UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 995

September Term, 2016

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CLARENCE WILLIAM CROPPER

v.

STATE OF MARYLAND

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Meredith,
Reed,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

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Opinion by Davis, J.

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Filed: June 7, 2017

Appellant, Clarence William Cropper, was charged by criminal indictment in the Circuit Court for Worcester County and subsequently convicted of sex abuse of a minor, sex offense in the second, third and fourth degrees and assault in the second degree in the Circuit Court for Worcester County (Groton, J.). Appellant was sentenced to 18 years' imprisonment. The instant appeal followed, where appellant posits the following questions for our review, which we reorganize:

1. Did the trial court err in finding [J.A.] competent to testify?

2. Did the trial court err by admitting inadmissible hearsay?

3. Was the evidence legally sufficient to convict [appellant]?

## FACTS AND LEGAL PROCEEDINGS

On October 10, 2015, D.P. visited his sister, K.W. and her three children, including the complainant, J.A., who was four years old at the time. Ms. W. and her children resided in a house with several adults, including appellant. During the visit, when Mr. P., who is wheelchair bound, wheeled himself out of the living room and into the first-floor hallway to discard something in the trashcan, he noticed appellant and J.A. sitting on the steps. He testified, "They were just sitting there," whereupon he asked J.A., "What you doing?" J.A. smiled in response and Mr. P. testified that he did not hear J.A. or appellant say anything. Appellant then went upstairs and J.A. continued downstairs to the living room with Mr. P.

Mr. P. then asked Ms. W. to push him outside where he recounted to Ms. W. that he saw appellant and J.A. sitting together on the steps and that it seemed "funny" to him. Ms. W. called J.A. outside and questioned her. She asked J.A. what she was doing on the steps

with appellant and J.A. responded, "Nothing." In response to Ms. W.'s third inquiry as to whether "Uncle Clarence touch[ed] you," J.A. replied, "No." When Ms. W. asked J.A. a fourth time, she responded, "[H]e was playing with my cootchie." Ms. W. called the police and took J.A. to a hospital to be examined.

After the medical examination, Tammy Jones, a licensed social worker with the Worcester County Department of Social Services at the Child Advocacy Center, interviewed J.A. Although she typically only interviews children once, Ms. Jones interviewed J.A. again on November 10, 2015 "to get some clarification" and, because on the day of the first interview, J.A. had been at the hospital all day and it was approximately 8:00 p.m. before Ms. Jones first had an opportunity to speak with her.

***§ 11–304(c) Hearing***

On January 5, 2016, the court held a hearing to determine whether a video of J.A.'s November 10, 2015 interview was admissible under Maryland Code § 11–304 of the Criminal Procedure Article (C.P.), also known as the "Tender Years Exception."[1]

During Ms. Jones' direct examination at the hearing, the State played the video of the November 10th interview for the court. During the interview recorded in November, J.A. helped Ms. Jones draw a face that included eyes, a nose, a mouth, and hair. J.A. indicated, on the drawing, that hands should be placed outside the face and she later drew fingers on the hands. J.A. correctly identified several members of her household at the time.

[1] Amended by 2017 Maryland Laws Ch. 161 (S.B. 944).

J.A. was able to identify all of the body parts on the diagram of a boy and a girl and she stated that she is a girl. When Ms. Jones asked if there were body parts that people are not supposed to touch and what J.A. meant when she replied, "Nobody," J.A. volunteered, "Uncle Clarence just touch it." J.A. then clarified what she meant by "it" by pointing to the vaginal area (which she called a "cootchie") on the diagram of the girl and agreeing that appellant touched her coochie. When Ms. Jones asked what body part appellant used to touch her, J.A. said his "stuff," her word for penis. When asked if appellant touched her with anything else on his body, J.A. raised her index finger and said, "finger."

When Ms. Jones asked whether appellant said anything when he touched her, J.A., imitating a deeper voice, said that appellant said, "[Y]ou're not getting no gum," and "Well, you're not going with me to McDonald's." Jones testified that J.A. answered, "no," when asked whether she knew the difference between the truth and a lie. However, there was confusion about J.A.'s response when Jones asked her, "So [] everything you've told me today, has it been the truth?" The transcript indicated no response, verbal or otherwise. Jones, however, insisted that J.A. gave a slight affirmative nod. The trial judge replayed the relevant portion of the tape three times and, at one point, said, "I'm going to have to get closer. Because from here, I can't see any nod." Ultimately, the motions court found as a fact that J.A. gave an affirmative nod in response to the question. Toward the end of the interview, Ms. Jones held up a pink marker and asked, "If I said this color is black, would that be the truth or a lie?" J.A. responded, "A lie."

On cross examination, Ms. Jones testified that J.A. was confused about the days of

the week and which body parts belong on the face. Ms. Jones also testified that J.A. said that the alleged assault happened at Aunt S's house. However, Ms. W. testified that J.A. and appellant were at home on October 10th and that Aunt S. was a neighbor.

At the hearing, Ms. W. testified that she sent J.A. upstairs to get a diaper for the baby shortly after appellant came home. J.A. was gone for about five minutes. Ms. W.'s brother, Mr. P., then asked her to wheel him outside. Once outside, Mr. P. told Ms. W. what he saw, *i.e.*, "And I don't know what they was doing, but it didn't seem right." Ms. W. then called J.A. outside and began questioning her. The following testimony ensued:

> So I—so [J.A.] came. She popped up. And I'm like, [J.A.], I said, what happened? She was like, nothing. So I pull her out. I closed the door. I'm like, [J.A.], I said, what was you and Uncle Clarence doing on the steps. And then she was like, no, that's not what happened. I was like—I said, [J.A.], did Uncle Clarence touch you? She was like, no. I asked her three times, and she told me no.
>
> Being that she's four and she's not in school yet, so I'm like, okay, so I'm thinking of a way I can ask her what happened without telling her what happened. So I was like, okay, I said, [J.A.], what was you and Uncle Clarence doing on the steps? And she plainly stated that he was playing with my cootchie. I didn't ask her did he touch any body part. I just said, what was you all doing on the steps, and that's what she stated.

Ms. W. explained that "cootchie" is what J.A. calls her genitals.

Afterwards, Ms. W.'s friend came over and engaged in a fight with appellant. Ms. W. took J.A. to the police station and then to a hospital where J.A. was interviewed by Ms. Jones.

Upon the conclusion of the aforesaid testimony and argument by the State and defense counsel, the court ruled that the video recording was admissible under C.P. § 11–

304(c). The motions judge also found that it was not necessary for him to examine J.A. in order to rule that the statement was admissible.

***The Trial***

Appellant elected to have a bench trial, which commenced on April 28, 2016. The first witness called by the State was Mr. P. who testified that he saw J.A. and appellant sitting on the eighth or ninth step of the staircase and that appellant had his arms around J.A. When appellant saw Mr. P., he reacted in a "scared" and "paranoid" fashion, "like he was doing something." After instructing J.A. to go downstairs, Mr. P. questioned her about what was going on, but she "teared up a little bit" and "act[ed] like she wanted to cry."

