Circuit Court for Wicomico County
Case No. 22-K-15-000422

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 20

September Term, 2016

TYRONE LEROY HUGHEY

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Shaw Geter,

JJ.

Opinion by Graeff, J.

Filed: August 3, 2017

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

Appellant, Tyrone Leroy Hughey, was convicted by a jury in the Circuit Court for Wicomico County, Maryland, of sexual abuse of a minor, attempted second degree rape, two counts of attempted second degree sexual offense, third degree sexual offense, sexual solicitation of a minor, and second degree assault. The court imposed an aggregate sentence of 45 years.

On appeal, appellant presents the following four questions for our review:

1. Did the circuit court err by ruling that the alleged victim's recorded interview with a social worker was admissible in evidence?

2. Did the circuit court err by finding the alleged victim competent to testify against appellant?

3. Did the circuit court err in giving a flight instruction?

4. Is the evidence legally insufficient to sustain appellant's convictions?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Motions Hearing

On July 6, 2015, Ciara Cooks, a licensed social worker with the Wicomico County Department of Social Services ("WCDSS"), received a report that "B.J.", a 7-year-old girl, had been sexually abused by her 32-year-old cousin, appellant.[1] That same day, B.J. and members of her family came to WCDSS's Child Advocacy Center for an interview.

[1] It is not necessary to identify the minors or parents involved in the proceedings. *See, e.g.*, *Thomas v. State*, 429 Md. 246, 252 n.4 (2012); *Muthukumarana v. Montgomery County*, 370 Md. 447, 458 n. 2 (2002).

Ms. Cooks subsequently interviewed B.J. in a "kid-friendly" room at the center; that interview was video recorded.

Ms. Cooks testified that, although B.J. was open when discussing general topics such as school, she was shy, anxious, and "shut down a little" when Ms. Cooks discussed the allegations. B.J. ultimately told Ms. Cooks that appellant "stuck his penis in her butt." This incident occurred while appellant was temporarily living at her home.

The prosecutor then played videotaped recordings of the interview between B.J. and Ms. Cooks for the court. During that interview, when asked what she told the police officers, B.J. said that appellant "put his penis in my butt." B.J. was shown anatomical drawings of a boy and a girl. B.J. referred to the genitals as "privacy." She agreed that "penis" was another word for a boy's "privacy."

B.J. stated that appellant assaulted her two days before the July 6 interview, at night in her bedroom while her brothers and sister were asleep. B.J. remembered seeing appellant's penis, and she stated that "[i]t hurt" when appellant placed it in her "butt." B.J. stated that it happened approximately ten times, on one occasion in the kitchen during the daytime. She also stated that "[h]e put it in my privacy" one time, again at night in her bedroom while her brothers and sister were asleep.

On cross-examination, Ms. Cooks testified that she learned that B.J. originally told her sister about the assaults and also made a statement concerning this incident to a SAFE

nurse and a police officer at the hospital.[2] Ms. Cooks spoke to B.J.'s sister, A.B., who told Ms. Cooks that the incidents between B.J. and appellant may have involved "an offer for oral sex."[3] Ms. Cooks agreed that B.J. never disclosed this latter information during the interview.

Ms. Cooks spoke to B.J.'s parents and learned more details about the layout of the house, including that B.J. stayed in a room downstairs with her brothers and sister. Ms. Cooks interviewed these three siblings. When asked whether they confirmed B.J.'s report, Ms. Cooks indicated that A.B. confirmed B.J.'s report; she stated that the other children overheard the allegations "as far as what was going on and why [B.J.] went to the hospital."

On redirect examination, Ms. Cooks elaborated that, when she interviewed A.B., A.B. informed her that B.J. stated that she was afraid to go to sleep. When asked why, B.J. told A.B. about the incidents with appellant. A.B. then reported the allegations to her father.

After Ms. Cooks testified, the court spoke with B.J. in chambers, with counsel for both parties present. B.J. stated her age and birth month, she knew the name of the street she lived on in Salisbury, and she told the court the names of her mother, father and

[2] "SAFE" is an acronym for sexual assault forensic examination nurse. *State v. Coates*, 405 Md. 131, 143 (2008).

