Circuit Court for Wicomico County
Case Nos. C-22-CR-22-000153, C-22-CR-22-000239

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

Nos. 620 & 622

September Term, 2023

QWENDA RENA JONES

V.

STATE OF MARYLAND

Arthur,
Tang,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: September 6, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

A jury in the Circuit Court for Wicomico County found Qwenda Rena Jones guilty of sexual offense in the second degree,[1] rape in the second degree, sexual abuse of a minor as a parent, and related offenses. On the premise that the victim was younger than 13 years of age at the time of the offenses, the court imposed enhanced sentences of life imprisonment for second-degree sexual offense and second-degree rape. The enhanced sentences are consecutive to one another.

Jones appealed, raising four issues:

> I. Are Jones's enhanced sentences of life imprisonment for second-degree sexual offense and second-degree rape illegal?
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> II. Did the trial court err in permitting the State to argue law to the jury?
>
> III. Did the trial court err in admitting [a law enforcement officer's] comments, opinions, and expressions of disbelief as to the evidence?
>
> IV. Is the evidence sufficient to sustain a conviction for second-degree rape?

We shall affirm the judgments.

BACKGROUND

Jones led a troubled life, characterized by frequent drug use and unstable relationships. She had children by multiple fathers and only intermittently had custody of her children. In the words of a police detective, "[t]he family moved around quite a bit," and they lived, at various times, in North Carolina, Delaware, and Maryland.

[1] The acts took place before the redefinition of the former crime of sexual offense in the second degree as rape in the second degree. 2017 Md. Laws, ch. 161.

Jones's daughter J. was born in October 2003. In 2022, when J. was 18 years old, she told her boyfriend and his mother that, when she was between seven and nine years old, Jones had permitted her to be sexually abused by various boyfriends, including Orlando Hill and Troy Rose. She said that she was prompted to disclose the abuse when she discovered that Jones's husband was "touching" J.'s sister.

J. notified the Somerset County Department of Social Services of the abuse. The Department, in turn, notified the Maryland State Police. J. was interviewed by a forensic social worker and a police detective. The detective, Sergeant Jonathan Pruitt of the Maryland State Police, arranged a controlled telephone call between J. and Jones. In that call, which was recorded, Jones made incriminating statements in response to J.'s allegations.

Sergeant Pruitt obtained an arrest warrant for Jones. Later the same day, he elicited a waiver of her *Miranda* rights and conducted an interview. In the interview, Jones claimed that she had been using crack cocaine and heroin, said that a boyfriend had put a gun to her head and told her to bring J. to his room, and denied either remembering or participating in the abuse that J. said had happened.

The State charged Jones and Orlando Hill with a number of sexual offenses.[2] Jones was tried separately from Hill.

[2] Two indictments were filed against Jones. Indictment No. C-22-CR-22-000153 (No. 153) charged 12 counts, alleged to have occurred between June 2013 and September 2013: sexual abuse of a minor by a parent (Count 1); sexual abuse of a minor by a household member (Count 2); sexual offense in the second degree (Count 3); sexual offense in the third degree (Counts 4, 5, and 6); sexual offense in the fourth degree (continued)

During Jones's trial, the prosecution called two witnesses: J. and Sergeant Pruitt, who had investigated J.'s allegations. J. described four discrete events of sexual abuse.[3]

The first incident occurred in North Carolina when, J. said, she was "[r]oughly seven years old." At that time, Jones lived "sporadically" with Hill and her daughters in a trailer. One night, while J. and her sisters were in their bedroom sleeping, Jones entered the room, "got" J., and "guided" her into the bedroom that she shared with Hill. Jones asked J. whether she "ever had sex before," and J. answered, "No." Jones placed J. on her bed, between her and Hill, and "showed" J. how to fellate Hill by "ma[king] motions." J. felt as if she "had to" fellate Hill, and she did so until he ejaculated in her

(Counts 7, 8, and 9); and assault in the second degree (Counts 10, 11, and 12). Indictment No. C-22-CR-22-000239 (No. 239) charged three additional counts, alleged to have occurred during a broader time frame between October 2012 and October 2014: rape in the second degree (Count 1); sexual offense in the third degree (Count 2); and assault in the second degree (Count 3). Before trial, the circuit court granted the prosecutor's motion to amend Indictment No. 153 so that it alleged that the crimes occurred during the same time frame as in Indictment No. 239. We adopt the numbering used in the circuit court, which designated the counts in Case No. 153 as Counts 1 through 12, and designated the counts in Case No. 239 as Counts 13 through 15.

[3] The first and last events occurred outside Maryland, but testimony about those events was admitted under *Vogel v. State*, 315 Md. 458, 466 (1989), which held that there is a "sexual propensity" exception to what is now Maryland Rule 5-404(b). The exception was "strictly limited to the prosecution for sexual crimes in which the prior illicit sexual acts are similar to the offense for which the accused is being tried and involve the same victim." *Id.* Several months after the trial in this case, the Supreme Court of Maryland observed that § 10-923 of the Courts and Judicial Proceedings Article of the Maryland Code, enacted in 2018, supersedes *Vogel* by making it easier to admit evidence under the "sexual propensity" exception to Rule 5-404(b). *Woodlin v. State*, 484 Md. 253, 266-69 (2023). The admissibility of evidence concerning sexual assaults that occurred in North Carolina and Delaware is not at issue in this appeal.

mouth. While J. was fellating Hill, Jones guided J.'s hand toward her vagina and had J. rub her external genitalia.

J. and her siblings moved to Delaware to live with J.'s uncle, and Jones and Hill moved to Salisbury, Maryland to live with Jones's father. During the school year, the children lived with their uncle; during the summer, they would visit Jones and Hill in Salisbury.

