Circuit Court for Worcester County
Case No.: C-23-CR-21-000172

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1067

September Term, 2022

CODY JEFFEREY DYLLAN JOLLEY

v.

STATE OF MARYLAND

Beachley,
Zic,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: March 5, 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 Rule 1-104(a)(2)(B).

Appellant, Cody Jefferey Dyllan Jolley, was indicted in the Circuit Court for Worcester County, Maryland, and charged with four counts of second degree rape of his stepdaughter, B.,[1] as well as one count of attempted second degree rape, six counts of sexual abuse of a minor, two counts of third degree sex offense, two counts of fourth degree sex offense, and one count of sexual solicitation of a minor. He was convicted of 13 of these 16 counts by a jury.[2] Mr. Jolley was sentenced to multiple consecutive life sentences, suspended to a total active term of imprisonment for 105 years, 60 of which are to be served as a mandatory minimum, with other conditions, and credit for time served. On this timely appeal, Mr. Jolley asks us to address the following questions:

1. Did the lower court err in finding that B.'s recorded statement to the social worker was admissible under Maryland Criminal Procedure Article, § 11-304?

2. Are Mr. Jolley's sentences on the four counts of second degree rape illegal?

For the following reasons, we shall vacate Mr. Jolley's sentences and remand for resentencing. Otherwise, the judgments are affirmed.

BACKGROUND

On May 21, 2021, Laverne Cray, the school guidance counselor at Snow Hill Elementary, taught the third-grade students a "good touch, bad touch lesson," showing them a video and talking to them about "trusted adults." Afterwards, the children went

[1] To preserve anonymity, we have chosen to represent this child with a randomly assigned initial.

[2] The court granted Mr. Jolley's motion for judgment of acquittal on three of the 16 counts.

outside for recess. At that time, B. approached Ms. Cray and asked "what should she do if she felt someone was touching her in a way that was not keeping her clean." B. informed Ms. Cray that her "dad" was touching her, motioning to her "private part." B. returned to class and Ms. Cray reported the conversation to the Worcester County Cricket Center.[3]

S.P.,[4] the mother of B., testified she lived in Snow Hill from March 2020 through May 2021 with her daughter, her son, and Mr. Jolley. During that time, B. was eight and nine years old. S.P. worked for a security company in Ocean City, Maryland and worked on weekends. While she was away at work, Mr. Jolley was left alone to care for the two children. Other than B. telling S.P. on one occasion that B. did not want to take showers around Mr. Jolley anymore, S.P. denied that B. ever reported inappropriate contact with Mr. Jolley prior to May 21, 2021. S.P. testified she learned for the first time on May 21 from a social services investigator that B. had reported that Mr. Jolley was "touching her inappropriately." Later that same day, S.P. and Mr. Jolley drove B. to the Cricket Center for an interview.

[3] The Cricket Center, located in Berlin, Maryland, is Worcester County's only Child Advocacy Center ("CAC"). Its website indicates it is "a child-friendly, safe and neutral location in which local law enforcement and Child Protective Services investigators may conduct and observe forensic interviews with children who are alleged victims of crimes. The Cricket Center provides child and non-offending family members with support, crisis intervention, trauma based therapy, and medical intervention." *About Us*, THE CRICKET CENTER, https://thecricketcenter.com/ (last visited Feb. 27, 2024).

[4] To preserve anonymity, we have chosen to represent B.'s mother with randomly assigned initials.

At trial, B., who was then ten years old, testified that, after watching the video in class, she approached Ms. Cray and told her that "[m]y stepdad Cody Jolley was touching me in inappropriate places and doing stuff that I asked him not to do." After going to the Cricket Center, B. also told "Ms. AJ," identified later as Althenia Jolley, who is a Licensed Masters Social Worker and a Child Protective Services ("CPS") investigator,[5] that, when she, her brother, and Mr. Jolley were at a creek near their home the weekend prior, Mr. Jolley put his hands down her swimsuit and touched her in "inappropriate places." B. clarified that Mr. Jolley's hands touched her vagina.

B. continued that, the day before the creek incident, Mr. Jolley took B. to his and her mother's bedroom, where Mr. Jolley "laid down and he made me sit on top of his dick." She further testified that Mr. Jolley's penis went into her "ass," and that she saw something "clear and kind of goopy" come from his erect penis, ejaculating into her; she testified that he told her that was "cum." Mr. Jolley also taught B. the words, "dick" and "ass." On the same day, B. testified that she had been "running away from him telling him to stop and he wouldn't stop. So[,] [she] hid behind [her] dresser and [her] closet door." Mr. Jolley "found [her] and . . . made [her] suck his dick." She testified, this meant putting her mouth on his penis and "going back and forth like this."

