Circuit Court for Anne Arundel County
C-02-CR-17-001534

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 924

September Term, 2018

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CALVIN O'NEIL JACKSON

v.

STATE OF MARYLAND

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Berger,
Leahy,
Wells,

JJ.

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Opinion by Berger, J.

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Filed: July 1, 2019

A jury sitting in the Circuit Court for Anne Arundel County convicted Calvin O'Neil Jackson, appellant, of sexual abuse of a minor, third-degree sexual offense, and second-degree assault. The court sentenced appellant to 25 years for sexual abuse; five years, all suspended, for third-degree sexual offense; and ten years, suspend all but five, for second-degree assault, for a total executed sentence of 30 years.

Appellant presents six questions for review, which we have rephrased slightly:

> I. Did the circuit court err by rejecting appellant's challenge to the prosecutor's use of peremptory strikes pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986)?
>
> II. Did the administrative judge abuse his discretion by denying appellant's motion for a continuance?
>
> III. Did the trial court err by failing to grant relief after a portion of a 911 call was inadvertently played for the jurors?
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> IV. Did the trial court err by permitting the prosecutor to elicit hearsay during the testimony of a police officer?
>
> V. Did the trial court err by failing to grant relief based upon alleged juror misconduct?
>
> VI. Was the evidence legally sufficient to sustain appellant's convictions for sexual abuse and third-degree sexual offense?

For the following reasons, we answer the first five questions in the negative and the sixth question in the affirmative and affirm the judgments of the circuit court.

## FACTS AND PROCEEDINGS

For approximately two years beginning in 2015, appellant was in a relationship with Stephanie Burrell. They have a son together, C, who was born in July 2016. In June

2017, Appellant was living with Ms. Burrell in her townhouse located on a cul-de-sac in Glen Burnie, along with C and Ms. Burrell's then 14-year old daughter, A; and her then almost 9-year old son, M.

On June 13, 2017, appellant was arrested and charged with assault and various sexual offenses arising from allegations made by A. He ultimately was indicted on eight charges: sexual abuse of a minor; sexual solicitation of a minor; attempted first-degree rape; attempted second-degree rape; attempted third-degree sexual offense; first-degree assault; second-degree assault; and reckless endangerment. The charges against him were tried to a jury over four days in April 2018. The State called eight witnesses, including A; M; Ms. Burrell; and several law enforcement witnesses. At the close of the State's case, the prosecutor dismissed the charges for first-degree assault; reckless endangerment; and sexual solicitation of a minor. Defense counsel conceded the sufficiency of the evidence on the charge of second-degree assault, but moved for judgment of acquittal as to the remaining counts. His motion was denied.

Appellant testified in his defense. The State called a police officer as a rebuttal witness. Defense counsel's renewed motion for judgment of acquittal at the close of all the evidence was denied. The testimony and other evidence adduced at trial showed the following.

On June 12, 2017, appellant and Ms. Burrell went out drinking with a male friend, Derrick.[1] A stayed home to babysit her brothers. All three children fell asleep in the living room while watching television – C in his swing, M on the couch, and A in a recliner.

According to A, she awoke around 2 a.m. on June 13, 2017 to find appellant standing next to her completely naked. He climbed on top of her, put his hand over her mouth, and told her to "[t]ake it or die[,]" which she understood to mean that he wanted her to have sexual intercourse with him. A began screaming, waking M and C. M began yelling at appellant. Appellant carried A to the stairs leading to the second floor and told her to go upstairs. When appellant walked back into the living room, A ran out the front door and into the cul-de-sac. Appellant, who remained naked, ran after her. A screamed for help and a neighbor, Tiffany Naylor, heard her. Ms. Naylor yelled at appellant from her second-floor window, "[w]hat are you doing?" As A ran toward Ms. Naylor's house, she tripped and hurt her knee. She ran inside Ms. Naylor's house. M also ran to Ms. Naylor's house. A stayed there until officers from the Anne Arundel Police Department ("AACPD") responded to the scene. Ms. Burrell arrived at the scene after the police responded.

A testified that prior to the incident on June 13, 2017, appellant had engaged in behaviors that made her uncomfortable. On multiple occasions, she had woken at night to find appellant standing in her bedroom, staring at her. On one of those occasions, she

[1] The record does not reflect Derrick's last name.

felt the covers move while appellant was in her bedroom. After A told Ms. Burrell that appellant was coming into her bedroom at night, Ms. Burrell spoke to appellant about it and told him to stop. Ms. Burrell also purchased a lock for A's bedroom door. One night after A began using the lock, however, appellant still managed to come into her bedroom.[2]

A also recalled multiple occasions when appellant placed his hands in his pants and fondled his penis while staring at her. He did so while sitting in a chair in the living room. A told her mother about this behavior as well. Once, while A was kneeling on the bathroom floor to bathe C, appellant put his face down near her bare feet and rubbed his mustache on her foot.

