, Appellant went on to state:

[9] Appellant waived any contention that the court erred in introducing this evidence by failing to object when it was introduced at trial and does not contend on appeal that the court erred by admitted Dr. Waldrop's testimony or the medical records. *See Beghtol v. Michael*, 80 Md. App. 387, 393–94 (1989) (noting that "[i]n the absence of a continuing objection, specific objections to each question are necessary to preserve an issue on appeal[,]" and that "a motion *in limine* is not the equivalent of a continuing objection.").

> [APPELLANT]: But it was also just, when I decided to . . . give him up[.] . . . I don't know . . . because I kept hope-
>
> * * *
>
> [APPELLANT]: And I know it sounds bad, I almost kept hoping that something would happen but my plan was to-
>
> DET. WEIGMAN: Like what would happen? For your family? Or to the baby? Or . . .
>
> [APPELLANT]: Like I was in denial so I kind of was hoping that something would happen so that it would-
>
> DET. WEIGMAN: Go away.
>
> [APPELLANT]: Yeah.

Appellant also reported that after her OBGYN visit, she resolved to hide the pregnancy from her husband, and inform him, inaccurately, that the pregnancy had been ectopic. On appeal, Appellant does not challenge as irrelevant or unfairly prejudicial the portions of her conversation with Det. Weigman related to the fact that she sought an abortion, the testimony of Dr. Waldrop, nor the related medical records. Appellant's challenges on appeal relate solely to the internet searches related to abortion, and evidence that she did not receive prenatal care during her pregnancy with Baby A.

B. The Standard of Review

When reviewing a court's admission of evidence over objection, we examine both the relevance and unfair prejudice of the challenged evidence. The standards of review for such claims are interconnected, yet distinct. As the relevance of evidence is a legal conclusion, we review a court's determination that evidence is relevant under Md. Rule 5-401 de novo. *Ford v. State*, 462 Md. 3, 46 (2018), *reconsideration denied* (December 11,

2018).

To be admissible, evidence must be relevant. Md. Rule 5-402. Evidence is relevant if it has *any* tendency to make the existence of a fact of consequence to the determination of the case more probable or less probable than it would be without that evidence. Md. Rule 5-401. (emphasis added). The relevance of evidence "is a very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018). If we determine that the evidence is relevant, we then analyze whether the trial court abused its discretion in determining that the probative value of the admitted evidence was not outweighed by the risk of unfair prejudice. *Portillo Funes v. State*, 469 Md. 438, 478 (2020).

Relevant evidence may be excluded when a court determines "its probative value is substantially outweighed by the danger of unfair prejudice[.]" Md. Rule 5-403. Evidence is unfairly prejudicial when it "might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged." *Odum v. State*, 412 Md. 593, 615 (2010). Absent an abuse of discretion, we may not disturb a "trial court's decision to admit relevant evidence over objection that the evidence [was] unfairly prejudicial." *Donaldson v. State*, 200 Md. App. 581, 595 (2011). "An abuse of discretion occurs where no reasonable person would take the view adopted by the circuit court." *Williams*, 457 Md. at 563. "[A] ruling reviewed under the abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling." *Nash v. State*, 439 Md. 53, 67 (2014) (quoting *North v. North*, 102 Md. App. 1, 14 (1994)).

C. The Parties' Contentions

Appellant argues that both evidence of her internet search history related to the termination of a pregnancy as well as the absence of prenatal care during the pregnancy were irrelevant and unfairly prejudicial and should have been excluded under Md. Rules 5-401 through 5-403. Specifically, Appellant argues that none of the evidence at issue made any fact of consequence to the determination of the trial more or less likely to have occurred. *See* Md. Rule 5-401. In the alternate, Appellant asserts that the evidence should have been excluded under Rule 5-403, as the danger of unfair prejudice substantially outweighed any probative value. Appellant claims that any probative value was substantially outweighed by the potential for evidence of use or consideration of abortion services to inflame strong prejudice in jurors due to the "divisive and emotional" nature of debates around reproductive healthcare services, which include abortion. Similarly, Amicus argues that evidence of a defendant's prior abortion or consideration of abortion, or lack of prenatal care, is both irrelevant to the determination of that person later harming their child and would be so prejudicial that it must categorically be considered to substantially outweigh any theoretical relevance. In support of these contentions, Appellant and Amicus cite to multiple out-of-state cases where appellate courts determined admittance of a party's prior abortion history was or would have been erroneous, either due to irrelevance, or the potentially prejudicial nature of such evidence.

