Circuit Court for Wicomico County
Case No. C-22-CR-21-528

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2107

September Term, 2022

STEVEN ERIC CROCKER

v.

STATE OF MARYLAND

Berger,
Leahy,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: October 11, 2024

* This is an unreported opinion. The 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).

Steven Eric Crocker ("Appellant") was tried and convicted by a jury in the Circuit Court for Wicomico County on multiple counts of sexual offense against a minor child ("Child"). Child, who had a speech delay, testified during the trial, and a video-recording of Child's interview with a social worker was also played for the jury and admitted into evidence. Much of this appeal concerns the admissibility of the interview recording and the competency of Child to testify.

The jury found Appellant guilty of the following: sexual abuse of minor—a household member; second-degree rape (fellatio); third-degree sex offense; fourth-degree sex offense; and second-degree assault (battery).[1] Appellant was then sentenced to twenty-five years for sex abuse of minor—a household member, and consecutive twenty years for second-degree rape, with all other convictions merged into the second-degree rape conviction for sentencing purposes.

Appellant presents the following four questions which we have re-ordered:

I. "Did the pre-trial hearing court abuse discretion by ruling that the recorded interview of [Child] was admissible?"

II. "Did the trial court abuse discretion or plainly err by allowing [Child] to testify?"

III. "Did the trial court abuse discretion by denying two motions for a mistrial?"

IV. "Is the evidence legally insufficient to sustain the convictions?"

First, we hold that the circuit court did not err in admitting Child's interview

[1] Although the verdict sheet did not specify the modality for Appellant's second-degree rape and second-degree assault convictions, the jury was instructed only on those modalities, leaving no ambiguity as to the basis for the convictions.

recording because the State sufficiently demonstrated "particular guarantees of trustworthiness" as required under Maryland Code (2001, Repl. Vol. 2018, Supp. 2023) Criminal Procedure Article ("CP"), section 11–304. As we discuss further below, this statute provides for admission of out-of-court statements made by a child victim in a criminal proceeding. *Second*, we conclude that Appellant failed to preserve the issue of whether the trial court abused its discretion or plainly erred by allowing Child to testify. *Third*, we hold that the court did not abuse its discretion in denying Appellant's two mistrial motions because the court sufficiently cured the potential prejudice in both instances. *Fourth* and finally, we hold that the evidence at trial was sufficient for the jury to find Appellant guilty of all convicted offenses beyond a reasonable doubt. Accordingly, we affirm the judgments of the circuit court.

BACKGROUND

On October 19, 2021, Katie Beran, a licensed social worker at Wicomico County Child Advocacy Center ("CAC"), conducted a video-recorded forensic interview with Child. During the interview, described below in further detail, the Child disclosed that Appellant had put his genital in her mouth.

Subsequently, Det. Daniel Shultz, a police officer assigned to the CAC, interviewed Appellant, who acknowledged that he woke up one morning to find Child placing her mouth on his penis. On December 20, 2021, Appellant was indicted and charged with six counts of criminal offenses against Child.: sex abuse of minor—a household member (Count 1); sex abuse of minor (Count 2); second-degree rape (Count 3); third-degree rape

(Count 4); fourth-degree sex offense (Count 5); and second-degree assault (Count 6). After a two-day trial, the jury rendered its verdict.

CP § 11-304 Hearing

Prior to the trial, the State filed a notice of intent under CP § 11–304(d), seeking to introduce Child's statement from the CAC interview. On March 17, 2022, the court conducted a hearing on the statement's admissibility. Ms. Beran was the sole witness at the hearing.

Ms. Beran's Testimony

Ms. Beran explained that the CAC is "a multi-disciplinary agency" designed to "investigate, prosecute, and treat victims of child abuse and neglect." By the time of the hearing, Ms. Beran had nearly ten years of experience at the CAC and had interviewed approximately 2,200 children. Ms. Beran had received training for a forensic interview method known as 'RATAC', which stands for Rapport, Anatomy, Touch, Abuse, and Closure. Ms. Beran explained that RATAC ensures interviewers "are using [the children's] words and not putting words into their mouths" when investigating allegations of abuse. Ms. Beran testified that Child was referred to the CAC on October 18, 2021, due to concerns that "an individual, [Appellant], had done something to" Child. Born in August 2013, Child was eight years old at the time.

The next day, Ms. Beran conducted a one-on-one interview with Child at the CAC, while Det. Shultz was present in an adjacent room. The interview lasted for about twenty minutes. Ms. Beran found Child "very difficult to understand." Child had been diagnosed

with ADHD, speech delay, seizures, and was on medication. During the interview, Ms. Beran repeated what Child said and asked her to correct any misunderstandings, though Child's speech was still unclear at times. As part of her RATAC method, Ms. Beran also used anatomical dolls and drawings—tools designed to help children who have difficulty verbalizing events. According to Ms. Beran, the anatomical dolls had "clothes that come on and off" and "body parts just like penises, vaginas, mouths, hands, everything." Ms. Beran testified that she could understand Child better with the use of these tools.

During Ms. Beran's testimony, the video-recording of Child's interview was played for the court.[2] In the video-recording, Child told Ms. Beran her name, age, and the names of her family members. She also stated that her mother and father share a bedroom, while she and her young brother have their own separate bedrooms. Ms. Beran then showed anatomical drawings of a male and a female, asking the child to identify each body parts. Child correctly identified most body parts on the drawings. Though Child was unable to name male and female genitals, she acknowledged that those were "part[s] no one's allowed to touch." When asked whether "any boy ever tried or anyone ever tried to have you touch the boy on that part of the body[,]" Child said, "no." Then, when Ms. Beran asked, "Did you tell someone that someone did?" the child answered, "yeah," and stated that she told her parents about "Daddy's friend Stevie" trying to touch her. Child continued, "Daddy's friend Steve (inaudible) my mouth," while she pointed to her mouth.

[2] The video-recording and its transcript were admitted into evidence during trial.

Ms. Beran gave Child anatomical dolls and asked, "So if that's you and this is [Appellant] . . . you show me what happened." Child then took the pants off the doll that represented Appellant and put the doll's penis into the other doll's mouth. Ms. Beran asked, "You did that?" and Child said, "No. [Appellant] did that." Upon Ms. Beran's inquiry, Child related that the incident happened "one time" in the "morning[,]" "in the living room" in the "wintertime" when Appellant was babysitting her when she was seven years old. She said that her mother was "upstairs in [her] room" and father was "working" at the time of the incident. She stated that Appellant babysat her "a lot" but denied any other occasion on which he tried to touch her inappropriately.

Ms. Beran testified that she spoke with each of Child's parents separately after the interview. According to Ms. Beran, both parents confirmed that Appellant lived at their home "from February to August." Child's mother ("Mother") recalled one occasion that Appellant babysat the child, although her father ("Father") denied that Appellant was ever left with Child.

The court's interview with Child

Following Ms. Beran's testimony, the judge conducted an interview with Child in a conference room. Counsel for both parties also attended the interview. Child correctly stated her name, age, and date of birth. She also provided the names of her parents, younger brother, school, and the town she was living in.

The judge asked Child about her interview with Ms. Beran.[3] Although Child gave no audible response to some of the court's questions, Child was able to confirm that she spoke the truth during the interview. When asked if she understood the difference between the truth and a lie, the child again answered affirmatively.

