Circuit Court for Baltimore County
Case No. C-03-CR-19-004960

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 1871

September Term, 2021

ANTHONY MICHAEL WESTERMAN

v.

STATE OF MARYLAND

Leahy,
Shaw,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: December 19, 2022

In December 2019, the State indicted Anthony Michael Westerman in the Circuit Court for Baltimore County with eight counts involving crimes against three women whom we shall refer to herein as A.B., E.C., and M.G.[1] Counts one through five charged Westerman with crimes against A.B. that occurred in October 2017: second-degree rape (two counts), third-degree sex offense, fourth-degree sex offense, and second-degree assault. Counts six and seven charged Westerman with second-degree rape of E.C. based on an incident that occurred in June 2019. Count eight charged Westerman with committing second-degree assault upon M.G. in June 2019. The court initially granted Westerman's motion for severance into three trials, one for each alleged victim, but he ultimately waived his right to a jury trial and agreed to a single bench trial of all the charges in a consolidated bench trial.

At the conclusion of the bench trial that occurred in August 2021, the court acquitted Westerman of the charges relative to his contact with E.C., but the court found Westerman guilty of the remaining charges. At sentencing, the court reversed its ruling with respect to one of the five counts pertaining to A.B., and therefore acquitted Westerman of count two: second-degree rape of A.B. involving cunnilingus. For sentencing purposes, three of the counts based upon Westerman's conduct with A.B. (third-degree sex offense, fourth-

[1] Under Md. Rule 8-125, this Court shall not identify the victim of a crime, except by his or her initials, if the alleged crime would require the defendant to register as a sex offender if convicted. Md. Rule 8-125(a)(2)-(b)(1). The Rule further provides that this Court shall not include other information from which the victim could be identified. Md. Rule 8-125(b)(2). Consistent with this Rule, we identify the victims of the alleged crimes by their initials. We also refer to T.M. — the recipient of A.B.'s prompt complaint of sexual abuse — and T.C., who is E.C.'s sister, by their initials as well.

degree sex offense, and second-degree assault) merged into count one (second-degree rape against A.B. involving vaginal intercourse) for which the court sentenced Westerman to 15 years, suspending all but four years to be served on home detention.[2]

As to count eight (second-degree assault of M.G.), the court sentenced Westerman to one day, to be served concurrent with the sentence on count one.

Westerman presents three questions for our review:

1. Did the trial court err by accepting Mr. Westerman's jury trial waiver without conducting a voluntariness inquiry in response to several "factual triggers"?

2. Did the trial court err by admitting testimony that exceeded the limits of the hearsay exception for prompt complaints of sexually assaultive behavior?

3. Was the evidence insufficient to sustain Mr. Westerman's conviction for second-degree assault?

We conclude that the trial court did not err in accepting Westerman's knowing and voluntary waiver of his right to be tried by a jury. We also conclude that the hearsay testimony of T.M. that was admitted pursuant to the exception for a prompt complaint of sexually assaultive behavior was within the scope of that exception. And we conclude that there was sufficient evidence to sustain the conviction of second-degree assault upon M.G. Consequently, we shall affirm the court's judgments.

[2] Westerman was employed as a Baltimore County police officer during the time that all of the charged conduct occurred.

BACKGROUND

Westerman's Jury Trial Waiver

The State indicted Westerman on December 23, 2019. During three periods over the course of 2020 through 2022, jury trials were suspended because of the COVID-19 pandemic: March 16, 2020 through October 5, 2020; November 16, 2020 through April 23, 2021; and December 29, 2021 through March 6, 2022. *See* FINAL ADMINISTRATIVE ORDER ON JURY TRIALS AND GRAND JURIES DURING THE COVID-19 EMERGENCY (March 28, 2022) *available at* https://mdcourts.gov/adminorders.

Westerman's counsel filed postponement requests in July 2020 and January 2021, indicating in those requests that it was his intent to be tried by a jury.

But, on February 22, 2021, the parties appeared before the court for a scheduling conference, at a time when jury trials remained suspended, and the court and counsel discussed the possibility of scheduling an earlier trial if Westerman chose to be tried by a judge. At that scheduling conference, after the State said that the June 15, 2021 trial date did not appear "to be a good trial date," defense counsel asked to approach the bench, and a bench conference occurred off the record. After the bench conference concluded, the court placed the following comments on the record:

> So, I will postpone the case generally. I will take under advisement the parties' request that the case be specially assigned to a Judge. I'll let you know who that is and then we can pick a trial date after that. Hopefully, without the need to come back in. He, Mr. Westerman waived Hicks previously.
>
> * * *

> **As we were discussing up here, Mr. Westerman,** we have some sixty-five murder cases that have been given priority during the time period April 26th through the end of 2021, . . . we have thirteen months' worth of cases to reset, along with the other new business that we get.
>
> So, those cases have been given enormous priority. **It is unlikely in the extreme that we would be in a position where we could give you a [jury] trial in this case during the July trial date. And so, everybody is sort of a mind to let's, let's, you know, most likely we're looking at dates maybe in November and December. If it's a bench trial, it could be advanced, you know, well before that, depending on the Judge's schedule, right? If I specially assign it.**

(Emphasis added.)

The following month, on March 25, 2021, the parties appeared for another status conference before the judge to whom the case had been specially assigned as discussed at the February 22, 2021 scheduling conference. Defense counsel informed the court that Westerman was "prepared to waive his right to a jury trial on the record today so we can set it in" for a bench trial before the judge who had been specially assigned. In accordance with Maryland Rule 4-246(b), Westerman's counsel and the court then asked Westerman questions on the record to ensure that the waiver was made knowingly and voluntarily:[3]

[3] The adequacy of the inquiry into whether the waiver of trial by jury was made knowingly and voluntarily by Westerman is the subject of the first issue on appeal. Rule 4-246(b) provides:

> A defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that the waiver is made knowingly and voluntarily.

(continued…)

[DEFENSE COUNSEL]: Okay. Mr. Westerman, because of the maximum penalties involved in each one of these, there's three separate cases, but they're all charged under the same case number. In each one of those cases, you have an absolute right to a jury trial.

If you wanted a jury, we'd come back on a different day, and you would be allowed to participate in the selection of twelve people from the community. Those people would be selected from a larger group who would be called in at random off the voter and motor rol[l]s of Baltimore County, Maryland.

You would, again, you would be allowed to participate in the selection of twelve people from that larger group. They would then sit in a jury box like this one. They would listen to the evidence, and they could only convict you if they were unanimously convinced beyond a reasonable doubt of your guilt.

If even one person didn't think you were guilty, that would result in what's called a hung jury and the State could retry you over and over again until there was a unanimous verdict. My understanding is that you wish to waive your right to a jury trial because you would also have a right to have a bench trial where a Judge would sit and listen to the, to the evidence.

And Judge Truffer would be bound by the exact same legal standard that the jury is, which is proof beyond a reasonable doubt. It's just that the Judge would be making that determination instead of a jury. My understanding is that you wish to waive your right to a jury trial and []elect to have your matter tried Court, in front of Judge Truffer, is that correct?

[WESTERMAN]: Yes, that's correct.