The next witness for the State was Ms. W. whose testimony mirrored her testimony at the C.P. § 11–304 hearing on January 5, 2016. However, her testimony about J.A.'s out-of-court statements differed:

> [K.W.]: When I asked her what was happening, she seemed like kind of shy, like she didn't want to tell me. So then like I asked her in a different way. I was like so—I was like so—I said, so what was your Uncle Clarence doing on the steps? She told me like nothing three times. I was like okay.
>
> Well—I was like, well, what happened, you know, while he was on the steps. And then she—she was like—she told me—she did this, told me to come here, and she whispered in my ear, he was playing with my cootchie, was her exact words.

Immediately thereafter, defense counsel objected and moved to strike that portion of Ms. W.'s testimony on the grounds of inadmissible hearsay. The prosecutor replied that it was admissible hearsay under the prompt report of sexual assault exception. The trial court overruled the objection. Ms. W. testified that J.A. was wearing jeans that day. She

also testified that she conducted her own examination of J.A.'s genitalia at home before taking her to the police station and a hospital. Ms. W. noted a scratch near J.A.'s clitoris.

The next witness to testify was J.A. She was five-years-old at the time of her testimony. The prosecutor began by asking J.A. simple questions. She struggled with some of the answers. J.A. did not know her last name or her birthday. When the prosecutor asked, "Do you know your numbers," J.A. replied, "ABC." The prosecutor asked J.A. whether she went to school and she initially indicated yes. However, she could not tell the prosecutor the name of her school or where it was located. Later, J.A. testified that she did not go to school. J.A. was also confused about with whom and where she lived,[2] although the State contends that she was not confused about where she lived.

The prosecutor asked J.A. if she knew what the truth was and J.A. responded in the negative. Defense counsel objected to J.A. testifying any further on the grounds that she did not understand what it meant to tell the truth, *i.e.*, that she was not a competent witness. However, the trial court overruled the objection. Again, J.A. testified that she did not know what it meant to tell the truth. Moreover, in answering the prosecutor's question as to what she thought "it means [to tell the truth]," J.A. replied, "I don't know." However, J.A. testified that she understood that she had to tell the truth when the prosecutor asked her questions. When asked if her pants were black, J.A. nodded yes. When the prosecutor asked

[2] She testified that she lived with her Aunt N. However, Ms. W., her mother, testified that she did not. J.A. also testified that she never lived with Uncle Clarence.

J.A. whether she (the prosecutor) was wearing pink or black, J.A. correctly answered "black."

J.A. also correctly identified various body parts on diagrams of a girl and boy during her testimony. She also testified that appellant touched her "cootchie" on the steps of the house and referred to the diagram of a boy to indicate that appellant had touched her with his penis and finger.

However, the following colloquy occurred:

> [Prosecutor:] Okay. When you tell us that Uncle Clarence touched your cootchie, is that the truth?
>
> [Defense counsel:] Objection.
>
> [J.A.] No.
>
> [Prosecutor:] Did that really happen?
>
> [J.A.]: (Making noise into the microphone.)
>
> [Prosecutor:] [J.A.] Did that really happen?
>
> [J.A.] (Shaking [her] head indicating no.)
>
> [Prosecutor:] No?
>
> [J.A.] Un-uh.
>
> [Prosecutor:] So did Uncle Clarence not touch your cootchie?
>
> [J.A.] Un-uh.

After this testimony, the prosecutor concluded her questioning and defense counsel moved to strike J.A.'s testimony on the grounds that she was incompetent. The trial court

reserved ruling; however, the trial court never definitively ruled on J.A.'s competence. Defense counsel did not cross-examine J.A.

Following J.A.'s testimony, Ms. Jones testified. The video of the November 10th interview was admitted into evidence and played in court. Ms. Jones also testified that she felt J.A. understood her and could communicate with her and that it is common for children her age not to understand the terms "truth" and "lie."

Finally, Althea Foreman, the sexual assault forensic examiner (SAFE) registered nurse testified that J.A. recounted the alleged sexual assault:

> She said that her Uncle Clarence had told her, come here, [J.A.] and that he had put his finger on her cootchie, and then he put his stuff[3] by her cootchie . . . then put his stuff back in his pants.

Before Ms. Foreman recounted J.A.'s words, defense counsel objected on the grounds of inadmissible hearsay. The prosecutor argued that it fell under the prompt report of sexual assault exception. The trial court overruled the objection. Ms. Foreman further testified that she examined J.A. and observed an abrasion, a quarter of a centimeter in length, to the side of J.A.'s clitoris. Ms. Foreman could not tell when the abrasion occurred, but that the appearance and color of the abrasion, *i.e.* bright red, indicated that it was sustained recently. She did not testify as to what caused it, but did consider it an abnormal

[3] At the November 10, 2015 interview with Tammy Jones, J.A. referred to a penis as "his stuff." Additionally, Ms. Foreman testified that J.A. used the word "stuff" in referencing a penis.

finding. Ms. Foreman also testified that the results of her examination were consistent with J.A.'s statement:

> It is consistent simply because the labia majora, especially an adolescent [sic] child that is four or five years old, those lips are protective. They are protective in all females from the time they are born until the time they're older. But they are tight, and they cover the clitoris very tightly. So to get down inside of that area, that area would have had to be opened and opened with some type of force.

Finally, the State rested and the defense moved for a judgment of acquittal. The trial court denied the motion and found appellant guilty on all five counts. In rendering the verdict, the trial judge stated:

> I'm not really relying on [J.A.'s] testimony today. It comes quite some time after the alleged incident. And, you know, the record, the typed record, will not clearly reflect the challenge that the witness posed to the prosecutor in terms of climbing in and out of the chair, making noises into the microphone, playing with the various things, making contradictory statements, and so forth.
>
> But considering the—which I think the Court can properly do, her—what I would say, it was a prompt complaint to her mother shortly after the alleged incident, the testimony which—not the testimony, but the statements that she made to Ms. Jones and to Ms. Foreman, as well as the physical evidence observed by [J.A.'s] mother, [and] Ms. Foreman, I am satisfied beyond a reasonable doubt that the Defendant is guilty with respect to all of the offenses, so we'll enter guilty verdicts as to all counts.

On July 18, 2016, appellant was sentenced to 18 years' imprisonment for sex abuse of a minor by a household member, with credit for time served since October 10, 2015. The court also sentenced appellant to 18 years' imprisonment for sex offense in the second degree, to be served concurrently. The convictions for sex offense in the third and fourth degrees, as well as the conviction for assault in the second degree, were merged with the second-degree sex offense conviction. The court also ordered lifetime registration as a sex

offender and, at the request of the prosecution, that appellant have no contact with the victim as a condition of his lifetime supervision. Finally, the court noted that, because it was crime of violence, appellant must serve at least fifty percent of his sentence before becoming eligible for parole.

Appellant filed a notice of appeal on July 19, 2016 and the instant appeal followed.

