UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1564

September Term, 2015

MARCELLE JAMES McCLELLAN

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: September 21, 2016

Appellant, Marcelle McClellan, was tried and convicted by a jury in the Circuit Court for Baltimore County (Cavanaugh, J.) of two counts of rape, one count of sexual abuse of a minor and one count of second degree sexual offense. Appellant was sentenced to fifteen years under the jurisdiction of the Maryland Division of Corrections for sexual abuse of a minor, all but ten years suspended, eighteen years, consecutive, for second degree rape, eighteen years, suspend all but ten years for the second conviction for second degree rape and eighteen years, suspend all but ten years for second degree sexual offense. The total sentence was sixty-nine years, with all suspended but forty eight years' imprisonment. Appellant filed the instant appeal, in which he raises the following issues for our review:

> 1. Did the trial court err in admitting evidence of A.S.'s statement to a police officer and a social worker?
>
> 2. Did the trial court err in refusing to allow A.S. to be recalled by the defense?

FACTS AND LEGAL PROCEEDINGS

The institution of the proceedings undergirding the instant appeal was promulgated by statements alleging sexual contact initiated by appellant, made to a police officer and a social worker by A.S., who was eleven years old at the time of trial. On Monday, June 9, 2014, Michelle Delovich, a social worker for the Baltimore County Department of Social Services, Child Advocacy Center, whose specialty as a forensic interviewer was the investigation of allegations of child abuse, interviewed A.S. with respect to the investigation involving appellant; also present was Baltimore County Policeman, Detective

Waites. The interview took place in the guidance office of an elementary school. An audio recording was made of the interview.

Admission of Evidence

At the beginning of the second day of trial, prior to the presentation of the State's first witness, the parties discussed the admission into evidence of the audio recorded statements that A.S. made to the detective and the social worker during the interview on June 9, 2014. The State sought to have the statements admitted under § 11–304 of the Criminal Procedure Article of the Maryland Annotated Code, Maryland's "tender years" exception. Appellant's counsel objected, arguing, *inter alia,* that it violated appellant's Sixth Amendment right to confront the witnesses against him under the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004). The trial court overruled appellant's objections and granted the State's motion:

> THE COURT: Okay. I thank you. Um, our courts have looked at the confrontation clause and how it plays into this statute. And this is seen as a . . . tender years exception, and our courts of appeals have found that Section E, if applied properly of the statute, um, provides the necessary safeguards for a defendant's Sixth Amendment right under the confrontation clause.

The trial judge then proceeded to discuss the factors concerning the guarantees of trustworthiness in support of her ruling that the statement could be admitted into evidence under the tender years' exception.

Recorded Statement

The recording of the interview, nearly an hour in length, was played at trial during direct examination of the State's first witness, Ms. Delovich. During the interview, after

A.S. told Ms. Delovich that she was ten years old, that she was in the fifth grade, that she lived with her mother, Christina, and her two brothers, A.S. stated that appellant would "come to the house and help out." A.S. sought appellant's assistance with her homework that focused on puberty. When A.S. was asked what appellant was telling her to do, she responded, "He was like (inaudible) have sex with him." Using illustrations, A.S. correctly identified male and female genitalia and indicated that the last time "something happened" with appellant was the preceding Friday. When asked what the current day was, A.S. responded "Monday" and then stated "nothing happened." When asked if anyone "touched [her] private part," she indicated that appellant had sexually abused her on Monday and Wednesday of the preceding week and was able to describe the incidents. When asked if, on Friday, appellant had done anything to her like the other days, A.S. stated that "no, he didn't do that," but that "he just like kissed me." She further indicated that appellant had kissed her on the mouth and that it was not the type of kiss family members would share.

A.S. also recounted that appellant had lived at the house over a period of two to three months and that he would actually sleep over two or three days per week. A.S. denied that her mother ever told her that appellant was there to supervise her, but she described how her mother left her in the house alone with appellant while she ran errands.

Trial Testimony

At trial, A.S. testified that she knew appellant because he used to live in the shelter where she lived with her family. She recalled speaking with the social worker and detective at her elementary school and she recounted which school grade she was in when she spoke

with them, but she denied seeing appellant in the courtroom, nor could she recall anything that he had allegedly done to her. Upon further questioning, she stated that she didn't want to talk about it and, consequently, the Assistant State's Attorney ceased direct examination. Defense counsel declined to cross-examine A.S.