When Jones's father was evicted from his dwelling in the summer of 2013, he, Jones, and Hill briefly moved to the now-defunct Temple Hill Motel in Salisbury. While J. and her siblings were visiting their mother at the motel, Jones once again forced J. to fellate Hill, and once again, he ejaculated into J.'s mouth. During this incident, J. "touched" the genitalia of both Jones and Hill at their direction. Afterward, Jones gave J. "cash" and told her, "Don't tell anybody." At the time of the assault, J. was nine years old.

Jones and Hill moved to a one-bedroom duplex on Barclay Street in Salisbury. J. and her siblings were staying there with Jones and Hill during "the summer before 5th grade." The children slept on the couch or on the floor of the living room. One night, Jones "came out of the bedroom and told [J.] to come here." When J. entered the bedroom, Jones removed her clothes and put her on the bed next to Hill. Hill then removed his clothes and attempted to have vaginal intercourse with J. J. "couldn't tell" whether Hill's penis had penetrated the inside of her vagina, but she "felt a pinch" while he attempted to do so, and she "was bleeding." J. characterized the ordeal as "painful" and said that Jones "rub[bed]" her forehead to "comfort" her. Jones followed J. into the

bathroom and "said that [Hill] cut" her, causing the bleeding. Jones told J. "that is what it was like to have a period."

Jones broke up with Hill and moved to her cousin's apartment in Laurel, Delaware, where she became involved with Rose. During the summer after J. completed the fifth grade, Jones facilitated yet another sexual assault of her daughter. This time, Jones "called" J. and Rose's daughter "into the bedroom." There, J. "was put behind" Jones and "in front of" Rose, while Rose's daughter "was put in front of" Jones. Rose removed J.'s clothes and "tried to have sex with" J. from behind. Rose tried to "push" his penis into J.'s vagina, but finally "stopped trying" because "it wouldn't go in." Afterward, J. got dressed, and Jones gave her "[a]bout $40.00" and told her "to go to the store" for food, which J. interpreted as an admonition not to "say anything."

J. testified about the controlled telephone call, during which she confronted Jones over the sexual abuse she had suffered. J. also testified about a letter that Jones sent her after being arrested. In that letter, which was admitted into evidence, Jones apologized and urged J. to recant her statements about the abuse.

Sergeant Pruitt, the lead investigator in the case, described the timeline of events, chronicling the movements of Jones and her family from North Carolina to Maryland to Delaware and then back to Maryland. Sergeant Pruitt described the controlled call he had arranged between J. and Jones, a recording of which was admitted into evidence through his testimony and played in open court. In Sergeant Pruitt's words, Jones, after being confronted by J. about the abuse she had allowed to take place, "apologized several

times" during the call, "blame[d] things on her drug addiction," and claimed that Hill and Rose "were feeding her drugs."

Sergeant Pruitt also testified about the statement that he had obtained from Jones shortly after her arrest. Finally, he read aloud the letter that Jones had sent to J., in which she asked J. to recant her accusations.

The jury deliberated for less than two hours before returning with its verdict, finding Jones guilty of all charges. The verdict sheet required the jury to find whether J. was under the age of 14 at the time of the second-degree rape and sexual offense, an element of the age-based modality of the offenses. The jury found that she was under the age of 14 at the time.[4]

The court imposed consecutive sentences of life imprisonment for Count 3 (second-degree sexual offense) and Count 13 (second-degree rape), 25 years' imprisonment for Count 1 (sexual abuse of a minor by a parent), and ten years' imprisonment for Counts 5 and 6 (third-degree sexual offense). The court merged the other convictions for sentencing purposes.

The two consecutive life sentences were based on the premise that the defendant was at least 18 years old, and the victim was younger than 13 years old; otherwise, the maximum penalty would have been only 20 years' imprisonment on each count. Md.

[4] The verdict sheet did not specifically ask the jurors whether they found that J. was under the age of 14 at the time of the offense. The verdict sheet asked the jurors whether they found Jones guilty of "Sexual Offense in the Second Degree – Age" and "Rape in the Second Degree – Age." The jury instructions informed the jurors that they could not find Jones guilty of those offenses unless they found that J. was under 14 years of age at the time of the acts.

Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CR"), § 3-304(c)(1)-(2), CR § 3-306(c)(1)-(2). The State had given timely notice of its intention to seek an enhanced sentence, but the jury was not asked to find—and thus did not find—that J. was younger than 13 years old at the time of the offenses.

This timely appeal followed.

Additional facts are included where pertinent to the discussion of the issues.

DISCUSSION

I.

During the sentencing hearing, the prosecutor asked the court to impose an enhanced sentence for Count 3 (second-degree sexual offense against a victim younger than 13) and Count 13 (second-degree rape against a victim younger than 13). Defense counsel objected that the verdict sheet did not require the jurors to find whether the victim was younger than 13 when the crimes were committed and that her age is an element of the offenses under *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In *Apprendi*, the United States Supreme Court held that a New Jersey hate-crime statute, which authorized a sentencing court to apply an enhanced sentence if the court found that the defendant's "purpose" had been "to intimidate" because of racial bias, violated the jury trial guarantee of the Sixth Amendment. *Id.* at 490-91. In so holding, the Court declared: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490; *accord Alleyne v. United States*, 570 U.S. 99, 103 (2013) (holding that "[a]ny fact that, by law, increases the penalty for a

crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt[]").

Jones contends that her enhanced sentences for second-degree sexual offense and second-degree rape were imposed in violation of *Apprendi*, because they are based on the premise that J. was younger than 13 years old, a finding that the jury was never asked to make. Therefore, she claims, those sentences are illegal.