In the State's view, the circuit court did not err. The State argues that while it does not disagree with aspects of Appellant's contentions, here both the evidence of Appellant's lack of prenatal care and internet searches related to pregnancy termination were relevant

to Appellant's intent to kill Baby A with deliberation once he was born. The State notes that both pieces of evidence "provided insight into [Appellant's] state of mind at a crucial time: the period where she could have legally terminated the pregnancy but chose not to do so." The State also contends that the evidence was relevant because Appellant's credibility had been called into question. Additionally, the State maintains that the evidence was not unfairly prejudicial and asserts that the cases cited by Appellant and Amicus do not apply to the facts herein. In the State's view, those cases are inapposite because they either dealt with instances when a party had terminated a *prior* pregnancy unrelated to the facts of the case, or when the death of the child in question occurred months after birth, rather than on the day of the birth, as occurred in the case at bar.

D. Evidence of Lack of Prenatal Care

We first examine the circuit court's decision to permit the State to introduce evidence of Appellant's lack of prenatal care during her pregnancy with Baby A. The court found that the evidence that Appellant did not seek prenatal care, despite knowing she was pregnant, was relevant to her intent to kill Baby A once born, an element the State was required to prove. Although we review relevance determinations de novo, we agree with the circuit court that the evidence was relevant. Appellant's intent to kill the child once born is undoubtedly a "fact that is of consequence to the determination of the action." Md. Rule 5-401. Similarly, that Appellant did not seek prenatal care, despite knowing she was pregnant, could lead to an inference that Appellant did not do so because of her intent to cause the death of the child once born. *See Thomas v. State*, 372 Md. 342, 351 (2002) (noting that relevance can be established by inference). This argument is bolstered by

evidence that Appellant had previously sought and received prenatal care for prior pregnancies and had attended an appointment with an OBGYN to confirm her pregnancy with Baby A. *See Snyder v. State*, 361 Md. 580, 592 (2000) ("[T]he relevancy determination is not made in isolation. Instead, the test of relevance is whether, in conjunction with all other relevant evidence, the evidence tends to make the proposition asserted more or less probable."). The fact that Appellant points to possible alternate explanations for this behavior, such as a theorized "lack of insurance or money to pay for visits to the doctor" does not materially impact our determination of the relevancy of the evidence.[10] Here, the State presented a nexus between the evidence and a fact of consequence sufficient to clear the "very low bar" of relevance. *Williams*, 457 Md. at 564.

We next turn to the court's determination that the probative value of Appellant's statements regarding the lack of prenatal care was not substantially outweighed by the risk of unfair prejudice, which we review under the abuse of discretion standard. *See* Rule 5-403; *Williams v. State*, 251 Md. App. 523, 566 (2021). We agree with Appellant and Amicus that by introducing evidence that a pregnant woman did not seek prenatal care, there is undoubtably a risk of introducing unfair prejudice. We acknowledge pregnant women do not always receive prenatal care for a variety of reasons, including the

[10] Such alternate explanations may be potentially valuable fodder for cross-examination or assertions of unfair prejudice, but that a wholly innocent explanation for an action may exist does not render evidence of that action irrelevant under Rule 5-401. Similarly, that failure to seek prenatal care is not a crime in Maryland is of no import to our relevancy determination. *See* Section 2-103(f) of the Criminal Law Article ("CR") of the Maryland Code.

accessibility of such care,[11] and agree with Amicus that prejudice could arise due to gender-based stereotypes and biases regarding the ways in which pregnant women are expected to behave. We further recognize that electing not to seek prenatal care is both a legally protected activity in Maryland, and observe that as a general principle, a lack of prenatal care is typically either irrelevant or minimally probative of a mother's intent to subsequently harm her child after birth. *See* Md. Code CR § 2-103. However, the facts of this case are far from typical.

Due to the specific facts of this case, we cannot say that no reasonable person could take the view espoused by the circuit court, and thus, cannot conclude the court abused its discretion on the issue of Appellant's lack of prenatal care. *See Sibley v. Doe*, 277 Md. App. 645, 658 (2016) (noting that an "abuse of discretion occurs where no reasonable person would take the view adopted by the trial court . . . or when the ruling is violative of fact and logic." (internal quotation marks and citation omitted)). Here, the court had evidence that Appellant hid her pregnancy from her family, emergency responders and hospital workers, only disclosing that she had delivered a child when medical personnel visually observed a severed umbilical cord. The court heard evidence that Baby A was killed very shortly after being born, that Appellant did not attempt to seek help for the baby, and that after Baby A's death, she wrapped the body in towels, which she disposed of in a bag and placed in a closed closet. Additionally, evidence was submitted that Appellant

[11] As recently as 2021, 6.3% of American children were born to mothers who either received no prenatal care, or care which began during the third trimester of pregnancy. Michelle J. Osterman, et al. *Births: Final Data for 2021*, 72.1 NAT'L VITAL STAT. REP. at 6 (Jan. 31, 2023), https://perma.cc/68ZL-APP8.

received prenatal care during her other pregnancies and had access to an OBGYN. Given this evidence, the court could reasonably conclude that Appellant's lack of prenatal care was probative of her intent during her pregnancy to harm or cause the death of Baby A once delivered.