A.S.'s mother, Christina J., testified that she met appellant at a shelter and that he later stayed with her family once or twice a week when she moved into a new apartment. Although appellant's name was also on the lease and he would pay rent, he only stayed a couple of nights per week. She denied that she would ever ask him to watch the kids or that he ever did. According to Christina J., appellant stayed a couple of nights during the week of June 2, 2014. She first learned of the allegations from the social worker after meeting with her at the school. She testified that, on the night of June 2, 2014, she worked until 9:00 p.m. and appellant was at the home with A.S. and her older sister, Tysha.

Sandra Bowles, a volunteer at the shelter where appellant was living, testified that she knew appellant to be a good father who focused primarily on his daughter. Bowles did not notice anything "untoward" about his behavior at that time.

Appellant testified that he was living at 6700 Fox Meadow Road in Baltimore City with his daughter and a couple that he had met at the shelter. He moved in at the end of May 2014. Prior to moving in with the couple, appellant had made arrangements to move into an apartment with Christina J.; consequently, he contributed to the rent at the Fox Meadow Road residence. He stated that he went to the Dunbrin Road apartment four times, at the most, and he never spent the night. He corroborated the testimony of Christina J. that

she never asked him to watch the kids. He admitted to helping A.S. with her homework at a time when the subject was puberty, but he did so in her mother's van while in the presence of her mother. He admitted that he had engaged in sexual relations with A.S.'s mother; however, he denied ever being at the house without the mother present and he denied ever engaging in any sexual relations with A.S.

Recalling A.S. to Testify

Later in the proceedings, appellant's counsel moved to recall A.S. The trial court denied counsel's motion and the following colloquy transpired between the parties:

> [APPELLANT'S COUNSEL]: I object to this—to this jury instruction, and I object to the—to the disk going back. And it's exactly what I argued before the disk came in, because virtually, exactly what I anticipated happening happened, which was the testimony of [A.S.] did not come out to permit the defense to cross-examine her on it.
>
> * * *
>
> [APPELLANT'S COUNSEL]: [The prosecutor], did not ask her the same questions that were asked of her on the tape, so the scope of permissible cross was simply, are you testifying here today because, or not testifying here today because you didn't want to.
>
> THE COURT: Correct. Um, however, I—I think permissible cross would have included the tape. I don't know what, if any, response you would have gotten given her state of mind today.
>
> [APPELLANT'S COUNSEL]: So what we're getting is, we're getting that tape in without cross, without confrontation, and it's exactly what I was arguing—
>
> THE COURT: Um-hum.
>
> [APPELLANT'S COUNSEL]: —earlier was the State is getting to send back something—
>
> THE COURT: Right.

[APPELLANT'S COUNSEL]: —that wasn't done in a— in a two—

THE COURT: Um-hum.

[APPELLANT'S COUNSEL]:—two-person confrontation setting.

THE COURT: Um-hum.

[APPELLANT'S COUNSEL]: No, no, confronting of the witness by the defendant, and, um, the—the jury is literally going to have that as their only evidence back there in the jury room.

THE COURT: [Prosecutor]?

[ASSISTANT STATE'S ATTORNEY]: Your Honor, I would just say [appellant's] counsel had every opportunity to cross-examine Ms. [A.S.], your Honor. I did not object to any questions he asked.

THE COURT: Um-hum.

[ASSISTANT STATE'S ATTORNEY]: It was not a—a situation where, it has been in some of the case law regarding that statute, where the judge didn't allow—

THE COURT: Right.

[ASSISTANT STATE'S ATTORNEY]: —defense attorney to cross-examine the witness or the—

THE COURT: Um-hum.

[ASSISTANT STATE'S ATTORNEY]: —witness wasn't called. The statute, um, that that testimony is allowed under is fashioned for exactly the situation that we're in today. Um, so I think it is permissible and I think the jury instruction goes to that.

THE COURT: I tend to agree. Um, you know, [appellant's counsel], you could have asked her, as I said, I don't know what, if any, response you would have gotten but, urn, I—I don't think you were limited.

[APPELLANT'S COUNSEL]: Then we will call her as a witness. Your Honor.