This was not the first weekend this type of behavior occurred. He also frequently licked her vagina during these interactions, and, on one occasion, made her give him an open-mouthed kiss following the interaction. "[H]e put his penis in [her] butt" on

[5] Althenia Jolley has no relation to Appellant, Mr. Jolley.

multiple occasions. On other occasions, sometimes while B. would pretend to be sleeping, Mr. Jolley tried to put his fingers and his penis in her vagina, until B. told him to stop. B. often pretended to be asleep, crossed her legs, tried to escape to her room or through a window to her grandmother's house, or told him "no," to stop or avoid interactions with Mr. Jolley. Mr. Jolley called B. "Daddy's little whore" and told her, "[T]his is our little secret. Don't tell anyone." He also bought her gifts when she complied with his demands and took them away when she did not. She testified that these incidents began before the pandemic, when she was eight years old, and included the time when he came into her bedroom and touched her "boobs" and when he touched her vagina while she was in the bathtub. B. confirmed that these reoccurring incidents took place when her mother was at work.[6]

After B. reported these incidents, she was interviewed by Ms. Jolley, a.k.a. "Ms. AJ," at around 2:30 p.m. on May 21, 2021. The interview was video- and audio-recorded. As it is the subject of Mr. Jolley's first question presented, we shall address it in more detail in the discussion that follows. The recording was admitted over defense objection and played for the jury in court.

Detective Vicki Martin, assigned to the Child Advocacy Center, watched the interview between Ms. Jolley and B. live from an adjacent room. Afterwards, Detective

[6] Lisa Wood, accepted as an expert in sexual assault forensic examination, testified that she examined B. approximately a week after the incident at the creek. There was "general redness" to B.'s genitalia and sensitivity to the hymenal tissue. Ms. Wood testified that these findings were consistent with B.'s account of that incident. She agreed she could not conclude that B. was sexually assaulted.

Martin arrested Mr. Jolley as he waited for B. inside his car in the parking lot. Mr. Jolley waived his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and gave a statement denying that he sexually abused B. Detective Martin then went to B.'s home and took several photographs corroborating the details of B.'s statement.

We shall include additional detail in the following discussion.

DISCUSSION

I. THE CIRCUIT COURT DID NOT ERR IN ADMITTING B.'S RECORDED STATEMENT TO A SOCIAL WORKER.

Mr. Jolley first contends the trial court should not have admitted B.'s video-recorded interview because the court: 1) did not examine B. outside of court prior to ruling on the admissibility of the statement; and 2) erroneously applied the factors under § 11-304(e) of the Criminal Procedure Article before admitting the statement. *See* Md. Code Ann., Crim. Proc. § 11-304. The State disagrees, responding that: 1) it was unnecessary for the court to examine B. under the circumstances; and 2) the court's analysis of the pertinent factors was supported by the court's detailed findings that the statement was sufficiently trustworthy. We agree with the State.

"An appellate court typically reviews a trial court's ruling on the admission of evidence for abuse of discretion." *State v. Galicia*, 479 Md. 341, 389 (2022) (citation omitted). "An abuse of discretion occurs where 'a trial judge exercises discretion in an arbitrary or capricious manner or . . . acts beyond the letter or reason of the law.'" *Id.* (quoting *Cooley v. State*, 385 Md. 165, 175 (2005)). "In some circumstances, the admissibility of particular evidence is a legal question, in which case an appellate court

accords no special deference to a trial court." *Galicia*, 479 Md. at 389 (citation omitted). For instance, "a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. Whether evidence is hearsay is an issue of law reviewed *de novo*." *Gordon v. State*, 431 Md. 527, 536 (2013) (quoting *Bernadyn v. State*, 390 Md. 1, 7-8 (2005)).

In addition, and pertinent to Mr. Jolley's argument, "statutory interpretation is a question of law, and, thus, our review of the meaning of a statute is *de novo*." *State v. Krikstan*, 483 Md. 43, 64 (2023) (citing *Lawrence v. State*, 475 Md. 384, 398 (2021)). As the Supreme Court of Maryland has explained, "our statutory interpretation focuses primarily on the language of the statute to determine the purpose and intent of the General Assembly." *Johnson v. State*, 467 Md. 362, 371 (2020). Further, "[i]f the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, we will give effect to the statute as it is written." *Rogers v. State*, 468 Md. 1, 14 (2020) (citation omitted); *accord DeJarnette v. State*, 478 Md. 148, 162 (2022).

Prior to the start of the motions hearing, Mr. Jolley's counsel informed the court that, although Mr. Jolley had the opportunity to watch the May 21, 2021, video-recorded interview where his stepdaughter, B., detailed allegations against him, he did not want to

view the interview.[7] After a short exchange between the court and Mr. Jolley confirming that decision, the court stated:

> And let the record reflect, too, that, per the agreement of counsel, I was provided a copy of the video, audio video, and I watched it in its entirety. So there's no need to play that today, unless counsel needs to for any points that they want to make, but I have watched it.