[3] Although the parties repeatedly referred to A.B. and B.J. as stepsisters, B.J.'s mother, Ms. D., clarified that the children are not related. B.J., however, refers to A.B. as her sister, and we will do the same.

siblings. B.J. indicated that she was in second grade, naming her teacher and stating that school was "good."

After further discussion about her likes and dislikes, the court asked B.J. generally about this issue. B.J. stated that she told her 10-year-old sister, A.B. what happened, and A.B. told her father, Mr. B. After Mr. B. told B.J.'s mom, B.J. went to the hospital. Appellant subsequently left the family's house.

B.J. remembered meeting with Ms. Cooks alone to talk about the incidents. B.J. felt okay and did not feel sick when she spoke to Ms. Cooks. B.J. stated that she told Ms. Cooks the truth about what happened. B.J. knew the difference between telling the truth and telling a lie.

After hearing argument, the court addressed the factors relating to trustworthiness of B.J.'s statements to Ms. Cooks. As discussed in more detail, *infra*, the court ruled that these statements were admissible under Md. Code (2008 Repl. Vol.) § 11-304(e)(2) of the Criminal Procedure Article ("CP").

Trial

B.J. testified at trial that she told her 10-year-old sister, A.B., that she was afraid to go to bed because she was afraid of appellant. She then acknowledged that, during the summer, while everyone was asleep, something happened involving appellant.

After B.J. agreed that this was hard to talk about, the prosecutor then showed B.J. two anatomical drawings, one of a boy and one of a girl. B.J. remembered talking to Ms. Cooks, known as "Ms. Ciara," and B.J. identified the genital areas on both a boy and a girl by the same word, "private." B.J. testified that appellant touched her "private" with

his "private part." She testified that she was wearing pajamas and that appellant was wearing shorts at the time.

According to B.J., this happened more than ten times, sometimes when she was lying on her back and sometimes when she was on her stomach. Appellant told B.J.: "Don't tell nobody." B.J. testified that she told appellant to "[s]top." She agreed with the prosecutor that the touching hurt. B.J. also agreed that she told Ms. Cooks that something happened involving her "butt," testifying that "[h]e hurt me," while she was in her bedroom. B.J. concluded direct examination by testifying that she told the truth.

On cross-examination, B.J. testified that she had lived in Baltimore since a Tuesday in November. When she lived in Salisbury, appellant slept in the living room. B.J. agreed with defense counsel that she told A.B., but not Ms. Cooks, that appellant wanted to put his penis in her mouth. B.J. also agreed that she did not tell A.B. that appellant hurt her "butt" or that he touched her "privates." She did tell a nurse at the hospital that appellant "put it in [her] butt."

At the time of these incidents, B.J.'s sister was asleep in the same bed and her brother was in asleep in a different bed in the room. B.J. agreed that appellant never took his or her clothes off.

On redirect, and on recross-examination, B.J. testified that appellant asked her to put his "private" in her mouth, and she did so. All this occurred while appellant stayed with B.J.'s family in Salisbury.

A.B. testified that she stayed with B.J. in Salisbury during the summer of 2015. B.J. told A.B. that "some things were happening to her with T.J.," including that "he was pulling

his pants down and making her do things with him." Appellant showed B.J. his "private area." A.B. then told her father. On cross-examination, A.B. confirmed that B.J. told her that appellant "would try to get her to touch it and suck it," and B.J. "always told him no."

B.J.'s mother, Ms. D., testified that, during the summer of 2015, she lived in Salisbury with A.B's father, Mr. B., and Ms. D.'s four children, including B.J. Ms. D. stayed in an upstairs bedroom and B.J. slept in a shared bedroom with one of her brothers. Appellant, Ms. D.'s 33-year-old cousin, stayed with the family for three or four weeks and slept downstairs in the living room.

One evening, after Ms. D. returned from work, Mr. B. informed her that "B.J. needed to tell [her] something." B.J. then told Ms. D.: "[M]ommy, T.J. touches me every night." Ms. D. immediately took B.J. to the hospital. She did not tell B.J. what to say. When Ms. D. returned from the hospital, Mr. B. had already asked appellant to leave.