THE COURT: Is she still?

[ASSISTANT STATE'S ATTORNEY: No.

[APPELLANT'S COUNSEL]: We did not permit her to be released, your Honor. We were not asked whether or not she would be needed further in this case.

[ASSISTANT STATE'S ATTORNEY**]**: Your Honor, she was not subpoenaed by [appellant's] counsel. She was a State's witness. She came in, testified, was able to be cross-examined. [Appellant's] counsel cross—chose not to cross-examine her, um, and um, her appearance was no longer required by the State. Um, I did not envision her being called in the defense case.

THE COURT: Um-hum.

[ASSISTANT STATE'S ATTORNEY**]**: I had no reason, as I did with Detective Waites, made him available to [appellant's] counsel.

THE COURT: Right.

[ASSISTANT STATE'S ATTORNEY]: [Appellant's] counsel, although I don't believe the summons was properly served on Detective Waites, did e-mail me a copy of a subpoena, that—and I told [appellant's] counsel that I would have Detective Waites here, which I did.

THE COURT: Right.

[ASSISTANT STATE'S ATTORNEY]: Had I been notified that the—

THE COURT: Um-hum.

[ASSISTANT STATE'S ATTORNEY]: —that the victim would have been required as well I would have made those efforts, also.

THE COURT: Yeah, I—I agree. I mean, I feel like the—that door is closed. Um, and that was—the time for asking about the statement was when she was on the stand.

[APPELLANT'S COUNSEL]: No, Your Honor. The scope of permissible cross-examination is only the extent that the State direct exam[ed]. So, the—the time to cross-examine her on that if . . . he was not to ask her any questions regarding that, he closes the door on the defense. He stops me because I'm only permitted to cross a State's witness—

THE COURT: Well—

[APPELLANT'S COUNSEL]: —to the scope of the live testimony, not the recording that just happened serendipitously this morning to have been played first, it could have easily been played second and I wouldn't have even— the jury wouldn't have even heard the second—the—the scope of the—of the statement before the woman was placed, or young lady was placed on the witness stand. So, I am not permitted to cross her any further than the direct examination.

THE COURT: Well, I disagree. I think, number one, I think the door was opened. I think [the State] asked her exactly about that. She said she didn't want to talk about it. But no one instructed you not to ask about it. No one objected to any questions you may have had about it. You chose not to ask questions of her, and perhaps that was out of deference to the upset of a 12-year-old, which I could understand. But I don't think that you were precluded in any way from asking any questions you felt were necessary about the recording. And as such, I'm allowing the instruction and I'm allowing the recording to go back.

Appellant was eventually convicted and the instant appeal followed.

DISCUSSION

I.

Appellant contends that the trial court erred in admitting into evidence A.S.'s out-of-court, recorded statement. Appellant argues that his confrontational rights were violated by the admission of the recorded statement into evidence under Md. Code Ann., Crim. Proc. ("C.P.") § 11–304, because the statement was testimonial in nature and the declarant was "unavailable" to explain the testimonial statement; consequently, his confrontational rights were violated when the trial court denied his request to recall the child victim as a witness. Appellant, therefore, maintains that the ruling of the circuit court should be reversed.

The State responds that appellant's claims are not properly before this Court. Even if, however, appellant has preserved his claims for our review, the State maintains that A.S. was present at trial, available for cross-examination and did, in fact, testify. According to the State, appellant's right to confrontation was not violated and this Court should affirm the ruling of the circuit court.

Although appellant does not address, in his brief, whether his claims were preserved, the State contends that, notwithstanding that appellant's counsel argued against the admissibility of the averments in the statement, the State's response is that, when the statement was played during the direct examination of social worker, Michelle Delovich, appellant's counsel did not object. Additionally, appellant did not argue, on appeal, that his objection to the court's ruling *in limine* preserved the issue for our review. Furthermore, according to the State, because the jury heard the recorded statement during Ms. Delovich's direct examination, appellant waived any objection to the statement's admission into evidence as State's Exhibit No. 1. Alternatively, the State argues that, if appellant's objection was not waived, his objection to the admission of the evidence was based on grounds of "the confrontational clause generally and whether admitting the recording ran afoul of fundamental fairness."

