Circuit Court for Carroll County
Case No. C-06-CR-21-000152

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 187

September Term, 2022

JOHN JOSEPH

v.

STATE OF MARYLAND

Kehoe,
Berger,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Majority Opinion by Berger, J.
Dissenting Opinion by Salmon, J.

Filed: June 26, 2023

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

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

John Joseph, appellant, was indicted, in the Circuit Court for Carroll County on five counts: Count I: sexual abuse of a minor by a family member; Count II: rape in the second-degree by vaginal intercourse with victim being under 14 years of age and defendant being four or more years older than the victim; Count III: rape in the second-degree by vaginal intercourse with victim being under 14 years of age and defendant being 4 or more years older than the victim; Count IV: rape in the second-degree upon a victim under 14 years of age and defendant being 4 or more years older than the victim who performed fellatio; Count V: rape in the second-degree upon victim under the age of 14 by defendant who performed cunnilingus.

Prior to trial, Joseph moved to suppress statements he had made to the police following his arrest. That motion was denied.

A four-day jury trial was held, which commenced on November 1, 2021. At the conclusion of the State's case, the court granted defendant's motion to dismiss Counts III and V. A jury ultimately convicted Joseph of one count of sexual abuse of a minor [Count I]; second-degree rape by vaginal intercourse [Count II]; and, second-degree rape by fellatio [Count IV]. The court sentenced Joseph to a term of eight years imprisonment, with all but four years suspended, on the conviction for sex abuse of a minor; a consecutive term of eight years imprisonment, with all but four years suspended, on the conviction for second-degree rape by vaginal intercourse; and a concurrent term of four years imprisonment, all suspended, on the conviction for second-degree rape by fellatio.

In this appeal, Joseph presents two questions for our review:

1. Whether the evidence was sufficient to sustain the conviction for second-degree rape by vaginal intercourse.

2. Whether the suppression court erred in denying the motion to suppress Joseph's statement?

As to the first question, we hold that the evidence was sufficient to sustain Joseph's conviction. As to the second question, we hold that the court did not err in denying Joseph's suppression motion. Accordingly, we affirm.

BACKGROUND

Joseph, a native of Nigeria, came to the United States in August 2018 to study at Fisk University in Tennessee. Joseph was 17 years old at the time. In May 2019, when he was 18 years old, Joseph moved to Maryland to complete a summer internship. While in Maryland, Joseph lived in the home of a family friend, Mr. A. Also living in the home were Mr. A.'s wife and two children, O.O. and A.A. O.O. was 11 years old at the time that appellant began to live with Mr. A.'s family. O.O. turned 12 in June of 2019. Appellant lived with the family until August 2019.

O.O. testified at trial that shortly after Joseph's arrival at her home, he began to touch her sexually, and on multiple occasions thereafter, Joseph touched her chest and genitals and on at least one occasion, she performed oral sex on appellant. O.O. also testified that on one occasion Joseph "tried to go inside [her]" but "it wouldn't go in."

In the summer or fall of 2020, O.O. told her mother and Mr. A. that she thought "[she] had been raped" by appellant. O.O.'s mother eventually contacted the Carroll County Police Department, and an arrest warrant was issued for Joseph, who was attending

Fisk University, which is located in Nashville, Tennessee. That warrant was sent to the Metropolitan Nashville Police Department, and Joseph was arrested in Nashville. While in custody, Joseph was interrogated by Nashville police officers, and, during that interrogation, Joseph made several statements regarding the allegations made against him by O.O. Joseph was eventually transported to Maryland and indicted in the circuit court for Carroll County for the five crimes already mentioned.

Motion to Suppress

Joseph moved to suppress the statements he made to the Nashville police along with a letter of apology he wrote to O.O. while in police custody. At the suppression hearing, Nashville Police Detective Hunter Fikes testified that, while working in the department's Youth Services Division, he received a call from the Carroll County Sheriff's Office informing him about the case involving Joseph. Detective Fikes then contacted the Fisk University security department and asked them to make contact with Joseph and bring him to the campus security office. Detective Fikes next went to the Fisk University security office where he arrested Joseph, and then brought him back to police headquarters. Upon arriving there, Joseph was taken to an interview room for questioning. Present during the interview were Joseph, Detective Fikes and Detective Edward Conrads.