To confirm Child's understanding of the distinction between the truth and a lie, the judge pointed to the black shirt that Child was wearing and asked her, "What if I said, no, your shirt is not black, it's purple, would that be the truth or a lie?" Child correctly responded, "Lie," explaining, "It's black." However, when the judge asked, "[W]hat do you think happens if you tell a lie?" Child did not answer. Although the judge gave several examples to clarify the question, Child remained unresponsive. When the judge asked about "getting in trouble," Child replied, "No more sleeping . . . with my brother[,]" but did not answer if she would get in trouble for lying. Before the interview concluded, the judge asked again, "Do you understand that if you tell a lie in court[,] you get in trouble?" and the child answered, "No."

The court's ruling

After the interview, the judge concluded that Child's videotaped interview statement had the "particularized guarantees of the trustworthiness." In explaining her conclusion, the judge discussed all thirteen factors outlined under CP § 11–304(e). The judge acknowledged that Child had difficulty answering whether she would get in trouble for

[3] During the interview with Child, the court referred to Ms. Beran "Ms. Katie."

lying, but then found that the child still "understood being truthful and did understand that she was truthful to Ms. Beran." The court also reasoned that her apparent difficulty with understanding the consequences of lying "goes more towards . . . her competency to testify as a witness" than towards the trustworthiness of her videotaped interview statement. Accordingly, the court deemed the videotaped statement admissible, contingent on Child's ability to testify, and reserved ruling on her competency until trial.

Trial

Appellant's trial occurred twice: the first trial, held in July 2022, ended in a mistrial after a juror contracted with COVID-19, but the second trial led to Appellant's conviction and this appeal. During the second trial in October 2022, the State called four witnesses: Mother, Det. Shultz, Child, and Ms. Beran. Appellant did not call any witnesses and waived his right to testify on his own behalf.

Mother's Testimony

Mother testified that Appellant began living with her family in the summer of 2021. At the time, the family was renting a bedroom from a house owned by a family friend and her son. The bedroom was upstairs, while the kitchen, living room, and the laundry room were downstairs. Mother explained that the family friend who owned the house knew Appellant, but that Appellant did not have a prior relationship with her family. Mother also denied having had much interaction with Appellant. During his approximate six-month stay, Appellant slept on a couch in the living room.

Mother identified Appellant in the courtroom. Mother testified that her children—

Child and her younger brother—called him "Stevie." Mother denied that she had ever personally asked Appellant to babysit the children. Mother stated that on most occasions, she had asked the family friend or her son to babysit the children. Mother acknowledged, however, that Father and the family friend's son had asked Appellant to watch the children. Mother described one occasion when Appellant was asked to babysit while the parents went grocery shopping.

Mother then described the night that Child told her about what happened. That night, Child told her, "Mommy, I have to tell you something." Child then said, "Stevie," and pointed to her mouth and crotch. In the presence of the jury, Mother reenacted Child's gesture, explaining, "This . . . is what she did." Mother explained that, although Child did not use the word "penis," Mother "knew what she meant."

Mother testified that she asked Child, "are you sure what you're saying to me?" Child replied, "yes, Mommy." Mother then asked, "are you positively sure you are telling me the truth," and Child again confirmed. Mother testified that Child repeated the same account to the family friend, who was at home at the time, and Father, after he returned from work. When Father confronted Appellant, he "denied it happening." Mother stated that "[s]omeone else" made a report to the police thereafter, leading to the forensic interview at the CAC.

Mother detailed Child's medical conditions, which include a seizure disorder, ADHD, behavior problems, and delayed speech. Mother described Child as "basically delayed everything from as [*sic*] a baby." At the time of the trial, Child was enrolled in

special education classes and received one-on-one therapies at her elementary school. Although Child was in the fourth grade, she performed "at a kindergarten level." She was also unable to communicate in writing and often relying on hand gestures to communicate. Mother noted that though she "ha[s] to really listen to what [Child] is saying," she understands Child most of the time.

Detective Shultz's Testimony

Det. Shultz testified that he interviewed Appellant on December 8, 2021. The interview took place at Easton Police Department, in a room equipped with visual and audio recording devices. Relevant portions of the recorded interview were played to the jury. Det. Shultz stated that when he mentioned Child's name during the interview, Appellant "didn't seem surprised" but began talking about one instance where Child saw him watching pornography. Appellant initially denied any sexual contact with Child. Det. Shultz testified that after he suggested "alternative reasons for things to happen," Appellant acknowledged to having woken up one morning to find Child placing her mouth on his penis.

Child's Testimony

Before Child was called as a witness, Appellant's counsel objected, arguing that Child was not a competent witness. Citing the court's previous interview with Child, Appellant questioned Child's ability to understand the oath and requested permission to *voir dire* her outside the jury's presence. The State countered that there was a *voir dire* of Child's competency during the first trial and that the court deemed her competent to testify

at the time.

The court granted defense counsel's request in part, stating, "I think it makes sense to have [the State] question her regarding the oath and truth versus a lie, and then [defense counsel may] have some *voir dire* related to that, and then we go to her direct testimony." The court required that both the preliminary inquiry and *voir dire* take place in front of the jury.

In response to the State's preliminary questions, Child confirmed her understanding of the difference between the truth and a lie and acknowledged her obligation to tell the truth. She also answered the State's questions regarding her name, age, and school. She identified family members sitting in the gallery and said that they "[s]leepy same room." During the State's preliminary questioning, defense counsel requested the opportunity to *voir dire* Child. Then the trial was briefly interrupted, as defense counsel pointed out that Child was speaking with Mother in the gallery. After the court warned people in the gallery to remain quiet, the State finished its preliminary questioning and then proceeded with direct examination. Defense counsel did not ask for another opportunity to *voir dire* Child, nor did he remind the court about the missed opportunity.

Child recalled having talked to Ms. Beran about "Stevie." She testified "Stevie" was a person who had lived in the same house with her. She also correctly identified a mouth and a penis, which she called "wanker," on anatomical diagrams. Then the following exchange took place:

> [THE STATE:] And so you circled those two body parts. Did something happen with this body part and this body part?

[CHILD.:] Yes.

[THE STATE:] Where did this body part go? And you're pointing your finger into your mouth right now. Does that mean it went into your mouth?

[CHILD:] (Nodding head up and down.)

[THE STATE:] Okay. Whose body part went into your mouth?

[CHILD:] Stevie.

[THE STATE:] Stevie?

[CHILD:] Uh-huh.

[THE STATE:] Is that a yes?

[CHILD:] (Nodding head up and down.)

Child further testified that she told her parents about the incident and "Stevie" moved out of the house afterwards. She denied that anything else happened with Appellant.

On cross-examination, Appellant's counsel questioned Child about the consequences of lying in court, to which Child replied, "Daddy nobody read toys." Appellant also pointed out inconsistences between Child's prior statements and her trial testimony. For example, Child had told Ms. Beran about having her own bedroom, but her testimony indicated that the family slept together in one room. In addition, Child testified that Father had only one brother, even though she had mentioned "Daddy's two brothers" during the first trial. Child did not answer what months she considered to be wintertime, and she could not recall what she or Appellant was wearing at the time of the incident. Child maintained, however, that she did not lie.

