Circuit Court for Wicomico County
Case No. C-22-CR-20-000525

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1966

September Term, 2021

CLARK ANDREW HUTCHISON

v.

STATE OF MARYLAND

Wells, C.J.
Ripken,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: April 6, 2023

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

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

Clark Andrew Hutchison, Appellant, was indicted on two counts of sexual abuse of a minor in violation of Section 3-602(b)(2) of the Criminal Law Article, Maryland Code (2002, 2012 Repl. Vol., 2018 Supp.),[1] four counts of second-degree rape in violation of Section 3-304 of the Criminal Law Article,[2] and four counts of third-degree sexual offense

[1] All statutory references to the Criminal Law Article are to Maryland Code (2002, 2012 Repl. Vol., 2018 Supp.).

Section 3-602(b)(2) of the Criminal Law Article provides:

> A household member or family member may not cause sexual abuse to a minor.

A "family member" is "a relative of a minor by blood, adoption or marriage." Section 3-601(a)(3) of the Criminal Law Article. A "household member" is "a person who lives with or is a regular presence in a home of a minor at the time of the alleged abuse." Section 3-601(a)(4) of the Criminal Law Article. "Sexual abuse" is defined as "an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not." Section 3-602(a)(4)(i) of the Criminal Law Article. Sexual abuse includes, but is not limited to, "incest, rape, sexual offense in any degree; and unnatural or perverted sexual practices." Section 3-602(a)(4)(ii) of the Criminal Law Article

Count 1 charged Hutchison as a "household member," while Count 2 alleged he was a "family member."

[2] Section 3-304 of the Criminal Law Article provides, in pertinent part:

> (a) A person may not engage in vaginal intercourse or a sexual act with another:
>
> …
>
> (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.

A "sexual act" is defined as the following, "regardless of whether semen is emitted: analingus; cunnilingus; fellatio; anal intercourse, including penetration, however slight, of the anus; or an act: in which an object or part of an individual's body penetrates, however slightly, into another individual's genital opening or anus; and that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party." Section 3-301(d) of the Criminal Law Article.

(continued…)

in violation of Section 3-307 of the Criminal Law Article.[3] At the jury trial, the Child[4] testified about the abuse she alleged to have endured by Hutchison, and recorded statements previously made by her to a social worker, Angela Brewington, in which the Child disclosed the abuse, were also admitted, pursuant to a pretrial ruling made by the motions judge.

Hutchison, thereafter, was found guilty by the jury of the two counts of sexual abuse of a minor and three counts of third-degree sexual offense,[5] but not guilty of three counts of second-degree rape. The trial judge then sentenced Hutchison to twenty-five years' incarceration for sexual abuse of a minor by a household member,[6] as well as consecutive

(…continued)

"Vaginal intercourse" means "genital copulation, whether or not semen is emitted," and "includes penetration, however slight, of the vagina." Section 3-301(g) of the Criminal Law Article.

[3] Section 3-307 of the Criminal Law Article provides, in pertinent part:

> (a) A person may not:
> …
> (3) 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[.]

"Sexual contact" is defined as "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." Section 3-301(e) of the Criminal Law Article.

[4] We will refer to the victim as "the Child" throughout this opinion.

[5] At the close of evidence, the trial judge had granted Hutchison's motion for judgment of acquittal as to one count of second-degree rape (Count 6) and one count of third-degree sexual offense (Count 10).

[6] Count 2, sexual abuse of a minor by a "family member" was merged for sentencing purposes with Count 1, sexual abuse of a minor by a "household member."

ten-year sentences for each of the three counts of third-degree sexual offense, with twenty years suspended.

On appeal, Hutchison presents two questions for our review:

1. Did the lower court err in finding [the Child's] statement to the social worker was admissible under Md. Crim. Proc. Art. § 11-304?
2. Was the evidence sufficient to support Mr. Hutchison's convictions beyond a reasonable doubt?

Before we delve into answering Hutchison's questions, however, we *sua sponte* address whether the convictions and sentences for two of the three third-degree sexual offenses should be vacated as illegal sentences under Maryland Rule 4-345(a), which provides: "The court may correct an illegal sentence at any time."

We shall vacate the convictions and sentences for two of the three third-degree sexual offense convictions (Counts 8 and 9), that were suspended, even though no one has challenged them. We do so pursuant to the provisions of Rule 4-345(a) and its interpretation by our Supreme Court (then the Court of Appeals of Maryland[7]) in *Waker v. State*, 431 Md. 1, 8 (2013), when Judge John C. Eldridge, the opinion's author, recognized that, "[The Supreme Court] has gone so far as to vacate, *sua sponte*, a sentence which was,

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

according to the Court, 'illegal' within the meaning of Rule 4-345(a) even though no party, at any time, complained about the particular sentence."

An illegal sentence "is one in which the illegality inhered in the sentence itself; i.e., there either had been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed for and, for either reason, is intrinsically and substantively unlawful." *Colvin v. State*, 450 Md. 718, 725 (2016) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). One such type of illegal sentence occurs "where no sentence or sanction should have been imposed," such as when a trial court "lack[s] the power or authority to impose the contested sentence." *Johnson v. State*, 427 Md. 356, 368-70 (2012) (citing *Alston v. State*, 425 Md. 326, 339 (2012)).