During the interview, which was recorded and admitted into evidence at the suppression hearing, Joseph initially claimed that he did not have an "inappropriate relationship" with O.O. and that there were no "sexual things going on" while he stayed with O.O.'s family. Joseph acknowledged that O.O. sometimes flirted with him while they

were together, but in the first part of the interview he denied engaging in any inappropriate sexual contact with O.O.

After listening to Joseph's protestations of innocence, Detective Fikes and Detective Conrads left the interview room and returned with a three-ring binder for a case unrelated to the subject one. Without revealing the exact contents of the binder to Joseph, Detective Conrads showed the binder to him and stated, untruthfully, that the binder was "the case file … from Maryland" and that it contained "all the evidence that we have in this case." Detective Conrads then said that he "just need[ed] to know the details about what happened." He added: "And I think that honesty is going to go a long ways in this case, especially in the District Attorney's eyes. So we are going to give you the time to be honest with us now, okay?"[1] Detective Fikes added that he just wanted to know Joseph's "side of the story" so that they could "get all of this done" and "start moving forward." Joseph and the detectives then engaged in a lengthy back-and-forth exchange about the accusations against him and the specifics of O.O.'s allegations.

Joseph eventually provided a detailed statement about his involvement with O.O. In so doing, Joseph admitted that, on one occasion, O.O. had "tried to get it on with [him]" and that, "before [he] knew anything, it escalated." Joseph admitted that he and O.O. were "hugging and kissing making out" and that, on one occasion, he touched O.O.'s breasts. At the conclusion of his statement, Joseph expressed remorse and stated that he "owe[d]

[1] Both Joseph and the State in their briefs attribute these statements to Detective Fikes. It appears from the record, however, that the statements were made by Detective Conrads.

an apology." Detective Fikes gave Joseph some paper to "write an apology letter," and, Detective Fikes, along with Detective Conrads, left the room. When he returned, Detective Fikes discovered that Joseph had written a letter to O.O. In that letter, which was admitted into evidence at the suppression hearing, Joseph referenced a "few moments of indiscretion" and stated that he "wished [he] handled things differently." *Id*.

Joseph did not testify at the suppression hearing but at the conclusion of that hearing, his counsel argued that Joseph's statements to the police and his apology letter were involuntary because they were the result of improper promises and/or inducements. According to Joseph's counsel, the statements and letter should be suppressed. The suppression court disagreed and denied Joseph's motion to suppress. Joseph's statements and the apology letter were later admitted into evidence at trial.

Second-degree Rape by Vaginal Intercourse

At trial, O.O. testified that, on "five to seven" different occasions during the summer of 2019, Joseph touched her chest and that she performed oral sex on him. According to O.O., these incidents always occurred in the living room or the guest room of the home they shared. Regarding the alleged incidents of vaginal intercourse, O.O. testified:

> [STATE]: . . . What if any other contact did you have with [Joseph]?
>
> [WITNESS]: About I remember three times or about two times where he tried to go inside me.
>
> [STATE]: Okay. And when you say go inside of you, what parts of his body?
>
> [WITNESS]: His genital.

> [STATE]: And what part of your body?
>
> [WITNESS]: My genital.
>
> [STATE]: Okay. And where did that happen in the house?
>
> [WITNESS]: One time in the guest room, and another time in the living room.
>
> [STATE]: And when you say tried, what do you mean?
>
> [WITNESS]: I remember the first time when he tried [to] do it it wouldn't go in, and I remember it hurting a lot. So it didn't go in, I guess. I don't know.
>
> [STATE]: I am sorry?
>
> [WITNESS]: That he tried to put it in, but it hurt. So it – I don't know – say.
>
> [STATE]: Okay. And then was there a time that anything else happened between the two of you? You described oral sex and those two times. Did anything else happen?
>
> [WITNESS]: Not that I can remember.