## DISCUSSION

### I.

Appellant first contends that the trial court erred in finding J.A. competent to testify. Appellant asserts that J.A. struggled with differentiating between the concepts of "truth" and "falsehood." In addition, appellant maintains that J.A. "demonstrated her total inability to understand basic questions" and that "her answers exhibited confusion and were riddled with inconsistencies." Specifically, appellant points to J.A.'s answers concerning whether she attends school, what her last name is, how she spells her first name, where she lives or with whom she lives. Finally, appellant asserts that the trial court's error is not harmless. Appellant contends that "[J.A.'s] testimony was the only testimony on this record as to the *corpus delicti*" and it also "corroborated [J.A.'s] hearsay statements[.]" Appellant asks us to reverse the ruling of the lower court.

The State responds that appellant has failed to preserve for review part of his contention and that "there was no abuse of discretion with respect to any of the claims." Specifically, the State asserts that appellant failed to preserve for review the issue of whether the trial court erred by not making a preliminary determination of J.A.'s

competence. However, the State maintains that, if preserved, the trial court was not required to make a preliminary ruling. The State also argues that J.A. satisfied the threshold for competency: "J.A.'s testimony demonstrated that she had 'intelligence enough to make it worthwhile' for the trial court to hear her and that she felt 'a duty to tell the truth.'" Finally, the State avers that, if the trial court erred in finding J.A. competent to testify, the error was harmless because the court stated it was not relying upon J.A.'s testimony to support appellant's convictions, *i.e.*, appellant was not prejudiced.

As a preliminary matter, we address the State's contention that appellant has failed to preserve the issue of preliminary competency ruling for our review. Upon our reading of appellant's brief, we do not agree with the contention that the trial court erred by not conducting a preliminary ruling. Although appellant states in his argument that, "where a party raises a substantial question as to the competency of another party's witness, the trial court must make a preliminary determination as to whether the witness is competent to testify," appellant includes this in the legal basis of his analysis and does not assert this as a contention on appeal. Appellant does note that the court reserved ruling on J.A.'s competence, ultimately not ruling expressly on the matter, but this is in the context of appellant's assertion that the trial court's error was harmful:

> Instead of immediately ruling on [J.A.'s] competence, the trial court allowed [J.A.] to testify for hours. Accordingly, the court's assertion that the court did not consider [J.A.'s] testimony in the court's ruling is not consistent with normal human reasoning, however much one might try. Accordingly, this trial court's ruling must be reversed.
>
> Therefore, the State's assertion that appellant made the contention is erroneous,

much less that appellant failed to preserve it. We now address appellant's contentions that the trial court erred in finding J.A. competent to testify.

"The determination of a child's competence is within the sound discretion of the trial judge. Absent an abuse of discretion, that determination will not be disturbed on appeal." *Perry v. State*, 381 Md. 138, 149 (2004). The method of determining a child's competency is also within the court's discretion. *Id.* at 157. However, "[a] competency determination, based upon the application of a test, requires that the trial court make findings of fact. . . . We apply the 'clearly erroneous' standard of review to that factual finding." *Jones v. State*, 410 Md. 681, 699 (2009).

Under Maryland law, there is a legal presumption that a witness is competent. MD. RULE 5–601; *Perry*, 381 Md. at 152 (citation omitted). In a criminal trial, "the age of a child may not be the reason for precluding a child from testifying." MD. CODE ANN., CTS. & JUD. PROC. § 9–103. "Rather, the test is 'whether the witness has intelligence enough to make it worthwhile to hear him [or her] at all and whether he [or she] feels a duty to tell the truth.'" *Perry*, 381 Md. at 148 (citations omitted). "The trial court must determine the child's 'capacity to observe, understand, recall, and relate happenings while conscious of a duty to speak the truth.'" *Id.* at 149.

The *Perry* Court distilled the essential requirements in determining a child's capacity to testify as follows: "(1) capacity for observation; (2) capacity for recollection; (3) capacity for communication, including ability 'to understand questions put and to frame and express intelligent answers;' and, (4) a sense of moral responsibility to tell the truth."

*Id.* at 149 (citation omitted).

Significantly, "[a] child's competency is not affected by the fact that the child makes contradictory statements on the witness stand." *Id.* at 149 (citations omitted). In *Bruce v. State*, 96 Md. App. 510, 520–21 (1993), "[a]lthough the victim did give a handful of 'wrong' answers," this Court held that "the record . . . demonstrate[d] that the victim understood and appreciated the importance of telling the truth." This Court further noted:

> His responses demonstrated that he was able to distinguish between the truth and a lie, that he was intent on telling the truth, and that he was unwilling to tell a lie even at the behest of adults. Under these circumstances, the trial court did not abuse its discretion in allowing the victim to testify.

*Id.* at 521–22.

In *Matthews v. State*, 106 Md. App. 725, 741 (1995), we upheld the circuit court's ruling that the child witness was competent to testify, reasoning that

> [t]he child responded affirmatively to the court's questions regarding whether she knew the difference between telling the truth and telling a lie. She promised to tell the truth. The court also allowed both the prosecutor and defense counsel to *voir dire* the child. After the *voir dire*, and after the court heard arguments, the court determined that the child understood the difference between telling the truth and not telling the truth. We perceive neither abuse nor error.

In *Jones v. State*, 68 Md. App. 162 (1986), however, we held that the child witness was incompetent to testify. The child only verbally responded twice to questions; she did not otherwise respond at all or only gestured with her head. *Id.* at 164–65. She indicated non-verbally that she did not understand what "telling the truth was. *Id.* at 164. The prosecutor followed up the query: "[W]hat happens if you—if you tell somebody something that is wrong? Some make believe or pretend answer?" to which the child

witness responded: "Make believe." *Id.* The child indicated that it was not "wrong" to "make believe," but did not respond when asked by the prosecutor: "Do you understand what I mean when I ask you that?" *Id.* When asked if it was "alright to play make believe here," the child indicated that it was not. *Id.* However, when asked if she would be able to provide the same answers that she previously provided to other adults, the child witness shook her head and then did not respond at all when asked if she remembered the answers. *Id.* at 164–65. As this Court determined, in reversing the trial court's decision, the child

> demonstrated [a] total inability to understand basic questions. Her answers exhibited confusion and were riddled with inconsistencies. Young [S] displayed an inability to communicate in any meaningful manner. She failed to exhibit an understanding or an appreciation of her obligation to tell the truth or, indeed, its very meaning.

*Id.* at 167–68.

In the instant case, while J.A.'s testimony was imprecise and her *voir dire* examination was sketchy, the record does support the proposition that J.A. was able to communicate, during her testimony, appellant's precise acts that constituted the offenses with which he was convicted, *i.e.*, sexual abuse of a minor and sexual offense in the second, third and fourth degrees and second-degree assault. Citing *Jones, supra,* appellant asserts that J.A.'s "trial testimony 'demonstrated her total inability to understand basic questions' and 'her answers exhibited confusion and were riddled with inconsistencies.'" However, unlike the child witness in *Jones,* J.A. was able to engage in communication that conveyed meaning, specifically her understanding of her obligation to tell the truth. Although J.A. responded negatively when asked by the prosecutor if she knew what the "truth" is, she

testified that she understood that she was required to tell the truth when answering questions in court. In furtherance of this understanding, J.A. answered correctly that the color of her pants was black. She was also able to correctly answer, when asked, if the prosecutor was wearing the color pink or black, that she was also wearing black.