A sentence for multiplicitous convictions is illegal under Rule 4-345(a), as no one can be convicted or sentenced for the same offense contained in multiple charges. *Brown v. State*, 311 Md. 426, 432 n.5 (1988) ("In *Ball v. United States*, 470 U.S. 856, 864-65 (1985), the Supreme Court held that both multiple convictions and multiple sentences come within the double jeopardy prohibition against multiple punishment for the same offense."). "Multiplicity is the charging of the same offense in more than one count." *Brown*, 311 Md. at 432 n.5. "The vice of multiplicity is that it may lead to multiple convictions and sentences for the same offense[.]" *Id.*

In explaining whether counts are multiplicitous, the analysis begins with the "unit of prosecution." *Georges v. State*, 252 Md. App. 523, 539 (2021). "The unit of prosecution of a statutory offense is generally a question of what the Legislature intended to be the act

or course of conduct prohibited by the statute for purposes of a single conviction and sentence." *Brown*, 311 Md. at 434.

To determine the unit of prosecution with respect to the charge of third-degree sexual offense, Section 3-307(a)(3) of the Criminal Law Article provides, in pertinent part: "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[.]" "Sexual contact" is defined as "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." Section 3-301(e) of the Criminal Law Article.

In *Georges v. State*, 252 Md. App. 523, 539 (2021), a case involving multiplicity, we examined the unit of prosecution for third-degree sexual offense and determined that the "dominant actus reus is non-consensual sexual contact." We concluded that "each such sexual contact is a viable unit of prosecution," which "may be charged separately and may be the subject of separate convictions." *Id.* at 541. In *Georges*, however, the distinct acts of sexual contact were touching the victim's breasts and touching her buttocks, albeit in the same criminal episode, but each charged as separate offenses in the indictment, such that Georges was "properly convicted of and punished for two separate and distinct acts of particularized non-consensual sexual contact." *Id.* at 543, 545-46.

In the present case, Hutchison was charged in Counts 7, 8, 9, and 10 with third-degree sexual offenses. Each count contained identical language, without any factual or temporal differentiations:

> THAT CLARK ANDREW HUTCHISON, between the 1st day of May, 2019 and the 1st day of September, 2019, in Wicomico County, State of Maryland, did unlawfully commit a sexual offense in the third degree upon [the Child] in violation of CR 3-307 of the Annotated Code of Maryland, contrary to the form of the Act of Assembly in such cases made and provided, against the peace, government and dignity of the State.

During jury instructions, the trial judge provided the following instruction as to the three remaining charges of third-degree sexual offense, after the fourth count had been removed by him from consideration by the jury:

> Sexual offenses, third degree sexual offense. The defendant is charged with the crime of third-degree sexual offense. In order to convict the defendant of third-degree sexual offense, the State must prove: one, that the defendant had sexual contact with [the Child]; two, that [the Child] was under 14 years of age at the time of the act; and three, that the defendant is at least 4 years older than [the Child].
>
> Sexual contact means the intentional touching of [the Child's] genital or anal area or other intimate parts for the purposes of sexual arousal or gratification or for abuse of either party. It does not include acts commonly expressive of familial or friendly affection or acts for accepted medical purposes.

On the verdict sheet presented to the jurors, each third-degree sexual offense was identified in identical language, without any distinction: "Sex Offense Third Degree – Touching of [the Child's] vagina."

The only inference as to why there were three counts of third-degree sexual offense charged was in the State's closing argument, when the prosecutor explained that there were three counts of second-degree rape (for which Hutchison later was acquitted by the jury), "because [the Child] said [it] happened three to four times," before the prosecutor described the elements of third-degree sexual offense:

> Sex offense third degree, again, three acts. Sex offense third degree does not require penetration. So for sex offense third degree is any touching whether

> over top or underneath. So the same for rape second degree, over top or underneath clothing. There doesn't have to be skin to skin contact. Any kind of touching of her private parts by his hand or any of his body parts for sexual gratification is sufficient for third degree sex offense. And, again, that she be under the age of 14. He is at least 4 years older than her.

During the State's opening, the prosecutor also had stated, "[Hutchison's] facing charges of sexual abuse of a minor; rape in the second degree; and third-degree sex offense." The State then posited that the Child would be testifying to the alleged abuse by Hutchison that occurred "several times on several occasions." The Child did testify that the abuse occurred on three or four occasions on different weekends during the summer of 2019, without any differentiation as to time, location, or any other factor.

In the present case, neither the counts of the indictment nor the jury instructions or the verdict sheet distinguished in any way among the three charges of third-degree sexual offense. While Hutchison could have been convicted of one count of third-degree sexual offense, were the evidence sufficient, he could not have been convicted and sentenced for the two other charges of third-degree sexual offense, because they were repetitions of the single count without any distinction and, as a result, multiplicitous. We, consequently, vacate the convictions and sentences for the second and third counts of third-degree sexual offense (Counts 8 and 9).[8] *See Johnson v. State*, 427 Md. 356, 378 (2012) ("When the illegality of a sentence stems from the illegality of the conviction itself, Rule 4-345(a) dictates that both the conviction and the sentence be vacated.").

[8] The charges for sexual abuse of a minor by a household member (Count 1) and sexual abuse of a minor by a family member (Count 2) did not implicate multiplicity because the identification of Hutchison's role was differentiated in the two.