At the conclusion of the State's case, Joseph moved for judgment of acquittal on all counts, and the trial court granted the motion on Count V, charging second-degree rape by cunnilingus, and Count III, which was one of the counts charging second-degree rape by vaginal intercourse. As to Count II, defense counsel moved for judgment on the basis that the State had failed to prove second-degree rape because there was no evidence of penetration. The trial judge rejected that argument, saying:

> THE COURT: As to Count [II], I am going to deny the motion for judgment of acquittal[.] . . . I think there is enough evidence from which a reasonable - - taking the evidence in the light most favorable to the State, from which a reasonable jury could

> conclude that all of the elements have been established here, including the element of penetration, which is part of course of vaginal intercourse.
>
> The jury is going to be instructed ultimately that vaginal intercourse means penetration of the penis into the vagina. The slightest penetration is sufficient and emission of semen is not required. Once again, the victim testified that the Defendant tried to put his penis in her vagina. She didn't use those terms, but she said his genitals and her genitals, that it wouldn't go in, that it hurt a lot.
>
> "I [sic] didn't go in." I think that is sufficient evidence. Certainly, the jury is going to be permitted to draw reasonable inferences from the evidence as well. I will grant you that the *Lawson* [*v. State*, 160 Md. App. 602 (2005)] case - - in the *Lawson* case would - - the testimony was fairly similar to what we have here. But in the *Lawson* case, the victim did testify that the Defendant tried to stick his private part into her's, penetrating her's.
>
> Presumably, the witness used the term "penetrating," which the victim did not use in this case. But penetrating her a little bit. But I don't think, you know, those magic words have to be used. I think the jury - - there is sufficient evidence to establish that, or from which a jury could infer that that happened. So, I am going to respectfully deny the motion for judgment of acquittal as to Count [II].

After defendant rested his case, the defense again moved for judgment as to Count II, once again claiming that penetration had not been proven. Defendant's motion was once again denied.

The court instructed the jury as to the crime of second-degree rape by vaginal intercourse as follows:

> Second charge is second[-]degree rape by vaginal intercourse. The Defendant is charged with the crime of second[-]degree rape. In order to convict the Defendant of

> second[-]degree rape, the State must prove: 1) that the Defendant had vaginal intercourse with [O.O.]; 2) that [O.O.] was under 14[]years[]of[]age at the time of the act; and 3) that the Defendant was then at least four years older than [O.O.]. Vaginal intercourse means the penetration of the penis into the vagina. The slightest penetration is sufficient and the emission of semen is not required.

DISCUSSION

I.

Parties' Contentions

In his brief, Joseph contends, as he did below, that the evidence was insufficient to sustain his conviction for second-degree rape by vaginal intercourse. He notes that, in order to prove that charge, the State needed to produce evidence of vaginal penetration. He argues that the State failed to prove the element of penetration. The State argues that O.O.'s testimony provided a sufficient evidentiary basis from which the jury could infer that penetration occurred.

Standard of Review

"The standard for appellate review of evidentiary sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Scriber v. State*, 236 Md. App. 332, 344 (2018) (quotation marks and citation omitted). The relevant question "is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Id.* (quotation marks and citation omitted). "When making this

determination, the appellate court is not required to determine 'whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'" *Roes v. State,* 236 Md. App. 569, 583 (2018) (quoting *State v. Manion*, 442 Md. 419, 431 (2015)). "This is because weighing the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact." *Scriber,* 236 Md. App. at 344 (quotation marks and citation omitted). "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." *State v. Krikstan,* 483 Md. 43, 64 (2023) (quotations marks and citation omitted). That is, we give deference to the fact-finder's "ability to choose among differing inferences that might possibly be made from a factual situation." *State v. Smith,* 374 Md. 527, 534 (2022), *cert. denied,* 482 Md. 264.