While, as we have acknowledged, introducing evidence of lack of prenatal care carries with it a risk of unfair prejudice, the court here did not act unreasonably in concluding that the risk did not substantially outweigh the probative value of the evidence. "Evidence is never excluded merely because it is 'prejudicial.'" *White v. State*, 250 Md. App. 604, 645 (2021) (quoting *Moore v. State*, 84 Md. App 165, 172 (1990)). Nor is evidence excluded because the danger of prejudice simply outweighs the probative value; it must, "as expressly directed by Rule 5-403, do so '*substantially*.'" *Montague v. State*, 471 Md. 657, 696 (2020) (emphasis in original) (quoting *Molina v. State*, 244 Md. App. 67, 135 (2019)). Additionally, while the potential for unfair prejudice exists, we note that the topic of prenatal care is not so inherently inflammatory and contentious to engender substantial unfair prejudice. For the reasons articulated above, we cannot say that the court abused its discretion in allowing the State to present evidence of Appellant's decision not to seek prenatal care during her pregnancy with Baby A.

E. Evidence of Internet Searches Related to Abortion

We note at the outset of this discussion that our decision today should be read narrowly, and in strict accordance with the specific facts of this case.

We begin again by reviewing the circuit court's ruling on the relevancy of the evidence de novo. *See Ford*, 462 Md. at 46. We conclude that the evidence of Appellant's

search history is relevant. As previously stated, Appellant's intent during her pregnancy is unambiguously a "fact of consequence" in this case. *See* Md. Rule 5-401. Similarly, in the context of other admitted evidence, Appellant's actions, which demonstrate that at least at one point, she considered inducing an abortion without the assistance of a medical professional, make it more probable that she intended to prevent others from discovering her pregnancy or child at any point. This in turn permits an inference that she would be inclined to harm or cause the death of the child to keep the pregnancy and birth secret. *See Thomas*, 372 Md. at 351. Additionally, Appellant's intent during her pregnancy was particularly relevant due to the nature of the charge, and her statement that she had "hope[d] something would happen" so the pregnancy would not be carried to term. Her credibility had also been called into question because of the discrepancy between evidence which showed she had sought and received abortion referrals, and her statements that the same doctor who provided the referrals informed her that it was too late to secure an abortion in Maryland. As relevance is established by examining the evidence "in conjunction with all other relevant evidence," we determine that in the specific facts of this case, Appellant's search history clears the low bar of relevance. *Snyder*, 361 Md. at 592.

Appellant and Amicus put forward several categories of cases from other jurisdictions which, in their view, support a finding of error in this case. While we agree that evidence of a defendant's use of abortion services or consideration thereof will frequently be both irrelevant and unfairly prejudicial, under the unique and specific facts of this case, we are not persuaded that the circuit court erred, and find the cited cases are distinguishable. Unlike in this case, where Appellant considered aborting the fetus which

would eventually become the victim in this case, Appellant and Amicus cite to several cases that examine the admissibility of evidence of *prior* abortions unrelated to the facts which precipitated the litigation. These include *Andrews v. Reynolds Mem'l Hosp., Inc.*, 201 W.Va. 624 (1997), *People v. Morris*, 92 Mich. App. 747 (1979), *Hudson v. State*, 745 So. 2d 1014 (Fla. 5th DCA 1999), *Bynum v. State*, 2018 Ark. App. 201, and *Billett v. State*, 317 Ark. 346 (1994).

In *Andrews*, the Supreme Court of Appeals of West Virginia held that evidence of an abortion which occurred "a few years before the birth at issue" was correctly excluded. 201 W.Va. at 633. In *Morris*, the Court of Appeals of Michigan found reversible error where evidence of a defendant's prior abortions was admitted on the theory that they were probative of the defendant's sanity at the time of a factually unelated crime, despite no testimony to that effect from mental health professionals. 92 Mich. App. at 750–51. In *Hudson*, a Florida appellate court found an abuse of discretion when the defendant's prior medically supervised abortions were admitted in a case in which the defendant's newborn baby was found deceased in a box in a closed closet. 745 So. 2d at 1014. In *Bynum*, an Arkansas appellate court found that a trial court had abused its discretion by admitting evidence of a defendant's prior abortions in a trial alleging that the defendant had concealed the birth of a stillborn child. 2018 Ark App. at 2. In *Billett*, the Supreme Court of Arkansas affirmed a lower court's exclusion of a witness's history of abortions as a topic of cross-examination. 317 Ark. at 348.

We agree with the central principle adopted by the cases listed above: a person's prior history with abortion untethered to the material facts of a case will generally not be

admissible. However, Appellant's case does not concern abortion history attenuated from the facts which gave rise to the criminal charge nor does the contested evidence relate to a prior pregnancy. Here, the pregnancy Appellant considered terminating resulted in the birth of Baby A, the same child she was alleged to have murdered *immediately* after the child's birth in her home.