[DEFENSE COUNSEL]: Sir, are you under the influence of drugs or alcohol today?

The Committee Note to Rule 4-246(b) provides the following suggested questions for "determining whether a waiver is voluntary":

> In determining whether a waiver is voluntary, the court should consider the defendant's responses to questions such as: (1) Are you making this decision of your own free will? (2) Has anyone offered or promised you anything in exchange for giving up your right to a jury trial? (3) Has anyone threatened or coerced you in any way regarding your decision? and (4) Are you presently under the influence of any medications, drugs, or alcohol?

[WESTERMAN]: No.

[DEFENSE COUNSEL]: Are, are you being currently treated by a, for any psychiatric disorders?

[WESTERMAN]: No.

[DEFENSE COUNSEL]: Okay. So, you're thinking clearly, you know what's happening here?

[WESTERMAN]: Yes.

[DEFENSE COUNSEL]: Has anybody made any threats, promises or inducements to you to get you to waive your right to a jury trial?

[WESTERMAN]: No.

[DEFENSE COUNSEL]: Is doing so your free and voluntary act?

[WESTERMAN]: Yes.

[DEFENSE COUNSEL]: Your Honor?

THE COURT: All right. Thank you, [defense counsel]. Mr. Westerman, you, you're thinking clearly right now?

[WESTERMAN]: Yes, sir.

THE COURT: You know exactly what you're doing?

[WESTERMAN]: Yes.

THE COURT: And you understand fully your right to a jury trial?

[WESTERMAN]: Yes, Your Honor.

THE COURT: All right and knowing that right, you are willing to give it up and have your case tried before me, at least three charges before me?

[WESTERMAN]: Yes, sir.

> THE COURT: All right. Based on that colloquy, the Court finds that Mr. Westerman's waiver of his right to a jury trial is knowing and voluntary and we will proceed on that basis. I find that he's waived his right to a jury trial.

And, as a result of Westerman waiving his right to trial by jury that day, the bench trial was scheduled, and ultimately completed, in August 2021, with the aforementioned specially assigned judge presiding.

The Trial

At trial, the State offered evidence of three separate incidents, which we will summarize in the same order as the State presented its case at trial.

1. The incident involving E.C. in June 2019.

As of June 2019, Westerman and T.C. had been dating on and off for about five years. On an evening in June 2019, T.C.'s sister—E.C., who was 20 years old at the time—joined Westerman and T.C., at Westerman's house for a bonfire. Throughout the course of that evening, E.C. drank six Angry Orchard hard ciders and two vodka mixed drinks. E.C. testified at trial that she "was very drunk after all that."

Later that evening, the three individuals went upstairs to go to sleep. E.C. went to sleep in the spare bedroom, while Westerman and T.C. went to the master bedroom. E.C. was watching videos on her phone before she fell asleep. She woke up when Westerman entered her room, wearing just his boxer shorts. Westerman got on top of E.C., and began kissing her. She pushed him away when he placed his tongue in her mouth. But despite that, Westerman continued kissing her. And E.C. acknowledged that she said nothing as Westerman removed her clothes and engaged in vaginal intercourse with her.

E.C. delayed reporting the incident to T.C., even though E.C. spent the next day at Westerman's house watching Netflix with her sister. Later that month, T.C. and Westerman went on vacation with Westerman's parents. During that time, there were 22 FaceTime calls between E.C. and Westerman.

But something occurred in late June 2019 at a birthday celebration for T.C. that caused T.C. to ask E.C. about Westerman. E.C. testified that she did not attend the birthday party because she was not old enough to drink. She was aware, however, that, after T.C.'s birthday party at Sunset Cove, T.C. moved out of Westerman's house. And E.C. testified that, after the birthday party, T.C. asked her if anything had happened between her and Westerman. E.C. then told T.C. what Westerman had done when she stayed at his house the night of the bonfire.

In October 2019, E.C. and T.C. contacted the police. When police investigators interviewed Westerman, he admitted to having sexual intercourse with E.C., but he said that it was consensual.

2. The Incident Involving A.B. in October 2017.

During the police investigation, T.C. also informed police of her understanding that there had been an incident between A.B. and Westerman that T.C. learned about from T.M. in October 2018.[4] That incident with A.B. had occurred in October 2017, when A.B. and

[4] At trial, T.C. testified about the sequence of events that occurred when she first learned about the incident involving Westerman and A.B. in October 2018:

> [T.C]: [T.M.] and I were out at Loony's hanging out. I don't know what we got into an argument about, but we got into an argument and then she told me that Tony [Westerman] --

(continued…)

her friend T.M. went to a bar in White Marsh called Red Brick Station. There, they drank with Austin Reisig and Westerman. Around 1:00 a.m., the group went to another bar across the street, Della Rose's, where A.B. drank more alcohol that Westerman bought. At some point, A.B. went to her car and fell asleep. T.M. found A.B. asleep in the car and awakened A.B. by knocking on the car windows. T.M. testified about her understanding of rideshare arrangements Westerman had made and Westerman's statements about where he would drop off T.M. and A.B.:

> [T.M.:] Um, so I told [Westerman] that I was probably just going to wait with [A.B.], and he insisted on us coming with him in his Uber, and that he would take us to our house -- or my house first.

> STATE: Okay. She told you that something happened between Tony and [A.B.]?
>
> [T.C.]: And [A.B.]
>
> STATE: The time frame that something happened between Tony and [A.B.], were you still dating the Defendant? . . . Were you on again when that happened, if you know?
>
> [T.C.]: When I found out, I was dating him. When it happened, we were not dating.
>
> STATE: Okay. What, if anything, did you do when you found out from [T.M.] about what happened?
>
> [T.C.]: I called [Westerman] and told him what [T.M.] told me . . . He was trying to convince me that what [T.M.] said didn't happen.
>
> STATE: As a result of hearing what happened with [A.B.] from [T.M.], and the Defendant's version to you, what, if anything, did you do regarding your relationship with the Defendant?
>
> [T.C.]: I stayed with him. My heart won over my mind.

So, I knocked on the window and [A.B.] opened the door, and I asked her if she wanted to do that. She declined at first, and then [Westerman] insisted, again, like just come with us. We can just Uber you guys home. It's fine. You don't even have to get an Uber, and then, eventually, [A.B.] did agree to do that.

* * *

[STATE:] Okay. So, you would have been dropped off. And what was your understanding of how this was going to work in the Uber?

[T.M.:] Under my impression, I just assumed that [Westerman] was just going to take us home.

[STATE:] And why did you assume that?

[T.M.:] Because that's what he said he was going to do.

* * *

[STATE:] And, um, what did you tell [A.B.] regarding where you were going?

[T.M.:] I told her that they were going to let us Uber in their Uber and that they were going to drive us back to my place, and I'll take you to your car in the morning.

[STATE:] And, um, what happened -- what did [A.B.] respond to that?

[T.M.:] She just said okay.

[STATE:] What did [A.B.] want to do initially?

[T.M.:] She originally wanted to stay in her car and sleep it out, um, but I told her that probably wasn't a good idea. And that -- and I was going to get us an Uber, but [Westerman] said don't worry about it, get in the Uber with us, we'll take you home.