The circuit court had imposed a 5-year period of probation in favor of suspending the 10-year sentences on the two convictions of third-degree sexual offense which we have now vacated. As a result, we remand for the limited purpose of resentencing to allow the court, if it wishes, the opportunity to impose a period of probation on any of the remaining counts.

We now turn to Hutchison's questions, the first of which presents us with an opportunity to interpret what process a judge must undertake when determining whether statements made by a purported child abuse victim to a social worker are admissible, when the child testifies at trial, under Section 11-304 of the Criminal Procedure Article, Maryland Code (2001, 2018 Repl. Vol.), which provides in pertinent part:[9]

> (a) "*Statement*" defined. In this section, "statement" means:
>
> (1) an oral or written assertion; or
>
> (2) nonverbal conduct intended as an assertion, including sounds, gestures, demonstrations, drawings, and similar actions.
>
> (b) *Admissibility*. Subject to subsections (c), (d), and (e) of this section, the court may admit into evidence in a juvenile court proceeding or in a criminal proceeding an out of court statement to prove the truth of the matter asserted in the statement made by a child victim who:
>
> (1) is under the age of 13 years; and
>
> (2) is the alleged victim or the child alleged to need assistance in the case before the court concerning:
>
> (i) child abuse under § 3-601 or § 3-602 of the Criminal Law Article;
>
> (ii) rape or sexual offense under §§ 3-303 through 3-307 of the Criminal Law Article[.]
>
> (c) *Recipients and offerors of statement.* An out of court statement may be admissible under this section only if the statement was made to and is offered

[9] All statutory references to the Criminal Procedure Article are to Maryland Code (2001, 2018 Repl. Vol.).

by a person acting lawfully in the course of the person's profession when the statement was made who is:

…

(4) a social worker[.]

(d) *Conditions precedent.* (1) Under this section, an out of court statement by a child victim may come into evidence in a criminal proceeding or in a juvenile court proceeding other than a child in need of assistance proceeding under Title 3, Subtitle 8 of the Courts Article to prove the truth of the matter asserted in the statement:

(i) if the statement is not admissible under any other hearsay exception; and

(ii) if the child victim testifies.

* * *

(e) *Particularized guarantees of trustworthiness.* (1) A child victim'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 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.
>
> (f) *Role of court.* In a hearing outside of the presence of the jury or before the juvenile court proceeding, the court shall:
>
> (1) make a finding on the record as to the specific guarantees of trustworthiness that are in the statement; and
>
> (2) determine the admissibility of the statement.
>
> (g) *Examination of child victim.* (1) In making a determination under subsection (f) of this section, the court shall examine the child victim 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:
>
> 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 presence by subpoena or other reasonable means; or
>
> (ii) the court determines that an audio or visual recording of the child victim's statement makes an examination of the child victim unnecessary.

For context, the record reflects that in September of 2020, the Child was 11 years old and living with her father, mother, and two sisters, in a Days Inn Hotel, located in Seaford, Delaware. During that time, the Child disclosed to her mother that Hutchison, her paternal grandfather, had inappropriately touched her during the summer of 2019 when the family lived on Castle Street in Salisbury, Maryland.

Within a week, the Child was interviewed by Angela Brewington, a licensed social worker employed by the Wicomico County Department of Social Services. In an audio and video recorded interview, the Child told Ms. Brewington that Hutchison had touched her "private part" during the summer of 2019, while she lived in Salisbury. During the interview, Ms. Brewington presented the Child with a blank diagram of a woman's body, pointed to various body parts, asked the Child how she referred to each body part, and

labeled each part accordingly. When Ms. Brewington pointed to the area of the woman's vagina on the diagram, the Child indicated that she refers to that as a "private part."

In the recorded interview, the Child explained to Ms. Brewington that during the summer of 2019, Hutchison would stay over at her house most weekends to help her father renovate her bedroom and that of her sisters. The Child recounted that, during the renovations, her parents would sleep in their bedroom, the Child and her two sisters would sleep on a mattress in the living room, and Hutchison would sleep on the living room sofa. During the interview, the Child stated that on 3 or 4 separate occasions at night, she was awakened to find Hutchison moving his hand up and down her "private part" for a minute. When Ms. Brewington asked whether his hands would touch the outside or inside of her "private part," the Child responded, "inside," and when asked if his hand was on the inside a little bit or all the way inside, the Child responded, "a little bit."

The State moved *in limine* to introduce the Child's recorded statements to Ms. Brewington into evidence at trial, pursuant to Section 11-304 of the Criminal Procedure Article, to which Hutchison demurred. In the course of a pre-trial hearing before the motions judge, the State played the audio and video recording of the Child's statements and introduced the transcript of the interview and the body diagrams, written on by Ms. Brewington in accordance with the Child's responses during the interview, during Ms. Brewington's testimony.

After Ms. Brewington testified, the State asked if the motions judge intended to conduct an examination of the Child at the hearing, and she stated that she could not "think of a single thing that I would ask the [C]hild that wasn't asked on the DVD, but I'm happy

to hear from counsel." Thereupon, Hutchison's counsel asked the motions judge to exercise her discretion to examine the Child to determine whether the Child understood the difference between the truth and a lie, a question which had not been addressed during the Child's interview with Ms. Brewington. The motions judge remarked that understanding the difference between the truth and a lie goes to witness competency, which was "not part of the equation" in her determination of admissibility under the statute. The motions judge, nevertheless, entertained the arguments of counsel on the issue.