A. Preservation

> Under Maryland Rule 4–323(a), '[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived.' This requirement means that 'when a motion *in limine* to exclude evidence is denied, the issue of the admissibility of the evidence that was the subject of the motion is not preserved for appellate review unless a contemporaneous objection is made at the time the

> evidence is later introduced at trial.' *Klauenberg v. State*, 355 Md. 528, 539 (1999). *See also Prout v. State*, 311 Md. 348, 356 (1988) ('If the trial judge admits the questionable evidence, the party who made the motion ordinarily must object at the time the evidence is actually offered to preserve [an] objection for appellate review.').

Morton v. State, 200 Md. App. 529, 540–41 (2011).

Furthermore, "[o]bjections are waived if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon v. State*, 407 Md. 16, 31 (2008). *See also Vandegrift v. State*, 82 Md. App. 617, 637–38 (1990) (holding that where the contents of the evidence have already been admitted without objection, a complaint to the admission of the evidence is not preserved for appellate review).

Critically, in the instant case, the recorded statement had not been admitted into evidence when it was played for the jury. Although appellant did not object to the presentation of the evidence to the jury, he did timely object to the evidence *when it was admitted.* Accordingly, we hold that appellant's claim concerning the admissibility of the recorded statement into evidence is preserved for our review.

B. Tender Years Exception

"In reviewing the factual findings required by [Md. Code Ann., C.P. § 11–304], we apply the 'clearly erroneous' standard of review.'" *Reece v. State*, 220 Md. App. 309, 319 (2014) (citing *Jones v. State*, 410 Md. 681, 700 (2009)).

Md. Rule 5–101(a) provides that the Rules of Evidence, unless otherwise indicated by statute or rule, apply to all actions and proceedings in the State. Hearsay constitutes out-of-court statements offered to support the truth of the matter for which they are asserted

and, as governed by the Rules of Evidence, is generally inadmissible. MD. RULE 5–802. To be admissible, "hearsay must fall within an exception to the hearsay rule or bear 'particularized guarantees of trustworthiness' in order to be admitted into evidence." *Marquardt v. State*, 164 Md. App. 95, 123 (2005) (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

When the prosecution attempts to offer hearsay evidence against a defendant, the trial judge must determine (1) whether the State has satisfied the foundational requirements of a recognized exception and, (2) if so, whether the admission of this hearsay statement would violate the defendant's right of confrontation." *Webster v. State*, 151 Md. App. 527, 544 (2003) (citation omitted). "The Confrontation Clause of the Sixth Amendment of the United States Constitution [1] and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to confront the witnesses against him." *Wagner v. State*, 213 Md. App. 419, 468 (2013) (citing *Martinez v. State*, 416 Md. 418, 428 (2010)).

However, "[w]e recognize that the right of confrontation does not compel the exclusion of all hearsay evidence." *Bell v. State*, 114 Md. App. 480, 501 (1997). "The right of confrontation affords an accused the opportunity to challenge the testimony of adverse witnesses. Therefore, hearsay evidence may be admitted against the accused only under specifically delineated circumstances[.]" *Id.*

One such exception is the "tender years" exception, codified in Md. Code Ann., C.P. § 11–304. "The legislation was enacted in response to concerns that child abuse and sexual

[1] Made applicable to the states through the Fourteenth Amendment.

offenses were not being prosecuted adequately due to many child victims' inability to testify as a result of their young age or fragile emotional state." *Collins v. State*, 164 Md. App. 582, 599 (2005) (citing *State v. Snowden*, 385 Md. 64, 76 (2005)). Although, under earlier iterations of the statute, the child victim had to be available to testify,[2] the statute was amended in 1994, to permit the use of the tender years hearsay exception "regardless of whether the child was available to testify." *Collins*, 164 Md. App. at 600.

Subsection (b) permits out-of-court statements to be admitted as evidence in certain cases.

> Subject to subsections (c), (d), and (e) of this section, the court may admit into evidence in a juvenile court proceeding or in a criminal proceeding an out of court statement to prove the truth of the matter asserted in the statement made by a child victim who:
>
> (1) is under the age of 13 years; and
>
> (2) is the alleged victim or the child alleged to need assistance in the case before the court concerning:
>
> (i) child abuse under § 3-601 or § 3-602 of the Criminal Law Article;
>
> (ii) rape or sexual offense under §§ 3-303 through 3-307 of the Criminal Law Article;
>
> (iii) attempted rape or attempted sexual offense in the first degree or in the second degree under §§ 3-309 through 3-312 of the Criminal Law Article; or
>
> (iv) in a juvenile court proceeding, abuse or neglect as defined in § 5-701 of the Family Law Article.