Ms. Beran's Testimony

Ms. Beran's testimony at trial was almost identical to the testimony she gave during the pretrial CP § 11-304 hearing. She recounted that on October 18, 2021, the CAC received a referral for Child, which "just stated that an individual by the name of Steven put his penis in her mouth." The next day, she interviewed Child using the RATAC method which she described to the jury. Ms. Beran explained that she was able to understand Child, even though she had to clarify at times. Over Appellant's continuing objection, the video-recording of the interview was admitted into evidence and played to the jury. Ms. Beran also testified that she conducted an independent CPS investigation on Appellant. Her subsequent testimony pertaining to her CPS investigation was stricken by the court.[4]

Judgment of Acquittal and Verdict

After the State's case, the court entered a judgment of acquittal on Appellant's sexual abuse of minor charge (Count 2), noting, "that's because of his status, not the act that allegedly occurred." The court then submitted the case to the jury.

In his closing argument, defense counsel contended that Appellant did not do "anything other than sleeping through the night, and [he] woke up, and [he] had an erection." He also argued that it was not a crime to "wake[ ] up with an erection . . . if a developmentally delayed girl puts her mouth on his penis because she saw him watching pornography a day or two before. That's not a criminal act."

[4] Portions of Ms. Beran's stricken testimony is included where relevant to the issues in our discussion below.

After deliberation, the jury found Appellant guilty of all remaining counts, namely: a sex abuse of a minor—a household member (Count 1); second-degree rape (Count 3); third-degree sex offense (Count 4); fourth-degree sex offense – sexual contact (Count 5); and second-degree assault (Count 6).

DISCUSSION

I.

Admissibility of Video-Recording

A. Legal Framework

To provide context for our discussion, we begin with a summary of the relevant law. Maryland Rule 5–801 defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5–801(c). Under the Rule, a "statement" includes oral and written assertions, as well as nonverbal conduct intended as an assertion. Md. Rule 5–801(a). A hearsay statement is generally not admissible, "except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes[.]" Md. Rule 5–802.

Section 11–304 of the Criminal Procedure Article, also known as the "tender years" statute, provides for one such exception to the rule against hearsay. The statute allows admission of hearsay statements made by children under the age of thirteen who are alleged to be victims of child abuse, rape, or other enumerated sexual offense to a physician, psychologist, nurse, or social worker, among others. CP §§ 11–304(a), (b). As courts have repeatedly recognized, this "exception is intended to balance the fundamental rights of the

accused with the need to protect child victims from further trauma." *Prince George's Cnty. Dep't of Soc. Servs. v. Taharaka*, 254 Md. App. 155, 170 n.8 (2022); *State v. Snowden*, 385 Md. App. 64, 75-78 (2005) (explaining the legislative intent of Maryland's tender years statute, initially codified at Maryland Code (1973, Repl. Vol. 1989), § 9–103.1 of the Courts & Judicial Proceedings Article).

To maintain the balance between these fundamental rights, CP § 11–304 contains many requirements. As a threshold matter, a child victim's 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); CP § 11-304(d)(1). The statute requires that the trial court conduct a hearing to determine, and make findings on the record, whether the statement at issue has "particularized guarantees of trustworthiness." CP § 11–304(e)–(g). The statute provides the following list of non-exclusive factors that the court must consider in assessing the trustworthiness of a child victim's out-of-court statement:

> (i) the child victim's personal knowledge of the event;
>
> (ii) the certainty that the statement was made;
>
> (iii) any apparent motive to fabricate or exhibit partiality by the child victim, including interest, bias, corruption, or coercion;
>
> (iv) whether the statement was spontaneous or directly responsive to questions;
>
> (v) the timing of the statement;
>
> (vi) whether the child victim's young age makes it unlikely that the child victim fabricated the statement that represents a graphic, detailed account beyond the child victim's expected knowledge and experience;

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

CP § 11–304(e)(2). 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). In other words, by weighing them, the trial court can "make a preliminary determination of whether the young child's statement is sufficiently reliable to be admitted into evidence." *In re J.J.*, 231 Md. App. 304, 328 (2016) (quoting *Montgomery Cnty. Dep't of Health and Hum. Servs. v. P.F.*, 137 Md. App. 243, 272 (2001)), *aff'd*, 456 Md. 428 (2017).

Our review of "[w]hether the trial court properly admitted a particular statement under an exception to the rule against hearsay often requires separate inquiries with divergent standards of review." *Curtis v. State*, 259 Md. App. 283, 298 (2023). "It is well established that a 'trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more

deferential standard of review.'" *Smith v. State*, 259 Md. App. 622, 666-67 (2023) (quoting *Gordon v. State*, 431 Md. 527, 538 (2013)). Thus, "[w]e review for clear error the trial court's preliminary findings as to the factual circumstances under which the statement was made." *Curtis*, 259 Md. App. at 298.

The same "clearly erroneous" standard of review applies to the court's factual findings on particularized guarantees of trustworthiness under CP § 11-304(e). *Jones v. State*, 410 Md. 681, 700 (2009). "A holding of 'clearly erroneous' is a determination, as a matter of law, that, even granting maximum credibility and maximum weight, there was no evidentiary basis whatsoever for the finding of fact." *State v. Brooks*, 148 Md. App. 374, 399 (2002). Thus, when reviewing a claim of clear error, "[t]he concern is not with the frailty or improbability of the evidentiary base, but with the bedrock non-existence of an evidentiary base." *Id.*

B. Parties' Contentions

Appellant contends that the circuit court "arguably abused discretion" in admitting Child's recorded statement after determining that it qualified as an exception to the hearsay rule under the tender years statute, CP § 11–304(e). Specifically, Appellant contends that the court should have determined that Child's statement lacked particularized guarantees of trustworthiness because: (1) Child gave a "markedly different" account from her parents regarding how often Appellant had babysat the child; (2) Child was unable to articulate the names of genitals or intimate body parts; and (3) Child "did not appreciate the significance or consequences of telling lies."

In response, the State highlights that the court considered all of the evidence presented under the relevant CP §11–304(e) factors. The State refutes Appellants' three arguments by asserting that: (1) Child's definition of babysitting might have been different from what her parents understood babysitting meant; (2) Child was able to identify the relevant body parts on the dolls, and "her limited terminology 'could be attributed to any number of things,' such as being 'embarrassed'" (quoting from the trial's court's oral ruling)"; and, (3) the trial court found that Child "'understood being truthful and did understand that she was truthful to Ms. Beran.'" (quoting from the trial's court's oral ruling). Accordingly, the State urges that the factual findings undergirding the trial court's determination that Child's statement had particularized guarantees of trustworthiness are not clearly erroneous and should be upheld.

C. Analysis

We hold the trial court was not clearly erroneous in finding that Child's video-recorded interview statement had the "particularized guarantees of trustworthiness" to be admissible at trial – subject to the latter determination that Child would be able to testify at trial. In making this finding, the court painstakingly reviewed and considered all statutory factors under CP § 11–304. The court's findings under each factor are as follows:

> (i) Personal knowledge: "It happened to her, so obviously she has personal knowledge."
>
> (ii) Certainty: "The statement was made on video. So clearly the statement was made."
>
> (iii) Motive to Fabricate: "There was no an [*sic*] apparent motive to fabricate or exhibit partiality by the victim that was testified to, so I don't

have any information either way on that."

(iv) Spontaneous or Responsive: "The statement was spontaneous or directly responsive, I found that it was appropriately responsive. I don't suppose I feel like it was spontaneous in that she didn't just walk in and blurt out what happened, certainly there were questions first. But I did think it was very telling that, when Ms. Beran said something like this is what you did, she said no, this is what Steve or Stevie did, that part was certainly spontaneous."