M corroborated A's version of events on June 13, 2017. He testified that he woke up because A and C both were screaming. He observed appellant "dragging [A] by her wrist . . . [u]p the steps." Appellant was completely naked except that he was wearing socks. M yelled at appellant that "[t]he baby is sleeping," which distracted appellant, allowing A to run out the door. M watched through the doorway as appellant chased A around outside of the townhouse. Appellant then returned to the townhouse and went upstairs. At that time, M ran out the door and to Ms. Naylor's house.

While at Ms. Naylor's house, M observed appellant, half-dressed, get into his car and drive away "really fast." Appellant "hit three [parked] cars" while leaving the cul-de-sac, but did not stop.

[2] A testified that the lock could be picked using a Q-tip.

Ms. Burrell testified that A had reported to her that appellant came into her room at night. When she confronted appellant about it, he claimed he had been looking for their cat or made other excuses. A also told Ms. Burrell that appellant fondled himself while looking at her.

On June 12, 2017, Ms. Burrell, appellant, and Derrick went to two bars to drink and play pool. While at the second bar, in Baltimore City, appellant became angry because he suspected that Ms. Burrell was cheating on him with Derrick. Appellant and Ms. Burrell fought and the police were called. Before the police arrived, appellant left the bar. Ms. Burrell's purse and her cell phone were in his car and she had no way to get home.

Ultimately, officers with the Baltimore City Police Department transported Ms. Burrell back to her townhouse. When she arrived, AACPD was on the scene. Ms. Burrell saw A, who was "crying, . . . limping . . . . [and] just very upset."

Ms. Burrell went inside her townhouse with AACPD officers. She observed appellant's shirt that he had been wearing that night with what appeared to be blood on it near the recliner where A had been sleeping. His belt was on the steps leading upstairs. A jar of Vaseline was on top of a pile of clothes on the couch in the living room. Ms. Burrell testified that the Vaseline ordinarily was stored in the bathroom. Ms. Burrell told police that appellant likely had gone to his mother's house, which is where he was apprehended.

Ms. Naylor testified that she had lived in a townhouse across the street from Ms. Burrell for four years. On June 12, 2017, her power had gone out. Consequently, when she went to sleep that night, she left her bedroom window open. She woke up around 2 a.m. on June 13, 2017 to the sound of appellant's car stereo blaring. She then heard him loudly arguing with someone on his cell phone. A few minutes later, she heard one scream, followed by another scream. She went to her window and observed A running out of her house screaming. Appellant ran out behind A, chasing her. Appellant was naked except for his socks. A tripped and fell and appellant was trying to grab her. At that point, Ms. Naylor yelled, "Calvin, what are you doing?" Upon seeing Ms. Naylor, appellant ran back inside Ms. Burrell's townhouse.

A came inside Ms. Naylor's house. She was "crying and she was shaking and she said that [appellant] tried to rape her." Ms. Naylor called 911. We will discuss the substance of that call, an excerpt of which was played for the jury, *infra.*

Ms. Naylor observed appellant get into his car wearing only shorts and drive away. He hit a neighbor's car and kept driving. Corporal Charles Crawford with the AACPD responded to the scene at 2:20 a.m. He observed A crying and with a bloody knee.

Corporal Christopher Linsenbigler, the primary investigator on the case, also responded to the scene. He observed A "crying [and] acting hysterical." She was clothed in a t-shirt and underwear. She had a cut on her knee. Corporal Linsenbigler asked A

what happened and she replied, "He tried raping me." Corporal Linsenbigler asked her who she was referring to and A replied that it was "her mother's fiancé[,]" *i.e.,* appellant.

In his case, appellant testified that he and Ms. Burrell's relationship was very volatile in 2017. On the night of June 12, 2017, he and Ms. Burrell drank heavily. He confirmed that he became angry with Ms. Burrell because he believed she was cheating on him with Derrick. According to appellant, he broke up with Ms. Burrell. After he left Ms. Burrell and Derrick at the bar in Baltimore City, appellant drove to his mother's house. There, he spoke to and argued with his brother. He then drove back to Ms. Burrell's townhouse. When he pulled up outside, his stereo was blaring. His brother called him while he was sitting in the car and he proceeded to argue loudly with his brother. By the time he walked up to the townhouse, A was standing at the front door. She asked him where her mother was and became angry when he told her he had left Ms. Burrell at the bar. Appellant went upstairs, packed up most of his clothes, and then put them in the trunk of his car. When he came back inside to get the rest of his belongings, A was on the telephone. He demanded to know who she was speaking to and they "got into a physical altercation over the phone[.]" Appellant denied that he was naked in A's presence, that he tried to rape her, or that he chased her.

Appellant also denied that he ever had watched A sleep in her bedroom at night or that he had rubbed his mustache against her foot. He admitted that he often put his hands in his pants when he was watching television, but denied that it was for sexual reasons.

On cross-examination, appellant was asked about a statement he made to the police at 8 a.m. on June 13, 2017 in which he had denied returning to Ms. Burrell's townhouse at all after leaving her at the bar. Appellant acknowledged that he had not been honest during that interview.