Analysis

Second-degree rape by vaginal intercourse is proscribed by Section 3-304 of the Criminal Law ("Crim. Law") Article (2002, 2021 Repl. Vol.) of the Maryland Code, which provides, in pertinent part, that "[a] person may not engage in vaginal intercourse or a sexual act with another … if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim." Crim. Law § 3-304(a)(3). "Vaginal intercourse" is "genital copulation, whether or not semen is emitted," and it "includes penetration, however slight, of the vagina." Crim. Law § 3-301(g). Thus, in order to prove second-degree rape by vaginal intercourse, the State must present evidence

that the defendant "penetrated" the victim's vagina. *Wilson v. State*, 132 Md. App. 510, 518 (2000).

In *Wilson*, this Court discussed precisely what is required for there to be "vaginal penetration:"

> The external female genitalia are covered by two folds of fatty or adipose tissue known as the *labia majora*, the major or outer lips. That is the critical locus for the legally sufficient element of penetration. When the *labia majora* are pushed aside, access is permitted into the pudenda or vulva generally. . . . [W]ithin the vulva or pudenda but in a more posterior position is the opening or orifice of the vaginal canal itself.
>
> * * *
>
> It is a well-settled principle of rape law that the penetration that is required is penetration only of the *labia majora*. No penetration of or entry into the vaginal canal itself is now or has ever been required.

132 Md. App. at 518-19.

Proof of vaginal penetration may be supplied by medical evidence or the victim's testimony (or both). *Kackley v. State*, 63 Md. App. 532, 537 (1985). We have noted that, when the evidence of vaginal penetration is supplied by the victim, "it is clear that the victim need not go into sordid detail to effectively establish that penetration occurred during the course of a sexual assault." *Id.* (quotation marks and citation omitted). Instead, "courts are normally satisfied with descriptions which in light of all surrounding facts, provide a reasonable basis from which to infer that penetration has occurred." *Id.* (quotation marks and citation omitted). That said, the evidence must show "actual entrance

of the sexual organ of the male within the *labia* (*majora*) of the . . . female organ, and nothing less will suffice." *Id.* at 536 (quotation marks and citations omitted). Put another way, the State must prove that the defendant's penis "pushed aside" the *labia majora*.

Here, the sole evidence related to penetration came from O.O., who testified that Joseph "tried to go inside" her. O.O. then added that Joseph had used his "genital" and had tried to go inside her "genital." O.O. stated that when Joseph "tried [to] do it it wouldn't go in" and that when "he tried to put it in, . . . it hurt." O.O. did not provide any other details regarding the alleged instances of vaginal intercourse.

Viewing O.O's testimony in the light most favorable to the State, we hold that her testimony was sufficient to show vaginal penetration. First, a reasonable inference can be made that O.O. was referring to Joseph's penis and her vagina when she testified that Joseph had used his "genital" and had tried to go inside her "genital." Second, a reasonable inference can be made that O.O. was referring to her vaginal canal when she testified that Joseph's penis "wouldn't go in." Third, a reasonable inference can be made that O.O. was also referring to her vagina in testifying that "it" hurt when Joseph tried to go inside of her. From those reasonable inferences, a fact-finder could have reasonably concluded that Joseph pressed his penis against O.O.'s vagina in an attempt to insert his penis into O.O.'s vaginal canal. That he did so with such force that he caused pain to O.O.'s vagina reasonably suggests that, while he was unable to penetrate her vaginal canal, he nevertheless penetrated the *labia majora*. Thus, the evidence was sufficient to show vaginal penetration.