Furthermore, the record does not illustrate that she demonstrated a "total inability to understand basic questions"; rather, she was able to understand and answer basic questions, *i.e.*, she correctly answered questions concerning her first name, her age, the names and ages of her siblings and where she lived at the time of the trial.[4] However, J.A. also lacked knowledge about some questions or answered them incorrectly. She did not know her last name or her birthday. She responded "ABC" when asked to recite "numbers." J.A. also initially testified that she attended school, but was unable to state the name of the school or where it was located and subsequently recanted her earlier testimony, stating that she did not attend school.

However, J.A. demonstrated an ability to understand and correctly answer substantive questions. When presented with diagrams of the male and female bodies and the corresponding body parts, she was able to testify that appellant touched her "cootchie" with his finger and penis and she was able to designate the body parts on the diagrams presented to her. Yet, J.A. was unable to answer some questions correctly; *i.e.*, without reference to the diagrams, J.A. responded in the negative to questions posed by the

[4] Appellant asserts that J.A. was confused concerning where she lived, but, as the State points out, J.A. testified correctly as to where she lived at the time of the trial.

prosecutor concerning whether or not appellant sexually abused her:

> [Prosecutor]: Okay. When you tell us that Uncle Clarence touched your cootchie, is that the truth?
>
> ***
>
> [J.A.]: No.
>
> [Prosecutor]: Did that really happen?
>
> [J.A.]: (Making noise into the microphone).
>
> [Prosecutor]: [J.A.], did that really happen?
>
> [J.A.]: (Shaking head, indicating no).
>
> [Prosecutor]: No?
>
> [J.A.]: Un-uh.
>
> [Prosecutor]: So did Uncle Clarence not touch your cootchie?
>
> [J.A]: Un-uh.

To be sure, there were, in fact, some inconsistencies in J.A.'s answers and testimony. Notwithstanding, we are persuaded that the trial court properly exercised its discretion in its determination that J.A. was competent to testify. "A child's competency is not affected by the fact that the child makes contradictory statements on the witness stand." *Perry*, 381 Md. at 149. The fact that J.A. was four years old when the matter at hand occurred and exhibited difficulty in understanding "the truth" is also not dispositive. A child's understand of what constitutes "the truth" is not determinative of his or her competence to testify; rather, a child's "sense of moral responsibility to *tell the truth*," *i.e.*,

right from wrong, is determinative. *Id.* J.A. expressly testified that she understood that she had to provide truthful answers to the prosecutor's questions and demonstrated truthful answers in furtherance of that understanding. Accordingly, we hold that the trial court, in its determination that J.A. was competent to testify, did not abuse its discretion or err in its factual finding.

**II.**

Appellant next contends that several forms of hearsay were admitted improperly in the instant case. The State responds that appellant has not preserved the hearsay issues and, if preserved, they are nevertheless "unavailing."

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MD. RULE 5–801. Rule 5–802 provides that, "[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." In general, appellate courts defer to the lower court's discretion in reviewing admissibility of evidence, however, "[h]earsay, under our rules, must be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is 'permitted by applicable constitutional provisions or statutes.'" *Shelton v. State*, 207 Md. App. 363, 375 (2012) (quoting *Bernadyn v. State*, 390 Md. 1, 8 (2005)). Therefore, "[w]hether evidence is hearsay is an issue of law that we review *de novo*, as is whether hearsay evidence properly was admitted under an exception to the rule against hearsay." *Muhammad v. State*, 223 Md. App. 255, 265–66 (2015).

***J.A.'s Statements to her Mother and the SAFE Nurse***

Appellant asserts that the trial court erred in admitting J.A.'s statements about the alleged sexual assault that were made to her mother, Ms. W., and the SAFE nurse, Ms. Foreman, because they were inadmissible under the proffered hearsay exception, *i.e.*, prompt report of sexual assault hearsay, as articulated in Md. Rule 5–802.1(d). Appellant's rationale is that J.A. was not competent to testify and, therefore, "any cross-examination would have been meaningless." Appellant also argues that J.A.'s trial testimony was not consistent with her out-of-court statements, as is required under the Rule. Finally, appellant argues that the statements made to her mother and the SAFE nurse should not be admitted as evidence under the hearsay exception because her statements "went beyond the boundaries of the hearsay exception to include narrative details of the complaint."

The State first responds that appellant has not preserved, on the instant appeal, the issues concerning the statements J.A. made to her mother and Ms. Foreman. At trial, the State maintains, appellant objected to Ms. W.'s testimony as "hearsay," adding that the hearsay exception invoked, *i.e.*, prompt complaint of a sexual offense, is analogous to an excited utterance and, therefore, J.A.'s statement to her mother was inadmissible because it was not "spontaneously given at the time of the incident. There was time to reflect, is our objection."

However, the State argues that, if they have been preserved for our review, J.A.'s statements to her mother and the SAFE nurse were offered into evidence pursuant to Md. Rule 5–802.1(d), which permits the admission of a hearsay statement as evidence, as an

exception for a "prompt complaint of sexually assaultive behavior." In citing a Ninth Circuit Court of Appeals opinion, *Walters v. State*, 122 F.3d 1172, 1175 (1997) (quoting *Delaware v. Fensterer*, 474 U.S. 730, 739 (1985)), the State asserts that, "even testimony that is 'marred by forgetfulness, confusion, or evasion' satisfies the Confrontation Clause so long as 'the defense is given a full and fair opportunity to probe and expose those infirmities through cross-examination.'" Finally, regarding the issue of narrative detail in the statements, the State asserts that appellant did not identify the "allegedly offending parts of the statements" and the case law appellant cited illustrates that there was no error in the case *sub judice.*

As a preliminary matter, we address the issue of preservation. "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" MD. RULE 8–131(a). A contemporaneous objection is required to preserve the issue for our review and "[t]he grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs." MD. RULE 4–323(a). "Where a party specifies the grounds for objection, as appellant did at the trial below, he is bound to that ground and waives any other objections not stated." *Braxton v. State*, 57 Md. App. 539, 556 (1984) (citation omitted).

In the instant case, appellant's trial counsel provided the following grounds for objection to admission of Ms. W.'s testimony concerning J.A.'s statements to her:

DEFENSE COUNSEL: Objection. We would move to strike. That's hearsay.

PROSECUTOR: Your Honor, that's a prompt report of a sexual assault, which is admissible hearsay.

THE COURT: Do you want to be heard?