On rebuttal, the State called AACPD Detective Katherine Holquist, who testified that when she interviewed appellant on June 13, 2017, he did not appear to be under the influence of alcohol or drugs.

The jury convicted appellant of sexual abuse of a minor, attempted third-degree sex offense, and second-degree assault, and acquitted him of attempted first- and second-degree rape. This timely appeal followed. We shall include additional facts in our discussion of the issues.

## DISCUSSION

### I.

### *Batson* Challenge

During jury selection, defense counsel challenged the prosecutor's use of peremptory strikes to remove African-American prospective jurors from the jury pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). As this Court has explained, a trial court must follow a "three-step process" in analyzing a "claim that peremptory challenges were exercised in an impermissibly discriminatory manner." *Elliott v. State*, 185 Md. App. 692, 712 (2009). First, the challenging party has the burden of making a "*prima facie* showing that the other party has exercised its peremptory challenges on an impermissibly

discriminatory basis, such as race or gender." *Gilchrist v. State*, 340 Md. 606, 625 (1995). Second, if the challenging party makes that showing, the burden of production shifts to the other party to "rebut the *prima facie* case by offering race-neutral explanations for challenging the excluded jurors." *Id*. 625-26. "Finally, the trial court must 'determine[] whether the opponent of the strike has carried his burden of proving purposeful discrimination.'" *Id*. at 626 (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (*per curiam*)).

In the case at bar, the pertinent facts are as follows. After twelve prospective jurors were seated in the box, the prosecutor used the seventh of her ten allotted strikes[3] to excuse prospective Juror No. 6, an African-American man, then seated as Juror No. 2. Prospective Juror No. 63, an African-American woman, was called up and the prosecutor exercised another peremptory challenge to strike that juror. At that time, defense counsel asked to approach the bench. Defense counsel made a *Batson* challenge, arguing:

> I understand that the State may have some articulable reasons for at least the first few people that were struck. But by my calculations, first off, the last juror that was struck, Juror Number 6[3[4]], I would note for the record is a black female.
>
> ***

[3] Because appellant was charged with attempted first-degree rape, which carries a possible life sentence, the prosecutor was permitted ten peremptory challenges and appellant was permitted twenty. Md. Rule 4-313(a)(2).

[4] Defense counsel mistakenly said Juror Number 62.

> The juror previous to that that was struck . . . was a black male, Juror Number Six, seated as Juror Number Two. And there were at least three more African-American individuals that were struck by the State prior to that.

The trial judge responded by noting that there were "two persons in the box too which [sic] are African-American and obviously were not struck." The trial judge nevertheless assumed that defense counsel had made "a *prima facie* case for pattern," and asked the prosecutor to provide her "race-neutral reasons, if any" for the challenged strikes.

The prosecutor noted that she disagreed that she had used "three other[]" strikes against African-American prospective jurors (in addition to the two specifically identified by defense counsel). She explained that she struck prospective Juror No. 6 because he had advised the court during *voir dire* that he had a job starting Saturday that would take him out of the state through Wednesday and that if he were selected, he would not be able to work that job.[5] The prosecutor observed that after prospective Juror No. 6 was initially accepted by both sides and seated in the box, he "slouched down . . . and put his head in his hand, and [the prosecutor] became concerned that he was going to have an issue being here and paying attention." She added that prospective Juror No. 6 also had stated during *voir dire* that his half-sister had been a victim of sexual molestation, which had made the prosecutor interested in keeping him on the venire. Nevertheless, the prosecutor determined to strike him because of his "attitude once he was [preliminarily] seated."

[5] Prospective Juror No. 6 worked as an office installer.

Turning to prospective Juror No. 63, the prosecutor explained that that juror had stated during *voir dire* that she had a family member who had been charged with murder, but had been found not guilty of the charges. The prosecutor was "concerned about her having reservation[s] about whether [the evidence in this case] was enough to charge [appellant]."

The court ruled as follows. It noted that it was not certain defense counsel had made a "*prima facie* showing of pattern in light of the fact that there are two African-Americans presently to my left of the 11 [in the] box[.]" After the Clerk interjected that there actually were three African-American jurors seated in the jury box, the trial judge corrected himself, adding that that "further amplifie[d]" his reasoning that there was not a pattern. In any event, the trial judge continued to step two of the analysis and found that the prosecutor had offered "race-neutral, constitutional reasons" for exercising peremptory strikes to remove prospective Jurors No. 6 and 63. The trial judge agreed with the prosecutor's characterization of prospective Juror No. 6's demeanor upon being preliminarily seated in the jury box and that prospective Juror No. 63's "assessment of the murder case" during *voir dire* could raise reasonable, race-neutral reasons for the prosecutor to strike her. The court thus ruled, in the alternative, that the defense had failed to make a *prima facie* showing of a pattern and/or that the State had satisfied its burden of showing race-neutral reasons for the use of the two peremptory strikes.

After the court ruled, jury selection resumed and the jury was sworn.