* * *

So we get in the car and, um, it was [Reisig], me and [A.B.] in the back seat, and [A.B.] immediately passed out. And, uh, on the car ride I actually leaned my head down on [A.B.] and I started to fall asleep as well.

> And when I eventually did wake up I realized that we were at [Westerman's], and I asked him why we were at his house. And he said, well, I have beer, we could all just chill for a little bit. And at that time I didn't think anything of it, because I had been there before, multiple times … so I thought, okay, I guess that's okay.
>
> And we went inside, and [A.B.] immediately went to sleep on the couch in the corner[.]

A.B. testified that, at Westerman's house that evening, A.B. woke up to find Westerman on top of her, and, she said:

> He was kissing all over my face and on my body. And I was like coming in and out. I didn't remember what was going on. And I was just confused. And I remember telling him to get off of me and he wouldn't.

A.B. recalled that her shirt was on, but she was not wearing pants or underwear. She testified that Westerman was "being very forceful" and applying pressure to her chest while attempting to put his penis in her vagina. A.B. further testified:

> I remember saying no multiple times. And as I was saying it, trying to push him off me with the best ability I could. Because I kept going like in and out.
>
> He started telling me that he likes it when I say no.

According to A.B.'s testimony, Westerman penetrated his penis into her vagina "a couple times" as she was trying to "push him off" of her. A.B. also testified to the following:

> [A.B.:] After -- I don't know how long it went on. But I kind of gave up and I did what I felt was the most comfortable to me and I did touch myself.
>
> [STATE:] And why did you do that?
>
> [A.B.:] Because, in that moment, I felt so uncomfortable, it was the only way for me to feel comfortable.

> [STATE:] To feel comfortable why?
>
> [A.B.:] In that situation, I can't really describe it. It was just something, I guess, I just had to like deal with.
>
> [STATE:] What happened next?
>
> [A.B.:] He finally like stopped. And I just blacked out again. I don't really know how like the whole end game went, but I know he eventually did stop.

T.M. later testified that A.B. told her about the rape the next day. Over defense counsel's objection, T.M. testified about what A.B. had told her:[5]

> [S]he told me that in the middle of the night she woke up to Tony taking her clothes off while she was asleep. And, um, she said she was very out of it, but didn't know like right away what was happening, and once she realizes what was happening she told him to stop. And he kept saying, oh, I like when you tell me no.
>
> And, um, she said that he did penetrate her and, um, eventually, she kept pushing him off, and eventually he stopped.

Westerman admitted to police that he performed consensual oral sex on A.B., but, he told police, he did not have intercourse with her.[6]

[5] This testimony by T.M. is the subject of Westerman's second issue on appeal in which he contends that the content of this testimony exceeded what is admissible pursuant to the hearsay exception for a "prompt complaint of sexually assaultive behavior to which the declarant was subjected[.]" *See* Maryland Rule 5-802.1(d); *Vigna v. State*, 241 Md. App. 704, 729-32 (2019); *Muhammad v. State*, 223 Md. App. 255, 266-71 (2015).

[6] We note that State's Exhibit 12 — the CD containing Westerman's interview with police, which was admitted into evidence at trial — was not transmitted with the record on appeal. Portions of that interview were played at trial and are transcribed in the transcripts in the record. The portion of the interview when Westerman told the police his version of his encounter with A.B. was apparently also played at trial, but it was not transcribed. At any rate, Westerman states in his opening brief filed in this Court that he "told police in [a] post-arrest interview that he performed consensual oral sex on [A.B.] but did not have (continued…)

3. The Incident Involving M.G. in June 2019.

As noted above, there was a party at Sunset Cove to celebrate T.C.'s birthday in June 2019. One of T.C.'s cousins, M.G., who considered T.C. "like my best friend[,]" traveled to Maryland in order to attend the party. M.G. met T.C. and Westerman at Westerman's house around 6:00 p.m., and they all went to Sunset Cove.

At one point that evening, Westerman asked M.G. if she would expose her breast to get the bartender's attention. M.G. testified about that exchange as follows:

> [Westerman] asked me if I would show my breast to the bartender to get his attention in order to get us shots. And I didn't think anything of the comment at first.
>
> I just let it go. Thinking, you know, this guy is just -- he's dating my cousin, and I am going to let that go.

Later that evening, Westerman grabbed M.G.'s hand and led her "through the bar area and through all of the people." M.G. testified about the incident:[7]

> I was just thinking he's taking me somewhere, and he wants to ask me how to eventually propose to [T.C.] Because, at this point, they had been dating for many years. And I was thinking like he just wants to be in my confidence of how she would want to go about doing that and maybe use some of my thoughts in that situation.
>
> So he took me by the hand and led me to a dark area behind the restaurant. He took me right there. He knew where he was going. And it's down a ramp, almost like a loading area for the restaurant where no one else can see you.

intercourse with her." The State does not dispute that Westerman made that statement to police.

[7] This testimony is the subject of the third issue on appeal, namely, whether there was sufficient evidence to support a conviction for second-degree assault of M.G.

> And, at that point, **he took me down there and turned me around and so I was facing directly towards him. Then he grabbed my waist and my neck to pull me in for a kiss, which I stopped by putting my hands on his chest and pushing away**.
>
> I was shocked because before that he had not done anything like that. And I asked him why he would try to attempt that with me. And I said, you know, I don't understand.
>
> You have been dating my cousin who is like my best friend for many years. And he said that he liked my personality more. He thought I was better looking than her.
>
> And I just looked at him, kind of in shock and thinking that something was wrong. I said, let's just go back to the bar and I will get you a glass of water.
>
> I didn't really know how to respond at that point. So we went back to the bar and sat down at the table. And I don't remember whether I actually got him water or not. But we sat back at the table. And it was just silence.
>
> And a few minutes later, I just asked him, why -- I don't understand why you would try something like that with me. And so then he looked at me and he said, oh, you are good.
>
> And I didn't know what he meant by that. And so he grabbed me by the hand a second time, just a few minutes, like literally minutes in between. And I allowed it because I was wondering if he was planning to apologize, if he really -- just giving him a second chance knowing like this guy is such an important part of my cousin's life.
>
> And I just wanted to like give him that moment. So I let him take me the second time. And when I realize he was -- he grabbed me again. And when I realized what was happening, I pushed away from him again. I told him to fuck off. And then I went to go find my cousin.

(Emphasis added.)

As to the first contact that occurred, M.G. repeated her description of the unwanted physical contact, testifying:

> **He took both of his hands. One hand on my waist. One hand on the back of my neck and pulled me closer to him**. At which point I realized he was closing his face in to give me a kiss. And, at that point, I used my hands to push him away.
>
> * * *
>
> We did not reach a point where our bodies were touching. I stopped it before it got to that point.

(Emphasis added.)

As to the second contact that occurred, M.G. testified as follows:

> The second time, it didn't get as far. He still tried to touch me. And I moved away when I realized that he was going for my waist and my neck again.
>
> It wasn't a grab this time. It was more of like he was reaching for me. And I don't remember whether he had both of his hands around me before I stopped him the second time.
>
> But it wasn't as big of a contact of him actually grabbing me and pulling me closer to him.