DEFENSE COUNSEL: Yeah. I don't think it is a prompt report because—had she said it initially—she said, nothing, nothing, nothing, I believe was the comments. And then there was further inquiry, which takes it away from the promptness of the report or—which is analogous to an excited utterance. It's like saying, I didn't run the—I didn't run the red light, and then turn around later and saying, well, I admit I ran the red light. That's not a prompt—that's not an excited utterance spontaneously given at the time of the incident. There's time to reflect, is our objection.

THE COURT: Well, I think we're—I think we're combining two objections, it sounds to me like.

DEFENSE COUNSEL: We're making one objection, but we're combining two rules of evidence to analogize, for the Court's benefit, in construing one rule of evidence.

THE COURT: Okay. Thank you. Overruled.

Regarding Ms. Foreman's testimony concerning the statements J.A. made to her, appellant's trial counsel offered the following grounds for objection:

DEFENSE COUNSEL: Objection. That would be hearsay.

THE COURT: Do you wish to be heard?

PROSECUTOR: It would still be a prompt report of sexual assault, Your Honor. The window is still 24 to 28 hours, I think, according to case law, so we're still within that time frame.

THE COURT: [Defense Counsel], anything else?

DEFENSE COUNSEL: Just ask the Court to rule on the objection.

THE COURT: Okay, overruled.

The above illustrates that appellant objected to Ms. W.'s testimony because of a lack of "promptness," as counsel characterizes it, and objected to Ms. Foreman's testimony because it was simply "hearsay." Our review of the record discloses that appellant did not object to the testimony of either Ms. W. or Ms. Foreman based on J.A.'s lack of competence, the ineffective nature of cross-examination or the lack of consistency between J.A.'s trial testimony and the statement made to her mother. Therefore, the issue appellant raises on appeal has not been preserved for our review. Furthermore, appellant does not request that we exercise our discretion to review the issue for plain error. We decline to exercise our discretion *sua sponte.*

Assuming, *arguendo*, that appellant had preserved the issue our review, we are not persuaded that the trial court erred in admitting the testimony of either Ms. W. or Ms. Foreman concerning the out-of-court statements that J.A. made about the incident. We explain.

Md. Rule 5–802.1 provides that "statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule" under certain situations. Subpart (d) provides one such situation for the "prompt complaint of sexually assaultive behavior to which the declarant was subjected [provided that] the statement is consistent with the declarant's testimony[.]"

The hearsay exception for the prompt report of sexually assaultive behavior is subject to certain limitations:

> 1) the requirement that the victim actually testify; 2) the timeliness of the complaint; and 3) the extent to which the reference may be restricted to the fact that the complaint was made, the circumstances under which it was made, and the identification of the culprit, rather than recounting the substance of the complaint in full detail.

*Muhammad*, 223 Md. App. at 269 (quoting *Nelson v. State*, 137 Md. App. 402, 411 (2001)).

> [T]he required consistency between the declarant's 'statement . . . of prompt complaint' and 'the declarant's testimony' contemplates a substantive consistency between 1) the content itself of the out-of-court statement and 2) the content of the trial testimony. Are the two stories themselves compatible? The concern is not with whether the victim can now, as a witness, accurately recall the details of precisely when and where and to whom her earlier declaration was made.

*Nelson*, 137 Md. App. at 413.

In the instant case, appellant argues that J.A. was incompetent to testify and, therefore, any cross-examination would have been meaningless. However, as discussed, *supra*, in Part I, the trial court found her competent to testify and our analysis affirms the trial court's decision. Furthermore, J.A. testified at trial, affording appellant an opportunity to cross-examine her, which he declined. Although appellant provides, in a footnote in his brief, a protracted excerpt from a law review article analyzing the trial strategies of not cross-examining a child witness, it does not alter the fact that J.A. was found to be a competent witness and was available for cross-examination at trial. Therefore, appellant's first assertion is without merit.

Appellant also argues that J.A.'s statements and her trial testimony were inconsistent. We disagree. Consistency, for purposes of Md. Rule 5–802.1(d), means a substantive consistency. As we articulated in *Nelson, supra*, we need to determine if "the

two stories are compatible[.]" We are persuaded that they are. Although there may have been inconsistencies within J.A.'s trial testimony, overall, she testified consistent with her out-of-court statements made to her mother and the SAFE nurse. J.A. testified that appellant touched her "cootchie" and indicated, *via* anatomic diagrams, which body parts were touched on her body, *i.e.*, genitals, and with which body parts appellant used to touch her, *i.e.* his penis and finger. She testified that their clothes were "on" during the incident and that the incident occurred on the "steps", which is consistent with her out-of-court statements.

In arguing that J.A.'s testimony was inconsistent with her statements, appellant offers two instances. First, he notes J.A.'s response in the negative to the question whether appellant touched her "cootchie," which occurred at the end of her direct examination. Second, appellant notes that, when asked how old she was at the time of the incident, J.A. responded "one," notwithstanding that her out-of-court statements concerned the incident when she was four-years-old. Starting with the last instance, we note that the record illustrates that she was loosely referring to how many times appellant had touched her genitals. When J.A. responded "one," the prosecutor asked, "one time?" The transcript indicates that J.A. provided a non-verbal answer, nodding her head, "indicating yes." This instance that appellant cites is actually consistent with J.A.'s out-of-court statements. Regarding the first instance when J.A. responded in the negative to a question as to whether appellant touched her genitals, we note that, while her trial testimony was imperfect and, at times, internally inconsistent, Rule 5–802.1(d) is concerned with the external,

substantive consistency between the out-of-court statements and J.A.'s trial testimony. We are persuaded that there was sufficient substantive consistency to satisfy the requirements of Rule 5–802.1(d).

Appellant's third claim as to why the statements should have been excluded is that there was too much narrative detail. As the State notes, appellant fails to provide any examples of narrative detail from the statements that "went beyond the boundaries of the hearsay exception[.]" In support of his position, appellant asserts that the statements should be excluded because "they failed to meet the criteria for the prompt report exception." Appellant then notes that there was "no other highly persuasive evidence of appellant's guilt," that the SAFE nurse could not identify what caused the scratch near J.A.'s clitoris and that there was no testimony or evidence that J.A. was otherwise physically injured, *i.e.*, bleeding or pain. Appellant also asserts that J.A. "never alleged that Mr. Cropper scratched her or caused her any pain." We are confounded and unpersuaded by appellant's argument. Appellant failed to support his claim with relevant argument and the argument that was provided would be better served in a sufficiency of the evidence analysis.

Finally, we note that appellant's objection to the testimony of Ms. W., based on "promptness" grounds, is also without merit. Regarding the hearsay exception for prompt complaint of a sexual offense, the "only time requirement is that the complaint have been made without a delay which is unexplained or is inconsistent with the occurrence of the offense, *in general a less demanding time aspect than with the typical excited utterance exception*." *Harmony v. State*, 88 Md. App. 306, 321 (1991) (emphasis supplied) (quoting

*Cole v. State*, 83 Md. App. 279, 288 (1990)). J.A. made the statement to her mother within minutes of the incident. We are unpersuaded that the statement lacked promptness so as to not satisfy the temporal requirements of the statutory hearsay exception.