Subsection (c) provides that "[a]n out of court statement may be admissible under this section only if the statement was made to and is offered by a person acting lawfully in

[2] MD. CODE (1973, 1989 Repl. Vol.), § 9–103.1(c) of the CTS. & JUD. PROC. Article.

the course of the person's profession," including a social worker. MD. CODE ANN., C.P. § 11–304(c)(4).

Subsection (d)(1) outlines specific procedural guidelines for the admittance into evidence of such an out-of-court statement: "(i) if the statement is not admissible under any other hearsay exception; and (ii) if the child victim testifies." However, not every out-of-court statement made by a child that follows these procedures is admitted into evidence.

> To satisfy the constitutional requirements of *Roberts*, [*supra*] . . . the legislature imposed safeguards in the tender years statute intended to insure that any admitted statement possessed 'particularized guarantees of trustworthiness.' Particularly, when a child victim does not testify, the out-of-court statement will only be admissible when there is corroborative evidence that the defendant had the opportunity to commit the alleged crime, and thirteen other enumerated factors relating to trustworthiness are met.

Collins, 164 Md. App. at 600.

Subsection (e)(1) requires that, in order to be admitted into evidence to prove the truth of the matter asserted, a child victim's out-of-court statement must have "particularized guarantees of trustworthiness." Subsection (e)(2) provides a non-exhaustive list of factors that "the court shall consider" in determining the trustworthiness of a child victim's out-of-court statement.

> (i) the child victim's personal knowledge of the event;
>
> (ii) the certainty that the statement was made;
>
> (iii) any apparent motive to fabricate or exhibit partiality by the child victim, including interest, bias, corruption, or coercion;
>
> (iv) whether the statement was spontaneous or directly responsive to questions;
>
> (v) the timing of the statement;

(vi) whether the child victim's young age makes it unlikely that the child victim fabricated the statement that represents a graphic, detailed account beyond the child victim's expected knowledge and experience;

(vii) the appropriateness of the terminology of the statement to the child victim's age;

(viii) the nature and duration of the abuse or neglect;

(ix) the inner consistency and coherence of the statement;

(x) whether the child victim was suffering pain or distress when making the statement;

(xi) whether extrinsic evidence exists to show the defendant or child respondent had an opportunity to commit the act complained of in the child victim's statement;

(xii) whether the statement was suggested by the use of leading questions; and

(xiii) the credibility of the person testifying about the statement.

Subsection (f) requires that, "[i]n a hearing outside of the presence of the jury or before the juvenile court proceeding, the court shall: (1) make a finding on the record as to the specific guarantees of trustworthiness that are in the statement; and (2) determine the admissibility of the statement." The interviewing of the child by the court, however, may not be necessary, as provided for in subsection (g)(1)(ii), if "the court determines that an audio or visual recording of the child victim's statement makes an examination of the child victim unnecessary."

In the instant case, we must determine whether, in applying the statutory requirements of § 11–304, the trial court erred in admitting into evidence A.S.'s previously recorded statement under the tender years exception. Under subsection (b)(1), the age

requirement is met, *i.e.*, A.S. was ten years old when the statement was recorded. Additionally, appellant was tried and convicted of two counts of rape, one count of sexual abuse of a minor and one count of second degree sexual offense, thereby complying with Md. Code Ann., C.P. § 11–304. Subsection (b)(2)(ii).

Regarding subsection (c) of § 11–304, A.S. made the recorded statement to a social worker, which is one of the eligible professions under the statute. Ms. Delovich, the social worker, was clearly acting lawfully in the discharge of her duties in the course of her profession when she interviewed A.S. Notably, appellant does not challenge her qualifications in his brief. Appellant does argue, however, that the statute does not include "police officers" and, therefore, Detective Waites presence and participation in A.S.'s statement negates Ms. Delovich as a social worker.[3] We disagree. There is nothing in § 11–304 or subsection (c) that stipulates if the statements are made to a qualified professional, *but* within the presence of law enforcement, then the statements become untrustworthy and cannot be admitted into evidence**.** Accordingly, we hold that this statutory requirement has been met.