The next day, the motions judge ruled that the Child's recorded statements to Ms. Brewington were admissible under Section 11-304(e) of the Criminal Procedure Article, and a personal examination of the Child by her was unnecessary, congruent with our holding in *In re J.J.*, 231 Md. App. 304 (2016) that "competency as a witness was not relevant to the admissibility of a child victim's statement to a social worker under 11-304."

In ruling on the admissibility of the Child's statements, the motions judge found that the Child was 11 years old at the time of her statements and that she qualified as an alleged victim of sexual abuse and offense under Section 11-304(b) of the Criminal Procedure Article. The motions judge also found that Ms. Brewington was a licensed social worker, who was acting lawfully as a professional with the Department of Social Services for Wicomico County, when she interviewed the Child, under Section 11-304(c) of the Criminal Procedure Article.

The motions judge then considered the thirteen factors necessary to determine whether the Child's statements possessed the "particularized guarantees of trustworthiness," as required by Section 11-304(e)(2) of the Criminal Procedure Article:

The motions judge found that the Child had spoken from personal knowledge, as she described what had occurred between her and Hutchison. The motions judge also stated that there was no question that the Child's statements were made, as they were audio and video recorded. Sections 11-304(e)(2)(i)-(ii) of the Criminal Procedure Article.

The motions judge also found that the Child's statements were not spontaneous, as her statements were given in direct response to questioning by Ms. Brewington. *Id.* at 11-304(e)(2)(iv). She also found the timing of the Child's statements was approximately a year and four months after the abuse allegedly began and a year from when it ended, but only four days from the Child's initial disclosure to her mother. *Id.* at 11-304(e)(2)(v).

The motions judge then found that the Child's statements were not a "graphic detailed account" beyond what would be expected by an 11 year old's knowledge and experience, and her description of Hutchison's actions, putting his hand on her "private part," was appropriate terminology for the Child's age. *Id.* at 11-304(e)(2)(vi)-(vii). Moreover, for the "nature and duration," the motions judge found that the abuse allegedly occurred "between three and four times over approximately four months in the summer of 2019." *Id.* at 11-304(e)(2)(viii).

The motions judge also found that the Child did not appear to be suffering pain or distress when giving her statement, pursuant to what she saw on the video. *Id.* at 11-304(e)(2)(x). In addition, the motions judge found that extrinsic evidence did exist to show that Hutchison had an opportunity to commit the alleged abuse, as the Child related to Ms. Brewington that Hutchison spent several weekends at the Child's family home during the

summer of 2019, and the Child's parents had corroborated the Child's statements regarding Hutchison's visits in 2019. *Id.* at 11-304(e)(2)(xi).

The motions judge further found that Ms. Brewington's questions were not leading or suggestive of any particular answer, as the Child said "she did not know" some of the answers to the questions asked, and it was "clear that she was utilizing her own thought process" when responding. The motions judge also found Ms. Brewington was a credible witness.

The motions judge determined, then, based upon her findings, that the Child's statements to Ms. Brewington possessed particularized guarantees of trustworthiness, and thus were admissible at Hutchison's trial.

Hutchison argues, however, that the motions judge clearly erred in determining that the Child's statements to Ms. Brewington were admissible, because she did not conduct an in chambers examination of the Child during the hearing. Pursuant to Section 11-304(g)(1)(ii) of the Criminal Procedure Article, a judge is not required to examine a child victim if the judge "determines that an audio or visual recording of the child victim's statement makes an examination of the child victim unnecessary." In the present case, the motions judge stated that "having received and reviewed: the State's Exhibit 1, the DVD; 2, the transcript; and 3, the diagram, the Court finds that an examination of the [C]hild in chambers as provided under 11-304(g) is unnecessary."

Hutchison argues that the Child was prompted to make accusations against Hutchison. During the 11-304 hearing, however, Hutchison did not raise the issue, although he did allege at trial that the Child was influenced by her mother to fabricate the allegations.

Nevertheless, even were Hutchison to have raised his claim of maternal influence at the 11-304 hearing, the motions judge found otherwise. In her assessment of the particularized guarantees of trustworthiness, the motions judge found that there was no evidence that the Child "was coached or even inadvertently influenced by any information received prior to the interview" or that Ms. Brewington was attempting to seek specific answers from the Child, pursuant to Section 11-304(e)(2)(xiii) of the Criminal Procedure Article.

The motions judge also found that there was no evidence that the Child had a "motive to fabricate" or that she demonstrated any bias from the interview, pursuant to Section 11-304(e)(2)(iii) of the Criminal Procedure Article. While Ms. Brewington had testified that the Child reported to her parents that Hutchison "got on her nerves" when he would visit her family, the motions judge found that the Child's dislike of Hutchison "is not inconsistent with there being child abuse and, perhaps, her dislike was occasioned by the child abuse, perhaps, not." Whatever the reason, the motions judge found the Child's dislike of Hutchison did not "rise to the level of undermining the trustworthiness of the statement in the Court's view."

Hutchison, then, argues that the motions judge should have conducted an examination of the Child because some of the Child's statements to her mother were inconsistent with those to Ms. Brewington relative to digital penetration. Hutchison urges that the motion judge's finding that the Child's statements displayed "inner consistency and coherence" was clearly an error due to the inconsistent statements about penetration.