4. The Court's Finding.

As noted above, the court found Westerman guilty of counts 1, 3, 4, 5, and 8. (The court initially also found Westerman guilty of count 2, but later reversed that finding.) In other words, the court found Westerman guilty of the rape and sexual assault of A.B., and the second-degree assault of M.G. But the court acquitted Westerman of the charges related to the incident with E.C. The court explained its findings as follows.

Regarding the charges arising from the incident involving A.B. in October 2017, the court stated:

> The Defendant contradicts [A.B.'s] account. States that no sexual intercourse ever occurred, that only oral sex occurred and that it was

consensual. He raises the question of why it took two years to report this incident.

In evaluating the two different versions of what took place, there are several facts which I find persuasive or at the very least notable. First is there was no prior relationship between [A.B.] and the Defendant. There's no evidence from any of the witnesses that talked about that night that they had any interest in each other, romantically or otherwise.

Second, it was undisputed that [A.B.] was very drunk and she had passed out in her car. The testimony of [T.M.] was that [A.B.] had passed out in the Uber and that once entering the house she passed out again on the couch.

It seems more likely to me that someone in that state of intoxication that late at night to the point where they're passed out in their car would not be in the condition shortly thereafter suggested by the Defendant and his witness Mr. Reisig.

And a couple comments on Mr. Reisig's testimony. The Court did not find it terribly credible. His manner of testifying was flat, [rote], to the point of being robotic. It struck me that the testimony was heavily rehearsed and it contained details that were never revealed to Detective Lan[e] in November of 2019 when he spoke to her. So I did not place a lot of credibility in Mr. Reisig's explanations.

Third was the repeated nature that [A.B.] -- [A.B.] repeated a number of times that she offered resist[a]nce. She tried to push him off. She was unable to do so. Told him to stop. She described the dead weight on her. That he was very forceful. She used that word time and again. And that she was, during this encounter penetrated vaginally several times.

I find her description credible and consistent with her prior statement and statements on cross examination. She held up very well during a very strong cross examination.

But there is one fact in trying to decide whether her version of events is as she says it was. There's one fact that stands out to me and I cannot argue it away. In her November 19, 2019 interview with Detective Lan[e], before that took place, [A.B.] and perhaps the Defendant, were the only people in the world who knew that during the course of that incident she had, in her words, touched herself.

> I concluded from listening to [A.B.] throughout her testimony that she's an intelligent woman. She had to understand that by saying that, that would not be helpful to her side of the story, so to speak. That that would imply a level of consent, a level of enjoying the incident. But she never the less didn't hesitate and she even knew that it was, as she called it, backwards and that she had battled in her own mind why she did that.
>
> I find it highly credible and highly supportive of her overall version of events that she was willing to say that in that way at that time when no one else knew it and it could only hurt her credibility ultimately. And as it turns out, I find that it aided her credibility.
>
> So then, considering the evidence that's been presented as to Counts 1 through 5, I find that on October 4th, 2017, the Defendant, by use of force and without the consent of the victim, had vaginal intercourse with [A.B.]
>
> And for that reason I find him guilty of Counts 1, 2, 3, 4 and 5 all of which -- many of which will merge but all of which are satisfied by that conclusion.[8]

In explaining why it found Westerman guilty of count eight, second-degree assault upon M.G., the court stated:

> At some point in time Mr. Westerman took [M.G.] by the hand outside to the back of the restaurant. **He at some point put his hands on her neck, her waist in an attempt to kiss her. She pushed him away** and both returned to the restaurant.
>
> After another short period of time, the Defendant once again took her by the hand, led her outside, again attempted to kiss her. There was a considerable conflict in the testimony as to what, if any, contact -- physical contact took place the second time. The testimony from [M.G.] was that he grabbed me again. I pushed him away and then she said the Defendant still tried to touch her. He was reaching for her. She eventually pulled away, turned and went back into the restaurant where she told [T.C.] of the incident that initiated a whole course of events which has wound up in this courtroom.

[8] As noted previously, at sentencing, the court reversed itself as to Count 2 and acquitted Westerman of that count (second-degree rape involving cunnilingus).

> The question is whether either or both of these incidents satisfies the elements of second degree assault by a standard of proof beyond a reasonable doubt.
>
> And it has been argued by the Defense that this is such a de minimus contact that it's a normal human contact and as such does not rise to the level of criminal behavior.
>
> And without addressing the merits of that statement, **there's little question that that contact satisfies the elements of second degree assault**. That it was -- **that the Defendant caused physical contact with [M.G.] and that that contact was intentional and was not consented to**.

(Emphasis added.)

But the court concluded that the charges arising from the incident with E.C. had not been proved beyond a reasonable doubt, noting that:

- E.C. told Westerman not to tell her sister.
- E.C. stayed in the same house as Westerman the next day, including in Westerman's company at times.
- After the incident, there were 13 communications between Westerman and E.C. during a short period of time, including five in one day for long periods of time.

On count 1 (second-degree rape), the court sentenced Westerman to 15 years, but suspended all but four years to be served on home detention. The other convictions related to A.B. merged for sentencing purposes into the conviction on count 1. And, for the conviction of second-degree assault of M.G. (count 8), the court sentenced Westerman to one day, to run concurrent with the sentence on count 1.

The Motion for New Trial

Westerman filed a motion for new trial, with a supporting memorandum, claiming, in pertinent part, that his jury trial waiver was not made knowingly and voluntarily. At the hearing on that motion, Westerman and his attorneys testified that their initial plan was to have three separate jury trials. After the third postponement, defense counsel advised Westerman that it could take another year before jury trials would be available to him. Westerman testified that the repeated postponements caused him to "just completely f[a]ll apart" mentally.

During cross-examination at the motion hearing, defense counsel admitted to telling the prosecutor that, if Westerman was assigned the "right [j]udge," then Westerman would "go Court trial[.]" Defense counsel acknowledged in his testimony that the specially assigned judge was a "good draw for the defense," and testified: "[O]nce we were assigned to Judge Truffer, after [Westerman] reluctantly said I can't take it anymore, I did, I did consider Judge Truffer a favorable pick." The testimony included the following exchange:

> STATE: Wasn't, wasn't your conversation with the Westerman family and the Defendant that Judge Truffer was a good draw and, therefore, you should go Court trial? Wasn't that the conversation that you had with them?
>
> [DEFENSE COUNSEL]: After fifteen months, yes.

The court denied Westerman's motion for new trial and made the following findings regarding the claim that the waiver was not knowing and voluntary:

> In dealing with the voluntariness of the jury trial waiver, I can only go on what was before me at the time. I am convinced, as I was then, in March of 2021, on the 25th of that month, that Mr. Westerman's waiver of his right to jury, to a jury trial was knowing and voluntary.