The video-recorded statement and a transcript were admitted during Mr. Jolley's jury trial, over defense objection.[8] As Mr. Jolley acknowledges, during the video-recorded interview, B. stated that she knew the difference between the truth and a lie. She then proceeded to have a conversation with Ms. Jolley about her family, her school, and the way Mr. Jolley "makes [her] feel because he's doing stuff that [she] [doesn't] feel is right." With the exception of one or two moments in the approximately one-hour-and-fifteen-minute interview, B. maintained her composure and detailed multiple incidents between her and Mr. Jolley, including cunnilingus, fellatio, vaginal intercourse, anal intercourse, and other sexual acts and contacts. B. also indicated that, after she watched a video in school that same day on "how the body is ours and not anybody else's," that she "sucked up the courage" to report the incidents.

[7] The motions hearing was set after the State filed its "Notice of State's Intent to Introduce Child Statements Pursuant to Maryland Criminal Procedure § 11-304."

[8] The video-recorded exhibit is included as a file on a USB drive and is included with the record on appeal. The transcript of the interview is in the record. Mr. Jolley expressly declined to watch the video during the motions hearing. B. testified at trial and repeated her allegations before the jury. The video interview was played for the jury during trial, with Mr. Jolley present.

As the motions hearing continued, the State called Ms. Jolley. On May 21, 2021, Ms. Jolley learned that there was a report that B. had been "inappropriately touched" by a family member. After briefly speaking with B.'s mother, S.P., Ms. Jolley went to B.'s school and spoke to B. there, in person. Ms. Jolley told B. she was a social worker and would speak to her at a later date, and then asked if she "had like any concerns or anything that she was worried about." According to Ms. Jolley, "[B.] expressed that she was concerned about it happening again and that she was tired of keeping it a secret." Ms. Jolley then persuaded S.P. to bring B. to the Child Advocacy Center, and B. was interviewed that same afternoon. The interview was audio- and video-recorded.[9]

Ms. Jolley testified that B. was nine years old, she did not show any signs of physical distress, other than being "emotional, but that was expected," and that her emotion was "consistent with the nature of the topic" being discussed. During the course of the interview, B. revealed that Mr. Jolley, her stepfather, "touched her in a sexual manner." Ms. Jolley was able to glean the specific body parts that were touched as B. referred to her private areas as her "vagina" and "A-S-S," and Mr. Jolley's penis as his "D-I-C-K." Ms. Jolley had no issues communicating with B.

On cross-examination by Mr. Jolley's counsel, Ms. Jolley testified that, based on her training, the fact that B. seemed "fine" and "matter of fact," made her "more

[9] The video recording shows that Ms. Jolley and B. were in a medium-sized carpeted room, sitting face-to-face in two large, upholstered chairs. There was also an upholstered sofa nearby. Two cameras, one focused on B. and one focused on the room and Ms. Jolley in particular, recorded the interview. A dry erase board was located nearby and both of them wrote on the board at times. No one else was present in the room.

credible" and that "[she] didn't find any reason for [B.] -- for why [B.] would have to lie about anything like that." Asked by counsel to explain, Ms. Jolley replied, "So matter of fact, I mean, like [B.] was able to provide details without even being questioned." She agreed with counsel that it was not necessary to "pull" the details "out of her, so to speak."

Ms. Jolley also explained that B. appeared "emotional" when she spoke "about being treated differently than her brother." B. was not "emotional" when she spoke about the sexual abuse. When asked whether that affected her assessment of B.'s credibility, Ms. Jolley replied, "Each child is different. Sometimes children show emotion, and sometimes they don't."

When asked about B.'s choice of words during the interview, specifically her tendencies to spell some out and not others, Ms. Jolley agreed that she "was concerned about the terms [B.] was using," and she "asked [B.] in the interview where [B.] learned them from." For instance, B. used the terms "cum" and "orgasm," during the interview. Counsel asked if Ms. Jolley spoke to B.'s mother about her vocabulary and Ms. Jolley testified: [10]

> So I did have a conversation with the mom about it. Initially, when I first went to her home to explain the concerns, she initially thought that it came from YouTube, the child was watching too much YouTube. After her later watching the

[10] Ms. Jolley's testimony at the motions hearing concluded with this answer. The motions court also heard from Detective Vicki Martin of the Worcester County Sheriff's Office. Detective Martin watched the live feed of the interview from an adjacent room. She then went to B.'s home and corroborated details from the interview. The detective also learned that Mr. Jolley had a "drinking problem," S.P. worked on the weekends, and B. was left in the custody and control of Mr. Jolley when S.P. was at work.

> interview, she believed that her daughter had been sexually abused and had learned those words from that.