In her evaluation of trustworthiness, the motions judge found that "the inner consistency and coherence of the statement was strong," pursuant to Section 11-304(e)(2)(ix) of the Criminal Procedure Article. The motions judge explicitly noted that, "although the [C]hild apparently told her mother that the defendant had not inserted anything into her, she was clear in her recorded statement that he inserted his hand a little bit." After acknowledging the difference, the motions judge found that, even though the Child's statements to her mother were different, "her statements to Ms. Brewington were *internally* consistent and coherent, and there's nothing about either statement that would be incoherent." As a result, the motions judge properly found the Child's statements internally consistent and coherent.

Accordingly, the motions judge did not err in deciding that an examination of the Child was unnecessary or in finding the Child's statements displayed "inner consistency and coherence."

In his second question, Hutchison argues that the evidence was insufficient to support his convictions for sexual abuse of a minor and third-degree sexual offense, because the Child's testimony was so inconsistent to render it devoid of any probative value. In response, the State contends that Hutchison failed to "identify any single element that the State supposedly failed to establish," and none of the alleged inconsistencies entitle reversal for legal sufficiency.

"When an appellate court reviews for sufficiency of the evidence, we determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt.'" *Brown v. State*, 252 Md. App. 197, 208 (2021) (quoting *Scriber v. State*, 236 Md. App. 332, 344 (2018). "It is not our role to retry the case." *Smith v. State*, 415 Md. 174, 185 (2010). "Rather, 'because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence.'" *Fuentes v. State*, 454 Md. 296, 307-308 (2017) (quoting *Smith*, 415 Md. at 185).

At trial, the Child testified that, during the summer of 2019, when she "was like 10 or 11," Hutchison would frequently come over to her home on Castle Street and help her father renovate bedrooms. When Hutchison would stay the weekend, the Child explained that her parents would sleep in their bedroom, the Child and her sisters would sleep on a mattress in the living room, and Hutchison would sleep on the living room sofa. The Child testified about how Hutchison would inappropriately touch her at night:

> [The Prosecutor]: Did [Hutchison] do anything to you during the night when he would stay on Castle Street?
> [The Child]: Yes.
> [The Prosecutor]: Did you tell your mom about it later on after it happened?
> [The Child]: Well, I told her when we were in the hotel.
> [The Prosecutor]: Okay. So when you say that things happened, did Grandpa touch parts of your body?
> [The Child]: Yes.
> [The Prosecutor]: Okay. Are you comfortable talking about those body parts or do you want to just circle what body parts we are talking about?
> [The Child]: Circle.
> [The Prosecutor]: Okay. So let me show you what has been marked for identification purposes as State's Exhibit 1. If you can take a look at this

> picture for me, and you probably saw one when you were with the social worker that looked like this. Is this kind of what you did with Miss Angie?[10]
> [The Child]: Yes.
> [The Prosecutor]: What is on State's Exhibit 1? So what is this a diagram of?
> [The Child]: A girl's body.
> [The Prosecutor]: Okay. Are you a girl?
> [The Child]: Yes.
> [The Prosecutor]: Okay. So when we're talking about what happened with grandpa, did it happen during the daytime or nighttime?
> [The Child]: Nighttime.

The Child explained that she would always sleep on the left side of the mattress, and she usually wore a nightgown to bed. The Child testified that at night, when she was asleep on the mattress in the living room, she would awaken to Hutchison touching her "private parts":

> [The Prosecutor]: So when Grandpa did these things that you said you would be in [the left] spot on the mattress?
> [The Child]: Yes.
> [The Prosecutor]: What would you usually wear to bed?
> [The Child]: Like a nightgown, or just – like a shirt and leggings.
>
> * * *
>
> [The Prosecutor]: So you said he would do this at nighttime. Would you be asleep or awake or how would it happen?
> [The Child]: Asleep.
> [The Prosecutor]: Okay. And when—after you were asleep, would it wake you up when he did these things?
> [The Child]: Yes.
> [The Prosecutor]: What would you wake up to? What—okay. What parts of your body were being touched when you woke up?
> [The Child]: My private parts.
> [The Prosecutor]: Your private parts, okay. So when you say private parts, do you want to circle that on here, or do you want me to circle—do you want to point to it on State's Exhibit 1?

[10] "Ms. Angie" referred to Ms. Angela Brewington, the social worker to whom the Child provided information about the alleged abuse and about who the first question herein is addressed.

During her testimony, the Child pointed to the area of the girl's vagina on the diagram and indicated that was the area that she referred to as "private parts;" the prosecutor circled the area on the diagram. The Child continued to talk about being touched "on top" of her underwear, "four to three times":

> [The Prosecutor]: So what I'm circling, is that what you call private parts?
> [The Child]: (Nodding head up and down).
> [The Prosecutor]: Okay. So what you would wake up to, was this part of your body being touched?
> [The Child]: Yes.
> [The Prosecutor]: Was it—could you feel what—was it underneath of your clothes or over top of your clothes?
> [The Child]: I was wearing underwear, so it was like on top of my underwear.
> [The Prosecutor]: Okay. On top of your underwear but underneath, I guess, whatever clothes you had on?
> [The Child]: Yeah.
> [The Prosecutor]: Are you describing—so it happened more than one time?
> [The Child]: Yeah, four to three times.
> [The Prosecutor]: Okay. So the first time that it happened, did it happen just like that?
> [The Child]: Yes.
> [The Prosecutor]: The first time it happened, do you remember what kind of clothing you had on?
> [The Child]: No.
> [The Prosecutor]: Okay. So you just know it was underwear?
> [The Child]: Yeah.