***J.A.'s Statements to the Licensed Social Worker***

Appellant also contends that J.A.'s statements about the alleged sexual assault, made to the licensed social worker at the November 10, 2015 interview, were admitted improperly as hearsay evidence. Specifically, appellant alleges that the trial court "incorrectly or inadequately" considered the C.P. § 11–304 statutory factors in ruling that the statement was trustworthy.

The State responds that appellant's argument concerning the admission of J.A.'s statement to a licensed social worker has not been preserved. However, the State argues that the "motions court carefully considered each of the factors set forth in [C.P. § 11–304] before determining that J.A.'s statements to Jones bore particularized guarantees of trustworthiness."

First, we address the issue of preservation. At the January 5, 2016 hearing, appellant, through counsel, provided the following argument as to why J.A.'s statement to Ms. Jones, a licensed social worker, should not be admitted:

> DEFENSE COUNSEL: Number one, the statement exhibits no personal knowledge of the event. The bald statement of he touched my cootchie doesn't describe where this occurred, who may have been present, what the child was wearing, the duration of this—

THE COURT: Well, that's not—that doesn't demonstrate a lack of personal knowledge. That only goes to a lack of detail.

DEFENSE COUNSEL: Okay. Well—well, that personal knowledge is in the detail is the reason I think it's not trustworthy for admissibility.

The timing of the statement was 30 days after the event. I believe 31 days to the day.

Whether the victim's age makes it unlikely, given the detailed account, beyond the child's expectation. Again, there's no detailed account, other than there was touching, as we've heard. No description of the account, the duration, the location, any details at all.

There's no pain or distress.

And there's nothing with regards to anything supportive that—that the child's version of what occurred, other than the child saying that they were touched. And the Defense's position is that makes this interview and/or statement inadmissible.

Those are my comments.

Although appellant made no objections to the admission of Ms. Jones's testimony or the recorded interview into evidence at trial, appellant argued specific grounds at the motions hearing in support of his assertion that the hearsay evidence should be excluded, *i.e.*, lack of personal knowledge, timing of the statement, the victim's age and corresponding levels of detail, lack of pain or distress suffered by the child victim. Although the grounds appellant provided are only some of the statutory factors, we are persuaded that it was sufficient to preserve appellant's contention, on appeal, that the trial court "incorrectly or inadequately" considered the statutory factors.

When ruling on the admissibility of a tape recorded interview offered into evidence

pursuant to C.P. § 11–304(f)(1), the trial judge must comply with the foundational requirements of that statute, including the requirement that the court "make a finding on the record as to the specific guarantees of trustworthiness that are in the statement[.]"

Pursuant to C.P. § 11–304(a),

> the court may admit into evidence in a juvenile court proceeding or in a criminal proceeding an out of court statement to prove the truth of the matter asserted in the statement made by a child victim who: (1) is under the age of 13 years; and (2) is the alleged victim . . . [of] child abuse under § 3–601 or § 3–602 of the Criminal Law Article.

C.P. § 11–304(c)(4) provides that such statement may be made to a social worker acting lawfully in his or her professional capacity. C.P. § 11–304(d)(2)(i) permits a child victim's statement to be admissible if the statement is not available under any other hearsay exception and the child testifies. However, subpart (d)(2)(ii) provides that, "[i]f the child victim does not testify, the child victim's out of court statement will be admissible only if there is corroborative evidence that the alleged offender had the opportunity to commit the alleged abuse or neglect."

C.P. § 11–304(e)(1) requires that, in order for a child victim's out-of-court statement to be admissible, it must possess "particularized guarantees of trustworthiness." Subpart (e)(2) outlines a non-exhaustive list of factors a trial court may consider in determining the trustworthiness of the out-of-court statement.

> (i) the child victim's personal knowledge of the event;
>
> (ii) the certainty that the statement was made;
>
> (iii) any apparent motive to fabricate or exhibit partiality by the child victim,

including interest, bias, corruption, or coercion;

(iv) whether the statement was spontaneous or directly responsive to questions;

(v) the timing of the statement;

(vi) whether the child victim's young age makes it unlikely that the child victim fabricated the statement that represents a graphic, detailed account beyond the child victim's expected knowledge and experience;

(vii) the appropriateness of the terminology of the statement to the child victim's age;

(viii) the nature and duration of the abuse or neglect;

(ix) the inner consistency and coherence of the statement;

(x) whether the child victim was suffering pain or distress when making the statement;

(xi) whether extrinsic evidence exists to show the defendant or child respondent had an opportunity to commit the act complained of in the child victim's statement;

(xii) whether the statement was suggested by the use of leading questions; and

(xiii) the credibility of the person testifying about the statement.

We review a trial court's consideration of the statutory factors under the clearly erroneous standard of review. *Reece v. State*, 220 Md. App. 309, 319 (2014) (citing *Jones*, 410 Md. at 700). A lower court's finding of fact will be overturned only when there is no evidence to legally support the finding. *See Kusi v. State*, 438 Md. 362, 384 (2014) (noting that a decision is clearly erroneous "when the credibility decision is so contrary to unexplained, unimpeached, unambiguous documentary evidence as to be inherently incredible and unreliable").

In the instant case, the motions court provided the following reasoning for admitting the statement into evidence:

> THE COURT: Well, that may go to the ultimate decision of the trier of fact, but—and I, likewise, will review the considerations.
>
> And first is the child victim's personal knowledge. I find that she did have personal knowledge. Obviously, she testified as to what her recollection was as to what occurred, so I find that to be sufficient personal knowledge.
>
> The certainty that the statement was made: Obviously it was made because we sat here and watched it [on the pre-recorded video].
>
> Any apparent motive to fabricate: There's a total lack—a total absence of anything to indicate that there was such a motive.
>
> Whether the statement was spontaneous or directly responsive to questions: Now it was directly responsive to question, but they—[Ms.] Jones was very careful and had been trained and obviously has conducted a lot of interviews and she was very careful not to lead the witness. But as a four year old, who, as you pointed out, was somewhat fidgety, she needed to direct her in a certain direction so she was able to get responses as to what was the purpose of the interview to find out if anything occurred, and if so, what did occur.
>
> The timing of the statement is somewhat—I understand why—based on Ms. Jones's knowledge, why she—why the victim wasn't questioned that particular night, which she indicated was seven o'clock. Why 30 days, I'm not sure, but I don't find that that causes the Court any problem as to the trustworthiness that the victim didn't display any lack of remembrance of what occurred.
>
> Whether the victim's young age makes it unlikely that she fabricated the statement: Certainly, as we saw demonstrated in the video, she, as a young child, was—this was not the focus of her attention. And, therefore, if it were, I think the—Ms. Jones wouldn't have to continue to direct her back to where she felt it necessary to explore what did occur. Therefore, I find that there's no indication that she fabricated the statement.
>
> The appropriateness of the terminology: Certainly as a four year old, they would be terms that would be used.