The procedural dictates under subsection (d) have also been met. A.S. testified at trial and neither party has made an argument that the recorded statement qualified for admission into evidence under another hearsay exception.

The constitutional threshold requirements under Subsection (e) are also met. Subsection (e) requires that, when out-of-court statements are admitted and the child victim

[3] Appellant also argues that this renders the recorded statement "testimonial" in nature, which will be addressed later in the opinion. *See infra* I.C.

does not testify, there must be particular guarantees of trustworthiness in order to avoid violating the right of the defendant to confront his accuser. Subsection (f) requires the court to make this determination on the record. The trial judge expressly states that she must go "through the analysis" and states her findings of trustworthiness on the record. We summarize those findings below:

• A.S. had personal knowledge; her recollection was "sufficient" and "spontaneous."

• A.S. "was able to say who, what, where and when as to each incident . . . and she was quite certain. She corrected the social worker" once or twice and the details she recalled were "as good as you can expect from a ten-year-old child."

• The trial judge did not find a motive to fabricate. Specifically, the judge notes that appellant did not live with them and he was not her mother's boyfriend; "it's not like she was trying to get someone out of her house or get away from someone." Additionally, the judge notes A.S. stated that the family was "moving soon" and, therefore, she would not see appellant again.

• "The statement was both spontaneous and directly responsive to questions, although I find the questions were not leading at all. They were open ended, appropriate questions," noting again that A.S. corrected the questioner several times.

• The judge noted that A.S. was very "clear on her timing" and that the incidents occurred close enough to when the statement was taken, so that "it was clearly still fresh in her mind." (The social worker took the statement on a Monday and A.S. stated that the incidents occurred "the prior Monday, Wednesday, Friday.").

• The trial judge found the terms used by A.S. to describe the incidents as appropriate for her age; "she wasn't using technical terms."

• "The nature and duration of abuse was a week, by [A.S.'s] statement, and it was the week preceding [the recorded] statement."

• A.S. was consistent in her statement. A.S. corrected the social worker, who "seemed a little confused" about the incidents. "The child seemed pretty certain about what event happened on what day[.]"

> • A.S. was not suffering pain or in distress when she made the statement. She was also not crying, although notably reluctant in making her statement to the social worker. The judge found that it was not an excited utterance.
>
> • The trial judge stated that she did not know whether there was "extrinsic evidence to show opportunity, but noted again that A.S. was "quite clear" about the incidents.
>
> • All questions asked during the interview with A.S. "were not leading." The judge found them to be "open ended," "appropriate" and not "suggestive."

Regarding the final factor of subsection (e), the trial judge noted that, as it pertained to the "credibility of the person testifying about the statement," she was unsure whether it applied to the social worker or A.S., since A.S. was going to testify. (Both A.S. and the social worker testified at trial). The judge concluded her analysis by noting: "I don't believe that any further interview by myself of the child is necessary in this case," thus fulfilling the procedural requirements of subsection (g).

Appellant argues that the admission of the recorded statement was "contingent" upon A.S.'s testimony. Although A.S.'s testimony does not corroborate her previously recorded statement, this Court has held that § 11–304

> does not require that the victim's out-of-court statement to a third party be consistent with the victim's in-court testimony to be admissible and, with good reason. '[A] young child can be easily intimidated into not testifying about [such] offenses . . . .' For that reason and others, 'as a general phenomenon, child abuse victims frequently recant their initial reports of abuse.' Indeed, it has been observed that a child's out-of-court statements may 'be *more reliable* than the child's testimony at trial, which may suffer distortion by the trauma of the courtroom setting or become contaminated by contacts and influences prior to trial.' That is why, we hold, that *any conflicts between [the child victim's] out-of-court statements and her in-court testimony do not render her out-of-court statements inadmissible, but rather present a question of credibility to be resolved by the jury.*

Lawson v. State, 160 Md. App. 602, 624–25 (Emphasis supplied) (quotations and citations omitted), *rev'd on other grounds*, 389 Md. 570 (2005).