This issue has two components. Mr. Jolley contends the court erred: 1) by not examining B. in person; and 2) in its consideration of certain enumerated factors required before admitting the statement. We shall address each argument in turn.

A. Court examination of B.

After hearing evidence, and prior to argument, the court considered whether it needed to perform an examination of B. On this, the court found as follows:

> Okay. And all of these -- all of the factors, I think, seem to tie into one another. I've got to go through a pretty exhaustive analysis as it relates to trustworthiness, particularized guarantees of trustworthiness. And I haven't made my findings in that regard, but I will. And based on those findings, that is -- that's part of the reason -- that's part of the reason why I don't think a chambers examination of the child is necessary.
>
> So it's interesting that you make that determination, but it's based in part on some of the particularized guarantees of trustworthiness that I'm going to talk about shortly. But I do not believe that an in-court -- I'm sorry -- an in-chambers examination of the child is necessary. And that has to do with, primarily, my observations of the child witness, her level of detail, the manner in which she testified or her, I guess, consistency, internal coherence and the like. I don't think -- when I weigh it against the potential harm/trauma of an in-chambers interview with the child, I think that that would outweigh the necessity of bringing a child in for an additional -- additional in-chambers examination. So I'm fully prepared to make my decision as it relates to the 11-304 in general, the admissibility of the out-of-court statement, without the child being necessary.

Defense counsel asked the court, and the court agreed, to reserve on that decision until it had considered all the factors required for admission of an out-of-court statement

by a child, pursuant to Crim. Proc. § 11-304. As will be discussed in more detail, the parties then addressed each of the 13 factors enumerated under Crim. Proc. § 11-304(e).[11]

At the conclusion of the argument, the court again returned to the issue of whether an examination of B. was required under Crim. Proc. § 11-304(g). The court made clear that it was not basing its decision on a balancing of potential harm to the child, but instead, "[m]y determination is based on my review of the interview, which was about an hour and fifteen minutes long. So it was quite lengthy, and it provided me an opportunity to make extensive observations of the child witness and observe the manner in which Ms. Jolley was conducting the interview." The court then reaffirmed its earlier ruling that an in-person examination of B. was not necessary in this case, finding as follows:

> What I do find is, although the child witness was nine years old at the time, she did have -- I think, [Prosecutor], you said that she was very articulate, and I agree. She seemed to be well beyond her years as it relates to her ability to put together thoughts, put together sentences, her vocabulary, the manner in which she responded to Ms. Jolley. At times, if you closed your eyes, it sounded like two adults conversing. And I think that, you know, that becomes problematic if the adult speak, so to speak, is only as it relates to the allegations. But her level of articulation and intellectual maturity, if you will, was across the board beyond that of a typical nine year old, in my experience. So I do find that she had the capacity, this is the witness, the capacity to observe, remember and very effectively communicate.
>
> And from direct questions from Ms. Jolley, and then also as a result of my observations, I can conclude very

[11] Mr. Jolley's argument on appeal is limited to the enumerated factors regarding out of court statements with particularized guarantees of trustworthiness in Crim. Proc. § 11-304(e), and the provisions concerning a court examination of a child victim or witness in Crim. Proc. § 11-304(g). There is no dispute as to the other prerequisites listed in Crim. Proc. § 11-304.

> confidently that she was conscious, is conscious, of the duty and importance to speak the truth. She had a -- she recognized the difference between a truth and a lie. And then from there, it was very clear that she, you know, had the ability to distinguish between a truth and a lie.

The court continued:

> Now, [Defense Counsel], that doesn't mean that cross-examination is foreclosed, certainly. But I think for the purposes of this preliminary determination, her ability to discern the difference was very -- very clear. And there were instances when Ms. Jolley asked follow-up questions where it would have been easy for the witness to pile on, so to speak, and say, oh, yeah, yeah, that happened, too, that happened, too. But if Ms. Jolley suggested -- and not in an inappropriate way, but if her question said, well, did anything else happen, or was it -- you know, it was -- I can't remember any specific examples right now, but there were instances where Ms. Jolley left the door open for her to expound further. And she very clearly, after thinking and pausing, she'd say, no, that didn't happen. So I think that the opportunity was there for her to demonstrate that she didn't know the difference between a truth and a lie, but my observations were that she did. And so for those reasons, I don't think that I would glean anything further from an in-camera or in-chambers interview of her.