The Child explained that she knew Hutchison was touching the "outside" of her "private part," because when she awakened, she saw "his face." The Child stated that Hutchison's hand did not go "underneath" her clothes and that he only touched the "outside" of her "private parts":

> [The Prosecutor]: And when he—did you know who was touching you when you first woke up?
> [The Child]: Yeah.
> [The Prosecutor]: Okay. How did you know who was touching you?
> [The Child]: Because I saw his face.

> [The Prosecutor]: Okay. So did you wake up and see his face?
> [The Child]: Yes.
> [The Prosecutor]: Okay. Did he say anything to you?
> [The Child]: No.
> [The Prosecutor]: Did you say anything?
> [The Child]: No.
> [The Prosecutor]: Okay. So when you say you saw his face, are you talking about your grandpa?
> [The Child]: Yes.
> [The Prosecutor]: Okay. Did you wake up before you felt something on your private parts? Like did you feel him touch any other part of your body before he touched your private parts?
> [The Child]: No.
> [The Prosecutor]: Did you feel his hand go underneath your clothes at all?
> [The Child]: No.
> [The Prosecutor]: And when you say you felt his hand on your private part, was it on the outside or the inside of your private part?
> [The Child]: Outside.

The Child testified that Hutchison would move his hand "up and down" her "private part" for "a minute" each time. She explained that she did nothing when Hutchison touched her because she was "in shock."

> [The Prosecutor]: Okay. How was it moving? I know you're showing me with your hand, but nobody else can see it. So maybe you can—do you want to either show or describe with your own words? Was his hand—was he using his whole hand or just fingers?
> [The Child]: His hand.
> [The Prosecutor]: His hand. Okay. So how was his hand moving on your private part? You can show it.
> [The Child]: (Indicating.)
> [The Prosecutor]: Like was like up and down?
> [The Child]: Yes.
> [The Prosecutor]: Okay. Is that what you're showing us?
> [The Child]: Yes.
> [The Prosecutor]: Okay. Did you—you said you were in shock, so you didn't move?
> [The Child]: No.
> [The Prosecutor]: How long do you think he touched you for? Like just a couple seconds, a minute or more?
> [The Child]: A minute.

After Hutchison finished, the Child related that "he went back to the couch and went to bed," and neither of them spoke:

> [The Prosecutor]: Okay. After he touched your private parts, could you tell where he went or what he did?
> [The Child]: He went back to the couch and went to bed.
> [The Prosecutor]: Did he say anything to you at all?
> [The Child]: No.
> [The Prosecutor]: Did you say anything to him?
> [The Child]: No.

The Child testified that the "three to four" alleged instances of abuse "happen[ed] the same way every time":

> [The Prosecutor]: Okay. So you said it happened three or four times or four or five times?
> [The Child]: Three to four.
> [The Prosecutor]: Three to four. Okay. So did it happen the same way every time?
> [The Child]: Yes.
> [The Prosecutor]: Every time—so did it happen every time that he would come on the weekend or just some weekends?
> [The Child]: Some of the weekends.
> [The Prosecutor]: Just some of the weekends. Okay. Every time, would you be asleep or were you ever awake when he started touching you?
> [The Child]: I was asleep every time.
> [The Prosecutor]: You were asleep every time?
> [The Child]: Yes.
> [The Prosecutor]: Were you always on that mattress in the living room?
> [The Child]: Yes.
> [The Prosecutor]: Okay. Were your sisters always in bed?
> [The Child]: Yes.
> [The Prosecutor]: Were your parents in their bedroom every time?
> [The Child]: Yes.
> [The Prosecutor]: Okay. Did he ever say anything to you about it?
> [The Child]: No.
> [The Prosecutor]: Okay. Did you ever say anything to him?
> [The Child]: No.
> [The Prosecutor]: So every time, did you wake up to him already touching you?

[The Child]: Yes.

The Child also reiterated that Hutchison's hand did not go "underneath" her underwear or "inside" her "private part":

[The Prosecutor]: Did his hand ever go underneath your underwear?
[The Child]: No.
[The Prosecutor]: Did his hand ever go inside your private part?
[The Child]: No.

In addition to Hutchison having touched her private parts when she was wearing a nightgown, the Child related that Hutchison would also touch her when she wore shorts. Initially, the Child did not remember how Hutchison's hand would get inside her shorts, but later clarified that he would put his hand down the front:

[The Prosecutor]: Did you ever wear anything other than a nightgown to bed? Did you ever have shorts or pants on?
[The Child]: Yeah.
[The Prosecutor]: Okay. How would his hand – do you know how he would put his hand inside your shorts or your pants? Or did he ever do it when you were wearing shorts or pants?
[The Child]: Yes.
[The Prosecutor]: Okay. How did his hand get inside your shorts or your pants, if you know?
[The Child]: I don't know.
[The Prosecutor]: You don't know. Okay. I think when – would your pants or your shorts be pulled down?
[The Child]: No.
[The Prosecutor]: Or – okay. Did he just put his hand down the front or the back?
[The Child]: Yeah.
[The Prosecutor]: Yeah.
[The Child]: Yes.
[The Prosecutor]: Okay. Are you—I know you're trying to show something with your hands. Is that what you meant?
[The Child]: He would like go under my pants and then—yeah.
[The Prosecutor]: Like his hand would go – you mean down the front? Is that what you mean?
[The Child]: Yes.