On appeal, appellant contends the trial judge "erred in three ways" in ruling upon the *Batson* challenge. First, the court should not have "considered the racial composition of the partially-selected jury seated in the jury box" in making its assessment of whether the defense had made a *prima facie* showing. Second, the court erred by not finding that the prosecutor's use of five of her six peremptory strikes to remove African-American jurors constituted a pattern. Third, the court erred by "not requiring the prosecutor to provide reasons for striking three of the five jurors removed."

The State responds that appellant's argument is largely unpreserved because he only identified before the trial court two strikes that he alleged were discriminatory, making it impossible for this Court to review on appeal the other three allegedly discriminatory strikes. The State maintains that, on this record, appellant failed to show clear error by the trial court in finding the absence of intentional discrimination. We agree.

As this Court explained in *Bailey v. State*, 84 Md. App. 323, 333 (1990), the burden on the party challenging the exercise of peremptory strikes is to make an "adequate record" from which an appellate court may review the trial court's ruling for error. Appellant failed to satisfy that burden as to three of the five challenged strikes. As discussed, appellant identified two prospective jurors -- Juror No. 6 and Juror No. 63 – both of whom were African-American and both of whom were struck by the prosecutor peremptorily. Though defense counsel stated that the prosecutor had used peremptory strikes to remove "at least three more African-American individuals," he did not identify

those prospective jurors by number. In her response, the prosecutor disputed that figure. Even then, defense counsel did not identify the three additional peremptory strikes he sought to challenge. When the court ruled, it made clear that it was assessing the propriety only of the race-neutral reasons offered for striking prospective Jurors No. 6 and No. 63. Appellant did not ask the court to direct the State to offer race-neutral reasons for any additional strikes. Having failed to identify the other three challenged peremptory strikes before the trial court or to request a ruling, appellant has waived his challenge to the court's failure to consider those strikes in assessing whether a pattern of discrimination had been shown.[6]

We need not address appellant's contention that the court erred by considering the racial composition of the individuals preliminarily seated in the jury box in ruling that appellant failed to make a *prima facie* showing of a pattern of discrimination. This is because the trial court also ruled, in the alternative, that the prosecutor adequately rebutted any initial showing of intentional discrimination. Thus, we shall assume for purposes of this opinion that appellant made a *prima facie* showing under step one and turn to the trial court's analysis under steps two and three. The trial court's determinations as to whether the strikes were made for race-neutral reasons "are

[6] Even in his brief in this Court, appellant does not specify which additional peremptory strikes he challenges as discriminatory. He maintains that the prosecutor used "five of six peremptory strikes to remove African-Americans." The prosecutor had used eight peremptory strikes prior to appellant raising his *Batson* challenge, however. Later in his brief, appellant lists seven jurors he alleges were removed by the prosecutor (Nos. 8, 22, 32, 39, 61, 6, and 63). He does not identify which of these jurors were African-American or which he maintains were discriminatory.

essentially factual, and therefore are 'accorded great deference on appeal.'" *Gilchrist*, 340 Md. at 627 (quoting *Hernandez v. New York*, 500 U.S. 352, 364 (1991)). For that reason, "[a]n appellate court will not reverse a trial judge's determination as to the sufficiency of the reasons offered unless it is clearly erroneous." *Id.* (citing *Stanley v. State*, 313 Md. 50, 84 (1988)). The race-neutral reasons provided, which appellant does not challenge as pretextual, were found by the court to be constitutionally adequate. The court's findings were not clearly erroneous as the race-neutral reasons were borne out by the answers given by the prospective jurors on *voir dire* and, as to prospective Juror No. 6, by the trial judge's personal observations of his demeanor. There being no clear error, the court did not err by determining that appellant failed to carry his burden of proof as to purposeful discrimination.

## II.

## Postponement Request

On the first day of trial, during jury selection, appellant, through counsel, requested a continuance.[7] The court took a recess to allow appellant to go before the administrative judge to make that request.

In the administrative court, defense counsel explained that appellant was seeking a postponement because he was "unhappy with the way that [defense counsel] ha[d] prepared the case." The administrative judge then asked appellant to advise the court

[7] Appellant also sought to discharge his counsel. After a lengthy on-the-record colloquy concerning appellant's complaints about his counsel's performance, appellant changed his mind and determined only to pursue his request for a postponement.

"whether [he] want[ed] [defense counsel] to represent [him], or if [he] want[ed] a postponement[?]"

Appellant explained that he had been incarcerated for 10 months and that, during that time, defense counsel had visited him just three times. Appellant did not wish to "fire" defense counsel, but he did seek to postpone the trial date because there were "a lot of things that needed to be addressed and wasn't addressed." He specified that defense counsel failed to obtain photographs of the crime scene and "the actual place that the alleged incident had took place" and that he had failed to investigate other witnesses who lived near Ms. Burrell's townhouse who could have testified to what they saw, what they heard, and "what happened prior to the night of the incident." Appellant could not specify the neighbors he thought should be interviewed or what he expected them to say. He added that A's medical records also should have been obtained because she had made a prior allegation of sexual abuse against another individual.