> He was advised by very able counsel and made what I considered a knowing and voluntary waiver of that. There was no hint at that time and, indeed, no hint at any time, that he was suffering from a mental illness that would have deprived him of the ability to knowingly make that, that choice.
>
> Indeed, those questions were specifically asked of him, and it is difficult to, to expect, expect that a Judge, a lay Judge, to, to be able to go beyond what the witnesses' statements were to determine if there was something else going on. Particularly when represented by very, very good counsel.
>
> …I've listened to the testimony this morning from Mr. Westerman and his mother, about the severe mental difficulties he was experiencing during this period of time. And, indeed, Mr. Westerman's own statement that he couldn't take it anymore, that he didn't know if he could survive the year.
>
> * * *
>
> I suspect, and this is where I, I do not find Mr. Westerman's testimony on this point credible, that he would have taken [i.e., waited for] a jury trial had he known one would have been available the next year. I, I suspect this is a case of buyer's remorse.
>
> They elected a bench trial before this Judge and were not dissatisfied with that choice until there was a verdict resulting in a conviction. So, for that reason, I, I'm going to deny the Defense Motion for a New Trial[.]

We shall supply additional facts that are pertinent to our analysis in the discussion of the three issues raised on appeal.

DISCUSSION

I. Jury Waiver

Westerman argues that the court should have examined him further about whether the unavailability of jury trials had such a coercive impact upon his decision to accept a bench trial that his jury waiver should be held to have been involuntary. Westerman further

claims that the court abused its discretion when it denied his motion for new trial in which he raised the jury waiver issue.

The State responds that Westerman's complaint about the voluntariness of his jury trial waiver is not preserved, but, even if it were preserved, the trial court correctly concluded that the waiver was voluntary. The State also contends that the court acted within its discretion in concluding that a new trial was not in the interest of justice.

Citing Maryland Rule 8-131(a), Westerman contends that the waiver issue was preserved because, among other reasons, the question of voluntariness was raised in, and decided by, the circuit court. He observes that the court initially ruled pretrial that his waiver was knowing and voluntary, and then considered the issue again when it was raised in the motion for new trial. He also asserts that his challenge "is preserved for review because it is rooted in his constitutional rights."

But the State points to "Westerman's failure to lodge a contemporary objection to the [court's acceptance of his] jury trial waiver" at the hearing conducted in March 2021 in accordance with Maryland Rule 4-246(b), the rule which is intended "to protect the personal and fundamental constitutional right of a criminal defendant to a trial by jury." *Nalls v. State*, 437 Md. 674, 680 (2014). Although Westerman concedes in his reply brief that a claim of non-compliance with Rule 4-246(b) "must be preserved by contemporaneous objection to be reviewed as a matter of right, [as held in] *Nalls*, 437 Md. at 693," he contends the Court of Appeals "has never held that the constitutional validity

of a jury trial waiver (or the waiver of other fundamental rights) is subject to that requirement[.]"[9]

Westerman's suggestion that any claim of infringement of constitutional rights may be raised for the first time on direct appeal is contrary to Maryland cases that have held that even structural errors are subject to the preservation requirement that there be a contemporaneous objection at trial, and, in the absence of a timely objection, are limited to plain error review. *See Savoy v. State*, 420 Md. 232, 243 n.4 (2011) ("The overwhelming majority of courts that have considered this issue have held, as we do here, that un-preserved structural errors are not automatically reversible, but, instead, are subject to plain error review."); *Taylor v. State*, 381 Md. 602, 623 (2004) ("[D]ouble jeopardy rights may be waived by failure to raise them in the trial court.").[10]

Furthermore, in this case, both Westerman and his defense counsel unequivocally represented to the judge conducting the hearing pursuant to Rule 4-246(b) that Westerman wanted to waive his right to a jury trial, and was doing so knowingly and voluntarily. The appellate courts of Maryland generally decline to review a claim of error that is *invited* by

[9] Prior to December 14, 2022, Maryland's highest state court was named the Court of Appeals of Maryland. The name of that court changed, effective December 14, 2022, to the Supreme Court of Maryland. On the same date, the name of Maryland's intermediate appellate court changed from the Court of Special Appeals to the Appellate Court of Maryland.

[10] Westerman does not argue in his briefs that he qualifies for plain error review, and it appears to us that he does not qualify. *See Newton v. State*, 455 Md. 341, 365 (2017) (citing *Boulden v. State*, 414 Md. 284, 313 (2010), as a case in which the Court had declined "to conduct plain error review of efficacy of [the] jury trial waiver").

the defendant. As the Supreme Court of Maryland explained in *State v. Rich*, 415 Md. 567, 575 (2010):

> The "invited error" doctrine is a "shorthand term for the concept that a defendant who himself invites or creates error cannot obtain a benefit—mistrial or reversal—from that error." *Klauenberg v. State*, 355 Md. 528, 544 (1999), quoting *Allen v. State*, 89 Md. App. 25, 43 (1991), *cert. denied*, 325 Md. 396 (1992). "The doctrine stems from the common sense view that where a party invites the trial court to commit error, he cannot later cry foul on appeal." *United States v. Brannan*, 562 F.3d 1300, 1306 (11th Cir. 2009).

We agree with the State's assertion that, after *Nalls*, any challenge to the trial court's conduct of the jury waiver analysis must be raised by a contemporaneous objection in the circuit court in order to be considered preserved to be raised on direct appeal.

The Court Did Not Err in Denying Westerman's Motion for New Trial.

Nevertheless, we agree with Westerman that he revisited the waiver issue with the trial judge by way of filing a motion for new trial, and his argument on appeal challenging the judge's denial of the motion for new trial is preserved for appellate review. When we review a claim that the trial court erred in denying a motion for new trial, the standard of review is for abuse of discretion. *Jackson v. State*, 164 Md. App. 679, 700 (2005). "[A] trial judge may order a new trial if the court finds it is in the interest of justice to do so." *Williams v. State*, 462 Md. 335, 344 (2019).

As quoted above, at the pretrial hearing to consider Westerman's waiver of his right to a trial by jury, his own attorney asked all of the questions that are suggested in the Committee Note to Rule 4-246(b) for "determining whether a waiver is voluntary[.]" At that hearing, Westerman's answers disclosed no sign of uncertainty, and did not trigger further inquiry. On appeal, Westerman contends that he "was too ashamed and

embarrassed to reveal to his lawyer or the court that he was receiving mental health treatment and was taking multiple psychiatric medications" at the time of the jury trial waiver. But Westerman unequivocally represented to the court that he was *not* being treated for any psychiatric disorders, nor was he under the influence of any drugs. In our view, the court did not err in accepting those statements. Despite Westerman's argument on appeal, we perceive no "factual triggers" that would have required the court to conduct a more extensive inquiry into the voluntariness of Westerman's jury trial waiver. *See Kang v. State*, 393 Md. 97, 110 (2006) ("[T]here is no uniform requirement explicitly to ask a defendant whether his or her waiver decision was induced or coerced, unless there appears some factual trigger on the record, which brings into legitimate question voluntariness.").

During the February 2021 status conference, the court informed Westerman and counsel about the timeframe for scheduling a jury trial, saying: "most likely we're looking at dates maybe in November and December [2021]" for a jury trial. And the court suggested that a *bench* trial could occur several months sooner. Westerman has not shown that either of those projections was unreasonable.

At the hearing on the motion for new trial, when Westerman was asked about the court's February 2021 statement that he could have likely had a jury trial scheduled around the end of that year, Westerman testified: "I don't remember [the court] saying that."