Wilson v. State, *supra*, is instructive.[2] There, the victim testified that "she had been raped 'back and front many times.'" *Wilson*, 132 Md. App. at 520-21. After being asked to elaborate, the victim stated: "Well, I mean the front part of me, my vagina, and the back, the rectum." *Id.* We held that the victim's testimony was sufficient to establish that penetration had occurred.[3] *Id.*

Joseph relies on *Craig v. State*, 214 Md. 546 (1957), one of the first Maryland appellate cases to discuss the sufficiency of evidence to prove penetration in a rape case. In *Craig*, the defendant was a 28-year-old man accused of common law rape of an eight-year-old girl. *Id*. at 547. The victim testified that the defendant forced her, at knife point, to enter an abandoned house where he performed cunnilingus on her. *Id*. at 548. The victim stated that the defendant "started messing" with her, which meant that he "stuck his hand up in [her]." *Id.* The victim testified that the defendant continued "messing" with her. *Id.* When asked what she meant by that, the victim stated that the defendant "put his private" in her "legs" and that it "hurt." *Id.* When asked to point to where the defendant "put his privates," the victim "indicated the region of her privates." *Id.* The *Craig* Court held:

[2] The State likens the instant case to *Kackley v. State*, *supra*. That case is inapposite because the victim's testimony in that case was considered in conjunction with supporting medical evidence. *Kackley*, 63 Md. App. at 538.

[3] Although additional medical evidence was presented in that case, we held that the victim's testimony was "itself enough to generate a *prima facie* case of penetration." *Wilson*, 132 Md. App. at 520-21.

> We do not think there was sufficiently definite testimony as to the element of actual penetration to permit the trial judge to be convinced beyond a reasonable doubt that the appellant was guilty of rape. . . . The prosecuting witness' statement that the appellant "messed" with her is not synonymous with, nor necessarily descriptive of, penetration. This is demonstrated by her two answers as to what she meant when she stated the appellant "messed" with her. Her first answer was that "he stuck his hand up in me," and the second was that "he put his private in my legs." What an eight-year-old child meant by language of this nature is subject to too much conjecture and speculation to form a basis upon which to support a conviction of so grave an offense. Of course, when she is permitted to explain fully what she meant by the terms she used, it may develop with sufficient certainty that there was an actual penetration, but, as the matter now stands, what she meant is too uncertain and indefinite. . . . We therefore hold that the evidence and proper inferences from the evidence were insufficient to permit the trial judge to be convinced beyond a reasonable doubt that there had been actual penetration; consequently his determination that the appellant was guilty of common law rape was clearly erroneous.

Id. at 549.

Craig is distinguishable from the instant case. Unlike the victim in that case, O.O. was consistent in describing the acts at issue. Moreover, the language used by O.O., namely, her testimony that Joseph used his "genital" to "go inside" her "genital," was both synonymous with and descriptive of penetration. Again, a victim "need not go into sordid detail to effectively establish that penetration occurred during the course of a sexual assault," and "courts are normally satisfied with descriptions which in light of all surrounding facts, provide a reasonable basis from which to infer that penetration has occurred." *Kackley*, 63 Md. App. at 537. For the reasons previously discussed, we are persuaded that O.O.'s testimony provided a reasonable basis from which a fact-finder could

infer that penetration had occurred. Accordingly, viewing the evidence in the light most favorable to the State, we hold that the trial judge did not err in submitting the issue of vaginal penetration to the jury.

II.

Parties' contentions

Joseph next claims that the suppression court erred in denying his motion to suppress the statements he made to the Nashville police and the apology letter he wrote to O.O. while in custody in Tennessee. Joseph contends that his statements and the apology letter were not voluntary because they were the product of an improper promise, or inducement by the police. Joseph notes that, after he repeatedly denied having any inappropriate contact with O.O., the officers lied to him about the existence of a "case file" from Maryland; told him that they just needed to find out his side of the story to move forward; and stated that honesty would go a long way in the eyes of the District Attorney. Joseph argues that the officers' conduct and comments clearly conveyed the idea that Joseph's situation would improve and that he would be treated more favorably if he confessed. Joseph contends that he subsequently relied on those inducements in making the statements at issue and in writing the apology letter.