Section 11-304 of the Criminal Procedure Article allows admission of hearsay statements made by children under the age of 13 who are alleged to be victims of child abuse, rape, or sexual offense to a physician, psychologist, nurse, or social worker, among others. Crim. Proc. §§ 11-304(a), (b). "To be admissible under § 11-304, the statement must not be admissible under any other hearsay exception, and the child victim must testify at trial." *Gross v. State*, 481 Md. 233, 248 n. 4 (2022); *see* Crim. Proc. § 11-304(d). The trial court must make a finding on the record as to the statement's "specific guarantees of trustworthiness" as well as determine its admissibility. Crim. Proc. §

11-304(f). *Accord Fallin v. State*, 460 Md. 130, 134 (2018). We apply "clearly erroneous" review to the court's factual findings. *Reece v. State*, 220 Md. App. 309, 319 (2014) (citing *Jones v. State*, 410 Md. 681, 700 (2009)). *Accord In re J.J.*, 456 Md. 428, 452 (2017). These factors "relate to whether the child was likely to be telling the truth when making the statements." *Prince v. State*, 131 Md. App. 296, 302 (2000) (discussing *Idaho v. Wright*, 497 U.S. 805, 822 (1990)).

As to the examination of the child, Section 11-304(g)(1) provides:

> (g)
>
> > (1) In making a determination under subsection (f) of this section, the court shall examine the child victim or witness in a proceeding in the judge's chambers, the courtroom, or another suitable location that the public may not attend *unless*:
> >
> > > (i) the child victim or witness:
> > >
> > > > 1. is deceased; or
> > > >
> > > > 2. is absent from the jurisdiction for good cause shown or the State has been unable to procure the child victim's or witness's presence by subpoena or other reasonable means; or
> > >
> > > (ii) *the court determines that an audio or visual recording of the child victim's or witness's statement makes an examination of the child victim or witness unnecessary.*

Crim. Proc. § 11-304(g)(1) (emphasis added).

The plain language of this section is determinative. As set forth above, the court reviewed B.'s video recorded statement in full and found that an examination of B. was

unnecessary. This ruling was not clearly erroneous or an abuse of discretion, and we hold that the court did not err on this ground.

B. Enumerated Factors regarding Trustworthiness of Statement

Turning to the enumerated factors the court was required to consider prior to admitting B.'s statement, those factors are as follows:

> (e)
>
> > (1) A child victim's or witness's out of court statement is admissible under this section only if the statement has particularized guarantees of trustworthiness.
> >
> > (2) To determine whether the statement has particularized guarantees of trustworthiness under this section, the court shall consider, but is not limited to, the following factors:
> >
> > > (i) the child victim's or witness's personal knowledge of the event;
> > >
> > > (ii) the certainty that the statement was made;
> > >
> > > (iii) any apparent motive to fabricate or exhibit partiality by the child victim or witness, including interest, bias, corruption, or coercion;
> > >
> > > (iv) whether the statement was spontaneous or directly responsive to questions;
> > >
> > > (v) the timing of the statement;
> > >
> > > (vi) whether the child victim's or witness's young age makes it unlikely that the child victim or witness fabricated the statement that represents a graphic, detailed account beyond the child victim's or witness's expected knowledge and experience;

> (vii) the appropriateness of the terminology of the statement to the child victim's or witness's age;
>
> (viii) the nature and duration of the abuse or neglect;
>
> (ix) the inner consistency and coherence of the statement;
>
> (x) whether the child victim or witness was suffering pain or distress when making the statement;
>
> (xi) whether extrinsic evidence exists to show the defendant or child respondent had an opportunity to commit the act complained of in the child victim's or witness's statement;
>
> (xii) whether the statement was suggested by the use of leading questions; and
>
> (xiii) the credibility of the person testifying about the statement.

Crim. Proc. § 11-304(e).

The court addressed each of these factors in turn, stating, in pertinent part, as follows:

> (i) *Personal knowledge*: "That was clear, she was speaking from personal knowledge."
>
> (ii) *Certainty*: "There's no question about that because it was audio and visually recorded."
>
> (iii) *Motive to Fabricate*: "I agree with [Defense Counsel] that the couple of instances where she did seem to get emotional or she seemed to pause -- I don't know whether she was -- I don't know whether I would characterize it as choking up, but clearly there was a response, was when she was talking about not being the favorite child. So I do note that, but I don't think that that is sufficient, even combined

with my other observations, to undermine the guarantees -- the particularized guarantees of trustworthiness.

And I'll note that we're talking about -- [Defense Counsel], in part of her argument, which I understand, was that she -- it would be more natural for a nine year old to be upset about the allegations of abuse, as opposed to that. I'm not so sure. I mean, because you're dealing with a topic that would be easier for a nine year old to get their developing mind around was, you treat him better than you treat me. That may be more upsetting to a child because they know that and understand it, as opposed to the allegations of abuse, which they shouldn't know and, perhaps, are not of a maturity to fully understand that. So you may be right, [Defense Counsel], but I think you can make an argument the other way as well.