The State concedes that there was an *Apprendi* error, but argues that the error was harmless beyond a reasonable doubt. According to the State, it was uncontroverted that, at all relevant times, J. was around nine or ten years old and that none of the charged acts took place when she was 13 or older.

The trial court pointed out that the verdict sheet required the jurors to find that the victim was younger than 14 and that "the testimony and the charge [were] consistent as to the fact that she was in the eight- to nine-year-old age range when this occurred." Accordingly, the trial court denied trial counsel's request to strike the notices of enhanced penalties, and it imposed consecutive life sentences for Counts 3 and 13.

We begin our analysis by summarizing the decisions of the Supreme Court of the United States that are most pertinent to the issue raised: *Neder v. United States*, 527 U.S. 1 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and *Washington v. Recuenco*, 548 U.S. 212 (2006).

In *Neder*, 527 U.S. at 6, a federal district court ruled that the materiality of any false statements, an element of several of the crimes charged (tax fraud, mail fraud, and wire fraud), was a legal question to be decided by the court rather than a factual issue to

be determined by the jury. Consequently, the court instructed the jury that it "need not consider" the issue of materiality. *Id.* The jury found Neder guilty of the charges, but made no finding as to whether his false statements were material. *Id.* The United States Supreme Court held that the omission of that element from the jury instructions was amenable to harmless error[5] analysis, rejecting Neder's assertion that the error was structural.[6] *Id.* at 10, 15.

A year later, in *Apprendi*, the Court held that, under the Sixth Amendment, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum[,]" "[o]ther than the fact of a prior conviction," "must be submitted to a jury, and proved

[5] In federal appellate courts, preserved claims of error are reviewed under a bifurcated standard: if the error is of constitutional dimension, then the prosecution bears the burden to show that it was harmless beyond a reasonable doubt (*Chapman* harmless error, named after *Chapman v. California*, 386 U.S. 18 (1967)), but if the error is not of constitutional dimension, then the prosecution must show only that it did not affect the defendant's substantial rights. *United States v. Lane*, 474 U.S. 438, 444-46 & n.9 (1986). In *Dorsey v. State*, 276 Md. 638, 657-59 (1976), the Court held that, under Maryland law, the *Chapman* standard applies to all preserved claims of error. When the doctrine of structural error emerged, it was recognized that such errors, if preserved for appeal, are exempt from harmless error analysis. *Savoy v. State*, 420 Md. 232, 247 (2011).

[6] A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Structural errors comprise "a limited class of fundamental constitutional errors that 'defy analysis by "harmless error" standards.'" *Neder v. United States*, 527 U.S. at 7 (quoting *Arizona v. Fulminante*, 499 U.S. at 309). A preserved claim of structural error, if established on appeal, results in an automatic reversal. *Id.*; *Savoy v. State*, 420 Md. at 243 & n.4. The class of structural errors is exceedingly narrow. *Arizona v. Fulminante*, 499 U.S. at 309-10; *Newton v. State*, 455 Md. 341, 354-55 (2017); *accord Washington v. Recuenco*, 548 U.S. at 218 (observing that "[o]nly in rare cases has [the United States Supreme] Court held that an error is structural, and thus requires automatic reversal").

beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. at 490. The Court did not decide whether a violation of the rule announced in *Apprendi* could be harmless error.

In *Washington v. Recuenco*, 548 U.S. at 222, the Court held that an *Apprendi* error is not structural, but is susceptible to harmless error review. In so holding, the Court said that the case was "indistinguishable from *Neder*,"[7] which involved the failure to submit an element of an offense to a jury. Because the only issue before us is one of federal constitutional law, we are constrained to apply *Recuenco* and, thus, to consider whether the *Apprendi* error in this case was harmless.

Because of the substantial similarity between an *Apprendi* error and an error in omitting an element of an offense from a jury instruction, we apply the test adopted in *Neder* and subsequently applied in *Nottingham v. State*, 227 Md. App. 592, 611-12 (2016). We first consider "'whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.'" *Nottingham v. State*, 226 Md. App. at 611 (quoting *Neder v. United States*, 527 U.S. at 19). "If, in answering that question, 'a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the [error] is properly found to be harmless.'" *Id.* (quoting *Neder v. United States*, 527 U.S. at 17); *accord United States v. Legins*, 34 F.4th 304, 322 (4th Cir.), *cert. denied*, 598 U.S. ___, 143 S. Ct. 266 (2022) (concluding that "the proper way to perform harmless-error analysis in both cases [i.e.,

[7] *Washington v. Recuenco*, 548 U.S. at 220.

either an *Apprendi* error or an error in omitting an element of an offense from a jury instruction] is to ask whether proof of the missing element is 'overwhelming' and 'uncontroverted'") (quoting *Neder v. United States*, 527 U.S. at 17-18).

In this case, it is uncontroverted that the victim, J., was born in late 2003. J. testified that she was "[r]oughly eight" or "nine" when, at Jones's direction, she was forced to fellate Hill in the Temple Hill Motel in Salisbury. She further testified that Jones forced her to have vaginal intercourse with Hill in a duplex in Salisbury during the "summer before 5th grade." Because children typically start the fifth grade when they are about ten years of age, her testimony establishes that she was about ten years old at that time. J.'s testimony about her age was not controverted in any way. Thus, all the evidence in the case establishes that J. was well under 13 years of age at the time when the offenses allegedly occurred.