Defense counsel then interjected to clarify these requests. He explained that appellant believed that photographs of the exterior of the townhouse and the parking area would be relevant to show the proximity of his vehicle to the townhouse when his stereo was blaring, casting doubt on the credibility of A's claim that she did not wake up until after appellant came inside. Appellant also believed that a "door-to-door" canvas of witnesses may have revealed that other neighbors heard something that would be "beneficial to the [d]efense." With respect to A's medical records, defense counsel explained that A allegedly had a "past history of psychological hospitalizations, which

may have an affect [sic] on her ability to testify truthfully" and there also was an "allegation that [A] was abused by another individual" that might be relevant for impeachment purposes. Defense counsel added that he only had received a package of discovery on March 29, 2018 (about a month before trial) that included a statement A made to a social worker, appellant's statement to the police, and other materials.[8]

The court denied the request for postponement, noting that the reasons raised by appellant all could and should have been brought to the court's attention at an earlier time and that none rose to the level of good cause.

After the parties returned to the trial judge's courtroom, the prosecutor asked if she could put some facts on the record relative to appellant's postponement request. She explained that the State had provided to defense counsel photographs of the crime scene, including exterior photographs of the townhouse and the surrounding area and an aerial photograph. Second, she had been advised that the defense investigator had contacted A on more than one occasion and had contacted other eyewitnesses. Third, the prosecutor argued that A's medical records pre-dating the incident in question would be "completely inadmissible" at trial. Finally, the prosecutor emphasized that the late discovery had been provided to defense counsel within 24 hours of its being received by the State's Attorney's Office and a full four weeks before trial.

[8] This material inadvertently had not been turned over to the State's Attorney's Office by the AACPD.

Appellant contends the administrative judge abused his discretion by denying the request for a postponement. He maintains that he was "forced to go to trial without the benefit of the additional [trial] preparation he sought[,]" which may have "cast doubt on [A's] credibility[.]"

The State responds that the administrative judge properly exercised his discretion by denying the request for postponement because appellant did not make a showing that additional investigation would produce "competent and material evidence" or that he had made "diligent and proper efforts to secure the evidence" prior to making the request. (Quoting *Prince v. State*, 216 Md. App. 178, 204 (2014)).

A party seeking a continuance of a criminal trial to permit additional investigation must show:

> (1) that he had a reasonable expectation of securing the evidence . . . within some reasonable time; (2) that the evidence was competent and material, and he believed that the case could not be fairly tried without it; and (3) that he had made diligent and proper efforts to secure the evidence.

*Smith v. State*, 103 Md. App. 310, 323 (1995) (citation omitted). We review a trial court's ruling on a motion to postpone for abuse of discretion. *Howard v. State*, 440 Md. 427, 441 (2014) (citing *Ware v. State*, 360 Md. 650, 706 (2000)). A court abuses its discretion when "[t]he decision under consideration [is] well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *King v. State*, 407 Md. 682, 697 (2009) (citation omitted).

In the case at bar, the three investigatory aims that appellant wanted his counsel to pursue all could have been pursued in advance of the trial date. Appellant presented no evidence that he had made "diligent and proper efforts to secure the evidence." *Smith*, 103 Md. App. at 323 (citation omitted). That alone supports the decision of the court to deny the motion. Further, the photographs appellant sought already existed, having been taken by the AACPD crime scene investigator, and, to the extent additional photographs were necessary, appellant did not explain why a defense investigator could not obtain those photographs during the trial.[9] With respect to the requested witness canvas, appellant failed to make a proffer as to what the potential witnesses might say and how it would be helpful to his defense. Finally, appellant did not make even a cursory showing that A's medical and/or psychological records contained evidence that would be exculpatory and, failing that, the medical records were not subject to disclosure even if defense counsel had requested them. *See* Md. Code (1973, 2013 Repl. Vol., 2018 Supp.), § 9-109(b) of the Courts and Judicial Proceedings Article (psychological records are privileged); *Goldsmith v. State*, 337 Md. 112, 133-34 (1995) (in order to be entitled to disclosure of privileged medical records, a criminal defendant must "establish a reasonable likelihood that the privileged records contain exculpatory information necessary for a proper defense"). For all these reasons, the administrative court did not abuse its broad discretion by denying the motion for continuance.

[9] The court asked defense counsel this question and he replied that he "potentially could" send his defense investigator to the crime scene that night to obtain any photographs.

## III.

## 911 Call

As mentioned, Ms. Naylor called 911 on June 13, 2017. In anticipation of her testimony at trial, defense counsel advised the court that he objected to the admissibility of portions of the 911 call. Outside the hearing of the jury, the tape was played. The recording included the following pertinent exchanges. First, after Ms. Naylor advised the 911 operator that appellant had left the crime scene, the operator asked, "And did he have any weapons?" Ms. Naylor responded, "Probably do."[10] Second, later in the recording, an emergency medical services ("EMS") dispatcher spoke to the 911 operator. As pertinent, the EMS dispatcher asked: "Any weapons involved?" and the 911 operator responded, "She said no."