It is notable to our admissibility determination that the relevant intent here was the intent to harm or cause the death of the child specifically *at the time of birth*. Accordingly, we are unpersuaded by the cases cited by Appellant and Amicus involving the deaths of children well after their births, in which admission of evidence of a defendant's contemplation of abortion was determined to be reversible error. These cases are *Stephenson v. State*, 31 So. 3d 847 (Fla. 3d DCA 2010) and *Wilkins v. State*, 607 So. 2d 500 (Fla. 3d DCA 1992). *Stephenson* involved the death due to neglect of a thirteen-month-old child who "suffered from serious health problems." 31 So. 3d at 848. In *Stephenson*, a Florida appellate court found that fundamental error occurred when the prosecuting attorney commented on the defendant's consideration of terminating the pregnancy which resulted in the birth of the child victim. *Id.* The reviewing court stated that the evidence was both irrelevant, and that "any conceivable relevance was substantially outweighed by the danger of unfair prejudice." *Id.* at 850. The *Stephenson* court stated that:

> [N]ot only is there no *permissible* relevance to the mother's consideration of abortion to the legal issues at hand, but its only *arguable* relevance makes its admission all the more inappropriate: it is apparently the thought that a person who considers abortion is more likely to have killed the child not aborted. This makes the familiar issue of the admission of prior convictions, which is precluded because the jury may (probably correctly) conclude that

> one who has been convicted before is guilty now, pale into insignificance. Simply put, the evidence that Stephenson, considered aborting her pregnancy did not tend to "prove or disprove a material fact," [citation omitted]; it tended to prove only a very harmful immaterial one.

Id. at 851 (emphasis in original).

Several important factors distinguish Appellant's case from *Stephenson*. Unlike in *Stephenson*, where the child victim was over a year old, the death in Appellant's case occurred immediately after birth. *Id.* at 848. Additionally, in *Stephenson*, the State's theory of the case was that the defendant's motive for the crime was related to the medical issues of the child, but the defendant "considered having an abortion long before she knew . . . the baby would likely be born with serious medical problems." *See id.* at 852 (Shepherd, J., concurring). Thus, the *Stephenson* court found that the defendant's consideration of terminating a presumptively healthy fetus was irrelevant to the eventual crime, the killing of a one-year-old disabled child. *Id.* at 852. By contrast, in the case at bar, Appellant was charged with causing the death of a child on the same day as birth, and her motive was alleged to be related to the very existence of the child, as opposed to any previously unknown unique issues. Therefore, we are not persuaded that the holding of *Stephenson* applies in the context of this case.

Similarly, *Wilkins v. State* is distinguishable from the case at bar. 607 So. 2d 500 (Fla. 3d DCA 1992). *Wilkins* was an appeal from a conviction of attempted first-degree murder and aggravated child abuse, in which the victim was a two-month-old infant. *Id.* at 501. In that case, a Florida appellate court ordered a new trial for reasons having nothing to do with abortion. *See id.* However, the appellate court noted that it was "greatly

concerned" by several categories of "inadmissible evidence adduced at trial[,]" which included that "the defendant and his wife considered having an abortion of the baby-victim." *Id.* Because of the limited discussion of the issue and the age of the victim, who was not a newborn, we are not persuaded that *Wilkins* is applicable or consistent with the facts in Appellant's case.

We again emphasize the exceedingly narrow scope of this determination. Under the facts of this case, Appellant considered surreptitiously inducing a miscarriage while she was pregnant with the victim, the challenged evidence involved a self-induced abortion not under the direction of a medical professional, the evidence demonstrated that the child died the same day of his birth, both the pregnancy and the child's body were hidden, and Appellant indicated she did not prepare for the child's birth in any way. Additionally, Appellant's intent during her pregnancy was of central importance to the determination of the action, and her credibility was at issue due to the discrepancy between her statement to Det. Weigman that she was informed by her doctor at the time she was 15 weeks pregnant that it was too late to secure an abortion,[12] although the records from the same visit noted that she was instead 11 weeks pregnant, and was provided with multiple referrals for abortion services. As to the specific facts of this case, we conclude that the evidence, again, clears the low bar of relevancy. *Williams*, 457 Md. at 564.

Thus, we next evaluate whether the court abused its discretion in concluding that the probative value of the evidence was not "substantially outweighed" by the danger of

[12] Appellant also repeated the same contention to a social worker and a nurse at the hospital.

unfair prejudice. Md. Rule 5-403; *Williams*, 251 Md. App. at 581. As noted above, the circuit court concluded, and we agree, that the evidence was relevant to Appellant's intent during the time she was pregnant. In so holding, the court could permissibly conclude that Appellant's search history was sufficiently probative because the specific searches involved inducing an abortion at home without the assistance or supervision of medical professionals, therefore permitting the inference that Appellant intended to keep the pregnancy and birth a secret. Moreover, the court could conclude that the evidence was appropriately probative to overcome the risk of prejudice because it shed light on her intent during her pregnancy and at the time of birth, certainly a fact of consequence to the case.