(v) Timing: "The timing of the statement, it's unclear how many months, but certainly months versus years prior when he was living there allegedly to when the statement was made. So a period of months, I'll say, I can't be more specific."

(vi) Likelihood of fabrication of graphic details based on age: "Whether the child victim's young age makes it unlikely that the victim fabricated the statement that represents a graphic detailed account beyond the child victim's expected knowledge and experience. I do think that, unless there has been things happening in the house that are abnormal, for the average child's experience that those, a seven or eight-year-old would be unlikely to have, her statement wasn't particularly graphic and detailed, other than her movements, I suppose, when she was acting out with the dolls, that certainly seems like it would be unlikely for someone of her tender years to have that knowledge."

(vii) Appropriateness of terminology based on age: "The appropriateness of the terminology of the statement to her age. I do think -- she was accurate as to all body parts, except she declined to name the two most obvious that are relevant here, well, at least one, I suppose, her vagina isn't particularly relevant given her scenario here, but the penis, I agree, I'm surprised that she didn't know at least something, "privates", or some term for that. But I couldn't tell if she was embarrassed and didn't want to say, or if she just doesn't know. She did circle the portions that she knew someone wasn't allowed to touch, so certainly she has some knowledge, but her terminology in that case I thought, which could be attributed to any number of things, but I don't know what those are."

(viii) Nature and duration of the abuse: "There was one event that was disclosed, and that's my only frame of reference."

(ix) Inner consistency and coherence of the statement: "It was

> consistent with itself, I found, for the most part."
>
> (x) Pain or distress when making the statement: "There was nothing to suggest that that was the case."
>
> (xi) Extrinsic evidence showing opportunity: "It appears that there were interviews of the parents that indicate that [Appellant] was residing in their home during the timeframe that's relevant here. And, also, I have heard testimony that there was a statement given by [Appellant] that corroborated some portion, that he had the opportunity, at least in residing in that dwelling."
>
> (xii) Leading questions: "There were no particular leading questions."
>
> (xiii) Credibility of the person testifying about the statement: "[A]s it appears to me, the question that she had the trouble with, and that was the only question, frankly, that I thought she had trouble with, and it's a big one, whether she would get in trouble for lying and whether she understood the consequences of lying. I did find that she understood being truthful and did understand that she was truthful to Ms. Beran. It's whether she can understand there's a consequence if she's not truthful when she comes in here and testifies against this [Appellant]. And it seems to me that that goes more towards her, essentially her ability and her competency to testify as a witness and take the oath than it does toward this video, this interview."

Appellant does not challenge any of these findings as clearly erroneous. He also agrees that the court "evaluated each of the [thirteen] statutory factors set forth in [CP § 11–304] (e)(2) in making her ruling." While Appellant claims that the court "should have" ruled differently, disagreement over how the court weighed relevant factors does not constitute clear error.

We are not persuaded by Appellant's argument that Child's statement was not trustworthy because she and her parents gave different accounts regarding how many times Appellant babysat Child. The tender years statute only requires that the court determine trustworthiness of Child's video-recorded statement based on its "*inner* consistency and

coherence." CP § 11–304(e)(2)(ix) (emphasis added). Trustworthiness of a hearsay statement comes from the circumstance of the statement itself, not from its consistency with other evidence. *See Simmons v. State*, 333 Md. 547, 561 (1994) ("Hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." (quoting *Idaho v. Wright*, 497 U.S. 805, 822 (1990) (brackets removed))). Here, Child only testified about being sexually assaulted by Appellant on one occasion, so the fact that parents thought Appellant babysat Child on just one occasion does not render Child's testimony untrustworthy. As noted by the court, it may be the case that Child thought Appellant was babysitting her on occasions when one of her parents was upstairs or somewhere else in the house.

Similarly, Child's failure to answer questions about the consequences of lying does not undermine the court's findings. "The plain language of [CP § 11–304] does not require a [] court to find that a child is truth[-]competent before admitting that child's statement under the statute, nor does its legislative history suggest a contrary interpretation." *In re J.J.*, 456 Md. at 450. Here, the trial court found that Child "understood being truthful and did understand that she was truthful to Ms. Beran."

Under the "clearly erroneous" standard of review, "the appellate court should not substitute its judgment for that of the trial court on its findings of fact[.]" *Ryan v. Thurston*, 276 Md. 390, 392 (1975). Given the court's detailed findings, which Appellant does not dispute, we cannot find the court's ruling was clearly erroneous. *See Reece v. State*, 220 Md. App. 309, 324 (2014) (holding that the trial court's findings were not clearly erroneous

where "[t]he court heard testimony, considered all the evidence adduced, and specifically addressed each of the factors set forth in CP § 11–304.").

II.

Competency to Testify

A. Parties' Contentions

Appellant next contends that the court "abused [its] discretion or plainly erred" by allowing Child to testify without making an explicit ruling on her competency. Notably, Appellant acknowledges that defense counsel did not move to disqualify Child as a witness or strike her testimony. Appellant also admits that although defense counsel asked to conduct his own *voir dire* to determine Child's competency, "before he could do so, the trial was interrupted by communication taking place between the witness and people in the gallery[,]" and the State continued with its line of questioning afterwards. Nonetheless, Appellant claims that defense counsel sufficiently communicated his concerns about Child's competency to preserve the issue for our review.

The State counters that the issue was not preserved and, even if it were, Appellant's contention lacks merits. The State contends the issue was not preserved because, although defense counsel initially expressed his intent to "object[ ] to her being permitted to testify" on the competency basis, he neither raised an objection nor asked permission to question the witness after the State completed its preliminary questioning. In the alternative, the State claims that defense counsel abandoned the issue "by neither objecting at that point, nor conducting any *voir dire* of his own, nor moving to disqualify Child or strike her

testimony."

On merits, the State claims that Child demonstrated her competency to testify by sufficiently describing the difference between truth and a lie and articulating the consequences of telling a lie.

A. Preservation

To preserve an issue for appeal, "[w]hat is required is a timely and clearly stated objection made to the trial court so that the court has an opportunity to consider the issue and to correct the error." *Jordan v. State*, 246 Md. App. 561, 587 (2020). In particular, "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." Md. Rule 4-323(a). "Otherwise, the objection is waived." *Id.* Unless "a timely objection or motion to strike appears of record," no error may be predicated upon a ruling that admits evidence. Md. Rule 5–103(a)(1). "Witness testimony is no exception to this broad-reaching rule." *Wise v. State*, 243 Md. App. 257, 275 (2019).

The transcript reveals that Appellant failed to raise a timely objection to Child's testimonial competency. Although defense counsel expressed intent to object *before* the child took the stand, he never followed through with his own *voir dire* to determine Child's competency when the State moved from preliminary questions to substantive questions.[5]

[5] We are not persuaded by Appellant's claim that a sudden disruption in the trial caused defense counsel to miss the *voir dire* opportunity. The transcript shows that defense counsel requested permission for *voir dire* while the State's preliminary questioning was (Continued)

Defense counsel never objected thereafter. In other words, as the State points out, after hearing Child's answers to the preliminary questions, *i.e.*, her name, age, and ability to tell between the truth and a lie, defense counsel no longer argued that she was incompetent or unqualified to testify. He also never moved to disqualify Child as a witness or strike her testimony. *See* Md. Rule 5–103(a)(1) (requiring "a timely objection or motion to strike appears of record" for preservation of an error).