For the foregoing reasons, we hold that the trial court did not err in admitting A.S.'s recorded statement under the tender years exception to hearsay. The judge systematically analyzed, on the record, the statutory factors, determining that the 50 minute recorded statement had a 'particularized guarantee of trustworthiness.' Furthermore, as *Lawson, supra*, instructs, "any conflicts between the child victim's out-of-court statements and her in-court testimony do not render her out-of-court statements inadmissible, but rather present a question of credibility to be resolved by the jury." In arguing that the recorded statement was contingent upon whether it was corroborated by A.S.'s testimony, appellant's argument is based on a fundamental misunderstanding of the legal jurisprudence of the statutory framework of the tender years exception**.** The legislative intent of the statute was to address the reality that "child abuse and sexual offenses were not prosecuted adequately due to many child victims' inability to testify as a result of their young age or fragile emotional state." *Collins, supra.*

At trial, appellant's counsel argued, *inter alia*, that A.S.'s statement should not be admitted in evidence in addition to her testimony, conferring upon the State an 'unfair' advantage in that the same account is presented to the jury more than once. Specifically, appellant's counsel asserted that the child witness "ought to be treated the same as every other witness" in the case and "[i]t ought not to be a combination of their testimony today plus a statement they made essentially in a—in a soft, secure environment a year ago." We

disagree. According to appellant's theory, an out-of-court statement would never be admissible under the tender years exception to the hearsay rule whenever the child victim testified at trial, a proposition, that is patently incorrect.

C. Testimonial Nature

Although out-of-court statements may be admissible as an exception to the Hearsay Rule in certain circumstances, they violate an accused's rights to confrontation when they are "testimonial" in nature.

> An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
>
> * * *
>
> Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

Crawford v. Washington, 541 U.S. 36, 51, 68–69 (2004).

Maryland courts have also ruled that "the Confrontation Clause mandates that testimonial statements may not be offered into evidence in a criminal trial unless two requirements are satisfied: 1) the declarant/witness is unavailable, and 2) the defendant had a prior opportunity to cross-examine the declarant/ witness." *State v. Snowden*, 385 Md. 64, 78–79 (2005).

Although the Supreme Court did not expressly define "testimonial" and elected to provide "proposed formulations" that were representative of testimonial statements,

Snowden, 385 Md. at 80–81 (quoting *Crawford*, 541 U.S. 51–52), the Court was quite clear that, when a declarant testifies at trial, the evidentiary restrictions of testimonial statements are no longer applicable.

> [A]s Justice Scalia pointed out in *Crawford*: 'when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements . . . . The Clause does not bar admission of a testimonial statement so long as the declarant is present at trial to defend or explain it.'

Lawson, 389 Md. at 588–89 (noting that "Lawson had the opportunity to, and did, cross-examine [child victim] specifically with regards to her out-of-court statements to the social worker").

In light of *Crawford, supra,* and its progeny, we are unpersuaded that the trial court abused its discretion in admitting the recorded statement, violating his confrontational rights, because the statement was "testimonial" in nature and the child victim was not legally "available" to testify and explain her recorded statement. Both the Supreme Court and the Maryland Court of Appeals recognize that, if the declarant testifies at the trial, "[t]he [Confrontation] Clause does not bar admission of a testimonial statement . . . ." *Id.* Moreover, witnesses who are present to testify, but "unavailable" are typically those asserting a privilege or immunity and even memory loss does not necessarily render a witness "unavailable." *Nance v. State*, 331 Md. 549, 572–73 (1993).

Appellant also contends that A.S. was "unavailable" and, accordingly, his confrontational right was violated, when her "reluctant" testimony "subsequently foreclosed any cross-examination on the subject." We reject appellant's premise.

> Generally, cross-examination is restricted to those points on which the witness had testified on direct examination. *This rule is not applied to limit cross examination of the witness to specific details brought out on direct examination 'but permits full inquiry of the subject matter.'*

Jackson v. State, 132 Md. App. 467, 481 (2000) (Emphasis supplied).

As noted by the trial judge, the substance of the recorded statement was unquestionably included in the "subject matter" that constituted the permissible scope of cross-examination. A.S. even testified, on direct examination, that she recalled making the recorded statement. Patently, appellant's failure to cross-examine A.S. after her direct examination by the State, which occurred *after* the recorded statement was admitted into evidence, was volitional. Had appellant's counsel cross-examined A.S. and, assuming the trial court had sustained an objection by the State, the case would have been in a different posture. Given the sequence of the proceedings, however, we perceive no abuse of discretion, even had the issue been preserved for our review.