During the hearing on the motion for new trial, Westerman testified as follows:

> THE COURT: . . . If for example, you could not have [had] a jury trial until the following year, would you . . . have been able to wait that long?
>
> [WESTERMAN]: Yes, sir. My ultimate goal was to go in front of a jury. That the biggest thing, even if I had to wait another year, if I'm given a date,

> that's something to look forward to. Not knowing what's, what's going on is, is one of the worst parts.

That testimony was not consistent with other portions of his testimony describing the delay as unbearable. And, even though Westerman testified at the hearing on his motion that he would have waited another year for a jury trial, he also testified that he "mentally … couldn't take it anymore[,]" which caused him to choose a bench trial instead of waiting for a jury trial. The court determined that Westerman's testimony on this point was not credible. We find no error in the court's determination.

Undoubtedly, the suspension of jury trials because of the pandemic presented unique circumstances outside either party's control. But we are not persuaded that the suspension of jury trials coerced Westerman's jury trial waiver. When jury trials resumed, the court rightfully placed an "enormous priority" on cases involving incarcerated defendants. Westerman was on house arrest pending trial. Westerman was confronted with a difficult decision: either wait several more months for a jury trial, or have a bench trial sooner. As the State observed in its brief: "This was, no doubt, a difficult decision. But simply because a decision is difficult does not make it coercive." We agree with the State that the fact that he was told that he could go to trial sooner if he waived a jury does not establish that he was acting involuntarily in choosing to waive his right to be tried by a jury. The choice of whether to wait remained with Westerman.

The court did not err in determining that Westerman voluntarily waived his right to a jury trial based on the advice of competent counsel. And, because the court thoroughly considered the representations and testimony presented in support of the jury waiver before

accepting the waiver, we perceive no abuse of discretion in refusing to grant a new trial based on the post-judgment claims that the waiver was not knowing and voluntary.

II. Hearsay Complaint of Sexual Assault

Westerman contends that the court erred in allowing T.M. to provide impermissibly detailed testimony about A.B.'s prompt complaint of the sexual assault. Westerman claims that this testimony exceeded the limits of the hearsay exception for prompt complaints of sexual assault. The State responds that T.M.'s testimony was within the limits of the hearsay exception.

1. This Argument is Preserved for Our Review.

At oral argument, the State suggested that Westerman's argument on this issue may not be preserved, noting: "[T]here's no objection to *the scope* of [T.M.'s] answer, and there's no motion to strike any of that testimony." But, when the prosecutor asked the question which unquestionably sought to elicit hearsay testimony from witness T.M., Westerman's attorney lodged a general objection, and the court did not seek further clarification from defense counsel before overruling the objection. The transcript reflects:

> [T.M.:] [Westerman] drives us back to the Avenue where [A.B.'s] car was parked.
>
> [STATE:] And then what happens?
>
> [T.M.:] Me and [A.B.] got out of the car, and once we got in [A.B.'s] car, that's when she said "I have to tell you something". And **she told me the whole story**.
>
> [STATE:] **And what did she tell you?**
>
> [DEFENSE COUNSEL]: Object -- **objection**, your Honor.
>
> THE COURT: **Overruled.**

> [STATE:] What does she tell you?
>
> [T.M.:] Um, she told me that in the middle of the night she woke up to Tony taking her clothes off while she was asleep. And, um, she said she was very out of it, but didn't know like right away what was happening, and once she realizes what was happening she told him to stop. And he kept saying, oh, I like when you tell me no.
>
> And, um, she said that he did penetrate her and, um, eventually, she kept pushing him off, and eventually he stopped.
>
> [STATE:] Um, penetrating her, did she get into specifics about what body part entered her body part or just --
>
> [T.M.:] His penis into her vagina.

(Emphasis added.)

The Supreme Court of Maryland has held: "[W]hen the trial court does not request a statement of the grounds for an objection, a general objection is sufficient to preserve all grounds which may exist." *Ali v. State*, 314 Md. 295, 306 (1988), *abrogated on other grounds by Nance v. State*, 331 Md. 549 (1993); *accord* Md. Rule 5-103(a)(1). Here, Westerman's counsel raised a timely general objection, and the trial court did not request a statement of the grounds for the objection. As a result, Westerman's contention that there was inadmissible hearsay in the answer to that question—"what did she tell you?"—is preserved for our review.

2. T.M.'s Testimony Did Not Exceed the Bounds of the Prompt Complaint Exception.

We now turn to the merits of Westerman's argument as to whether T.M.'s testimony exceeded the bounds of the exception to the hearsay rule that allows certain testimony about a prompt complaint of a sexual assault.

Although "[d]eterminations regarding the admissibility of evidence are generally left to the sound discretion of the trial court[,]" *Baker v. State*, 223 Md. App. 750, 759 (2015) (quotation marks and citations omitted), "a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility." *Bernadyn v. State*, 390 Md. 1, 8 (2005). *Accord Gordon v. State*, 431 Md. 527, 535-36 (2013). But, even though "determinations of hearsay admissibility are subject to [*de novo*] review on the law[,]" the Court explained in *Gordon*: "A hearsay ruling may involve several layers of analysis." *Gordon*, 431 Md. at 536. If the court is required to make any factual findings in order to resolve a hearsay determination, those findings will not be disturbed unless clearly erroneous. *Id.* at 538. The Court explained in *Gordon*:

> Under this two-dimensional approach, the trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed de novo, *see Bernadyn*, 390 Md. at 7-8, but the trial court's factual findings will not be disturbed absent clear error, *see State v. Suddith*, 379 Md. 425, 430-31 (2004) (and citations contained therein).

Id.

It is clear that hearsay testimony that is a "prompt complaint of sexually assaultive behavior" is admissible if it falls under Rule 5-802.1(d), the "prompt complaint" exception, which states:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> * * *

> (d) A statement that 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[.]

We have observed that the "'legally sanctioned function"' of the prompt complaint exception is to "'give added weight to the credibility of the victim'" by corroborating the victim's account of the alleged assault. *Choate v. State*, 214 Md. App. 118, 146 (2013) (quoting *Nelson v. State*, 137 Md. App. 402, 411 (2001)). Professor McLain explains the rationale for this hearsay exception in her treatise: "Admission of the fact that a prompt complaint was made will forestall the creation of reasonable doubt in the jurors' minds, simply because they have not heard when the first report of rape was made." LYNN MCLAIN, MARYLAND EVIDENCE STATE AND FEDERAL § 801(2):2 at 305 (3d ed. 2013).[11]

In *Muhammad v. State*, 223 Md. App. 255, 268 (2015), we stated: "The purpose of the exception is fulfilled by allowing the State to introduce, in its case-in-chief, the basics of the complaint, *i.e.*, the time, date, crime, and identity of the perpetrator." We also observed in *Muhammad*: "The narrative details of the complaint are not admissible, as they exceed the limited corroborative scope of the exception." *Id*.