The nature and duration of the abuse or neglect is, I think, a non-issue in this case.

The inner consistency and coherence of the statement: Again, it's, I think, a non-issue.

The child victim was suffering pain or distress: I didn't—there was no evidence of that.

And the extrinsic evidence to show that the defendant had the opportunity to commit the act: Certainly there was an abundance of that based on the victim's mother, who testified that the victim and the Defendant were in the house together upstairs together, in fact, were seen next to each other on the steps. So I find that it is a trustworthy statement and is to be admissible.

As far as the determination as to the interview of the child, the Court shall examine the child victim unless the Court determines that the audio or visual recording of the child victim's statement makes an examination of the child unnecessary.

I find it hard to believe that an interview of the child by the Court would create any more determination as to her trustworthiness, which is going to last for a few minutes. Obviously, at least my viewing of the tape, the victim, early on with Ms. Jones, was clearly reserved and somewhat uncomfortable until such time as Ms. Jones was able to have her relax, gain her confidence, and they had a give and take interaction where the child did, obviously, for lack of a better word, loosen up and was able to become comfortable enough that, again, she was fidgety and in and out of the chair.

And based on that, based on her—which I should make clear for the record, I did view—when [Ms.] Jones asked, are you telling me that this—what you told me is the truth, it was a single nod. There was no indication to me that it was as a result of her putting her fingers in her mouth or in her nose or anything else. It was definitely a single nod in response to that question . . . .

So I find, as a result of viewing the video, there is not a necessity for the Court to examine the child.

As the above record excerpt illustrates, the motions court heard testimony and reviewed the physical recording several times to dispel confusion and addressed the

relevant factors as required by the statute. The judge considered the relevant factors and determined that the statement possessed the requisite "particularized guarantees of trustworthiness." Accordingly, we hold that the trial court did not err.

**III.**

Finally, appellant contends that the evidence presented was legally insufficient to sustain his convictions. He bases this contention solely on J.A.'s lack of competence to testify as well as the internal inconsistencies of her testimony, which appellant maintains, calls into question the credibility of the testimony and, thereby, its probative value. Appellant invokes the *Kucharczyk* doctrine,[5] maintaining that it is "fully applicable" in the "similarly extreme facts" of the instant case, again focusing solely upon the legal sufficiency of J.A.'s trial testimony. Appellant does not argue as to why the other evidence presented at trial was legally insufficient to support his convictions. Nor does appellant analyze any of his convictions or the elements required to support those convictions in disputing the legal sufficiency of the evidence presented.

The State responds that appellant's argument concerning the applicability of the *Kucharczyk* doctrine has not been preserved because appellant did not raise this argument in support of his motion for judgment of acquittal. However, the State asserts that, assuming that the argument has been preserved, the evidence presented is sufficient to support appellant's convictions. According to the State, the *Kucharczyk* doctrine is

[5] Kucharczyk v. State, 235 Md. 334 (1964).

inapplicable to the instant case. The State also asserts that, even if J.A.'s testimony was the only evidence presented, it would still be legally sufficient. The State also fails to analyze appellant's individual convictions and the necessary elements required to uphold each conviction in relation to the evidence presented at trial.

As a preliminary matter, we address the State's contention that appellant has not preserved for appeal his argument concerning the applicability of the *Kucharczyk* doctrine. We recently reiterated in *Chisum v. State*, 227 Md. App. 118, 129 (2016) that, "[a]fter a bench trial, appellate review of the legal sufficiency of the evidence is automatic and does not require a motion by the appellant." When we review a claim pertaining to the legal sufficiency of the evidence, we "must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Carroll v. State*, 202 Md. App. 487, 504 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Regarding the *Kucharczyk* Doctrine, our discussion in *Bailey v. State*, 16 Md. App. 83, 95–97 (1972) is particularly instructive:

> Despite the limited utility of the doctrine, the life of *Kucharczyk* has been amazing for the number of occasions on which and the number of situations in which it has been invoked in vain. *Kucharczyk* does not apply simply because a witness's trial testimony is contradicted by other statements which the witness has given out of court or, indeed, in some other trial. Nor does *Kucharczyk* apply where a witness's trial testimony contradicts itself as to minor or peripheral details but not as to the core issues of the very occurrence of the *corpus delicti* or of the criminal agency of the defendant. Nor does *Kucharczyk* apply where the testimony of a witness is 'equivocal, doubtful and enigmatical' as to surrounding detail. Nor does *Kucharczyk* apply where a witness is forgetful as to even major details or testifies as to what may seem improbable conduct . . . . Nor does *Kucharczyk* apply where a witness

> does contradict himself upon a critical issue but where there is independent corroboration of the inculpatory version. In each of those situations, our system of jurisprudence places reliance in the fact finder to take contradictions or equivocations properly into account and then to make informed judgment in assessing a witness's credibility and in weighing that witness's testimony. Even in a pure *Kucharczyk* situation, the ultimate resolution is solely in terms of measuring the legal sufficiency of the State's total case and not in terms of the exclusion of the contradictory witness's testimony.

(citations omitted).

By invoking the *Kucharczyk* Doctrine, appellant is essentially attacking, by another name, the competency of J.A. to testify, thereby averting our review of the evidence for legal sufficiency. This is particularly patent by the absence of appellant's argument and analysis concerning *all* of the evidence presented as it relates to the essential elements of the crimes for which he was convicted. *Carroll*, *supra*. As we stated in *Bailey*, *supra*, in measuring the sufficiency of the evidence, we need to look at the State's "total case." In invoking *Kucharczyk*, appellant ignores the rest of the evidence that supports his five convictions, *i.e.*, Ms. W.'s testimony, Ms. Jones' testimony, Ms. Foreman's testimony, J.A.'s out-of-court statements to her mother after the incident occurred, J.A.'s statements to Ms. Jones during the November 2015 interview and the physical evidence observed by Ms. W. and from the forensic examination.

Furthermore, appellant did not specifically raise the *Kucharczyk* Doctrine at trial. As stated, *supra*, Rule 8–131(a) delineates the scope of our appellate review and provides that, "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Appellant not

only inappropriately invoked the *Kucharczyk* Doctrine based on a claim of the sufficiency of the evidence with multiple types of evidence to analyze, but he has also failed to preserve it for our review.

However, assuming that appellant preserved his *Kucharczyk* argument, we are not persuaded by its merits. In *Kucharczyk*, the conviction was based solely upon the testimony of a 16-year-old victim with an I.Q. around 56. 235 Md. at 336, 337. During testimony, the victim denied the occurrence of the incident at three different times, *i.e.*, twice on direct examination and once during cross examination. *Id.* at 336–37. Regarding review for sufficiency of the evidence, the *Kucharczyk* Court noted that:

> Our conclusion flows from the fact that the testimony of the prosecuting witness, who was the only person that testified as to any overt act on the part of the appellant, was so contradictory that it lacked probative force and was thus insufficient to support a finding beyond a reasonable doubt of the facts required to be proven.