Appellant presses that, despite defense counsel's failure to object after the State began *voir dire*, he "did enough *in advance of [Child's] testimony* to alert" the court of his

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still ongoing. The State indicated that it had a few more questions to ask before defense counsel's *voir dire*.

> [DEFENSE COUNSEL]: Your Honor, I'm asking permission to voir dire the witness at this point. I think there is a . . . threshold question that has yet been answered.
>
> THE COURT: Okay. Are you done with that portion?
>
> [THE STATE:] No, I can go in further.

Then, after a brief interruption due to communication between Child and Mother, the State resumed its questioning on [Child]'s competency. At that point, defense counsel asked for permission to approach:

> [DEFENSE COUNSEL]: Permission to approach, Your Honor. Well, I'll withdraw the request to approach –
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: – right now. But I will likely be asking it at some point.

The record does not support Appellant's claim that the State "took over" questioning after the interruption.

intent to object. (Emphasis added). We are not persuaded. Not only did defense counsel fail to challenge Child's competency to testify, but he also chose to cross-examine the child, focusing on gaps and inconsistencies in her testimony. "Strategies and positions of a party often change over the course of litigation and even within the course of a conversation during trial." *Lopez-Villa v. State*, 478 Md. 1, 12-13 (2022). Without a timely and contemporaneous objection to Child's competency, the trial court could not tell whether Appellant abandoned his previous position or acquiesced with the court's decision to find the child as a competent witness. *See Simms v. State*, 240 Md. App. 606, 617 (2019) ("[W]here a party acquiesces in a court's ruling, there is no basis for appeal from that ruling."). Accordingly, we conclude Appellant has waived the issue for review on appeal under Maryland Rule 8-131(a).

III. Mistrial

A. Supplemental Facts

Before addressing Appellant's next contention regarding the denial of his two mistrial motions, we provide the following facts for context.

First Motion

Defense counsel made his first motion for mistrial during Mother's testimony. On direct examination, the State asked Mother, "how much time [it] took between [Child] making that disclosure to you and then police being contacted?" Mother answered, "It actually – well, without compromising another case – [.]" A bench conference followed, and defense counsel moved for a mistrial, stating, "[t]he implication is that this disclosure

is growing out of some other disclosure or growing out of some other case." The State countered that it was unclear what Mother was referring to, and she mentioned it only once. The court struck the testimony but denied the mistrial motion, noting, "I think it's correctable at this juncture." The court reasoned, "it was an isolated incident. It was a single incident. I do think it was - - it could be taken lots of ways . . . I also think that it was certainly not a directed question by counsel." The court then gave a curative instruction, "[t]he jury will disregard the last answer that is stricken." The court also took a recess and directed both parties to speak with the witnesses for further warnings.

Second Motion

Appellant's second mistrial motion came during Ms. Beran's testimony. The State asked Ms. Beran whether she had conducted her "own investigation for the purposes of [CPS] that's separate from the law enforcement investigation[.]" Ms. Beran answered, "yes," and then explained:

> So the law enforcement has their criminal investigation, and then [CPS] has their own [CPS] investigation where we have to determine whether or not child abuse or neglect occurred. So in this case – there's three findings. An indicated finding means that we absolutely believe that something happened and it stays on your [CPS] record for 30 years. An unsubstantiated finding means that we don't really have anything to say it happened, but we believe something could have happened which is on your record for five years. And a ruled out finding, which means we don't have any evidence that this happened.
>
> And [Appellant] was indicated for child sexual abuse in this case.

Appellant immediately objected, and at the subsequent bench conference, moved to strike the testimony and requested a mistrial.

The court granted the motion to strike and reserved on the motion for mistrial, recognizing that Ms. Beran's testimony on the CPS investigation was "clearly not admissible" and resulted in "clearly some prejudice" to Appellant. The court instructed the jury, "Anything related to the Social Services independent investigation is stricken. The jury will disregard all of – anything related to the independent investigation by Social Services." Then, following a recess, the court denied Appellant's second mistrial motion after reciting its detailed legal analysis, which we include in our discussion below.

Before the trial resumed, Appellant clarified that while he did not "seek to argue with the [c]ourt's ruling," he was concerned with the cumulative prejudice from both Mother's and Ms. Beran's testimony.

B. Parties' Contentions

Appellant contends that the trial court abused its discretion in denying his mistrial motions. Appellant argues that Mother's reference to "another case" implied "another police investigation" and thus could have influenced the jury to convict him. further claims that the court's curative instruction was insufficient to alleviate the prejudice because it was given "after a substantial break, during which a bench conference took place," and that it "is possible that the jurors may not have remembered exactly what the last question and answer were."

Similarly, Appellant claims that Ms. Beran's testimony about the CPS investigation was sufficiently prejudicial to warrant a mistrial, even with the court's instruction to "disregard . . . anything related to the independent investigation by Social Services."

Appellant contends the Supreme Court's decision in *Rainville v. State*, 328 Md. 398, 409-10 (1992), is dispositive because in that case the Supreme Court "held that the trial court abused [its] discretion in denying the request for a mistrial even though the prosecutor's question was 'appropriate,' the trial court offered a curative instruction, mother was not the State's primary witness, and the inadmissible testimony was not repeated."

In the alternative, Appellant argues that even if neither instance warranted a mistrial on its own, their cumulative prejudice amounts to a reversible error.

In response, the State maintains the trial court properly exercised its discretion in denying Appellant's mistrial motions. First, the State argues that Mother's reference to "another case" was an "isolated" statement that, as the trial court observed, "could be taken lots of ways." The State highlights that Appellant had also conceded that "it [was] somewhat vague[,]" and notes that the statement was unsolicited and terminated almost immediately. Further, the State claims that the court sufficiently cured any potential prejudice to Appellant, as the court not only instructed the jury to disregard Mother's (stricken) statement, but also directed that Mother and other witnesses be warned not to talk about any other cases. Refuting Appellant's complaint that the court's instruction was not given immediately, the State points out that Appellant "does not explain how he could have been prejudiced by a question or answer that the jury did not remember."

Second, with regard to Ms. Beran's testimony, the State likewise claims that it was a "single statement . . . not directly solicited by counsel[.]" The State also claims that Ms.

Beran was not a principal witness in the case and that her testimony "would have been heard against the backdrop of other evidence," including Appellant's recorded statement that he awoke with his penis in Child's mouth. To the extent that Ms. Beran's testimony prejudiced Appellant, the State emphasizes that the court struck the testimony and gave an "unequivocal curative instruction." Finally, the State argues that Appellant's claim regarding the "cumulative error" was not preserved and, if preserved, it lacks merits because the record does not show how the comments, even taken together, caused prejudice so great to warrant a mistrial.

C. Standard of Review and Legal Framework

We review the denial of a motion for mistrial under an abuse of discretion standard. *Simmons v. State*, 436 Md. 202, 212 (2013). "That is, we look to whether the trial judge's exercise of discretion was 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id.* (quoting *Stabb v. State*, 423 Md. 454, 465 (2011)). The decision to grant a mistrial is an "extraordinary remedy," and "the trial judge has considerable discretion regarding when to invoke it." *Whack v. State*, 433 Md. 728, 751-52 (2013) (quoting *Powell v. State*, 406 Md. 679, 694 (2008)). "Ordinarily, the exercise of that discretion will not be disturbed upon appeal absent a showing of prejudice to the accused[,]" which is both "real and substantial." *Washington v. State*, 191 Md. App. 48, 99 (2010) (quoting *Wilson v. State*, 148 Md. App. 601, 666 (2002)). Thus, "[t]he determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md.