The court had other available evidence that this was particularly salient, as Appellant's credibility was at issue. For instance, Appellant reported to Det. Weigman that she falsely represented to her husband the pregnancy was ectopic and stated that she intended to hide the birth from him and take the baby to a firehouse. Appellant also stated that she had been informed in May of 2018 that she was 15 weeks pregnant, and it was too late to seek an abortion, which was in direct contrast to the information included in her medical records. Contrary to Appellant's statements, medical records created at the time of her OBGYN visit indicated that she was 11 weeks pregnant and was not told it was too late to terminate the pregnancy, but rather was provided referrals for abortion services.

Importantly, the court could also consider the fact that the record already contained evidence, admitted without objection, that Appellant had sought abortion services. Because evidence regarding Appellant's consideration of abortion was already in the record, it is reasonable to conclude that the evidence of Appellant's search history was less prejudicial

than it might otherwise have been absent other admitted evidence showing that Appellant had previously considered abortion. *See Snyder v. State*, 210 Md. App. 370, 395 (2013) ("The evidence was cumulative and hence not unduly prejudicial."). Additionally, the court employed *voir dire* questioning meant to guard against improper bias in the jury. Specifically, the court asked, "many people have strong opinions about the morality of having considered getting or having an abortion. Would your beliefs about abortion prevent you from giving a fair and impartial verdict in this case?" In so doing, the court used Appellant's requested *voir dire* question verbatim.

Under Md. Rule 5-403, "[i]t is ordinarily within the discretion of the trial court to weigh the degree of relevance against any unfair prejudice which might arise[.]" *Mason v. Lynch*, 388 Md 37, 48 (2005). In the context of this case, we cannot say that no reasonable person could agree with the circuit court that any risk of unfair prejudice did not substantially outweigh the probative value of the evidence. Because a trial court's decision to admit evidence notwithstanding a challenge under Md. Rule 5-403 is "is entrusted to the wide discretion of the trial judge," and we must apply a "highly deferential" standard, we conclude that the court did not err in admitting the evidence of Appellant's search history. *Oesby v. State*, 142 Md. App. 144, 167–68 (2002) (noting that reversal under the abuse of discretion standard "should be reserved for those rare and bizarre exercises of discretion that are, in the judgement of the appellate court, not only wrong but fragrantly and outrageously so."). Although we recognize that abortion and other forms of reproductive healthcare carry with them the potential risk of unfair prejudice, we are unable to determine that the court below was "fragrantly and outrageously" wrong, and therefore, cannot find

error under the abuse of discretion standard. *Id*. at 168.

III. APPELLANT'S STATEMENTS TO A LAW ENFORCEMENT OFFICER WERE VOLUNTARY.

Appellant challenges the circuit court's denial of the motion to suppress statements made to a police detective while Appellant was in the hospital. Specifically, Appellant argues that the court erred in concluding that her statements were voluntary.

A. Appellant's Interview at the Hospital

Following Appellant's admission that she gave birth in her home and left the baby in a bag in the closet, Appellant was transported into an operating room for delivery of the placenta and repair of vaginal tears. Around the same time, Det. Weigman arrived at the hospital. At approximately 7:00 p.m., Det. Weigman was informed by hospital staff that Appellant "was going to go in for a minor procedure," but "in about two hours she should be alert and able to speak with [police]."

During the procedure, Appellant was placed under general anesthesia for approximately 30 minutes, which involved the administration of three medications: Midazolam, Fentanyl, and Propofol. At 8:36 p.m., Doctor Lori Suffredini ("Dr. Suffredini"), the attending anesthesiologist, entered a post-operative note related to Appellant's procedure. Dr. Suffredini testified that she "never" puts in a note unless the patient is "able to appropriately respond to a question[,]" because the answer shows "they're meeting the criteria that they're recovering from anesthesia." Dr. Suffredini also testified that "typically" a person who received general anesthesia for an "outpatient procedure" such as Appellant's operation, "would be able to leave the recovery room

within about an hour," and would be "stable to go home." Dr. Suffredini agreed that a person stable to go home could "get up and walk out on their own."

At 9:25 p.m., Det. Weigman, who was accompanied by a social worker, interviewed Appellant in her hospital room. At the outset of the interview, Det. Weigman observed that Appellant was "very alert [and] was willing to speak with us." Det. Weigman confirmed that Appellant was "alert and understanding," and after noting to Appellant she was a police officer, informed Appellant of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Having been verbally informed of her rights, and that she was not under arrest, Appellant completed a written waiver form and agreed to speak to Det. Weigman.