(iv) *Spontaneous or Responsive*: "That's a mix. And, [Prosecutor], you -- it seems as if, when you look at these statements, you can -- you can see the type of statement that they're trying to address or they're wanting us to look at -- consider these factors in relation to certain types of statements, where it was, like an excited utterance almost. Well, that doesn't apply here. It really wasn't spontaneous. I guess the spontaneity was earlier in the day when she made her report, and then she was then brought into contact with Ms. Jolley. So it really wasn't like immediately spontaneous. It was spontaneous, I guess, in the sense if we want to look at it as a day-long period. But it was directly responsive to questions from Ms. Jolley, because, as she pointed out, she had a mandate, she had to make inquiry, so she did. And the witness, I think, directly responded to her -- to her inquiries, her questions.

(v) *Timing*: "I just talked about that. Timing of the statement was within the context of these -- of the alleged abuse. There was testimony that it had happened in the spring of 2020 and that it had just resumed, perhaps, the weekend before, is my recollection. So the weekend before, Friday, Saturday, Sunday. They were coming into another Friday, Saturday, Sunday. I think there was corroboration from the detective that the twenty-first was, in fact, a Friday.

So it came in the context of her being alone again with her stepfather.

The timing of the statement, to [Defense Counsel's] argument at trial is, it came on the heels of this video that she saw in school. So, I mean, I could see how the State and the defense could -- could argue that from their perspective. It doesn't, however -- I recognize the issue, but it doesn't undermine the trustworthiness of the statement for the purposes of today's review.

(vi) *Likelihood of fabrication of graphic details based on age*: "I mean, many of the things that she said were well beyond the expected knowledge and experience of a child. That includes just normal, mundane things. Because, again, I found her to be advanced for her age, but she did speak of things that were beyond her knowledge and experience. And I think that that lends -- that lends some trustworthiness to her -- to her statement. Because in -- in the context of making her statement, she says that she learned some of that terminology from, you know, her stepfather, from the Defendant. And she -- many of the things that she said, at least in her account, she was parroting what her stepfather had said, at least that's her version."

(vii) *Appropriateness of terminology based on age*: "That seems somewhat redundant to or duplicative of the prior factor. The appropriateness of the terminology of the statement to the victim's age: I do find it to be appropriate, given her age, and not necessarily her chronological age, because I think she's older than nine years as far as her intellectual development."

(viii) *Nature and duration of the abuse*: "The statement -- her statement indicates that the abuse had commenced in March of 2020, which was just over a year prior, and had lasted for a couple of months and had recently resumed. So it was of a -- you know, of a significant duration. The nature of it was certainly -- was very serious. The nature of the allegations certainly are."

(ix) *Inner consistency and coherence of the statement*: "Again, I found them to be consistent and coherent. I guess if

we pick apart any statement there are inconsistencies, lack of coherence, perhaps, that you can pick up, but I didn't find any of them to be material or significant that would undermine the trustworthiness of the statement."

(x) *Pain or distress when making the statement*: "I did not notice any pain or distress. I mean, I guess it was a Friday, so she was looking at potentially being with her stepfather for the course of the weekend while the mother worked. There was some -- I wouldn't even characterize it as distress, but there was some emotional response a couple of times during the course of the interview, but, again, not in pain or distress."

(xi) *Extrinsic evidence showing opportunity*: "The testimony of the detective was thorough in that regard, and there were a number of significant instances of corroboration that she found. They lived together; had a drinking problem; watched porn; hiding behind the bedroom door; the location of the creek; the bathing suit that was mentioned in the statement; there were items -- or there were gifts that were identified by the detective that came from the Defendant; recall that the witness said that she was, I guess, coaxed into certain things or attempted to be coaxed by the Defendant through gifts, so there is corroboration in that respect; the biological mother did, in fact, work Friday, Saturday and Sunday, which matched the testimony of -- or the statement of the witness; and 5/21/21 was, in fact, a Friday. I had already said that."

(xii) *Leading questions*: "And I always have my antenna up for that, as to whether or not there are any leading questions asked by the interviewer, and I found that the question -- the format and the questioning was entirely appropriate. There were no leading questions that I identified, or none that were of a material nature. It did seem to be consistent with the Child First training, which is deemed to be the gold standard."

(xiii) *Credibility of the person testifying about the statement*: "I don't really know that that's at issue because I was able to observe the statement in full."

Having considered all the factors, the court ruled as follows:

> Okay. That is the extent of the factors. And after considering all of those factors, the Court does find that there's a requisite level of particularized guarantees of trustworthiness. So the Court does find, under 11-304, that the State has met its burden, and the statement is admissible at trial pursuant to 11-304. And just to reiterate, based on all that I just said and my prior -- or my previous findings specific to the chambers conference, I, again, confirm that the chambers conference is not necessary for the making of this determination.