218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594-95 (1989)).

Where, as here, a witness's reference to inadmissible evidence is at issue, Maryland courts looks to the following factors in determining whether a mistrial is required:

> [W]hether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists[.]

Guesfeird v. State, 300 Md. 653, 659 (1984); *see also Rainville*, 328 Md. at 408 (holding that these factors are "equally applicable" to "different kind[s] of inadmissible and prejudicial testimony."). The application of the *Guesfeird* factors is "open-ended and fact-specific," and not limited to those factors alone. *Washington*, 191 Md. App. at 100.

In *Rainville*, the defendant was charged with raping and sexually abusing a minor. 328 Md. at 399. At trial, the victim's mother testified that the defendant was "in jail for what he had done to [the victim's brother]." *Id.* at 401. The trial court denied the defendant's motion for a mistrial and instructed the jury not to consider the referenced testimony. *Id.* at 402.

The Supreme Court of Maryland applied the *Guesfeird* factors in its analysis of the trial court's decision to deny a mistrial. *Id.* at 409-11. In determining that the trial court abused its discretion, the Court explained that while the comment was a single, isolated, and unsolicited statement, it "almost certainly had a substantial and irreversible impact upon the jurors, and may well have meant the difference between acquittal and conviction."

Id. at 410. Specifically, the Court noted that the State's case "rested almost entirely upon" the victim's testimony and that the defendant "adamantly denied ever having touched" her. *Id.* at 409. The Court also noted that conflicting witness testimony had been presented. *Id.* Therefore, the Court reasoned, "the State's evidence that does not hinge at least in part upon the determination of the defendant's credibility is hardly of sufficient strength to permit us to find beyond a reasonable doubt that the inadmissible evidence did not in any way influence the verdict." *Id.* at 411 (quoting *Kosmas v. State*, 316 Md. 587, 598 (1989)).

To the contrary, in *Washington*, after applying the *Guesfeird* factors we held that an inadvertent statement did not cause incurable prejudice and therefore a mistrial was appropriately denied. 191 Md. App. at 104. There, the defendant moved for a mistrial when a witness described the defendant's behavior at the time of shooting as "hostile," even after the trial court had warned the witness not to characterize the defendant's behavior. *Id*. at 97. The court denied the motion for a mistrial and gave a curative instruction. *Id.* at 98. We held that the trial court did not abuse its discretion, reasoning that the witness's statement was not only isolated and unsolicited, but also his testimony "neither enhanced nor detracted" from the credibility of any of the principal witnesses. *Id.* at 104.

D. Analysis

Denial of Mistrial Motions

Applying the foregoing principles, we discern no abuse of discretion in the trial court's denial of Appellant's motions for mistrial. On both occasions, the court carefully

applied the relevant *Guesfeird* factors and reasonably weighed all of the relevant evidence and potential for prejudice in exercising its discretion. In denying Appellant's first mistrial motion, the court reasoned:

> Okay. Well, it was an isolated incident. It was a single incident. I do think it was – it could be taken lots of ways.
>
> And I – I am not sure I am even aware that – I know counsel mentioned in chambers because we were talking about whether there was an impeachable, that there was another investigation, but I also think that it was certainly not a directed question by counsel.
>
> So it was inadvertent, certainly, on the State's Attorney's part. I don't know about the witness.
>
> So I think it's correctable at this juncture. I'm going to deny the mistrial. I would ask.
>
> I am going to strike it, and I will say that once we're back without the white noise.
>
> But I am going to ask [the State] if you will warn her again not to bring any of that up.

While the court did not explicitly cite *Guesfeird* or *Rainville*, it took into account whether Mother's statement "was a single, isolated statement[,]" and whether the statement was "solicited by counsel[.]" *See Guesfeird*, 300 Md. at 659. The court balanced the potential prejudice against the remaining evidence, concluding that the prejudice was "correctable at this juncture." *See Kosh*, 382 Md. at 226 (stating that the prejudice to the defendant is the "determining factor" in a mistrial analysis); *also Guesfeird*, 300 Md. at 659 (listing the presence of "other evidence" as a factor in mistrial analysis). Ms. Beran also clearly conveyed that the CPS investigation was separate from a criminal

investigation, and the court highlighted the "independent" nature of the CPS inquiry in its curative instruction.

In denying Appellant's second mistrial motion, the court expressly addressed all *Guesfeird* factors:

> The recess that we had to take gave me the opportunity to look up some cases including, I guess, it's Guesver [*sic*] is one of those cases, and that indicates that factors to be considered in determining a mistrial are whether the reference to the inadmissible evidence is repeated or whether it's a single isolated statement, whether the reference was solicited by counsel or was an inadvertent or unresponsive statement, whether the witness who was making the reference is a principal witness upon whom the entire prosecution depends, whether credibility is a crucial issue, and whether a great deal of other evidence exists.
>
> There is definitely prejudice here. The jury heard that DSS as a State agency indicated him for abuse, and she explained that that stays on his record for, I believe, she said 30 years. It was obviously completely improper, inappropriate. It was stricken. We can't unring the bell now that it's been rung.
>
> So in looking at those factors, it appears to me it was a single statement. The reference was not directly solicited by counsel. I think there was a volunteering of information that counsel had not asked that perhaps naturally and reasonably flowed from what she was testifying about, but I don't think it was any -- it was solicited at all by the State, and I don't think it was malicious. It is somewhat surprising that it occurred. I share [Appellant's] kind of being flabbergasted, I guess, that a witness who has been a social worker for so long would make that statement, although I don't find any reason to attribute malice.
>
> The witness making the reference is a principal witness on whom the entire prosecution depends, I would say that's not the case because her value as a witness is because of a prior statement made by the person upon who the entire prosecution depends [on,] which is [Child].
>
> Credibility is a crucial issue in this case, [Child's] credibility.
>
> And whether a great deal of other evidence exists.

> At this point, there is certainly other evidence that exists, most crucially, perhaps, is the statement that was given by the defendant that lays out his version of what occurred with [Child]. Mistrials are within the discretion of the Trial Court and should be granted when they're necessary or required to serve the ends of justice.
>
> So the inadmissible statement was that DSS, which is the agency that's tasked with investigating children and families and providing services for them determined in their own independent investigation that abuse occurred. And while certainly that's prejudicial, it seems to me that the fact that DSS and the police and the State's Attorney's Office conducted an investigation and brought charges and then proceeded with a criminal case would have led one to believe that, of course, DSS believed that abuse had occurred. So I do not believe that this rises to the level of a mistrial. Nor do I find the prejudice so great as to require a mistrial in the interest of justice. So I am going to deny the motion for a mistrial. I do want to again express that I will give any corrective instruction that is requested by the defense. I leave that fully within [Appellant's] discretion because he may wish not to draw attention to it. That's a strategic decision. And further, I wanted to say this now because [Appellant] should be given great leeway to cross Ms. Beran on the process and any lack of due process that exists in DSS's independent investigation or process. And I wanted to give him time to think about that before he is doing cross-examination.