The State contends that Joseph's statements and letter were provided without reliance on any improper inducements and that the suppression court properly denied his motion to suppress. The State argues that nothing about the officers' conduct or comments would have led a reasonable person to believe that he would receive special treatment or

any other benefit in exchange for a confession. The State also maintains that, even if there were improper inducements, there was no evidence from which it could be concluded that Joseph relied on those inducements in making his statements or in writing the letter of apology.

Standard of Review

"The circuit court's determination from a suppression hearing that a statement is voluntary is a mixed question of law and fact that we review *de novo*." *Brown v. State*, 252 Md. App. 197, 234 (2021). In undertaking that review, we are limited to the record developed at the suppression hearing. *Id.* "[W]e view the evidence presented at the [suppression] hearing, along with any reasonable inferences drawable therefrom, in a light most favorable to the prevailing party." *Davis v. State*, 426 Md. 211, 219 (2012). "We extend great deference to the findings of the hearing court with respect to first-level findings of fact and the credibility of witnesses unless it is shown that the court's findings are clearly erroneous." *Daniels v. State*, 172 Md. App. 75, 87 (2006). "We give no deference, however, to the question of whether, based on the facts, the trial court's decision was in accordance with the law." *Seal v. State*, 447 Md. 64, 70 (2016); *see also Winder v. State*, 362 Md. 275, 310-11 (2001).

Analysis

In Maryland, involuntary confessions are inadmissible. *Knight v. State*, 381 Md. 517, 531 (2004). "[A] confession is involuntary if it is the product of certain improper threats, promises, or inducements by the police." *Lee v. State*, 418 Md. 136, 161 (2011).

Thus, "'if an accused is told, or it is implied, that making an inculpatory statement will be to his advantage, in that he will be given help or some special consideration, and he makes remarks in reliance on that inducement, his declaration will be considered to have been involuntarily made and therefore inadmissible.'" *Williams v. State*, 445 Md. 452, 478 (2015) (quoting *Hillard v. State*, 286 Md. 145, 153 (1979)).

"When a criminal defendant claims that his or her confession was involuntary because of a promise made to him or her by interrogating officers, the State must present evidence in order to refute the claim." *Knight*, 381 Md. at 532. "If the defense files a proper pre-trial suppression motion, the State bears the burden to prove, by a preponderance of the evidence, that the inculpatory statement was freely and voluntarily made and thus was the product of neither a promise nor a threat." *Id.* (quotation marks and citation omitted).

The Supreme Court of Maryland[4] has established a two-prong test for determining whether a statement has been rendered involuntary by way of an inducement:

> First, the trial court determines whether any officer or agent of the police force promised or implied to the suspect that he or she would be given special consideration from a prosecuting authority or some other form of assistance in exchange for the confession. Second, if the court determines that such a promise was explicitly or implicitly made, it decides whether the

[4] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also*, Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland[.]").

> suspect's confession was made in apparent reliance on the promise.

Id. at 533-34. "Both prongs must be satisfied before a confession is deemed to be involuntary." *Winder*, 362 Md. at 310.

"To resolve whether the officer's conduct satisfies the first prong, 'the court must determine whether a reasonable person in the position of the accused would be moved to make an inculpatory statement upon hearing the officer's declaration.'" *Smith v. State*, 220 Md. App. 256, 274 (2014) (citing *Hill v. State*, 418 Md. 62, 76 (2011)). That determination is an objective one; the accused's subjective belief is irrelevant. *Id.* "An improper promise or inducement occurs when an accused is told, or it is implied, that making an inculpatory statement will be to his advantage, in that he will be given help or some special consideration." *Knight*, 381 Md. at 534 (quotation marks and citation omitted).