Defense counsel requested that the first exchange be redacted. The court granted that request and instructed the prosecutor to stop the recording prior to the 911 operator's question and restart it after Ms. Naylor's answer. When the recording was played, however, the prosecutor inadvertently permitted the 911 operator's question to be played before the recording was stopped. Nevertheless, Ms. Naylor's answer was not played for the jury. At the bench conference that followed, defense counsel argued that that was a "bell that . . . can't be unrung," was "prejudicial" to appellant's defense, and was not relevant to any of the charges.

[10] No weapons were recovered when appellant was apprehended and there was no evidence that he ever threatened A with a weapon.

The court noted that the "chief prejudicial effect" of the excluded question and answer was the answer, because Ms. Naylor was speculating that appellant had a weapon. The 911 operator's question, in the court's view, was much less prejudicial because "people expect 911 operators to ask that question."

The prosecutor emphasized that because the second exchange between the 911 operator and the EMS dispatcher in which the 911 operator mischaracterized Ms. Naylor's response *had* been played for the jury, the jurors naturally would assume that Ms. Naylor's answer to the earlier question had been "No." Thus, in the prosecutor's view, appellant benefited from the inadvertent playing of the question.

The court agreed and determined that the error in the admission of the 911 operator's question did not prejudice the appellant. Appellant contends the trial court erred by not fashioning a remedy once an excluded portion of the 911 call was inadvertently played for the jury. He suggests that the court should have instructed the jurors not to consider that question. The State responds that appellant did not ask for that relief (or any specific relief) and, in any event, the error in playing the excluded question was harmless. We agree.

The inadvertent playing of the 911 operator's question was not prejudicial to appellant considering the subsequent exchange on the same topic between the operator and the dispatcher. The court did not abuse its broad discretion by declining to take further action, particularly because appellant requested no specific relief from the court. *Cf. Ball v. State*, 57 Md. App. 338, 359 (1984), *aff'd in part and rev'd in part on other*

*grounds by Wright v. State*, 307 Md. 552 (1986) (if a defendant gets the remedy he requests and asks for no other relief, there can be no error by the court in not granting additional relief).

## IV.

## A's Statement to Corporal Linsenbigler

The court ruled that A's statement to Corporal Linsenbigler on June 13, 2017 that appellant "tried raping me" was admissible under the excited utterance exception to the rule against hearsay. Appellant contends the court erred by so ruling because the State failed to lay an adequate foundation that the statement was "made while [A] was under the stress of excitement caused by the event or condition." Md. Rule 5-803(b)(2).

The State responds that the statement properly was admitted as an excited utterance. Alternatively, the State contends the statement also was admissible as a statement of identification and a prompt complaint of sexually assaultive behavior.

"'Hearsay' is 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). "Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5–802. We review *de novo* whether hearsay evidence properly was admitted under an exception to the rule against hearsay. *Bernadyn v. State*, 390 Md. 1, 7-8 (2005). There are "aspects of a hearsay ruling," however, that are not "purely legal," such as a trial court's factual findings relative to the foundation that must be laid under the excited utterance exception.

*Gordon v. State*, 431 Md. 527, 536 (2013.) We review those findings for clear error. *Id.* at 538.

A statement is admissible as an excited utterance if "made at such a time and under such circumstances that the exciting influence of the occurrence clearly produced a spontaneous and instinctive reaction on the part of the declarant . . . [who is] still emotionally engulfed by the situation." *State v. Harrell*, 348 Md. 69, 77 (1997) (citation omitted) (alteration in *Harrell*). A trial court assessing if this exception has been satisfied must examine the totality of the circumstances, including "the time between the startling event and the declarant's statement" and whether the "statement was made in response to an inquiry[.]" *Id.* A statement made closer in time to the startling event and spontaneously is more likely to be an excited utterance, but neither factor is dispositive. *Id*.

In the case at bar, A, age 14, awoke to find appellant standing over her naked. He covered her mouth and told her to "take it or die." She fled her home clothed only in a t-shirt and underwear with appellant chasing after her. This clearly was a startling event. *See Cooper v. State*, 434 Md. 209, 243 (2013) (victim of a sexual assault is "clearly involved in a 'startling event' that can trigger an excited utterance").

Corporal Crawford and Corporal Linsenbigler responded to Ms. Naylor's house shortly thereafter. Corporal Crawford said A was "crying." Corporal Linsenbigler described her as "crying, acting hysterical." Ms. Burrell arrived at the soon after the police. She described A's demeanor as "very upset." This was evidence from which the

court reasonably found that A remained "emotionally engulfed" by the event. The fact that A made the statement in response to Corporal Linsenbigler asking her, "What happened?" is not dispositive as there was ample evidence showing that A's statement, which was like her earlier statement to Ms. Naylor that appellant had tried to rape her, was spontaneous and not the product of reflection.