Jennifer Hastings, a member of the Wicomico County Sheriff's Office, testified that on July 5, 2015, she responded to the emergency department of the hospital, and B.J. told her that "she had been hurt by her cousin," meaning appellant, and that this occurred at night, in her own bedroom.

Dana Cannon, a forensic examination nurse at the hospital, testified that she examined B.J. on July 5, 2015. Ms. Cannon observed generalized redness in B.J.'s vaginal area. The hymen had two curved areas and there was a vaginal notch. Ms. Cannon testified that there were several possible reasons for the curvature, including sexual assault. Ms. Cannon testified that her observations were consistent with the information provided

by B.J. On cross-examination, Ms. Cannon agreed that she did not see any tears, bruising, bleeding, or abrasions in B.J.'s genital or anal areas.

Ms. Cooks testified that she interviewed B.J. at the Child Advocacy Center for the WCDSS on July 6, 2016. Consistent with her testimony at the motions hearing, Ms. Cooks explained that the interview was recorded in a "child friendly" room. During the course of the day, she spoke to A.B. and learned additional details about the incidents with appellant. This information formed the basis for further discussion with B.J., during which time B.J. disclosed that appellant "sexually abused her" while he lived with the family. The recorded interview with B.J. was then played for the jury. After the tape, and accompanying transcript, were admitted into evidence, Ms. Cooks testified that B.J.'s use of the word "privacy" meant "[o]n the female it was the vagina and on the male it was the penis."

On cross-examination, Ms. Cooks agreed that, in response to her question as to what B.J. told the police, B.J. responded: "[H]e put his penis in my butt." Ms. Cooks further testified that A.B. was the one who first told her that there was a discussion about oral sex between B.J. and appellant.

Detective Ed Fissel, a member of the Salisbury Police Department, interviewed appellant on July 15, 2015. Appellant admitted that he had been in B.J.'s bedroom, but he maintained that he had no "altercations or problems" with B.J. or her parents. A DNA sample was obtained from appellant and compared to sperm found on B.J.'s bed sheets, but no match could be made to any known individual.

The defense called three witnesses. Dr. Suzanne Rotolo, a SAFE nurse, reviewed B.J.'s medical report and photographs. She testified this was a "normal examination," with no injuries.

Mr. B. testified that he lived at the Salisbury address at the time of the alleged incident. When A.B. first came to him, he spoke to B.J., who stated that "T.J. touched her." Mr. B. took B.J. to tell her mother about the incidents. He then told appellant to leave the family residence.

Appellant also recalled A.B. to the witness stand. A.B. testified that B.J. did not tell her when the last incident involving appellant occurred.

We shall provide additional details, as necessary, in the discussion that follows.

DISCUSSION

I.

Admissibility of Out-of-Court Statement

Appellant first contends that the court erred in ruling that B.J.'s recorded interview with Ms. Cooks was admissible in evidence. He asserts that the "recorded interview lacked sufficient indicia of reliability to justify its" admission.

The State contends that this issue is not preserved for review because appellant did not object when the statement was admitted at trial. In any event, it argues that the contention is without merit, asserting that the court properly exercised its discretion in admitting the evidence.

A.

Preservation

We begin with the State's preservation argument. Although appellant filed a motion *in limine* to exclude the evidence, such a motion "'does not relieve the party, as to whom the ruling is adverse, of the obligation of objecting when the evidence is actually offered. Failure to object results in the non-preservation of the issue for appellate review.'" *Wimbish v. State*, 201 Md. App. 239, 261 (2011) (quoting *Reed v. State*, 353 Md. 628, 637 (1999)), *cert. denied*, 424 Md. 293 (2012). Here, appellant did not object when B.J.'s statements were admitted into evidence. Accordingly, we agree with the State that this issue is not preserved for this Court's review.

B.

CP § 11-304

Even if the issue were preserved, we would conclude that the court did not err or abuse its discretion in admitting B.J.'s statements. We explain.