Moreover, none of the offenses charged were alleged to have been committed after J. reached her thirteenth birthday, which was in late 2016: the indictments in these cases alleged that the acts took place "between the 20th day of October, 2012 and the 20th day of October, 2014."[8]

Finally, in his statements to the jury, the prosecutor repeatedly asserted that J. was no more than ten years of age at the time of the events in question. In his opening statement, the prosecutor told the jury that it would hear that J. was "eight to ten years

[8] Thus, this is not a case like *United States v. Legins*, 34 F.4th at 317, 318, in which the prosecution had failed to include the sentence-enhancing factor in both the charging document and the verdict sheet.

old" at the time of the offenses. And in closing, the prosecutor asserted, without objection, that she was eight or nine years old at the time of the incident at the Temple Hill Motel, that she "would have been around ten years old" at the time of the incident in the duplex, and that she was "nine or ten" at the time of all of the events in question.

In her reply brief,[9] Jones argues that the evidence of J.'s age was not overwhelming because J. could not specifically say how old she was at the time of the incidents in North Carolina and Delaware, because J. agreed with the prosecutor that her memory was based on "incidents happening" and not "timing and stuff," and because the prosecution argued in closing that J. should not be expected to remember "minute details" of the trauma that she had experienced. To the contrary, even if J. was uncertain exactly how old she was when the events allegedly occurred, there is no question that she was no more than ten years old when they were alleged to have occurred. Moreover, even if there were some questions about whether these incidents actually occurred (for example, because of J.'s inability to recall "minute details"), there is no question that, if they occurred, they occurred well before J. was 13 years old.

Thus, the conclusion that J. was less than 13 years of age at the time of the offenses in this case is certainly supported by overwhelming evidence. But further examination is required before we can determine whether it was uncontested.

[9] Jones did not confront the issue of harmless error in her opening brief. Instead, she relied exclusively on *Parker v. State*, 185 Md. App. 399 (2009), a case in which this Court reversed a conviction because of an *Apprendi* violation that the State did not attempt to characterize as harmless. *Id.* at 414 n.10 ("the State did not advance a harmless error argument, and we have not considered that issue[]").

In her reply brief, Jones claims that the issue of "J.'s age at the time of the offenses was hotly contested." First, she claims, "J.'s age *must have been* in contention at trial because [Jones] never once conceded that J. was younger than 14 years old, let alone younger than 13 years old." (Emphasis in original.) Second, she argues that "the State went into trial fully armed for contention as to J.'s age," pointing specifically to Sergeant Pruitt's testimony, which, she asserts, had the "singular purpose" of establishing "J.'s age at the time of the incidents." Third, according to Jones, trial counsel "expressly contested J.'s age" by "challeng[ing] the admissibility of Sergeant Pruitt's timeline testimony" on "hearsay and confrontation grounds," while claiming that J. "was never very specific" about the timeline of events. Finally, Jones maintains that trial counsel's closing argument "made it abundantly clear that J.'s age was in dispute."

Jones's first argument—that the issue of age was contested because Jones did not concede it—proves too much. If Jones were correct, then an issue would be contested whenever a criminal defendant did not admit guilt and insisted on putting the prosecution to its proof. *Neder* implies, however, that an issue is controverted when, for example, the defendant "bring[s] forth facts contesting the omitted element[.]" *Neder v. United States*, 527 U.S. at 19.[10] An issue is not controverted simply because it is not conceded.

[10] The *Neder* Court stated: "In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." *Id.* The Court added that, if, after a "thorough examination of the record," "the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless." *Id.*

Contrary to Jones's second contention, the issue was not controverted merely because the State "went into trial fully armed for contention as to J.'s age." Even though the State neglected to request a verdict sheet that asked whether J. was younger than 13 at the time of the offenses, the State was still aware that it needed to prove that she was younger than 14 in order to establish the age-based modality of the offenses of second-degree rape and second-degree sexual offense. J.'s age was not controverted merely because the State undertook to discharge its burden.

As to her third contention, Jones may have unsuccessfully challenged the admissibility of Sergeant Pruitt's timeline on hearsay and confrontation grounds, but she did not dispute the information in the timeline once it came into evidence. In particular, Jones's cross-examination of Sergeant Pruitt was not focused on establishing that J. might have been 13 or older at the time of the incidents in Maryland, but on creating reasonable doubt as to whether the jury should believe that the incidents occurred at all. For example, in examining Sergeant Pruitt, defense counsel established that J. did not remember the name of the hotel, that she thought that the duplex was on Church Street rather than on Barclay Street, and that she did not initially recall whether Hill had ejaculated at the motel. Counsel, however, made no attempt to cast doubt on whether J. might have been younger than 13 at the time when the offenses allegedly occurred.

Similarly, although Jones may have argued to the court that J. "was never really specific" about when the events occurred, her cross-examination of J. was focused on creating reasonable doubt about whether the offenses occurred at all, not on controverting the evidence of her age when the offenses allegedly occurred. For example, in cross-

examining J., defense counsel established that she had given inconsistent accounts about where she first lived when she moved with her mother and Hill from North Carolina. Defense counsel also established that J. initially said that the incident at the duplex occurred before the incident at the hotel, but had changed her account at trial. Counsel established that J. did not remember that the duplex was on Barclay Street and that she had learned of the address from the prosecutor. Counsel tried to establish that the incidents could not have occurred as J. described them, because too many people were sleeping in the cramped quarters that she, her mother, Hill, and her four siblings were occupying—someone, he suggested, would have witnessed it. Counsel also suggested that J. had some motivation to retaliate against her mother because of an argument about J.'s boyfriend.[11] In other words, the goal of the cross-examination was not to controvert the evidence that J. was younger than 13 at the time when she said the incidents occurred, but to create reasonable doubt about whether the incidents occurred at all.