Even if the court had erred in admitting the statement under the excited utterance exception, which it did not, we agree with the State that A's statement also properly was admitted as a prompt complaint of sexually assaultive behavior under Md. Rule 5-802.1(d).[11] Her statement to Corporal Linsenbigler was made the same night that appellant was alleged to have assaulted her; Corporal Linsenbigler only testified to the fact that the complaint was made and that A identified appellant as the perpetrator; and the statement was consistent with A's trial testimony. *See Gaerian v. State*, 159 Md. App. 527, 538 (2004) (discussing the criteria for admission under Rule 5-802.1(d)).

## V.

## Juror Misconduct

The second and third days of trial were separated by a weekend. On the third day of trial, defense counsel explained that he had learned that morning that on the preceding Friday, appellant's wife, Amber Jackson, overheard Juror No. 6 discussing the case with

[11] That rule permits admission of a prior statement made by a witness who testifies and is subject to cross-examination if the "statement . . . is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony[.]" Md. Rule 5-802.1(d).

an unknown individual. Defense counsel proffered to the court that Ms. Jackson heard the Juror No. 6 refer to appellant as a pedophile.

Defense counsel argued that the juror's alleged statement raised three concerns. First, Juror No. 6 had disobeyed the court's instructions not to discuss the case; second, Juror No. 6 could have been speaking to another juror about the case since Ms. Jackson was unsure of the identity of the other party to the conversation; and third, his "use of the word pedophile" suggested that the juror had "already made up his mind" before the defense presented any evidence.

The court examined Ms. Jackson under oath. She testified that at the end of the second day of trial, she and her daughter walked out of the courthouse together. She overheard Juror No. 6 "stating that this is a difficult case – with a [sic] unknown person, I don't know who the other person was, I believe it was other people standing [waiting for] the trolley – stating it was a difficult case and it involved a pedophile." Ms. Jackson attempted to contact defense counsel that same day, but was unable to reach him at his office.

The court then examined Juror No. 6, without placing him under oath. He confirmed that he had taken the trolley from the courthouse to the parking lot on Friday after trial had adjourned. The court asked Juror No. 6 if he had discussed the case with anyone and he replied that he had not. He testified that he had "told plenty of people that [he was] on a jury," but had not discussed any specifics of the case.

After Juror No. 6 was excused, defense counsel moved to strike him from the venire or, in the alternative, moved for a mistrial on the basis that Juror No. 6 may have spoken to other jurors about his views. The court ruled that this was "[c]ertainly not mistrial category." The only issue was "how reliable was the information [Ms. Jackson provided] and did a juror prejudge the case." The court emphasized that there was no evidence of any "taint flowing to another person" on the jury. The prosecutor deferred to the court on the issue of removing Juror No. 6, but noted that it was the word of appellant's wife against the testimony elicited by the juror.

The trial judge, having seen and heard Juror No. 6's answers to his questions, found that the juror did not exhibit "guile" and that he did not "seem to be . . . conforming his answers to match what the [c]ourt [said]." Juror No. 6 had not been sworn in, however, and the court determined to reexamine under oath to ensure that his answers remained consistent. The court emphasized, however, that Ms. Jackson had a clear interest in the case and that it was disinclined to strike a juror based on "mere conjecture."

Under oath, Juror No. 6 again was asked if he had discussed the case with anyone**.** He replied that aside from saying that he was serving on a jury and that the trial involved a "serious crime," he had not had any discussions with anyone about the case. He was confident that he had not had any discussions about the nature of the crime. The court admonished Juror No. 6 to keep an open mind going forward and not to prejudge the case based upon the State's evidence. Juror No. 6 responded that he would continue to do so.

The court ruled that it would not strike Juror No. 6, noting that while under oath, he had repeated his same answers, which the court already had credited. Defense counsel noted his objection for the record and emphasized that Ms. Jackson also had been examined under oath.

Appellant contends the trial court abused its discretion by denying the motion for mistrial because Ms. Jackson's testimony suggested that Juror No. 6 had prejudged the evidence and the court, during its questioning, did not ask Juror No. 6 "whether he could decide the case fairly or make a decision solely upon the evidence presented." Even if a mistrial was not warranted, appellant contends the court abused its discretion by not excusing Juror No. 6 and replacing him with an alternate juror given that a "genuine question was raised about the ability of [the] juror to follow instructions." The State responds that the court properly exercised its discretion to deny the motion for mistrial and the motion to remove Juror No. 6.

"A motion for mistrial . . . because of alleged jury misconduct must be granted if the evidence of misconduct indicates that a fair and impartial trial could not be had under the circumstances." *Summers v. State*, 152 Md. App. 362, 375 (2003). "Because a trial judge is in the best position to evaluate whether a defendant's right to an impartial jury has been compromised, 'an appellate court will not disturb the trial court's decision on a motion for mistrial . . . absent a clear abuse of discretion.'" *Id*. (quoting *Benjamin v. State*, 131 Md. App., 527, 541 (2000)); *see also State v. Hawkins*, 326 Md. 270, 278 (1992) (trial judge ruling upon a motion for mistrial is "physically on the scene . . . to

observe matters not usually reflected in a cold record[,] . . . . to ascertain the demeanor of witnesses . . . [and] has his finger on the pulse of the trial"). Likewise, a trial judge's decision to excuse a juror, *vel non*, and replace him or her with an alternate juror based upon an allegation of misconduct is committed to the sound discretion of the court. *Miles v. State*, 88 Md. App. 360, 373 (1991).