On appeal, Mr. Jolley contends the court erred "when it concluded that the fact that B. became emotional during her recorded statement when speaking about not being the favorite child while exhibiting no such emotion when making her allegations involving very serious and graphic acts of sexual abuse" because it did not offer "any explanation of how to account for this disconnect." Mr. Jolley also argues, in addition to this inconsistency, that B.'s statement was not sufficiently trustworthy because the "timeline did not make sense;" B. had a "clear motive to fabricate;" and because B. "exhibited no physical or other distress" when making her statement. The State responds to Mr. Jolley's argument in detail, directing our attention to the court's findings on each of the enumerated factors.

We have recognized: "[a] trauma-informed credibility assessment can also recognize that victims of child sexual abuse can't always tell a perfectly coherent narrative." *Prince George's County Dep't of Soc. Servs. v. Taharaka*, 254 Md. App. 155, 172-73 n. 11 (2022) (citations omitted). Also, children may delay reporting depending on particular "family dynamics." *Id*. at 177 n. 15 (citations omitted). Furthermore:

> This is a complex issue, and those considering the credibility of children reporting sexual abuse should consider all of the ways that familial issues affect child sexual abuse and reporting. While difficulties at home may provide a motive to fabricate a report, social science also indicates that children who experience family dysfunction are both (1) more likely to experience sexual abuse and (2) more likely to delay disclosure or not disclose their sexual abuse at all.

Id. at 174 n. 12 (citations omitted).

Again, we are not persuaded that the court was clearly erroneous. A clearly erroneous holding by the appellate court is "limited to a situation where, with respect to a proposition or a fact as to which the proponent bears the burden of production, the fact-finding judge has found such a proposition or fact without the evidence's having established a prima facie basis for such a proposition or fact." *State v. Brooks*, 148 Md. App. 374, 398 (2002). "A finding of fact should never be held to have been clearly erroneous simply because its evidentiary predicate was weak, shaky, improbable, or a '50-to-1 long shot.'" *Id*. *See also Hartford Fire Ins. Co. v. Estate of Sanders*, 232 Md. App. 24, 39 (2017) ("In other words, we are not making findings of fact but are making a legal assessment as to whether the trial court's factual finding satisfies the clearly erroneous standard of appellate review."); *Danz v. Schafer*, 47 Md. App. 51, 62-63 (1980) (It was recognized that "the core difference between the trial function and the appellate function. One is to decide cases; the other is to screen out trial error."). The trial court properly exercised its discretion in denying Mr. Jolley's motion and admitting B.'s statement at trial.

II. MR. JOLLEY'S SENTENCE IS ILLEGAL.

Mr. Jolley contends that he was illegally sentenced to four consecutive terms of life imprisonment, with mandatory minimum sentences, because the penalty provision applied by the sentencing court does not apply to the specific counts charged in the indictment. Mr. Jolley asks us to vacate the sentences for these four convictions and remand for the circuit court to correct these specific sentences, with the new sentences not to exceed twenty years' imprisonment. The State concedes the merits of the issue and recommends we vacate all of Mr. Jolley's sentences, on all 13 convictions, and remand for a new sentencing hearing, pursuant to *Twigg v. State*, 447 Md. 1 (2016). As we shall explain, we concur on the merits and conclude that Mr. Jolley was illegally sentenced because he was not charged with offenses subject to an enhanced penalty. We also agree with the State that all of Mr. Jolley's sentences are to be vacated so that the circuit court may exercise "maximum flexibility on remand to fashion a proper sentence that takes into account all of the relevant facts and circumstances." *Twigg*, 447 Md. at 30 n.14.[12]

Whether a sentence is illegal and whether "an alleged defect relating to a sentence is cognizable in a motion to correct an illegal sentence" are questions of law and this Court reviews both *de novo*. *Farmer v. State*, 481 Md. 203, 222–23 (2022). *See Johnson v. State*, 467 Md. 362, 389 (2020); *State v. Crawley*, 455 Md. 52, 66 (2017). We defer to

[12] Although no objection was raised at sentencing, there is no dispute that a "court may correct an illegal sentence at any time." Md. Rule 4-345(a). *See also Nelson v. State*, 187 Md. App. 1, 11 (2009) ("[A]n enhanced penalty imposed improperly is an illegal sentence.") (citation omitted).

the trial court's findings of fact and do not "disturb these findings unless they are clearly erroneous." *Rainey v. State*, 236 Md. App. 368, 374 (citation omitted).