In fact, much of the cross-examination only confirmed that J. was less than 13 years of age at the time when the offenses were alleged to have occurred. On cross-examination, J. testified that she was "around seven or eight" years old at the time of the incident in the hotel in Salisbury and that she was "probably eight or nine" years old at the time of the incident at the duplex. She reiterated that the incident at the duplex occurred during the summer before she started the fifth grade. And she testified that she

[11] In the defense case, Jones took the stand and testified that the alleged argument concerned J.'s desire to mail drugs to Jones's house and J.'s failure to attend school.

moved from North Carolina in "around" 2012, when she would have been eight or nine years old.

Furthermore, Jones took the stand in her own case and indirectly corroborated the evidence that J. was well under 13 years old at the time of the crimes with which Jones was charged. Jones testified that she lived with Hill in Salisbury at various points from "2012 to the end of 2013," when J. would have been between eight and ten years old. Jones testified that she stayed at the Temple Hill Motel for about two days beginning on about June 18, 2012, when J. would have been eight. Jones also testified that, after moving to Laurel, Delaware, for a few months, she moved to Barclay Street in Salisbury in November 2012, shortly after J.'s ninth birthday. On cross-examination, Jones testified that J. visited her "for a weekend" at the Temple Hill Motel and at the Barclay Street duplex. Thus, instead of controverting the evidence about J.'s age at the time when the offenses allegedly occurred, the defense corroborated it.

Finally, Jones cites defense counsel's statement in closing argument that "[i]t's not clear where October 2012 or October 2014"—the dates in the indictment—"even came from and no real certainty about the actual ages." Counsel's point was that the timeline originated with Sergeant Pruitt—which is not entirely consistent with Jones's rather specific testimony about when she, Hill, and her children moved from North Carolina to Maryland, when she stayed at the Temple Hill Motel, when she moved to Delaware, when she moved back to Barclay Street in Salisbury, etc. In any event, even if there was no "real certainty" about whether J. was eight, nine, or ten years old at the time when the

offenses were alleged have occurred, it was certain that—however old she was—she was younger than 13.

In summary, the record, in our judgment, contains no evidence that could rationally lead to a finding that J. was 13 years of age or older at the time of the offenses that were alleged to have occurred in this case. In other words, the record contains no "'evidence that could rationally lead to a contrary finding with respect to the omitted element.'" *Nottingham v. State*, 227 Md. App. at 611 (quoting *Neder v. United States*, 527 U.S. at 19). Jones "did not, and apparently could not, bring forth facts contesting" the uncontroverted evidence of J.'s age when the crimes allegedly occurred. *Neder v. United States*, 527 U.S. at 19.

Jones counters that the *Apprendi* error "cannot be considered harmless beyond a reasonable doubt" because, she says, "this Court cannot know how the procedural posture of the case and the evidentiary record could have, and undoubtedly would have, been different had the State raised the issue of J. being younger than 13 years old, as it was required to do under *Apprendi*." In the abstract, that contention has some force. In the circumstances of this case, however, it has none.

Here, the indictment charged that the offenses occurred at a time when J. was less than 13 years old. In addition, the State gave timely pretrial notice of its intention to seek an enhanced sentence because the victim was younger than 13 at the time of the offenses. And, in order to prove the age-based modality of second-degree sexual offense and second-degree rape, the State undertook to prove—and did prove, based on a specific

jury finding on the verdict sheet—that the victim was younger than 14. Thus, J.'s age was an issue throughout the entire trial.

The *Apprendi* error occurred only because, at the end of the trial, the court used a verdict sheet that asked whether J. was younger than 14 (for purposes of the charges of second-degree sexual offense and second-degree rape), but did not also ask whether J. was younger than 13. In these circumstances, it is very difficult to imagine how the trial would have proceeded differently if the State had done what it ought to have done and requested a verdict sheet that asked both whether J. was less than 14 at the time of the offenses and whether she was less than 13.

On this record, we conclude, beyond a reasonable doubt, that the missing element was "'uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error[.]'" *Nottingham v. State*, 227 Md. App. at 611 (quoting *Neder v. United States*, 527 U.S. at 17). Therefore, the *Apprendi* error in this case was harmless.[12]

II.

Jones contends that the trial court erred in permitting the prosecutor to argue law to the jury. Relying upon *White v. State*, 66 Md. App. 100 (1986), and *Newman v. State*,

[12] In her reply brief, Jones asks us to order supplemental briefing on whether *Apprendi* errors should be subject to review for harmless error under Maryland law. Because Jones did not raise that issue until her reply brief, we decline to order supplemental briefing. Md. Rule 8-504(a)(6) (requiring that a party's opening brief shall include "[a]rgument in support of the party's position on each issue"); *Robinson v. State*, 404 Md. 208, 215 n.3 (2008) (stating that "[a]n appellate court will not ordinarily consider an issue raised for the first time in a reply brief[]").

65 Md. App. 85 (1985), Jones asserts that the prosecutor impermissibly "took it upon [him]self to explain" the force element of second-degree rape and second-degree sexual offense. Moreover, according to Jones, the prosecutor "misrepresented what constitutes force for second-degree rape and second-degree sex offense" by understating what the State must prove to establish that element.[13]

During closing argument, the prosecutor stated:

> So if you find her guilty of sexual offense in the second degree based on the age requirements, there's an additional force instruction that if she committed those acts with force, those acts were committed with force, you find that as well.
>
> And, again, I kind of touched upon the force presence in this case, and there's a difference . . . between actual force and constructive force, and the law makes no difference. Force is force. It treats them the--

Trial counsel objected, and the court convened a bench conference:

> THE COURT: Basis?
>
> [TRIAL COUNSEL]: This is now--I forget the exact term--but arguing the law and particularly law that wasn't even instructed to the jury.