But more recently, we again examined the scope of the exception and its limits, and pointed out: "'[A]lthough the earlier case law admitted only the bare fact that the complaint had been made, the restraints have been loosened at least to the point of admitting as well

[11] A common law version of the exception was recognized in Maryland prior to the adoption of the Title 5 Rules of Evidence in 1994. *See Green v. State*, 161 Md. 75, 82 (1931) ("[I]f the prosecutrix had testified to a violent assault, the fact of the making of complaint within a reasonable time under the circumstances is original evidence, and may be shown to prevent the inference that the woman did in fact maintain a silence inconsistent with her narrative at the trial[.]").

the essential nature of the crime complained of and the identity of the assailant.'" *Vigna v. State*, 241 Md. App. 704, 731 (2019) (quoting *Cole v. State*, 83 Md. App. 279, 293 (1990)), *aff'd on other grounds*, 470 Md. 418 (2020). Indeed, the text of Rule 5-802.1(d) does not limit narrative details of the "sexually assaultive behavior," but provides the hearsay statement is admissible if it is: "A statement that 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[.]"

As stated above, the testimony that was admitted here was as follows:

> [A.B.] told me that in the middle of the night she woke up to Tony taking her clothes off while she was asleep. And, um, she said she was very out of it, but didn't know like right away what was happening, and once she realizes what was happening she told him to stop. And he kept saying, oh, I like when you tell me no.
>
> And, um, she said that he did penetrate her and, um, eventually, she kept pushing him off, and eventually he stopped.
>
> * * *
>
> [The penetration was of] [h]is penis into her vagina.

In our view, this testimony does not go beyond the essential nature of the crime complained of and the identity of the assailant. The time was "the middle of the night[,]" the date of the crime was the night before the declarant's statement, the assailant was the defendant, "Tony[,]" and the crime was that Westerman penetrated A.B.'s vagina for sexual gratification without her consent when she was "very out of it," after she told him "no" and tried to push him off her body.

This description of the sexual assault includes essential elements of the offenses with which Westerman was charged, including: Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL") § 3-304(a)(1) ("A person may not engage in vaginal intercourse . . . with another: (1) by force . . . without the consent of the other[.]"); CL § 3-304(a)(2) ("A person may not engage in vaginal intercourse . . . with another: (2) if the victim is . . . a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is . . . a mentally incapacitated individual, or a physically helpless individual[.]"); CL § 3-307(a)(2) ("A person may not: . . . engage in sexual contact with another if the victim is . . . a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is . . . a mentally incapacitated individual, or a physically helpless individual[.]").[12]

At oral argument before this Court, the State said: "[T]he only sentence that the State acknowledges is beyond the scope [of the exception] is the 'and kept saying "oh I

[12] With respect to the rape of A.B., the charging document simply alleged two violations of CL § 3-304. It did not specify which modality of the crime Westerman employed. Nevertheless, we have pointed out: "Notwithstanding the variation in modalities, the critical denominator is the act of engaging in sexual intercourse with a woman without her consent. The modalities simply represent different ways in which that consent may be found to have been lacking." *Travis v. State*, 218 Md. App. 410, 424 (2014). During closing argument, the State argued, in essence, that A.B. resisted the rape, she was mentally incapacitated, she was physically helpless, and Westerman knew or should have known that A.B. was mentally incapacitated and physically helpless. The State contended that one of the second-degree rape counts dealt with Westerman's vaginal penetration of A.B., and the other second-degree rape count dealt with Westerman's admission that he performed cunnilingus on A.B., even though A.B. did not remember Westerman performing cunnilingus as he admitted in his statement to the police.

like . . . when you tell me no"' because that's not precisely within the elements of the nature of the crime with which he's charged." But we conclude that even that sentence did not exceed the scope of the hearsay exception because it described Westerman's response to hearing the victim tell him "no," and consequently, related to the essential elements of force and lack of consent.

Among the charges related to the assault of A.B., Westerman was charged with committing a third-degree sexual offense against A.B. in violation of CL § 3-307, which is a specific intent crime. Relevant here, CL § 3-307(a)(2) provides: "A person may not: . . . engage in sexual contact with another if the victim is . . . a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is . . . a mentally incapacitated individual, or a physically helpless individual[.]" "Sexual contact" in that context "means an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." CL § 3-301(e)(1) (emphasis added). Indeed, the pertinent phrase in CL § 3-301(e)(1) "that prohibits contact 'for sexual arousal or gratification, or for the abuse of either party' establishes a specific intent requirement." *Bible v. State*, 411 Md. 138, 157 (2009) (citation omitted). The Supreme Court of Maryland held in *Bible*: "Circumstances surrounding the touching that would aid in the determination of whether it was for the purposes of sexual gratification might include . . . whether anything was spoken between" the defendant and the victim. *Id.* at 158. T.M.'s statement that Westerman "kept saying, oh, I like when you tell me no" indicated that Westerman had the specific intent to engage in contact with A.B. "for sexual arousal or gratification"

and to take advantage of A.B.'s impaired capacity. *See* CL § 3-301(e)(1). Because that statement was descriptive of the nature of the crime, we conclude that the portion of T.M.'s testimony that included that statement did not exceed the permissible scope of the prompt complaint exception.

Although Westerman places great reliance upon the fact that we found a witness's testimony in *Muhammad* exceeded the scope of the prompt complaint exception, we are persuaded that the testimony in Westerman's case was more like the testimony we found properly admitted in *Vigna*.

In *Muhammad*, we held that a detective's testimony exceeded the scope of the prompt complaint exception, noting that the detective's "testimony was not limited to the circumstances in which [the victim] made her complaint of sexual assault to him or that [the victim] had identified the appellant as the perpetrator and given the location, date, and time of the assault." 223 Md. App. at 271. Explaining that conclusion, we pointed to portions of the detective's testimony repeating the victim's description of matters that occurred both *before and after* the sexual assault. We explained:

> [Detective Bell] testified that [the victim] told him [1] that the appellant emerged from some bushes and approached her; [2] that he identified himself as a member of BGF; [3] that he put her in a "sleeper hold"; [4] that he forced her into a vacant house; that he told her to "suck his dick"; that she tried to escape by biting his penis; that he beat her around the head; that she defended herself by scratching his face; that he pushed her to the ground and beat her more; and [5] that she could not recall anything beyond that point in time until she woke up at Shock Trauma. These details corroborated much more than [the victim's] testimony that she was sexually assaulted by the appellant in a vacant row house on the afternoon of July 21, 2012. Indeed, they corroborated [the victim's] entire narrative of events, from the moment she encountered the appellant on the street to the moment she awoke at Shock

> Trauma. Detective Bell's testimony about his interview with [the victim] exceeded the bounds of a prompt complaint of sexual assault.

Id. (emphasis added).

Detective Bell's testimony included hearsay statements offered to prove that: Muhammad ambushed the victim after emerging from a hiding place; he told the victim he was a member of the BGF gang; he placed the victim in a chokehold and a violent struggle occurred as the victim attempted to flee; and when the victim woke up in the hospital, she had no memory of what happened after being beaten by Muhammad. *Id*.

Unlike Detective Bell's testimony in *Muhammad*, T.M.'s testimony about A.B.'s prompt complaint did not describe the "entire narrative of events," *id*., but focused only on Westerman's sexually assaultive conduct. Consequently, we are persuaded that T.M.'s testimony regarding A.B.'s prompt complaint of sexual assault is more analogous to the testimony that this Court held was properly admitted in *Vigna*, 241 Md. App. 704.