Det. Weigman was not in a police uniform, and medical personnel were present and moving about the area. At several points during the interview, a nurse interjected to ask Appellant medical questions. Although Appellant's husband was not given access to the room, at no point did Appellant request his presence, and Det. Weigman testified it was standard police procedure to separate adult interviewees to prevent another person from improperly influencing an interviewee's answers. The interview lasted approximately one hour. During the questioning, Appellant was sitting in a hospital bed and was not restrained by police.

The circuit court described Appellant's procedure as "relatively minor," and found that based on the recording of the interview, "it seems clear . . . that [Appellant] is alert and appropriately responsive and not slurring her speech or confused by virtue of any medication." The court also noted that during the interview, Appellant "seemed to understand the questions and to respond in a coherent, rational, thoughtful way[,]" and that

Appellant "was capable of writing and signing documents." The court determined that Appellant was capable of undertaking "a really thoughtful analysis" of who would be available to care for her living children. The court also found that there were no threats, promises, or abuse by the police, and that Appellant had the ability to terminate the interview at any time. The court described Det. Weigman as "very kind, very patient, quite frankly trying to understand the mindset and what potential plausible explanation there might be," and characterized Appellant as "[having] some college education, no criminal record, intelligent, responsive." The court found that Appellant's responses to Det. Weigman's questions were "coherent, lucid, detailed, rational, [and] accurate in their detail." Ultimately, the court found that Appellant's statements were voluntary and made after a valid waiver of her rights against self-incrimination.

B. The Standard of Review

"Only voluntary confessions are admissible as evidence under Maryland law." *Knight v. State*, 381 Md. 517, 531 (2004). The circuit court's ruling on the voluntariness of a statement is a mixed question of law and fact that this Court reviews de novo.

> In undertaking our review of the suppression court's ruling, we confine ourselves to what occurred at the suppression hearing. [W]e view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion, here, the State. We defer to the motions court's factual findings and uphold them unless they are shown to be clearly erroneous. We, however, make our own independent constitutional appraisal, by reviewing the relevant law and applying it to the facts and circumstances of this case.

Brown v. State, 252 Md. App. 197, 234 (2021) (internal citations and quotations omitted).

C. The Parties' Contentions

Appellant asserts that her statements to Det. Weigman were involuntary, and therefore must be suppressed under Maryland common law, as well as under Maryland and United States constitutional principles.[13] Specifically, Appellant contends that her statement could not have been voluntary, as she was questioned while still recovering from a surgical procedure and still under the effects of drugs used to induce general anesthesia. Appellant also argues that she was kept separate from her family in a coercive environment, and that she was "intimidated and pressured" by Det. Weigman during the interview.

The State disagrees and asserts that Appellant's statements in the interview were voluntary. The State notes that although Appellant was recovering from a medical procedure, it was a routine one, and Det. Weigman did not begin the interview until well after the anesthesiologist, Dr. Suffredini, signed off on Appellant's post-operative note. The State argues that the hospital environment was in no way coercive and asserts that the recording of Appellant's interview demonstrates that she was lucid and responding appropriately to all questioning.

D. Voluntariness Analysis

"Maryland law requires that no confession or other significantly incriminating remark allegedly made by an accused be used as evidence against him, unless it first be

[13] Appellant challenges only the circuit court's determination that her statements were voluntary; she does not argue that Det. Weigman's explanation of her rights pursuant to *Miranda* was facially insufficient, or that her waiver of those rights was not made knowingly or intelligently. *See Gonzalez v. State*, 429 Md. 632, 650 (2012) (citation omitted).

shown to be free of any coercive barnacles that may have attached by improper means to prevent the expression from being voluntary." *Winder v. State*, 362 Md. 275, 307 (2001) (internal quotation marks and citation omitted). In assessing voluntariness, we evaluate the totality of the circumstances surrounding the interrogation and confession. *Smith v. State*, 220 Md. App. 256, 273 (2014). More specifically, in determining the voluntariness of a statement, we examine "whether it was extracted by any sort of threats, or violence, or obtained by any direct or implied promises . . . or by the exertion of any improper influence . . . . Otherwise stated, the test of the admissibility of [a] confession is whether [the accused's] will was overborne at the time he confessed," rather than freely given by the accused. *Lodowski v. State*, 307 Md. 233, 254 (1986) (citation omitted).