[13] The cases on which Jones relies date from the bygone era in which jurors, as the judges of the law under Article 23 of the Maryland Declaration of Rights, were empowered "'*to resolv[e] conflicting interpretations of the law [of the crime]* and to decid[e] whether th[at] law should be applied in dubious factual situations[.]'" *Newman v. State*, 65 Md. App. at 101 (quoting *Stevenson v. State*, 289 Md. 167, 178-79 (1980)) (further citation omitted) (emphasis in *Newman*); *see White v. State*, 66 Md. App. at 118. In *Newman v. State*, 65 Md. App. at 101-02, this Court stated that the trial court correctly precluded defense counsel from arguing the definition of "reasonable doubt" and reading case law to a jury. In *White v. State*, 66 Md. App. at 120-21, this Court held that the trial court erred in allowing a prosecutor to read cases to the jury on the subjects of reasonable doubt and circumstantial evidence, but that the error was harmless. More broadly, *Newman* recognized that to permit counsel to read case law about the definition of "reasonable doubt" "would be to permit the usurpation of the court's function." *Newman v. State*, 65 Md. App. at 103.

[PROSECUTOR]: I think it's an accurate statement of the law.

THE COURT: I think it's an accurate statement of the law as well. Overruled.

The prosecutor resumed his closing argument:

> Yes, sorry. The law makes no distinction between force. This is constructive force due to the convergence of the circumstances, her age, her being isolated, her unique position as a parent forcing her to do these thing[s], her fear that her mom was a primarily disciplinarian and she was afraid she was beat, she was afraid she couldn't--might be separated from her siblings, she was afraid, you know, that Orlando Hill was much bigger than her and she was a small, you know, nine- and ten-year-old child. All of these are facts that are force.
>
> The exploitation involved and her mom basically telling her she needs to do these things, coaching her, showing her how to perform oral sex. You know, if that's not force, there's no other--there's no greater force on the planet that would coerce a small child into doing these acts. There was force present in this case.

Trial counsel did not object to the prosecutor's additional comments.

Maryland Rule 4-323(c) governs the method of making objections during a criminal trial:

> **(c) Objections to Other Rulings or Orders.** For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

In her brief, Jones specifically challenges only the prosecutor's assertion that J.'s fear of being separated from her siblings amounted to force. The prosecutor did not make that assertion until after the court had overruled Jones's initial objection to the

prosecutor's comment about force and constructive force. Yet, Jones did not object again when the prosecutor argued that J.'s fear of being separated from her siblings amounted to force. Consequently, she did not preserve her objection. *See Westley v. State*, 251 Md. App. 365, 411 n.17 (2021).

Jones objects that the court did nothing to cure the prejudice that allegedly resulted from the prosecutor's remark. The court, however, was unable to take any curative measures because Jones did not object to the remark about which she now complains. We cannot fault the court for failing to do something that no one asked it to do.

III.

On three discrete occasions, Maryland's appellate courts have reversed criminal convictions when a jury was exposed to an investigator's expressions of disbelief in a suspect's statements or an investigator's opinions as to the suspect's untruthfulness. In *Crawford v. State*, 285 Md. 431, 439-51 (1979), the Court held that a defendant had been deprived of her due process right to a fair and impartial trial, because the jury had heard two lengthy interrogations, in which the detectives tried to persuade her to recant by repeatedly expressing disbelief in her claim of self-defense, asserting that she was not telling the truth, telling her that they knew how she had killed the victim, and asking her to explain why other witnesses were lying. In *Casey v. State*, 124 Md. App. 331, 339 (1999), this Court reversed a criminal conviction in part because the circuit court had admitted irrelevant evidence—a recording of an interrogation in which the investigators expressed disbelief in the defendant's account by telling him, "we know that's not true," and "we know different." *Id.* at 337-38. And, in *Walter v. State*, 239 Md. App. 168, 189-

91 (2018), this Court held that the circuit court erred in admitting an investigator's irrelevant commentary and expressions of disbelief because it had little, if any, effect on the suspect's steadfast protestations of his innocence. We cautioned, however, that an investigator's "expressions of disbelief" may be "a perfectly legitimate investigative tactic to induce [a suspect] either to confess or to change his account and to introduce inconsistencies that the detective could exploit in further questioning." *Id.* at 189.

Jones relies on this trio of cases to argue that the circuit court erred in admitting some of Sergeant Pruitt's comments in the recorded interview that he conducted with her shortly after her arrest.

A recording of the interview was played in open court, and a redacted copy was admitted in evidence. Jones challenges nine statements by Sergeant Pruitt, but in her briefs she addresses only five. We decline to consider any statements other than the five that Jones addresses in her briefs. *See Tallant v. State*, 254 Md. App. 665, 689 (2022). Those five statements are:

1. To abuse your daughter. I know that you were there. You were present on more than one occasion while your daughter was being abused.

2. I know that there was at one point in time that one of your boyfriends and you, whoever, had her touch your vagina while she was giving him oral sex.

3. Nobody deserves to go through what she went through.

4. But we know something happened with [J.] and Orlando [Hill] in North Carolina[.]

5. But she has no reason to not—I mean, not tell the truth.[14]

We cannot evaluate the challenged remarks without considering the context in which they were made. Earlier in the day on which Sergeant Pruitt made these remarks, he had arranged a controlled telephone call between J. and Jones. Sergeant Pruitt listened to the entire call.