In *Vigna*, an elementary school teacher was charged with sexually abusing several female students. In this Court, Vigna claimed that the school counselor's testimony about a child's prompt complaint exceeded the scope of the prompt complaint hearsay exception, citing *Muhammad*. *Id*. at 731. The school counselor (Ms. Sobieralski) testified as follows:

> Ms. Grey walked in and said, [A], please tell Ms. S. what you told me. And she said, you know how everybody loves--this is [A] talking. You know how everybody loves Mr. Vigna? I said, yes. And she said, well he makes me feel uncomfortable. And I said, how so? And she said, when he hugs me he touches my butt. And he makes me sit on his lap, and when I try to get up he doesn't let me.
>
> * * *

> I asked where and when this was happening. And she said when she goes to say goodbye at the end of the day. I asked if anybody else was involved and she said another student[']s name.

Id. at 731-32.

We held that this statement "fell *well within the limitations* to the prompt complaint exception. Ms. Sobieralski's testimony *provided the context of the complaint*, identified Mr. Vigna as the culprit, *and stated the nature of the allegations*." *Id.* at 732 (emphasis added).[13] Similarly, T.M.'s testimony here provided the context of the complaint, identified Westerman as the culprit, and stated the nature of A.B.'s allegations that were the basis for the charges concerning her sexual assault.

For all these reasons, we hold that T.M.'s testimony about A.B.'s prompt complaint did not exceed the bounds permitted under Md. Rule 5-802.1(d).[14]

[13] When Vigna sought certiorari in the Court of Appeals, he did not seek review of our determination that Ms. Sobieralski's testimony fell within the limitations of the prompt complaint exception under Md. Rule 5-802.1(d). As a result, the Court of Appeals did not examine that issue when the Court affirmed our judgment affirming the conviction. *Vigna v. State*, 470 Md. 418, 438 n.8 (2020).

[14] The State also argues that, even if T.M.'s testimony exceeded the scope of the prompt complaint hearsay exception, any error was harmless because this was a bench trial, citing *Nixon v. State*, 140 Md. App. 170, 189 (2001), where this Court observed that there is "clear distinction" between bench trials and jury trials when assessing whether an error is harmless. Citing *State v. Babb*, 258 Md. 547, 550-51 (1970), the State asserts: "Unlike juries, judges are presumed to be 'capable of evaluating the materiality of evidence,' and unmoved by inadmissible evidence[.]" Because we have held that the trial judge in this case did not err in admitting the testimony of T.M., we need not reach the question of whether any error in that regard was harmless.

III. Evidence of Second-Degree Assault

Westerman argues that the evidence was insufficient to find him guilty of the second-degree assault of M.G. that occurred at a birthday dinner at Sunset Cove. The following standard of review applies when assessing the sufficiency of the evidence:

> In determining whether the evidence is legally sufficient, we examine the record solely to determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In examining the record, we view the State's evidence, including all reasonable inferences to be drawn therefrom, in the light most favorable to the State. In so doing, it is not our role to retry the case. 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, 307-08 (2017) (internal quotation marks, citations, and brackets omitted); *accord State v. Wilson*, 471 Md. 136, 159 (2020).

CL § 3-203 prohibits second-degree assault, and CL § 3-201(b) states that assault "means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings." "The common law elements of assault in the second degree of the battery variety are (1) the unlawful, (2) application of force, (3) to the person of another." *Koushall v. State*, 479 Md. 124, 150 (2022). "This type of assault requires proof that the (1) defendant caused a harmful physical contact with the victim, (2) the contact was intentional, and (3) the contact was not legally justified." *Cooper v. State*, 128 Md. App. 257, 265 (1999), *superseded by statute on other grounds, as recognized in Britton v. State*, 201 Md. App. 589, 601 (2011).

Maryland Criminal Pattern Jury Instructions ("MPJI-Cr") 4:01C instructs that the battery version of the crime of assault in the second degree requires proof of the following:

> Assault is causing offensive physical contact to another person. In order to convict the defendant of assault, the State must prove:
>
> (1) that the defendant caused [offensive physical contact with] [physical harm to] (name);
>
> (2) that the contact was the result of an intentional or reckless act of the defendant and was not accidental; and
>
> (3) that the contact was [not consented to by (name)] [not legally justified].

Here, the trial court made the following findings regarding Westerman's contact with M.G.:

> At some point in time Mr. Westerman took [M.G.] by the hand outside to the back of the restaurant. **He at some point put his hands on her neck, her waist in an attempt to kiss her**. **She pushed him away** and both returned to the restaurant.
>
> After another short period of time, the Defendant once again took her by the hand, led her outside, again attempted to kiss her. There was a considerable conflict in the testimony as to what, if any, contact -- physical contact took place the second time. The testimony from [M.G.] was that he grabbed me again. I pushed him away and then she said the Defendant still tried to touch her. He was reaching for her. She eventually pulled away, turned and went back into the restaurant where she told [T.C.] of the incident that initiated a whole course of events which has wound up in this courtroom.

(Emphasis added.)

The court concluded that there was "little question" that Westerman's conduct satisfied the elements of second-degree assault of the battery variety, stating: Westerman "caused physical contact with [M.G.] and that . . . contact was intentional and was not consented to." We perceive no error in the trial judge's conclusion.

At oral argument before this Court, Westerman's counsel contended that the intentional battery modality of second-degree assault requires a specific intent to cause contact that is intentionally offensive or harmful. *See* MPJI-Cr 4:01C(2). In support of that argument, Westerman's counsel points to *Elias v. State*, 339 Md. 169, 183-84 (1995), wherein the Court said that the State must produce "legally sufficient proof that the perpetrator intended to cause harmful or offensive contact against a person without that person's consent and without legal justification." *Id.* We agree with the State that, notwithstanding the awkward phraseology employed in *Elias*, the only intent required for the crime of second-degree assault is the intentional touching, and not an intent that the touching be offensive or harmful. Ample Maryland cases have held that second-degree assault of the intended battery modality is a general intent crime. *See, e.g.*, *Koushall*, 479 Md. at 147 ("battery requires a general intent"); *Wieland v. State*, 101 Md. App. 1, 27, 38-39 (1994) (rejecting *dictum* in *Lamb v. State*, 93 Md. App. 422, 443 (1992), and holding that "intended battery is a general intent crime"). *See also Quansah v. State*, 207 Md. App. 636, 647 (2012) ("A battery is a touching that is either harmful, unlawful or offensive.").

Although there was testimony about two separate encounters, the trial court noted that there "was a considerable conflict in the testimony as to what, if any, . . . physical contact took place the second time." However, there was little dispute about the first encounter. As to the first encounter, M.G. said that Westerman took her to a secluded area at the restaurant, and, she testified, "he took me down there and turned me around and so I was facing directly towards him. Then *he grabbed my waist and my neck to pull me in* for a kiss, which I stopped by putting my hands on his chest and pushing away." (Emphasis

added.) At that point, M.G. was highly offended and "asked him why he would try to attempt that with" her.

The trial judge credited M.G.'s testimony as to the first time Westerman grabbed her neck and waist, and that that touching was unwanted and offensive. This evidence was sufficient to find Westerman guilty of second-degree assault.

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