This issue centers around § 3-304 of the Criminal Law Article, which provides as follows:

> **Prohibited – In General**
>
> (a) A person may not engage in vaginal intercourse or a sexual act with another:
>
> (1) by force, or the threat of force, without the consent of the other;
>
> (2) if the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual; or
>
> (3) 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.
>
> **Prohibited – Children under age 13**
>
> (b) A person 18 years of age or older may not violate subsection (a)(1) or (2) of this section involving a child under the age of 13 years.
>
> **Penalty**
>
> (c)(1) Except as provided in paragraph (2) of this subsection, a person who violates subsection (a) of this section is guilty of the felony of rape in the second degree and on conviction is subject to imprisonment not exceeding 20 years.
>
> (2)(i) Subject to subparagraph (iv) of this paragraph, a person 18 years of age or older who violates subsection (b) of this section is guilty of the felony of

> rape in the second degree and on conviction is subject to imprisonment for not less than 15 years and not exceeding life.
>
> (ii) A court may not suspend any part of the mandatory minimum sentence of 15 years.
>
> (iii) The person is not eligible for parole during the mandatory minimum sentence.
>
> (iv) If the State fails to comply with subsection (d) of this section, the mandatory minimum sentence shall not apply.
>
> **Required Notice**
>
> (d) If the State intends to seek a sentence of imprisonment for not less than 15 years under subsection (c)(2) of this section, the State shall notify the person in writing of the State's intention at least 30 days before trial.

Md. Code Ann., Crim. Law § 3-304.

Mr. Jolley was charged with four separate counts of second degree rape, all of which were expressly pursuant to Crim. Law § 3-304(a)(3). That meant that the penalty provision in Crim. Law § 3-304(c)(1) applied, and Mr. Jolley was "subject to imprisonment not exceeding 20 years" for each of the four associated convictions.[13]

However, as the State concedes, Mr. Jolley was sentenced pursuant to Crim. Law § 3-304(c)(2). The subsection's plain language provides that the enhanced penalties only apply to convictions under Crim. Law § 3-304(b). Accordingly, we agree that Mr. Jolley was illegally sentenced. As the Supreme Court of Maryland has stated: "Where the

[13] The court's jury instructions were based on Crim. Law § 3-304(a)(3). The verdict sheet did not address the ages of the victim and the perpetrator but did list the specific acts alleged for each of the four second degree rape counts.

General Assembly has required or permitted enhanced punishment for multiple offenders, the burden is on the State to prove, by competent evidence and beyond a reasonable doubt, the existence of all of the statutory conditions precedent for the imposition of enhanced punishment." *Jones v. State*, 324 Md. 32, 37 (1991); *see Nelson*, 187 Md. App. at 16 (applying plain language interpretation to an enhanced penalty statute and "recognizing that an enhanced penalty statute is a highly penal statute, [and] must be strictly construed so that only punishment contemplated by the language of the statute is meted out") (cleaned up); *see also Clark v. State*, 218 Md. App. 230, 257-58 (2014) (vacating a sentence where the circuit court erroneously thought defendant was subject to a different mandatory minimum penalty).

This brings us to the remedy. Maryland Rule 8-604(d)(2) states that, "[i]n a criminal case, if the appellate court reverses the judgment for error in the sentence or sentencing proceeding, the Court shall remand the case for resentencing." In *Twigg*, 447 Md. at 20-21, a case decided under the doctrine of merger, the Supreme Court of Maryland approved remanding a case for resentencing on a greater offense after the merger of a lesser-included offense. Recognizing that sentencing in a case involving multiple counts is akin to sentencing on a "package" that "takes into account each of the individual crimes of which the defendant was found guilty," *id*. at 26-27, the Court concluded that a remand for resentencing was a preferred remedy because "'the sentencing judge, herself, is in the best position to assess the effect of the withdrawal [of the assault conviction from the sentencing package] and to redefine the package's size and shape (if, indeed, redefinition seems appropriate).'" *Twigg*, 447 Md. at 28 (citation

omitted). This afforded the sentencing court "maximum flexibility on remand to fashion a proper sentence that takes into account all of the relevant facts and circumstances." *Twigg*, 447 Md. at 30 n.14.

In this case, like *Twigg*, we are ultimately concerned with the imposition of an illegal sentence, thus, we shall vacate the sentences on all 13 of Mr. Jolley's convictions and remand this case to the circuit court for resentencing. We note that, upon remand, the court may not impose a sentence greater than the sentence it originally imposed which, in this case, was an aggregate sentence of 105 years' imprisonment. *Id.* ("The only caveat, aside from the exception set forth in [Md. Code Ann., Courts and Jud. Proc. §§ 12-702(b)(1)-(3)], is that any new sentence, in the aggregate, cannot exceed the aggregate sentence imposed originally."). *Accord Nichols v. State*, 461 Md. 572, 609-10 (2018) (vacating and remanding pursuant to *Twigg*, and observing that the sentencing court may not impose a sentence in excess of the defendant's original aggregate sentence).

SENTENCES VACATED AND REMANDED FOR A NEW SENTENCING HEARING. JUDGMENTS OTHERWISE AFFIRMED.

COSTS TO BE PAID ONE HALF BY APPELLANT AND ONE HALF BY WORCESTER COUNTY.