*Kucharczyk* is inapplicable to the instant case. As discussed extensively, *supra*, J.A.'s testimony, while imperfect, was not "so contradictory" as to render it devoid of probable value. Furthermore, J.A. was not the only prosecuting witness testifying. *Kucharczyk*, itself was a sufficiency of the evidence review because the victim's testimony was the *only testimony* of the incident. Unlike *Kucharczyk*, J.A.'s testimony was not the only testimony or evidence of the incidence. As this Court stated, in *Bailey*, even in a "pure *Kucharczyk* situation," the correct focus for a sufficiency of the evidence analysis is the *entirety of the State's case*, not the piecemeal evidentiary review in which appellant urges this Court to engage. Accordingly, we hold that the narrow *Kucharczyk* Doctrine is

inapplicable in the instant case.

Appellant provides no further argument or analysis that the evidence presented was legally insufficient to support his convictions. In his brief, appellant concludes his sufficiency of the evidence argument as follows: "Here, [J.A.'s] testimony was so contradictory that it lacked probative force. Accordingly, there was legally insufficient evidence to convict Mr. Cropper." As J.A.'s testimony was the sole focus of appellant's sufficiency of the evidence argument, he essentially ignores the entirety of the evidence presented and how it supports, *vel non*, his criminal convictions. We review *sua sponte*.

Sex offense in the second degree is outlined in Md. Code Ann., Crim. Law (C.L.) § 3–306(a)(3), which provides that "[a] person may not engage in a sexual act with another . . . if the victim is under the age of 14 years, and the person performing the sexual act is at least 4 years older than the victim." Furthermore, subpart (b) provides that "[a] person 18 years of age or older may not violate subsection (a) . . . of this section involving a child under the age of 13 years." C.L. § 3–301(d)(1)(v) defines "sexual act," *inter alia*, as "an act: 1. in which an object or part of an individual's body penetrates, however slightly, into another individual's genital opening or anus; and 2. that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party."[6]

Sex offense in the third degree, as outlined in C.L. § 3–307(a)(3), provides that "[a]

[6] C.L. § 3–301(d)(2) "Sexual act" does not include: (i) vaginal intercourse; or (ii) an act in which an object or part of an individual's body penetrates an individual's genital opening or anus for an accepted medical purpose.

person may not . . . engage in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim[.]" C.L. § 3–301(e)(1) defines "sexual contact", as it pertains to §§ 3–307, 3–308 and 3–314, as "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party."[7]

> The phrase in C.L. § 3–301(f)(1) that prohibits contact 'for sexual arousal or gratification, or for the abuse of either party' establishes a specific intent requirement. Thus, the State must prove two elements beyond a reasonable doubt: (1) the fact of the touching, and (2) the intent to do so for sexual arousal or gratification.

*Bible v. State*, 411 Md. 138, 157 (2009). The Court of Appeals in *Bible, supra*, further noted indicia that may illustrate that the accused possessed the requisite specific intent of intentional touching for sexual arousal or gratification:

> Circumstances surrounding the touching that would aid in the determination of whether it was for the purposes of sexual gratification might include whether the defendant and victim were strangers or knew each other; whether either party was undressed; whether anything was spoken between them; whether the touching occurred in public or in a secluded area; whether the defendant displayed any signs of sexual arousal; or whether the defendant behaved in nervous or guilty manner when another person came upon the scene. With respect to the touching itself, the force of the touching, the motion (was it a pat, a rub back and forth, a circular motion, a brush), the duration, and the frequency are all important. This list is not exhaustive, but merely descriptive of the type of circumstantial evidence that would be relevant.

411 Md. at 158.

Sex offense in the fourth degree is governed by C.L. § 3–308(b)(1) which provides

[7] C.L. § 3–301(e)(2) "Sexual contact" does not include: (i) a common expression of familial or friendly affection; or (ii) an act for an accepted medical purpose.

that "[a] person may not engage in sexual contact with another without the consent of the other[.]" Furthermore, "the term 'abuse' in the statute is [not] limited to physical injury. Rather, the plain language of the statute supports the conclusion that the term 'abuse' includes a touching for the purpose of physical, mental, emotional, or sexual injury." *Lapin v. State*, 188 Md. App. 57, 72 (2009).

The crime of sexual abuse of a minor is governed by C.L. § 3–602(b)(1), which provides that, "[a] parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor." C.L. § 3–602(b)(2) provides that, "[a] household member or family member may not cause sexual abuse to a minor." Under C.L. § 3–601(a)(4), a "household member" is defined as "a person who lives with or is a regular presence in a home of a minor at the time of the alleged abuse." C.L. § 3–602(a)(4)(i) defines "sexual abuse" as "an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not."

Subpart (a)(4)(ii) further provides that "sexual abuse includes: 1. incest; 2. rape; 3. sexual offense in any degree; 4. sodomy; and 5. unnatural or perverted sexual practices." "Any one of the sexual offenses satisfies the molestation/exploitation 'element' of child sexual abuse." *Twigg v. State*, 447 Md. 1, 17 (2016).

C.L. § 3–203(a), which governs the crime of second-degree assault, provides that "[a] person may not commit an assault." C.L. § 3–201(b) defines "assault" as "the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings."

In the case *sub judice*, the evidence presented supported appellant's convictions. Based on the evidence presented, J.A. was a minor at the time of the offense; stated otherwise, having been born in 2011, she was four years old when the matter under review occurred. Regarding appellant's classification as a household member, the court stated that the evidence "was clear and uncontradicted that he had been living in this residence for a period of time, that he was regularly there, that there was the regular routine that he had coming home from work," as related by the testimony of Ms. W., J.A.'s mother. There was also evidence of appellant's age in relation to the statutory age requirements.

Regarding the sexual abuse and contact, there was testimony and evidence of intentional touching and penetration of J.A.'s genital area. As Ms. Foreman testified that, the pediatric labia majora is "tightly closed" and in order to reach the underlying clitoris, whereby a scratch could occur, "the area would have had to be . . . opened with some type of force," thereby effectuating the penetration.

Although this small scratch near J.A.'s clitoris and accompanying forced opening of her labia majora constitutes a physical injury of a sexual nature, there is also evidence to support the statutory requirement of abuse or sexual gratification. Many of the factors mentioned in *Bible, supra*, are also present in the instant case. Appellant knew J.A., the incident occurred in a secluded place, appellant appeared nervous when confronted by J.A.'s uncle, Mr. P. and the touching involved the genital area, where appellant's penis was also involved.

The court noted that it was not relying on J.A.'s trial testimony; rather, the trial

judge stated that the prompt complaint J.A. made to her mother after the incident, the statements J.A. made to Ms. Jones and to Ms. Foreman, as well as the forensic evidence from J.A.'s examination in the hospital and physical evidence observed by her mother, supported appellant's convictions for the five offenses, for which he was tried. We agree and affirm appellant's convictions.

**JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED;**
**COSTS TO BE PAID BY APPELLANT.**