CP § 11-304 allows the State to introduce into evidence hearsay statements made by children under the age of 13, who are alleged to be victims of child abuse, rape, or sexual offense, to a physician, psychologist, nurse, or social worker, among others. As this Court recently explained:

> Although out-of-court statements generally are excluded from evidence as hearsay, "[m]any states, including Maryland, have enacted statutes, sometimes known as the tender years exception, designed to protect the emotional and psychological health of young children alleged to be victims of sexual abuse and to provide for the admissibility of *ex parte* statements . . . under particular circumstances." *Myer v. State*, 403 Md. 463, 479 (2008). Maryland's statute, CP § 11-304, is the "legislatively approved method"

> governing "the admissibility of hearsay statements by a child abuse victim under [13] in juvenile and criminal court proceedings." *Montgomery Cty. Dep't of Health & Human Servs. v. P.F.*, 137 Md. App. 243, 272 (2001).[4] The statute "addresses the inherent questions of trustworthiness raised by such a young child's out of court statement and balances the need to protect child victims from the trauma of court proceedings with the fundamental right of the accused to test the reliability of evidence proffered against him or her." *Id.*

In re: J.J., 231 Md. App. 304, 323-24 (2016), *cert. granted*, 452 Md. 522 (2017).

CP § 11-304(d) sets forth certain conditions for an out of court statement by a child victim to come into evidence "to prove the truth of the matter asserted in the statement." These conditions include, in a criminal case, that the statement is "not admissible under any other hearsay exception" and "the child victim testifies." CP § 11-304(d)(1)(i)-(ii).

CP § 11-304 sets forth further requirements for the admission of a child's out-of-court statement, as follows:

> (e) *Particularized guarantees of trustworthiness*. — (1) A child victim's out of court statement is admissible under this section only if the statement has particularized guarantees of trustworthiness.
>
> (2) To determine whether the statement has particularized guarantees of trustworthiness under this section, the court shall consider, but is not limited to, the following factors:
>
> (i) the child victim's personal knowledge of the event;
>
> (ii) the certainty that the statement was made;
>
> (iii) any apparent motive to fabricate or exhibit partiality by the child victim, including interest, bias, corruption, or coercion;
>
> (iv) whether the statement was spontaneous or directly responsive to questions;
>
> (v) the timing of the statement;
>
> (vi) whether the child victim's young age makes it unlikely that the child victim fabricated the statement that represents a graphic, detailed account beyond the child victim's expected knowledge and experience;

[4] In 2011, the age was changed from "under the age of 12 years" to "under the age of 13 years." 2011 Md. Laws, Ch. 87 (H.B. 859); 2011 Md. Laws, Ch. 88 (S.B. 768).

(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.

The statute imposes a duty on the court to do certain things after considering the 13 statutory factors. Specifically, the court is required to:

(f) *Role of Court.* — In a hearing outside of the presence of the jury or before the juvenile court proceeding, the court shall:

(1) make a finding on the record as to the specific guarantees of trustworthiness that are in the statement; and

(2) determine the admissibility of the statement.

(g) *Examination of child victim*. — (1) In making a determination under subsection (f) of this section, the court shall examine the child victim in a proceeding in the judge's chambers, the courtroom, or another suitable location that the public may not attend unless:

* * *

(ii) the court determines that an audio or visual recording of the child victim's statement makes an examination of the child victim unnecessary.

CP § 11-304(f)-(g).

Thus, as we explained in *In re: J.J.*, 231 Md. App. at 328-29,

pursuant to CP § 11-304, "a trial judge must make a preliminary determination of whether the young child's statement is sufficiently reliable to be admitted into evidence." [*Montgomery Cty. Dep't of Health & Human Servs. v. P.F.*, 137 Md. App. 243, 272 (2001)]. "The statute directs that such hearsay 'may be admissible . . . only if the statement possesses particularized guarantees of trustworthiness.'" *Id.* In that regard, the court must determine

whether "the totality of the circumstances that surround the making of the statement . . . render the declarant particularly worthy of belief," i.e., "whether the child was likely to be telling the truth when making the statements." *Prince v. State*, 131 Md. App. 296, 301-02 (2000). The 13-factor test set forth in § 11-304 is designed to guide the trial court's analysis of the trustworthiness of the statement. *Id.* at 302. In reviewing the circuit court's findings of fact pursuant to the statute, we apply the "clearly erroneous" standard of review. *Reece v. State*, 220 Md. App. 309, 319 (2014), *cert. denied*, 442 Md. 195 (2015). *Accord Jones v. State*, 410 Md. 681, 700 (2009).