Appellant is correct that "[a] defendant's will can be overborne, and hence, his or her confession rendered inadmissible, as a result of the use of drugs." *Hof v. State*, 337 Md. 581, 597 (1995). However, "being under the influence of narcotics does not automatically render a confession involuntary," it is merely one factor courts must consider. *Id.* Appellant contends that her statements were involuntary in large part because at the time she was interviewed by Det. Weigman, Appellant was "still in the throes of the drugs" used to place her under general anesthesia. Appellant notes that just hours prior to the interrogation, she had been placed under general anesthesia, and to that end, given Midazolam, Fentanyl, and Propofol, all of which served to numb her and induce amnesia during the procedure. In asserting the continuing effect of the drugs was significant enough to render her statements involuntary, Appellant points to Dr. Suffredini's testimony that "the half-life of Fentanyl

is about three or four hours," with the half-lives of the other drugs being less.[14]

However, Dr. Suffredini testified further that "each patient is different. The exact amount of time that it takes for a patient to recover from anesthesia is dependent on a lot of factors[.]" Dr. Suffredini noted that a person who came in for a "similar outpatient procedure" would be able to leave the recovery room "within about an hour" and would be "stable to go home." Dr. Suffredini agreed that a person who is "stable to go home" would be able to "get up and walk out on their own." Dr. Suffredini also testified that at 8:36 p.m., after Appellant's procedure, she entered a post-evaluation note regarding Appellant. Dr. Suffredini stated that for her to leave a patient's bedside and enter a post-evaluation note, "the patient has to be able to appropriately respond to a question."

At the time of the interview, Appellant confirmed that she was feeling alert, understanding, and able to make decisions. She was able to write and had previously completed paperwork. The interview began at 9:25 p.m., approximately 50 minutes after Dr. Suffredini entered the post-evaluation note. After reviewing the audio recording of Det. Weigman's interview with Appellant, the circuit court concluded, and we agree, that Appellant's responses to Det. Weigman's questions were "coherent, lucid, detailed, rational, [and] accurate in their detail." We likewise agree with the court that Appellant undertook a forward-looking "thoughtful analysis" of who would be available and best suited to care for her two living children while she was in the hospital. We conclude that, notwithstanding Appellant's apparent nervousness during the interview, she did not seem

[14] We note there was no evidence in the record concerning the dose of any drug that was administered to Appellant as part of her procedure.

confused or under the influence of drugs, and Appellant's demeanor and answers during the interview support a finding that her statements were voluntary, as opposed to reflecting the behavior of someone whose "will [has been] overborne . . . as a result of the use of drugs." *Hof*, 337 Md. at 597.

Nor do Appellant's other contentions that her statement was involuntary fare much better. We disagree that the hospital environment was an inherently coercive location for an interview. Although Appellant's husband was not present during the questioning, there is no evidence that she requested his presence, and Appellant had previously told hospital employees he should not be allowed in her room. The questioning itself took place in a hospital room, where civilian hospital employees freely entered, exited, and even interrupted the questioning to speak with Appellant, as opposed to a more secluded and thus potentially more coercive police interrogation room. *See Brown v. State*, 452 Md. 196, 215 (2017) (noting that in *Miranda*, the Supreme Court of the United States was "specifically concerned about providing procedural safeguards for those who are held incommunicado and cut off from the outside world."). The interview was conducted by a single officer, who was not in uniform, and was accompanied by a social worker. The interview lasted approximately one hour, and at no point was Appellant handcuffed or restrained by police. To the contrary, she was explicitly told she was not under arrest.

Nor do we agree with Appellant's characterization of Det. Weigman's demeanor as "antagonistic" or "intimidat[ing]." Although the nature of questioning was inherently uncomfortable for Appellant, a review of the recorded interview reveals that Det. Weigman's demeanor during the questioning was insufficient to render Appellant, who

was an adult woman with some college education, unable to make a voluntary statement. Moreover, we agree with the circuit court that "there were no threats, no promises, no abuse by the police," and that the tone of the interview was "quite friendly and almost sympathetic."

For these reasons, we conclude, based on a totality of the circumstances, the State met its burden of demonstrating that by a preponderance of the evidence, Appellant's statements were voluntary under both Maryland and federal law. *See Buck v. State*, 181 Md. App 585, 631–32 (2008).

IV. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTIONS.

A. The Evidence Required for Conviction

Appellant also contends that the evidence introduced at trial was insufficient for a rational jury to find her guilty of second-degree murder and first-degree child abuse. Specifically, Appellant argues that there was insufficient evidence for the jury to find, beyond a reasonable doubt, that Baby A was born alive, and that Appellant caused the infant's death. To sustain the convictions against Appellant, the State was required to introduce evidence sufficient to convince a reasonable factfinder that the infant victim was born alive. *See State v. Fabien*, 259 Md. App. 1, 40 (2023) (stating that a fetus is not a "person" under the law and noting that "one becomes a human being only when one is born alive." (internal quotation marks omitted)). In Maryland, a live birth has occurred when a baby has been completely expelled or extracted from the mother's body, and subsequently "breathes or shows any other evidence of life[.]" *See* Md. Code HG § 4-201(n).