During that call, J. began by asking Jones why she called J. into Hill's bedroom. Jones did not deny that she had done what J. said she had done. Instead, she replied:

> I don't know. I can't even speak on it myself, baby. I guess it is what I was going through. I really can't speak on that. All I can do is apologize. It was, like, something I was going through during my addiction. I'm not even going to lie to you.

When J. asked whether the same was true concerning the abuse by Rose, Jones, again, did not deny what J. said she had done. Instead, she replied:

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[14] The other four statements, not addressed in the briefs, are:

1. There are sexual predators that—your boyfriends you pick abused [J.], okay? And we're starting back when she was eight years old, you had brought her into the bedroom and was [sic] asking [J.] about if she knew [what] sex was.

2. She gave Orlando [Hill] oral sex in North Carolina. And he ejaculated in her mouth at eight years old, and you were present in the bedroom while this was happening.

3. Her innocence was taken from her because you were addicted to crack, and you had these piece of shit boyfriends in your life that took advantage of you to get to your daughters.

4. She only recalls the one time Orlando [Hill] in North Carolina which is--if something happened, at least it only happened one time in North Carolina.

> Yeah. That was an addiction thing that I don't understand why. I really don't. I'm kind of glad everybody's getting it off their chest.

J. continued, "Did—did you feel like you had to with [Hill] because, like, you had me touch you, too?" Jones did not deny that she had J. "touch" her. Instead, she replied:

> Yeah. I felt like—I don't—I don't even really—I can't—I don't—you know how calm the situation was, you really know now that you're wrong, and you really don't have the proper answers for everything? That's the situation where I'm at. I don't know why. I don't understand why. It's, like, I was being told to do it under the addiction that I was in, but it wasn't something that I—that's why it didn't end like it did, the other relationships, because I had been thinking about it after a while. I was made to do something that I wasn't supposed to do.

Later, J. told Jones, "You were right beside me when you had me, like, sucking [Hill's] dick." Once again, Jones did not deny what J. said. Instead, she replied, "Okay. And I know that's understandable, but like I said, a lot of things I was forced to do[.]"

In the recorded call, Jones apologized profusely to J.:

> And I do seriously apologize. Like, I'm not that person no more, I'm not. And I know I'll never get our bond back. And I know that you got a lot of questions that I really--I can't even--I don't really have answers for. Some of the shit I don't even remember.

Jones added, "I'm sorry for everything."

Toward the end of the call, Jones apologized again:

> I'm sorry, baby. I'm sorry. There ain't nothing I can do to change things. There's nothing I can do to take back. I'm just saying I'm sorry. I'm so sorry that you're going through what you're going through on this because of me. I am sorry.

Just before the call ended, J. asked about the incident in Delaware and about how Jones gave her money when it was over. Jones responded:

> I don't know. I don't know. It is—everything was in the midst of my addiction, girl. I just—I don't know. I don't have an answer for everything. I don't have an answer. I'm an asshole. I was an asshole. I did things I wasn't supposed to do. I was wrong. That's all I have for you. I mean, I don't—doing crack is a crazy thing. Doing cocaine is a crazy thing. I just wasn't thinking straight. And that's how they kept me, so I wouldn't think straight.

The State correctly argues that, in many of the challenged statements, Sergeant Pruitt was simply reminding Jones of what she herself had expressly or tacitly admitted in the call with J. Jones had admitted that she was present on more than one occasion while her daughter was being abused (Statement No. 1). Jones had also admitted that she had J. touch her (Jones's) vagina while J. was fellating Hill (Statement No. 2). And Jones had admitted that something happened between J. and Hill in North Carolina (Statement No. 4). In these challenged statements, therefore, Sergeant Pruitt was confronting Jones with her own admissions in an attempt to obtain additional information from her; he was not expressing disbelief of Jones's explanations or expressing his opinion about her guilt. It was perfectly appropriate for the court to admit those statements.[15]

It was also appropriate for the court to admit the additional statements. Through the apologies that Jones had made on the recorded call, she had already acknowledged that "[n]obody deserves to go through what [J.] went through" (Statement 3). In fact, Jones specifically said that she was sorry that J. was "going through what [she was] going through." So when Sergeant Pruitt told Jones that "no one deserves to go through what

[15] The same is true of the four additional statements that Jones enumerates, but does not address, in her brief. *See supra* n.14. In each of those statements Sergeant Pruitt was confronting Jones with admissions that she had made in the call to J.

[J.] went through," he was not expressing disbelief of Jones's explanations or expressing his opinion about her guilt. He was encouraging Jones, as he himself said just a moment later, "to make it right" by being more forthcoming about the abuse that J. had endured.

Finally, in the circumstances of this case, it was not inappropriate for the court to admit Sergeant Pruitt's statement that J. had "no reason" "not to tell the truth" (Statement 5). Sergeant Pruitt made that statement after Jones asserted that J. had never visited her when she lived at the duplex on Barclay Street in Salisbury. After Sergeant Pruitt disputed Jones's assertion by stating that J. had "no reason" "not to tell the truth," Jones changed her account, recalling that J. came to visit and even stayed overnight. She even recalled that J., who was nine or ten at the time, was experiencing vaginal bleeding the following morning. In *Walter v. State*, 239 Md. App. at 193, this Court recognized that a law enforcement officer's expression of disbelief may be relevant and admissible if the statement "induce[s] the suspect to alter [her] account or to inculpate [her]self," as Sergeant Pruitt's statement did here.

We hold that the trial court did not err in admitting the challenged remarks by Sergeant Pruitt.

IV.

In her final point, Jones contends that the evidence is insufficient to establish her guilt (as accomplice) of rape in the second degree.