C.

Circuit Court's Ruling

In addressing the requisite statutory factors, the circuit court here found as follows:

> So the first factor is the child victim's personal knowledge of the event. The statement that was given by [B.J.] seems to indicate obviously her personal knowledge. I don't really find that to be in dispute.
>
> The certainty that the statement was made. Again, the Court finds that the statement was clearly made. We watched the video of it. I think it was pretty clear in what she was intending.
>
> An apparent motive to fabricate or exhibit partiality by the child victim including interest, bias, corruption or coercion. There doesn't appear to be any apparent motive to fabricate or exhibit partiality by [B.J.].
>
> Further, in chambers, when asked she said she knew the difference between telling a lie and telling the truth, and that she had been truthful when she had made her statement to, as we referred to in chambers, Ms. Ciara [Cooks].
>
> And that whether the statement was spontaneous or directly responsive to questions. And I mean, sometimes these rules and statutes are written so when they lay these criteria I'm not sure it's clear exactly what the intent is of the criteria they're asking, and this is one of them, which is was [B.J], in essence, responding to questions or is it asking at the time she made this statement, was it done spontaneously? In other words, did she have to do it without leading questions? Did she just spontaneously say, hey, this is what occurred, and – or is that criteria saying that she actually responded when asked. I'm not quite sure. I could see that both ways.

The Court notes that [B.J.] is seven years old. And that I think as counsel stated, she was nervous. She was nervous today in chambers. I mean, despite saying that she wasn't, she was chewing her fingernails the entire time, and any child it would seem to me would be nervous in these situations. But the Court finds, I think, that not just she was able to respond adequately to the questions that were asked, was able to provide answers in a meaningful way, but looking back at the transcript also, in effect, was able to sort of spontaneously say what she felt had occurred.

In the transcript of page 8, she just says, can you tell me what you told the police officers? And she just said, he put his penis in my butt. It was not a leading question. There was no sort of reason for her to, in effect, fabricate it or responding to a leading question. She spontaneously answered and then responded to other questions.

The timing of the statement was in close proximity to the time when this allegedly occurred.

She is seven years old, so the next one is whether the child victim's young age makes it unlikely that she fabricated the statement that represents a graphic detail of account beyond the child victim's expected knowledge and experience.

Again, [B.J] is seven years old. That has to be kept into account when considering how graphic or detailed her account would be. But the Courts finds [sic] that it was unlikely that she fabricated the statement.

I think the terminology, the next factor was appropriate for her age. Now, there was a little bit of difference in the terminology but not to the point that I feel that the term that she used using the word, penis instead of privacy, deviates to the point where it would be slang or something that someone had told her to say.

The nature and duration of abuse or neglect. It was all in close proximity, again, to when the statement was made, and I think the statement and the next factor was consistent and coherent. And she did not appear to be suffering any pain or distress when making the statement.

As I said, I think she was clearly nervous. I don't think that she was in any physical discomfort, and as a matter of fact when asked about it in chambers, I think she said both today and at that time that she had felt fine.

> And, again, I think there is whether – the next factor, factor 11, whether extrinsic evidence exists to show the defendant or child respondent had an opportunity to commit the act complained of. I think the testimony is that [appellant] was living in the house at that time. Further, I think there is adequate, at least enough evidence to show that these acts could have occurred.
>
> I don't think the questions were leading in the nature that would invalidate the statement.
>
> And the last one is I found [B.J.] to be credible. I mean, in light of the conversations in chambers, her ability to answer questions. I think they were appropriate for a seven-year-old. She testified she knew the difference between telling the truth and telling a lie. I found her to be credible.
>
> The Court finds that there is a particularized guarantee of trustworthiness about it, and the statement will be admissible.

D.

Appellant's Contentions

Appellant contends that three of the statutory factors "should have been weighed on the side of excluding the interview." With respect to factor (vii), the "appropriateness of the terminology of the statement to the child victim's age," appellant argues that B.J. told Ms. Cooks that "her word for the male sexual organ was 'privacy,'" and therefore, her use of the word penis in her statement suggests that she was repeating what someone else said.