The Child then testified that Hutchison would touch her "private parts" on "different weekends" throughout the summer, but that it occurred the same way each time:

> [The Prosecutor]: Okay. And do you know, did it happen only on the weekends, like different weekends that it happened?
> [The Child]: Different weekends.
> [The Prosecutor]: Okay. The last time that it happened, was there anything different about that time from the other times that you remember?
> [The Child]: No.
> [The Prosecutor]: Was there any time that he did it a way different than the others that you remember that sticks out more than the others?
> [The Child]: No.

The Child then stated that the alleged abuse occurred only "three to four times" and only at her home on Castle Street:

> [The Prosecutor]: Okay. Is there anything else that happened—
> [The Child]: No.
> [The Prosecutor]: --and you think it was just those three—the three to four times?
> [The Child]: Yes.
> [The Prosecutor]: Okay. And only on Castle Street?
> [The Child]: Yes.

In addition to the Child, the Child's father testified that Hutchison was his father:

> [The Prosecutor]: And are you familiar with Clark Hutchison?
> [The Child's father]: Yes.
> [The Prosecutor]: How do you know Mr. Hutchison?
> [The Child's father]: He is my father.
> * * *
> [The Prosecutor]: Okay. Do you know approximately how old [Hutchison] is?
> [The Child's father]: In his 50's.

Throughout his testimony, the Child's father also corroborated many details of the Child's testimony, including that Hutchison would stay over at the family home on Castle Street frequently during the summer of 2019, and that Hutchison helped the Child's father

remodel the home. The Child's father explained that Hutchison would sleep on the living room sofa when he stayed over, and the Child, along with her two sisters, would sleep in the living room. The Child's mother also corroborated the Child's testimony and acknowledged Hutchison was her father-in-law and that he frequently stayed over on the weekends during the summer of 2019 to help renovate the home.

In addressing whether sufficient evidence supported the remainder of Hutchison's convictions, we need not rely at all on the Child's statements to Ms. Brewington, although they are corroborative. We determine, nevertheless, that the elements of sexual abuse of a minor, involving the two counts that were merged, as well as the remaining count of third-degree sexual offense, were satisfied.

In determining whether the elements of sexual abuse of a minor, Section 3-602(b)(2) of the Criminal Law Article, were satisfied, that Section provides:

> A household member or family member may not cause sexual abuse to a minor.

Sexual abuse of a minor, then, embodies three elements: "(1) that the defendant is a parent, family or household member, or had care, custody, or responsibility for the victim's supervision; (2) that the victim was a minor at the time; and (3) that the defendant sexually molested or exploited the victim by means of a specific act." *Schmitt v. State*, 210 Md. App. 488, 496, *cert. denied*, 432 Md. 470 (2013).

A "family member" is "a relative of a minor by blood, adoption or marriage." Section 3-601(a)(3) of the Criminal Law Article. A "household member" is "a person who lives with or is a regular presence in a home of a minor at the time of the alleged abuse."

Section 3-601(a)(4) of the Criminal Law Article. "Sexual abuse" is defined as "an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not." Section 3-602(a)(4)(i) of the Criminal Law Article. Sexual abuse includes, but is not limited to, "incest, rape, sexual offense in any degree; and unnatural or perverted sexual practices." Section 3-602(a)(4)(ii) of the Criminal Law Article.

In the present case, the Child's testimony, and that of her parents, were sufficient to establish that Hutchison was a "family member" and that he was also a "household member" because the Child and her parents testified that Hutchison was the Child's paternal grandfather and that he regularly stayed at their Castle Street home on the weekends during the summer of 2019, the timeframe during which the sexual abuse occurred.

The testimony also established that the Child was a minor during the summer of 2019, as she testified that she was around "10 or 11," and her parents corroborated her date of birth.

The Child also testified that Hutchison would touch her vagina over her underwear with his hand at night, on three to four separate occasions, for a minute each time, an act that involves sexual molestation or exploitation of the Child. *See Tate v. State*, 182 Md. App. 114, 127-28 (2008) (finding sexual abuse based upon defendant rubbing the outside of his stepdaughter's vagina). Accordingly, there was sufficient evidence to convict Hutchison of sexual abuse of a minor by a family member and sexual abuse of a minor by a household member in violation of Section 3-602(b)(2) of the Criminal Law Article.

The evidence also was sufficient to establish the elements of Section 3-307(a)(3) of the Criminal Law Article, the remaining third-degree sexual offense, which provides, in pertinent part:

> (a) A person may not:
> …
> (3) 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[.]

"Sexual contact" is defined as "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." Section 3-301(e) of the Criminal Law Article.