"If the court finds that an improper inducement was made, then the court turns to the second prong, which is whether 'the suspect makes a confession in apparent reliance on the police officer's explicit or implicit inducement.'" *Smith*, 220 Md. App. at 275 (quoting *Lee*, 418 Md. at 161). "This prong 'triggers a causation analysis to determine whether there was a nexus between the promise or inducement and the accused's confession.'" *Id.* (quoting *Winder*, 362 Md. at 311). "Factors relevant to the reliance analysis include the amount of time that elapsed between the improper inducement and the confession, [] whether any intervening factors, other than the officer's statement, could have caused the confession, [] and the testimony of the accused at the suppression hearing related to the interrogation[.]" *Hill*, 418 Md. at 77 (internal citations omitted).

With those principles in mind, we hold that the motions judge did not err when he held that Joseph's statements and apology letter were voluntary. First, the officers' deception regarding the "Maryland case file," which involved the officers bringing a binder into the interrogation room and stating, untruthfully, that it contained "all the evidence" from the case against Joseph, did not violate defendant's rights. Police officers are generally permitted to use deception to obtain a confession from a defendant. *Winder*, 362 Md. at 305. Here, the officers used the binder merely as a prop.

Moreover, there was nothing improper about the comments highlighted by Joseph. The officers' comments that they "just needed to know the details about what happened" and just wanted to know Joseph's "side of the story" so that they could "get all of this done" and "start moving forward," were not promises that it would be to defendant's advantage if he incriminated himself and no reasonable person in Joseph's position would have construed those comments as indicating that he would receive special treatment or be regarded more favorably if he confessed. Rather, the comments merely encouraged Joseph to tell the truth about what happened between him and O.O. *See Winder*, 362 Md. at 311 (noting that an officer's eliciting statement must contain a promise or offer and that "a mere exhortation to tell the truth is not enough to make a statement involuntary") (quotation marks and citation omitted). Similarly, the comment that "honesty is going to go a long ways in this case, especially in the District Attorney's eyes" did not suggest that the officers, or any other State agent, were going to help Joseph in any way if he confessed. Nor did the words suggest that a confession would result in the "District Attorney" helping

him. As with the other comments, the officers were simply asking Joseph to be honest, and no reasonable person in Joseph's position would have believed that the officers were promising some benefit in exchange for an inculpatory statement. *See Knight*, 381 Md. at 535-36 (holding that officer did not improperly induce a confession by informing the defendant "that the prosecutor would be made aware of his cooperation"); *see also Brown*, 252 Md. App. at 237-39 (holding that an officer's statement to a defendant that the officer was "trying to help" and wanted to "help [the defendant] out" were not improper inducements because the officer "never indicated that [the defendant] would receive some form of 'special consideration' or 'assistance'"). Accordingly, the suppression court did not err in denying Joseph's motion to suppress.

But, even assuming, arguendo, that the motions judge erred when he found that appellant failed to demonstrate that an improper promise or inducement had been made, we cannot say that the suppression court erred when it held, in the alternative, that there was no proof that the defendant relied on any alleged promise or inducement. Here, evidence plainly did not establish that Joseph offered his statements or wrote the apology letter in reliance on the officers' alleged inducements. For starters, Joseph did not testify at the suppression hearing, a fact that essentially foreclosed his chance of prevailing on the reliance prong. *See Ashford v. State*, 147 Md. App. 1, 56 (2002) ("Without [the defendant's] testimony, there is usually no direct evidence of involuntariness."). Moreover, aside from the fact that the statements and apology letter were provided after the alleged inducements, there is nothing in the record to indicate a nexus between those

events. After the alleged inducements occurred, but before Joseph made any of the statements at issue, Joseph and the officers engaged in a somewhat lengthy colloquy about the specific accusations against him. At no time during that discussion did the officers mention the District Attorney or otherwise suggest that Joseph would receive any sort of benefit. To the contrary, the officers consistently emphasized that they merely wanted Joseph to tell the truth about what happened between him and O.O. At one point, Joseph asked the officers to give him "a minute to calm down," and the officers complied. Shortly thereafter, Joseph made the statements at issue. But, Joseph never admitted to committing any of the crimes for which he was indicted. Moreover, the statements he gave did not "spill out" as if Joseph had succumbed to any sort of pressure. Rather, the statements were buried within a long and mostly innocuous soliloquy about his involvement with O.O. At the conclusion of that statement, and without any suggestion that he do so, Joseph volunteered that he wanted to apologize. The officers then left the room, and Joseph penned the apology letter, which, once again, did not specifically admit to the commission of a criminal act for which he was charged. He simply admitted to offensive behavior.