In addressing this issue, the court stated:

> Now, there was a little bit of difference in the terminology but not to the point that I feel that the term that she used . . . penis[,] instead of privacy, deviates to the point where it would be slang or something that someone had told her to say.

The court did not err or abuse its discretion in so concluding. Ms. Cooks explained that she used the anatomical drawings to confirm that B.J. used the word "privacy" for penis.

And during the interview, B.J. was asked "[i]s penis another word to use for privacy?" The transcript indicates that "[B.J.] nodded her head up and down."

Appellant next cites factor (xi), whether extrinsic evidence existed to show that he had opportunity to commit these crimes. Appellant argues that the only extrinsic evidence came to Ms. Cooks through B.J. We disagree. Ms. Cooks testified that she spoke to A.B. and B.J.'s parents, including discussing the living arrangements in the house. The court's findings that appellant lived at the house and that there was evidence that the acts could have occurred were not clearly erroneous.

Finally, appellant contends that Ms. Cooks used leading questions and that factor (xii) requires the court to consider whether the statement was suggested by such questions. B.J.'s primary accusatory statement, however, that appellant "put his penis in my butt," came after the open-ended, non-leading question, "[c]an you tell me what you told the police officers?" The court was not clearly erroneous in assessing this factor.

Ultimately, we are not persuaded that the court's factual findings on these three factors, or the remaining factors enumerated by C.P. § 11-304(e), were clearly erroneous. Thus, even if preserved, we would conclude that the court properly exercised its discretion in admitting B.J.'s statement at trial.

II.

Appellant next asserts that the trial court erred in finding B.J. competent to testify. He asserts that "the *voir dire* of B.J. demonstrated that she may not have been capable of providing an accurate and consistent account of [a]ppellant's alleged actions."

The State disagrees. It contends that the court properly exercised its discretion in finding that B.J. was competent to testify.

There is a legal presumption that "every person is competent to be a witness." Md. Rule 5-601. In determining whether a witness is competent to testify, the trial court, in its discretion, should determine "[1] 'whether an individual witness has sufficient capacity to observe, recollect, and recount pertinent facts' and [2] whether that individual 'demonstrates an understanding of the duty to tell the truth.'" *Perry v. State*, 381 Md. 138, 145 (2004) (quoting LYNN MCLAIN, MARYLAND RULES OF EVIDENCE 103 (2d ed. 2002)). "A trial court's determination that a witness is competent to testify is a matter within the trial court's discretion, and a decision in that regard will not be disturbed absent an abuse of discretion." *Cruz v. State*, 232 Md. App. 108, 112 (2017), *cert. denied*, ___ Md. ___, 2017 WL 2955312 (filed June 21, 2017).

Here, prior to B.J. taking the stand at trial, defense counsel challenged her competency to testify. The court allowed *voir dire* on the issue in front of the jury. On direct examination by the prosecutor, B.J. testified that she was 7 years old and born on a certain date, but she was unsure of the year of her birth. She was in second grade at an elementary school in Baltimore. B.J. was unsure how long she lived in Baltimore, but she testified that she used to live in Salisbury, where she also had attended second grade at a certain elementary school.

The prosecutor then asked B.J. questions about whether she knew the difference between a truth and a lie. Asked what color jacket the prosecutor was wearing, B.J. responded that it was gray. When asked if it would be true if the prosecutor said the jacket

was purple, B.J. agreed that would be a lie "[b]ecause it's gray." B.J. testified that she would tell the truth at trial and no one told her to lie. The prosecutor asked additional questions, and when defense counsel was asked if she had "any questions on voir dire with respect to competency," defense counsel stated: "Not at this time, Your Honor." The court then found B.J. "competent to testify."

Appellant contends that the circuit court abused its discretion in finding B.J. competent to testify because she did not know what year she was born, how long she lived in Baltimore, and whether the Salisbury residence had two floors. As the State notes, however, B.J. was able to answer many factual questions, she understood the difference between truth and falsehood, and she stated that she was going to tell the truth. Under these circumstances, we cannot conclude that the circuit court abused its discretion in finding B.J. competent to testify.

III.

Appellant contends that the circuit court erred in giving a flight instruction. He argues that "there was no connection established between the flight and the crimes for which [a]ppellant was on trial."