In assessing the sufficiency of the evidence supporting a criminal conviction, we ask "'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.'" *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original); *accord Stanley v. State*, 248 Md. App. 539, 564 (2020). "In applying that standard, we give 'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *McClurkin v. State*, 222 Md. App. at 486 (quoting *Harrison v. State*, 382 Md. 477, 488 (2004)); *accord Stanley v. State*, 248 Md. App. at 564.

On appellate review of the sufficiency of the evidence, a court will not "retry the case" or "re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010); *accord Stanley v. State*, 248 Md. App. at 564. 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." *Fraidin v. State*, 85 Md. App. 231, 241 (1991) (emphasis in original); *accord Stanley v. State*, 248 Md. App. at 564-65; *Smith v. State*, 232 Md. App. 583, 594 (2017).

Jones challenges whether the evidence was sufficient to establish all elements of second-degree rape. In accordance with Maryland Criminal Pattern Jury Instruction 4:29, the court instructed the jury that "rape" entails "vaginal intercourse with a female."[16] In accordance with that same instruction, the court instructed the jury that:

[16] Jones was charged with two different modalities of second-degree rape—one in which the defendant is at least four years older than the victim and the victim is less than 14 years of age, and a second in which the defendant uses force or the threat of force and the victim does not consent. The court instructed the jury on both.

> Vaginal intercourse means the penetration of the penis into the vagina. The slightest penetration is sufficient. An emission of semen is not require[d].

"[T]he penetration that is required is penetration only of the *labia majora.*" *Wilson v. State*, 132 Md. App. 510, 519 (2000). "No penetration of or entry into the vaginal canal itself is now or has ever been required." *Id.*

In arguing that the evidence was insufficient to establish penetration, Jones relies on *Craig v. State*, 214 Md. 546 (1957). In that case, an eight-year-old child testified that the defendant took her to an empty house at knifepoint, where he "committed an act of cunnilingus with her[.]" *Id.* at 548. Then, according to the victim, he "grab[bed]" her, and "started messing with" her. *Id.* When asked to explain what she meant by "messing with her," she said, "He stuck his hand up in me and I started crying." *Id.* He took off most of his clothes and most of her clothes and "started 'messing' with her," by which she meant that he "put his private in [her] legs." *Id.* When asked "to point to where he put his privates, . . . she indicated the region of her privates." *Id.* After allowing her to go to the bathroom, he "forced her back into the bedroom and started 'messing' with her again." *Id.* "She again went to the bathroom and when she came out he again started 'messing' with her." *Id.*

Later that evening, a physician examined the child and concluded that she had sustained "'superficial lacerations of the hymen and the vestibule; partial penetration.'" *Id.* at 548-49.

Nonetheless, the Court held that the evidence of penetration was insufficient to support the conviction for rape. The Court asserted that the "prosecuting witness'

statement that [Craig] 'messed' with her is not synonymous with, nor necessarily descriptive of, penetration." *Id.* at 549. The Court observed that the child gave conflicting answers when asked what she meant by "messing with her" and that what she "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." *Id.* at 548-49. 549.[17] As the State explains in its brief, the medical findings were consistent with what might have happened if the defendant had put only his hand in the victim's vagina.

In *Smith v. State*, 224 Md. 509 (1961), the Court examined *Craig* and explained why the evidence of penetration in that case was insufficient:

> In the Craig case, . . . the issue presented involved the testimony of an eight year old girl who testified that the defendant had 'messed' with her. There was no other evidence submitted to substantiate the fact that the victim understood the meaning of that term as including penetration. The judgment was therefore reversed and the case remanded for a new trial.

Smith v. State, 224 Md. at 511.

Craig is the high-water mark of judicial skepticism of the sufficiency of the evidence of penetration. In more recent years, "[w]here the key to the prosecutor's case rests with the victim's testimony, the courts are normally satisfied with descriptions which, in light of all the surrounding facts, provide a reasonable basis from which to infer that penetration has occurred." *Simms v. State*, 52 Md. App. 448, 453 (1982).

[17] In 1957 rape was capital offense, and Craig had been sentenced to death. *Id.* at 547. Moreover, when *Craig* was decided, an appellate reversal for evidentiary insufficiency did not result in an automatic acquittal. See *Rivera v. State*, 248 Md. App. 170, 181-82 (2020), for further discussion of this point.

For example, in *Kackley v. State*, 63 Md. App. 532 (1985), the 11-year-old victim testified that the defendant tried to "[s]tick his thing up in [her] hole," that he told her "that it wouldn't go in[,]" and that he said that "he had to stick his finger up in there[.]" *Id.* at 535. This Court held that the victim's testimony, together with evidence that a medical finding of "'a recent superficial abrasion, caused by mechanical trauma, and fresh blood on the posterial aspects of the vaginal opening[,]'"[18] sufficed to establish the element of penetration. *Id.* at 536-38. This was so even though "[t]he doctor testified that he could not say what caused the trauma." *Id.* at 536 n.4.

In the present case, J. testified that she "couldn't tell" whether Hill's penis had penetrated the inside of her vagina, but that while he attempted to do so, she "felt a pinch," which caused "bleeding." J. stated that the ordeal was "painful," and Jones told J. that Hill had "cut" her, causing the bleeding. As in *Kackley*, the evidence here created a "fair inference" that Hill's "effort to accomplish intercourse was by his penis[.]" *Id.* at 538. Moreover, Jones's observation that J. was bleeding despite J.'s inability to observe a cut on her external genitalia provides additional support for the inference that Hill's penis had penetrated at least the outer folds of J.'s vagina. Thus, there was sufficient circumstantial evidence for a rational jury to find that there was "[t]he slightest penetration," MPJI-Cr 4:29, which is all that was required.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.

[18] *Id.* at 536 (footnote omitted).