As our Supreme Court has recognized, "a trial judge is ordinarily in a uniquely superior position to gauge the potential for prejudice in a particular case, and therefore to determine whether a mistrial is appropriate or required." *Watters v. State*, 328 Md. 38, 50 (1992). Here, although recognizing some prejudice in the comment, the trial court explained why, in light of all of the circumstances and after applying all of the *Guesfeird* factors, Ms. Beran's comment did not require the extraordinary remedy of declaring a mistrial. We are persuaded by the court's observation, for example, that even absent the comment, the jury would have assumed that DSS believed that abuse had occurred under the evidence already admitted about the DSS investigation. The trial court also

appropriately placed the comment in the context of the evidence already admitted against Appellant, and the central role of Child's own testimony. In contrast to the circumstances in *Rainville,* however, the underlying case did not rest entirely upon the testimony of the child; here, the jury heard Appellant's recorded statement that he "woke up" and found "her mouth" rather than her hand on his penis.[6]

To find an abuse of discretion, the court's ruling must be "so far removed from any center mark imagined by this Court that it places that decision 'beyond the fringe of what we deem minimally acceptable.'" *Woodlin v. State*, 484 Md. 253, 292-93 (2023) (quoting *State v. Matthew*s, 479 Md. 278, 305 (2022)). We cannot say that occurred here.

Cumulative Prejudice

Our holding remains the same when we consider the cumulative impact of the statements at issue. Preliminarily, it is not clear that defense counsel preserved this

[6] The following portion of the recorded interview between Det. Shultz and Appellant was played to the jury:

> [Appellant:] I woke up and . . .
>
> [Det. Shultz:] You woke up.
>
> [Appellant:] (No response)
>
> [Det. Shultz:] Did she have your penis in hand when you woke up? No? So what did you wake up to?
>
> [Appellant:] Her mouth.
>
> [Det. Shultz:] Her mouth, ok.
>
> [Appellant:] I am pretty sure that that woke me up.

argument for appeal, as he made no reference to cumulative impact or prejudice in his mistrial motions, and only mentioned a concern about the cumulative prejudice *after* the court denied the second mistrial motion. In doing so, he also stated that he did not "seek to argue the Court's ruling." We elect to consider the issue, even though it was not raised properly, because it was raised sufficiently for the trial court's consideration under the totality of the circumstances. But our review is constrained by the fact that Appellant, neither below nor on appeal, explains how "the cumulative prejudicial impact of the errors [underlying each motion for mistrial] may be harmful even if each error, assessed in a vacuum, would have been deemed harmless." *Muhammad v. State*, 177 Md. App. 188, 325 (2007). Accordingly, when reviewing the trial court's lengthy and detailed ruling on Appellant's second motion for mistrial, we may assume that the trial judge, who is "in the best position to evaluate whether or not a defendant's right to an impartial jury has been compromised," *Allen v. State*, 89 Md. App. 25, 42-43 (1991), considered the totality of the circumstances, and found that the cumulative effect of Ms. Beran's comment, following the earlier comment by mother, was insufficient to require a mistrial. *See Davis v. State*, 344 Md. 331, 339 (1996) ("because judges are presumed to know and, properly to have applied, the law," their preliminary determinations and findings "may be implicit").

On this record, we cannot say the trial court abused its discretion in failing to find cumulative prejudicial error. As mentioned previously, by the time defense counsel made the second motion for mistrial, the jury had already been exposed to a significant amount of trial testimony and evidence, including the recorded interview with Det. Shultz in which

Appellant acknowledged that Child's mouth was on his penis, and Child's own testimony in her video-recorded statement to Ms. Beran.

At minimum, the court was not "manifestly unreasonable" in concluding that any cumulative prejudice from the statements could be remedied by its curative instructions. *Simmons v. State*, 436 Md. 202, 212 (2013). We presume the jurors followed those instructions. *See Carter v. State*, 366 Md. 574, 592 (2001) ("[G]enerally[,] cautionary instructions are deemed to cure most errors, and jurors are presumed to follow the court's instructions[.]"); *Simmons*, 436 Md. at 222 ("[W]hen curative instructions are given, it is generally presumed that the jury can and will follow them."). Following each instance of inadmissible testimony, the court held a bench conference with both parties to resolve the issue without the jury overhearing. Immediately after each bench conference, the court struck the testimony and instructed the jury to disregard it. *Compare Lawson v. State*, 389 Md. 570, 601-02 (2005) (finding no timely instructions to cure the prosecutor's improper closing remarks, as the court only gave a pattern jury instruction after the closing argument, without linking it to the specific remarks) *with Miller v. State*, 380 Md. 1, 35-37 (2004) (holding that the trial court properly cured prejudice from a prosecutor's improper remarks, where the court sustained the defendant's motion to strike, and then instructed the jury to disregard the specific comments). The court thus effectively minimized potential prejudice by giving prompt and clear curative instructions.

In sum, we conclude that the challenged statements, even cumulatively, were not so prejudicial as to deny Appellant a fair trial. To the extent that any prejudice did result, the

court soundly exercised its discretion by addressing it with curative instructions, rather than resorting to the extraordinary remedy of a mistrial. Accordingly, we find no abuse of discretion.

IV. Sufficiency of Evidence

A. Parties' Contentions

Finally, Appellant contends that the jury did not have sufficient evidence to convict him. As noted, Appellant was convicted of the following offenses: a sexual abuse of minor—a household member; second-degree rape (fellatio); third-degree sex offense; fourth-degree sex offense; and second-degree assault (battery). Rather than challenging each element of his convicted offenses, however, Appellant generally claims that he did not commit "any act," let alone with criminal intent, towards Child. He argues:

> [I]f [Appellant's] account was credited, proof of the *actus reus* was lacking. [Appellant] maintains that the evidence is legally insufficient to establish that he committed any act during the encounter with [Child] Therefore, the prosecution failed to prove an essential element of each crime with which he was charged with and convicted, that is, the *actus reus*.

The State counters that "it is not the function or duty of the appellate court to undertake a review of the record that would amount to, in essence, a retrial of the case." (quoting *State v. Albrecht*, 336 Md. 475, 478 (1994)). The State also notes that, when reviewing the legal sufficiency of evidence to sustain the jury's conviction, our standard is highly differential one, requiring us to view the evidence in the light most favorable to the State. Thus, according to the State, Appellant's contention "must fail because the jury was not required to accept" his account of the events.

B. Legal Framework

"When reviewing the sufficiency of evidence, we view the evidence and any reasonable inferences therefrom in the light most favorable to the State and determine whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Sewell v. State*, 239 Md. App. 571, 607 (2018) (quoting *Donati v. State*, 215 Md. App. 686, 718 (2014)). "We do not reweigh the evidence but simply ask whether there was sufficient evidence—either direct or *circumstantial*—that could have possibly persuaded a rational jury to conclude that the defendant was guilty of the crime(s) charged." *Id.* In doing so, "we defer to the fact finder's opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence." *Lindsey v. State*, 235 Md. App. 299, 311 (2018) (quoting *Neal v. State*, 191 Md. App. 297, 314 (2010)).

We begin by outlining the requisite elements for each of the offenses on which Appellant was convicted. First, "sexual abuse" is defined under Maryland Code (2002, Repl. Vol. 2021), Criminal Law ("CL") section 3–602, as "an act that involves sexual molestation or exploitation of a minor[,]" including, "incest," "rape," "sexual offense in any degree" and "any other sexual conduct that is a crime." CL §3–602(a)(4). A person may be found guilty of second-degree rape if that person

> engage[s] in vaginal intercourse or a sexual act with another[,] if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim.