The phrase "for sexual arousal or gratification, or for the abuse of either party" establishes a specific intent requirement, which may be deduced from the "circumstances surrounding the touching, or from the character of the touching itself." *Bible v. State*, 411 Md. 138, 158-59 (2009). Circumstances that may demonstrate a specific intent for sexual gratification may include "whether the defendant and victim were strangers or knew each other…whether the touching occurred in public or in a secluded area[.]" *Id.* at 159. With regards to the character of the touching, "the force of the touching, the motion (was it a pat, a rub back and forth, a circular motion, a brush), the duration, and the frequency are all important." *Id.*

Here, the Child and her parents testified that the Child was under the age of 14 during the summer of 2019. Hutchison was at least 4 years older than the Child, as the Child's father testified that his father was "in his fifties." The Child also testified that, after she went to bed, she was awakened by Hutchison moving his hand up and down her vagina,

over her underwear, on three to four occasions, for a minute each time. The circumstances surrounding the touching, and the nature of the touching reflect Hutchison's specific intent to touch the Child's vagina for purposes of sexual gratification. *See Bible v. State*, 411 Md. 138, 159 (2009). Accordingly, there was sufficient evidence to support Hutchison's conviction of third-degree sexual offense in violation of Section 3-307(a)(3) of the Criminal Law Article.

Hutchison argues, however, without citation to authority, that the Child's testimony was so inconsistent that it should not have been given any weight. Hutchison contends that "no trier of fact should have credited [the Child's] testimony," because at trial, she testified that Hutchison did not digitally penetrate her, but in her statements to Ms. Brewington, which were admitted at trial, she stated that Hutchison did touch the "inside" of her vagina.

The Child's statements at trial were sufficient to satisfy the elements of both sexual abuse of a minor and third-degree sexual offense. Whether or not Hutchison digitally penetrated the Child does not, in any way, offend his convictions, and the jury acquitted him of the counts of second-degree rape that required penetration under Section 3-304(a)(3) of the Criminal Law Article.[11] Further, as we have said in *McKinney v. State*, 82

[11] Section 3-304 of the Criminal Law Article provides, in pertinent part:

> (a) A person may not engage in vaginal intercourse or a sexual act with another:
> …
> (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.

"Sexual act" includes the following, "regardless of whether semen is emitted: analingus; cunnilingus; fellatio; anal intercourse, including penetration, however slight, of the anus;

(continued…)

Md. App. 111, 117 (1990), "[t]he resolution of discrepancies [between the girls' testimony and pretrial statements they had made to their teachers, their principal, and a social worker] and the credibility of the witnesses and their testimony was for the trier of fact." As a result, even considering any difference between the Child's statements to Ms. Brewington about penetration and her statements at trial, we are satisfied that the elements of sexual abuse of a minor by a family or household member and third-degree sexual offense were met.

Hutchison also argues various other alleged inconsistencies within the Child's testimony at trial. Hutchison contends that the Child could not remember if Hutchison's hand went down her shorts, but she later testified that he did put his hand down the front of her shorts. The Child initially did not remember how Hutchison would get his hand down her shorts, but then later testified that Hutchison put "his hand down the front."

Hutchison further argues that in her testimony, the Child contradicted her parents' testimonies, because she stated that she did not tell her father about the alleged abuse on the day of her initial disclosure to her mother, but her mother and father testified that she had. In addition, Hutchison argues that the Child's parents' testimonies themselves were also so inconsistent as to render them "as equally incredible as their daughter." The litany

(…continued)

or an act: in which an object or part of an individual's body penetrates, however slightly, into another individual's genital opening or anus; and that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party." Section 3-301(d) of the Criminal Law Article.

"Vaginal intercourse" means "genital copulation, whether or not semen is emitted," and "includes penetration, however slight, of the vagina." Section 3-301(g) of the Criminal Law Article.

of alleged inconsistencies are for a jury to consider, however, rather than an appellate court. *Fuentes*, 454 Md. at 307-308 (explaining that an appellate court does "not re-weigh the credibility of witnesses or attempt to resolve any conflicts in evidence").

Finally, Hutchison contends that the evidence was insufficient because "there was no forensic evidence" or "any DNA evidence or fingerprint evidence introduced linking him to the offenses." In their opening statements and closing arguments both the State and Hutchison spoke to the fact that there would not be any forensic or DNA evidence presented at trial, although a missing evidence instruction was not requested. *See Patterson v. State*, 356 Md. 677, 682 (1999) ("If the State fails to produce evidence that is reasonably available to it or fails to explain why it has not produced the evidence, a defendant is permitted to comment about the missing evidence in his or her closing argument to the jury."). Despite the lack of such forensic evidence, the jury convicted Hutchison of sexual abuse of a minor and third-degree sexual offense, and it was within the purview of the jury to do so.

CONCLUSION

In conclusion, although initially we vacate Hutchison's conviction and sentences for Counts 8 and 9, the counts of third-degree sexual offense that were suspended, we hold that the circuit court did not err in determining that the Child's statements to Ms. Brewington were admissible at trial and that there was sufficient evidence to sustain Hutchison's convictions for sexual abuse of a minor by a family or household member and Count 7, the remaining third-degree sexual offense.

CONVICTIONS AND SENTENCES FOR COUNTS 8 AND 9 VACATED. CASE REMANDED FOR THE LIMITED PURPOSE OF RESENTENCING, IF THE COURT DESIRES. JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AS TO ALL OTHER COUNTS AFFIRMED. COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND WICOMICO COUNTY.