II.

Appellant next contends that the recorded statement given by A.S. to the social worker was "clearly inadmissible" and its admission "was contingent" upon A.S.'s testimony. When A.S. "claimed a complete lack of memory on the subject and refused to speak on it," appellant argues that the "evidence could no longer be admitted under § 11–304." However, when the court overruled appellant's objection to the admission of A.S.'s recorded statement into evidence and its submission to the jury, appellant acknowledges that his trial counsel asked that A.S. be recalled in order to allow him to cross-examine her. The trial court's refusal, according to appellant, was an abuse of discretion.

The State responds that the trial court did not abuse its discretion when it denied appellant's request to recall A.S. as a witness because appellant's counsel did not ask that A.S. be instructed to remain and she had not been subpoenaed as a witness for the defense. The State also maintains that appellant's reliance upon *Myer v. State,* 403 Md. 463 (2008), is incorrect.

> Ordinarily, the court's denial of a request by counsel to recall a witness for cross-examination is reviewed under an abuse of discretion standard. Upon review, if the decision not to cross-examine was a pure tactical and strategic decision, a reviewing court will ordinarily find no abuse of discretion on the part of the trial court. *See, e.g., Deibert v. State,* 150 Md. 687, 693 (1926) (stating that when an appellant did not inquire about an issue on cross-examination '[h]is failure did not give him the right to call the witness to the stand again for what was, in effect, a belated cross-examination').

Myer, 403 Md. at 482.

"Trial courts are granted broad discretion under Md. Rule 5–611(a) to control the mode and order of the interrogation of witnesses and the parties' presentation of evidence. Subject to constitutional considerations, the same is true as to the scope and timing of cross-examination." *Id*. at 476. "We review an exercise of authority for abuse of discretion[,] . . . [which] can occur when the trial judge's action 'impair[s] the ability of the defendant to answer and otherwise receive a fair trial.'" *Id.* (quoting *State v. Hepple*, 279 Md. 264, 270 (1977) (citing *Ware v. State*, 360 Md. 650, 684 (2000)).

"The 'main and essential purpose' of the Confrontation Clause is to ensure that the defendant has an *opportunity* for effective cross-examination of adverse witnesses, 'which cannot be had except by the direct and personal putting of questions and obtaining

immediate answers.'" *Taylor v. State*, 226 Md. App. 317, 332 (2016) (Emphasis supplied) (citations omitted).

In *Myer, supra*, the Court held that "the denial of the *opportunity* to cross-examine *after* the tape recording had been admitted 'inhibited the ability of the defendant to receive a fair trial.'" *Id.* at 479 (Emphasis supplied) (quoting *Martin v. State*, 364 Md. 692, 698 (2001)). Significantly, pivotal to the Court's admission of the *ex-parte* statement into evidence was the Court's decision, affording appellant the opportunity to cross-examine. In *Myer*, "[t]he State waited until the end of its case-in-chief to formally offer the video-tape into evidence." *Id.* at 469. "[T]he opportunity to cross-examine [the child victim] was not a meaningful one *when it preceded the receipt of the video-tape into evidence*." *Id.* at 482 (Emphasis added). The Court also linked the timing with the strategy of defense counsel. "Petitioner did not elect to cross-examine [the child victim] immediately after her direct testimony because he objected to the admissibility of the videotape. In a case such as this, it is an abuse of discretion to deny petitioner the opportunity to cross-examine on issues arising from the introduction of that evidence." *Id.*

In the case *sub judice*, appellant was provided the opportunity to cross-examine A.S. after her recorded statement had been played for the jury and was received into evidence as State's Exhibit No. 1 during Ms. Delovich's testimony. Accordingly, *Myer* may be distinguished in that the same issue is not present in the case *sub judice.* This distinction afforded appellant the opportunity to be fully informed as to both the content of the

recorded statement *and* A.S.'s live testimony when provided the opportunity to cross-examine her**.**

For the foregoing reasons, we hold that the court did not abuse its discretion in admitting the statement and denying the request to recall the victim.

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