For the above reasons, we agree with the motions judge when he found that Joseph's statements and apology letter were not made in reliance on the alleged inducements. Accordingly, the suppression court did not err in denying Joseph's motion.

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

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UNREPORTED

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STATE OF MARYLAND

Kehoe,
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Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Salmon, J.

Filed: June 26, 2023

I dissent from the portion of the majority opinion affirming appellant's conviction of Count II, charging second-degree rape by vaginal intercourse.

The relevant facts in this case are accurately set forth in the majority opinion but, in my view, even taking those facts in the light most favorable to the State, the testimony of O.O. was insufficient to show vaginal penetration. Although a reasonable inference can be made that O.O. was referring to her vagina when she testified that Joseph "tried to go inside" her "genital," she never testified that Joseph actually penetrated, even slightly, her genital area. Rather, O.O. consistently maintained that Joseph merely tried to penetrate her genital area. Put another way, O.O. never said that Joseph's attempt to "go inside" her was successful.

The relevant facts in *Craig v. State*, 214 Md. 546 (1957) are accurately summarized in the majority opinion, but a few points deserve emphasis. In *Craig*, the victim said that the defendant "put his private in [her] legs," she then pointed to her "privates" and said that it "hurt." *Id*. at 548. And in *Craig*, there was medical testimony that showed, *inter alia*, that "the external genitalia were reddened"; the hymen had a "superficial laceration" at the lower border which was bleeding, and "there was a superficial laceration of the mucosa of the vestibule[.]" *Id*. at 548. A physician examined the victim and testified for the State that her impression was "superficial lacerations of the hymen and the vestibule; partial penetration." *Id*. at 549.

The *Craig* Court said:

> "We do not think there was sufficiently definite testimony as to the element of actual penetration to permit the trial judge to be convinced beyond a reasonable doubt that the appellant was guilty of rape. There is no doubt that

> his conduct was abhorrent, detestable and repulsive. But he was not tried for this; he was convicted of rape and nothing less than actual penetration will suffice to sustain a conviction thereof.

Id.

I think the evidence presented by the State in the subject case was even weaker than that in *Craig* because there was no medical testimony and the victim's testimony was as vague as that in *Craig*.

I disagree with the majority's view as to what can be legitimately inferred from O.O.'s very limited testimony. Saying that the defendant tried to go inside her is not the equivalent of saying he did go inside her. Those words were too vague to prove that appellant's penis pushed aside the victim's *labia majora*. Thus, while O.O. could have been talking about her vaginal canal when she stated that Joseph "tried to go inside" her "genital," she just as easily could have been indicating that he unsuccessfully tried to go inside of her *labia majora*. If the latter were true, then Joseph's attempt at intercourse would not have constituted vaginal penetration because there would have been no evidence that Joseph put his genital "inside" of O.O.'s *labia majora*. Unlike the situation in *Craig*, where the victim pointed to her "privates" as the area where the defendant caused pain, here, O.O. provided no details regarding the location of her pain. Thus, while O.O. may have been referring to the inside of her vagina when she testified that "it hurt," she just as well could have meant that the source of pain was outside of her vagina or some other part of her body.

O.O's testimony may well have been sufficient to prove that Joseph was guilty of attempted second-degree rape but he was never charged with that crime. In my view, O.O.'s testimony merely aroused suspicion of a vaginal penetration, but, in order to reach the conclusion espoused by the Majority, a factfinder would have to resort to speculation or conjecture.

For all of the above reasons, I conclude that the evidence was insufficient to prove second-degree rape by vaginal penetration.