In the case at bar, the trial court examined Ms. Jackson and Juror No. 6 under oath. It credited Juror No. 6's responses in which he denied having spoken to anyone about the nature of the charges against appellant. The court noted that Juror No. 6, unlike Ms. Jackson, was disinterested in the outcome of the trial. The trial judge nevertheless admonished Juror No. 6 to continue to keep an open mind and not to discuss the case with anyone. Juror No. 6 responded that he could and would carry out those instructions. The trial judge was in the best position to assess the demeanor of Ms. Jackson and Juror No. 6 and we will not second guess the trial court's credibility findings. In light of those findings, the court did not abuse its broad discretion by denying the motion for mistrial and to excuse the juror.

## VI.

## Legal Sufficiency of the Evidence

Appellant contends the evidence was legally insufficient to convict him of sexual abuse of a minor and attempted third-degree sexual offense.[12] On review of the

[12] Appellant concedes, as he did in his motions for judgment of acquittal made at trial, that the evidence was legally sufficient to convict him of second-degree assault.

sufficiency of the evidence, we are concerned with "whether any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt." *Moye v. State*, 369 Md. 2, 12 (2002). The crime of sexual abuse of a minor is codified at Md. Code (2002, 2012 Repl. Vol.), Section 3-602(b) of the Criminal Law Article ("Cr.L."), which provides, in pertinent part, that a "parent or other person who has . . . temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor." The term "sexual abuse" is defined as "an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not" and also includes a "sexual offense in any degree." Cr.L. § 3-602(a)(4)(i) & (ii). Exploitation means taking "advantage of or unjustly or improperly use[ing] [a] child for [a defendant's] *own* benefit." *Degren v. State*, 352 Md. 400, 426 (1999) (quoting *Brackins v. State*, 84 Md. App. 157, 162 (1990) (emphasis in *Brackins*)).

The crime of sexual offense in the third degree is codified at Cr.L. section 3-307 and, as pertinent, prohibits a person over the age of 21 from engaging in "vaginal intercourse with another if the victim is 14 or 15 years old."[13] Cr.L. § 3-307(a)(5). In his motion for judgment of acquittal made at the close of the State's case, defense counsel argued with respect to the charges of sex abuse of a minor, attempted first- and second-degree rape, and attempted third-degree sexual offense predicated on an attempt to

[13] Appellant mistakenly states in his brief that the prosecutor proceeded on a theory that appellant violated subsection (a)(4). The indictment, the prosecutor's argument in opposition to appellant's motion for judgment of acquittal, and the jury instructions all make clear, however, that the State was proceeding under subsection (a)(5).

engage in vaginal intercourse, that the State had failed to adduce evidence that appellant intended to engage in vaginal intercourse with A. At the close of all the evidence, defense counsel renewed his motion, incorporating the arguments previously made. He reiterated his view that "[a] finder of fact cannot find that the intentions of [appellant] as illustrated through the facts that were presented in the State's case-in-chief, as well as through any sort of rebuttal, in any way proves that [appellant] attempted to have vaginal intercourse with [A]."

On appeal, appellant contends more broadly that the State failed to adduce sufficient evidence to establish that he acted with the requisite criminal intent to commit a third-degree sex offense or sexual abuse of a minor. He argues, moreover, that there was "no direct proof that his alleged actions were done for the purpose of sexual arousal or gratification."

The only argument preserved for review, however, is the particularized sufficiency challenge made at trial: that the State failed to prove that appellant acted with the specific intent to engage in vaginal intercourse with A. *See, e.g.*, *Steward v. State*, 218 Md. App. 550, 557-58 (2014) (only particularized arguments raised in a motion for judgment of acquittal at trial are preserved for appellate review). With respect to the crime of sexual abuse of a minor, no such specific intent was required. A's testimony that appellant masturbated while watching her and touched his mustache to her foot while she bathed C was sufficient evidence from which a rational juror could find that he used or took advantage of A for his benefit, meeting the definition of exploitation under the statute.

In any event, we also hold that the evidence was legally sufficient for a rational juror to find that appellant had a specific intent to engage in vaginal intercourse with A, supporting his conviction for attempted third-degree sexual offense predicated on vaginal intercourse pursuant to Cr.L. section 3-307(a)(5), and his conviction for sexual abuse of a minor pursuant to Cr.L. section 3-602(b) predicated on the commission of a sexual offense of any degree. A testified that when she awoke on June 13, 2017, appellant was standing next to her completely naked, that he climbed on top of her and covered her mouth, that he told her to "take it or die," and that after M and C awoke, he attempted to force her upstairs. She further testified that she understood his words and actions to mean that he intended to have sexual intercourse with her. There also was evidence that a jar of Vaseline was present in the living room and that it usually was stored in the bathroom. This was evidence from which a rational juror could find that appellant intended to engage in vaginal intercourse with A.

**JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.**