CL §3–304(a)(3) (emphasis added). As pertinent to this appeal, a "sexual act" is defined

as "any of the following acts, regardless of whether semen is emitted: . . . (iii) fellatio[.]" CL § 3–301(d)(1)(iii).[7]

For the third- and fourth-degree sex offenses, the keyword is "sexual contact." Under the statute defining the third-degree sex offense, a person may not

> **engage in sexual contact** with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim[.]

CL §3–307(a)(3) (emphasis added).

For the fourth-degree sex offense, the governing statute provides that "[a] person may not engage in . . . sexual contact with another without the consent of the other[.]" CL § 3–308(b)(1). In turn, "'[s]exual contact' . . . means an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." CL § 3–301(f)(1). Thus, to convict Appellant of third- and fourth-degree sex offenses, the jury must have had enough evidence to find beyond reasonable doubt: "(1) the fact of the touching, and (2) the intent to do so for sexual arousal or gratification." *Bible v. State*, 411 Md. 138, 157 (2009).

While the second-degree assault, today codified at CL § 3–203, encompasses three

[7] While Maryland law does not provide a statutory definition for "fellatio," the Supreme Court of Maryland recognized that the legislature intended to give the term "its common, ordinary, and well-accepted meaning[,]" and held that "fellatio . . . encompasses [an] oral contact with the male sex organ[.]" *Thomas v. State*, 301 Md. 294, 321 (1984). Consistent with *Thomas*, the trial court instructed the jury, "Fellatio means that [Child] applied her mouth to the sexual organ of the male defendant." Neither party objected to this definition.

different common law theories, only one is relevant here: battery. *See* CL § 3–201(b) ("'Assault' means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings."); *Snyder v. State*, 210 Md. App. 370, 381-82 (2013) (explaining the three different modalities under the statutory offense of second-degree assault). As this Court explained,

> Th[is] variety of second-degree assault requires the State to prove that the defendant **caused offensive physical contact or physical harm to the victim,** that the contact resulted from the defendant's intentional or reckless act and was not accidental, and that the victim did not consent to the contact.

State v. Wallace, 247 Md. App. 349, 363 (2020) (emphasis added); *see also Lamb v. State*, 93 Md. App. 422, 444 n.4 (1992) (finding it "indisputabl[e]" that the common law crime of battery encompasses offensive touching or contact).

To place Appellant's contention in proper context, we now turn to the meaning of *actus reus*. It is well-established that every crime has two components—the physical act (*actus reus*) and the mental intent to do the crime (*mens rea*). *Hall v. State*, 448 Md. 318, 330 (2016). For instance, in a third- or fourth-degree sex offense, the act of touching is the *actus reus*, while the intent to cause the touching for sexual arousal or gratification is the *mens rea*. *See Bible*, 411 Md. at 157 (finding sufficient evidence of touching but insufficient evidence of intent).

Since Appellant does not address whether there was sufficient evidence of *mens rea*, or the intent to commit a crime, our review is limited to whether any reasonable jury could have found that Appellant committed the physical act underlying the crime. For an act to be a crime, it must be voluntary. As Professor LaFave explained:

> The word “act” might be defined in a broad sense to include such involuntary actions as bodily movements during sleep or unconsciousness, or in a narrow sense to mean only voluntary bodily movements. **At all events, it is clear that criminal liability requires that the activity in question be voluntary.** The deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be determined.

Wayne R. LaFave, CRIMINAL LAW § 3.2(c), at 208 (3d ed. 2000) (emphasis added). In this context, Appellant’s contention can be understood as claiming not only that no touching occurred between him and Child, but that, even if touching did occur, it was not a voluntary act on his part.

C. Analysis

We conclude that the record contains sufficient evidence to sustain the jury’s verdict. First, we note that Appellant’s argument is based on a flawed premise—“if [his] account was credited, proof of the *actus reus* was lacking.” As the State correctly notes, it is not our role “to undertake a review of the record that would amount to, in essence, a retrial of the case.” *Albrecht*, 336 Md. at 478 (1994). The sole question we ask is “whether there was sufficient evidence . . . that *could have* possibly persuaded a rational jury to conclude that the defendant was guilty of the crime(s) charged.” *Sewell*, 239 Md. App. at 607 (emphasis added). Thus, we, like the jury, are not required to credit Appellant’s account of events. *See Sifrit v. State*, 383 Md. 116, 135 (2004) (“The jury [is] free to believe some, all, or none of the evidence presented[.]”). As Judge Charles E. Moylan, Jr. elaborated:

> Virtually every crime testified to by multiple witnesses could give rise to half a dozen conceivable scenarios or different stories. That is why we have

> factfinders. We, on the other hand, are not concerned with those other possible stories, because we are not factfinders. The factfinding job has already been done by someone else. All that matters at this juncture is that the factfinding ju[ry] believed the victim's story . . . . Appellate concern is not with what should be believed, but only with what could be believed.

Travis v. State, 218 Md. App. 410, 422-23 (2014) (emphasis removed).

Moreover, when viewed in the light most favorable to the State, the evidence permitted a rational jury to conclude that Appellant voluntarily caused a touching of his penis with Child's mouth. There was ample evidence of the touching. During her video-recorded interview at the CAC, Child reenacted the alleged interaction between Appellant and herself using anatomical dolls. Again, Appellant did not deny that some form of touching occurred. In the closing, defense counsel argued:

> [E]ven though when [Child] is given the opportunity to demonstrate with dolls what happened, the demonstration that she undertakes not of the male standing up and she is being made to perform fellatio upon the male. No. The orientation is that the male is laying down, and the mouth is applied to that person. [Child's] words, [Child's] actions, not [Appellant's] . . . and it matters.
>
> * * *
>
> [Appellant] has not committed a crime if he wakes up with an erection, and no blame attaching to [Child], if a developmentally-delayed girl puts her mouth on his penis because she saw him watching pornography a day or two before. That's not a criminal act. And it doesn't become a criminal act because he didn't go to the police right way and say this happened.

The jury, however, was presented with evidence that the touching was Appellant's voluntary act. During her CAC interview, Child used anatomical dolls to demonstrate her interaction with Appellant. Defense counsel claimed that Child put the female doll's mouth on the male doll's penis. However, when Ms. Beran asked, "You did that?" Child's answer

was clear: "*No. Stevie did that*." (Emphasis added). A rational jury could credit that response and find that Appellant "did" commit an act which would have qualified as "fellatio," CL § 3–301(d)(1)(iii), "a touching of [his] genital," CL § 3–301(f)(1), and "battery." CL § 3–201(a). Child's trial testimony that Appellant's "wanker" went into her mouth (rather than that her mouth went to his "wanker") also reasonably supports the inference that Appellant committed the act on his own volition.

For the reasons stated above, we hold that the evidence was sufficient to convict Appellant of second-degree rape; third-degree sex offense; fourth-degree sex offense; and second-degree assault. In addition, because the offense of sex abuse of minor includes "rape," "sexual offense in any degree" and "any other sexual conduct that is a crime," Appellant's conviction for sex abuse of minor—a household member— was also supported by sufficient evidence. CL §3–602(a)(4). Accordingly, we affirm Appellant's convictions.

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

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

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