B. The Standard of Review

"When reviewing the sufficiency of the evidence to support a conviction, we view the evidence in the light most favorable to the State and assess whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Krikstan*, 483 Md. 43, 63 (2023) (quoting *Walker v. State*, 432 Md. 587, 614 (2013)). As this Court recently reiterated:

> Our role is not to review the record in a manner that would constitute a figurative retrial of the case. This results from the unique position of the fact[-]finder to view firsthand the evidence, hear the witnesses, and assess credibility. As such, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence. Our deference to reasonable inferences drawn by the fact-finder means we resolve conflicting possible inferences in the State's favor, because we do not second-guess the jury's determination where there are competing rational inferences available.

Turenne v. State, 258 Md. App. 224, 236 (2023) (quoting *Krikstan*, 483 Md. at 63–64). Furthermore, "circumstantial evidence is entirely sufficient to support a conviction, provided the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused." *Id.* at 255–56 (quoting *Neal v. State*, 191 Md. App. 297, 314–15 (2010)). Differing reasonable inferences may arise from the evidence, and the factfinder is permitted to select from among those inferences. *See Smith v. State*, 415 Md. 174, 183 (2010). A reviewing court may not "second-guess the jury's determination where there are competing rational inferences available." *Id.*

C. The Parties' Contentions

Appellant argues that the evidence is insufficient to prove that her child was born

alive due to the testimony of the witnesses in this case. Specifically, Appellant notes that the medical examiner, Dr. Mourtzinos, testified that various test results from the autopsy were "consistent with" live birth, but then agreed at trial that there are "situations where [she] might make a finding that is consistent with live birth, but also consistent with stillbirth." Appellant also points to the fact that Dr. Mourtzinos agreed that CPR could cause aeration of the lungs and did not personally observe the baby's body in the period between its birth and arrival at the medical examiner's office, instead relying on others to inform her that there had been no CPR attempted. Additionally, Appellant characterizes Dr. Mourzinos as "discount[ing] the presence of an infection in the baby's pancreas and decomposition around the umbilical cord."[15] Appellant contrasts Dr. Mourzinos' testimony with that of the defense experts, who opined that the results of the autopsy were consistent with both live birth and stillbirth.

The State disagrees and asserts that the jury had sufficient evidence to return a finding of guilty for both counts. Specifically, the State highlights Dr. Mourtzinos' determination that to a reasonable degree of medical certainty, the baby was born alive, that the child's lungs were aerated, and that the cause of death was asphyxia and exposure,

[15] In so arguing, Appellant conflates several different medical terms. At trial, Dr. Mourtzinos testified that "[t]here was no evidence of an overwhelming infection" in the infant's body. She did note that pancreatic *inflammation* was discovered during the autopsy, and that such inflammation "has been linked to asphyxial deaths in infants." Additionally, Dr. Mourtzinos never testified to observing decomposition in the umbilical cord, although she did observe inflammation. Dr. Mourtzios also agreed that she did not observe "any signs of decomposition in the baby." Appellant is, however, correct that Dr. Mourtzinos did not believe that these findings prevented her from making her final determination of live birth and homicide.

and that the death was a homicide. Additionally, the State argues that Appellant's behavior in concealing the pregnancy, birth, and body of the baby allowed the jury to determine that the baby was born alive, and Appellant caused his death.

D. The Sufficiency of the Evidence

Here, viewed in the light most favorable to the State, the evidence was sufficient for a rational jury to find all essential elements of the crimes for conviction. *See State v. Suddith*, 379 Md. 425, 429 (2004). In determining that Baby A was delivered alive, and that Appellant caused Baby A's death, the jury could consider the testimony of Dr. Mourtzinos that to a reasonable degree of medical certainty the child was born alive, and that the cause of death was homicide caused by asphyxiation and exposure. Additionally, the jury could consider that a wide variety of tests were conducted by Dr. Mourtzinos before arriving at her conclusion, and that she did not consider any single test to be dispositive. The jury was likewise able to evaluate Appellant's statements to Det. Weigman. During that interview, Appellant stated that she had hidden the pregnancy from her husband, did not seek medical assistance with the pregnancy or birth, and after giving birth, had wrapped the baby in a towel, placed him in a bag, placed the bag in the closet, and shut the door. In the same interview, Appellant stated that after the baby was born, she did not inform anyone, did not try to call emergency services, did not try to provide care to the baby, and "didn't really look at the baby that closely." These and other facts permit inferences sufficient for a reasonable factfinder to determine that Appellant caused her baby's death. *See Smith*, 415 Md. at 183.

Appellant's presentation of an alternate narrative and the testimony of experts

reaching different medical conclusions does not alter that, in the light most favorable to the State, the record evidence was sufficient for a rational jury to find that Appellant's child was born alive, and that her actions caused his death. *See Suddith*, 379 Md. at 429. Therefore, we conclude the evidence was sufficient for the jury to return guilty verdicts on both counts.

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

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0925s22cn.pdf