The State contends that this argument was not made at trial, and therefore, it is not preserved for this Court's review. In any event, the State asserts that appellant's argument fails on the merits.

A.

Proceedings Below

On July 14, 2015, Detective Milton Rodriguez, a member of the Salisbury City Police Department, was asked to assist in the apprehension of appellant at appellant's place of employment, Amick Farms' chicken processing facility in Hurlock, Maryland. When appellant saw the police, he "took off running."

The police subsequently saw appellant at another business. Appellant told the detective that his name was "Bishop," but the detective "knew it was him." When appellant "realized that we knew that it was him he took off running again." The police ultimately tackled appellant and subdued him.

After all the evidence was received, and prior to jury instructions, defense counsel objected to the giving of a flight instruction, stating as follows:

> [DEFENSE COUNSEL]: Because when this incident occurred, when the flight occurred it was ten days after the incident occurred. He knew about the allegations, he was at work. There's no indication that he was trying to hide or go away or leave the county from what he has been accused of, he just ran when they tried to arrest him at work and I'm asking that that instruction not be given.
>
> THE COURT: That's clearly an issue so I'll give it. Flight is flight whether it's immediately afterwards or if it's a year later.
>
> [DEFENSE COUNSEL]: That is not true. If you read the case law, Your Honor, it states that it has to be at the time the incident occurred. He didn't leave on his own choice when the incident occurred. You heard the testimony of [Mr. B.] that he asked him to leave, so he didn't flee the house, he was asked to leave so he left. Then as far as when they went to arrest him, this was ten days after the incident occurred, or ten days after when he was asked to leave when it came out, when it was disclosed, it's not close in time.

The prosecutor responded that the instruction was appropriate unless there was "another reason for the fleeing, i.e. that he was drunk and driving, that he could have fled for that, not this." The prosecutor stated, without further comment from defense counsel, that there was no indication that appellant was doing "anything other than trying to elude being charged."

Thereafter, the court instructed the jury, as follows:

> You may hear the word flight mentioned in closing arguments. A person's flight shortly after the commission of a crime or after being accused of a crime or suspecting that he or she may be accused of a crime by itself is not enough to establish guilt but it is a fact that you can use in assessing whether or not there's guilt. Flight may be motivated by a number of factors, some of which are fully consistent with innocence. . . .
>
> You must decide whether the Defendant's behavior as described in the testimony suggests flight. Number two, whether this flight on his part suggests a consciousness of guilt. Three, whether this particular consciousness of guilt relates back to the crimes for which he is on trial today. And four, whether this consciousness of guilt suggests actual guilt on his part for the charges he's facing today.[5]

B.

Preservation

Maryland Rule 4-325(e) provides, in pertinent part: "No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." Compliance with this rule requires that:

> There must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the

[5] Appellant subsequently renewed his objection to the court's decision to give a flight instruction in this case.

> ground for objection unless the ground for objection is apparent from the record[,] and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.

Robinson v. State, 209 Md. App. 174, 200 (2012) (quoting *Bowman v. State*, 337 Md. 65, 69 (1994)), *cert. denied*, 431 Md. 221 (2013), *overruled on other grounds*, *Dzikowski v. State*, 436 Md. 430 (2013).

Here, defense counsel objected to the flight instruction because appellant's flight occurred ten days after he was told to the leave the family residence, asserting that "[t]here's no indication that he was trying to hide or go away or leave the county from what he has been accused of, he just ran when they tried to arrest him at work and I'm asking that that instruction not be given." On appeal, appellant makes a different argument, i.e., that there was no connection that his flight from the police permitted an inference of consciousness of guilt of the crimes against B.J. Under these circumstances, we agree with the State that the issue is not preserved for review. *See Id.* at 201-02 ("[W]here the objection to the jury instructions in the circuit court was on grounds other than that raised on appeal, the appellate contentions [are] not preserved for review."); *Head v. State*, 171 Md. App. 642, 667 (2006) (objections to jury instruction waived where "[n]one of [defendant's] reasons for objecting to the instruction were raised below"), *cert. denied*, 398 Md. 315 (2007).

C.

Propriety of Flight Instruction

Even if the issue were preserved, we would find it to be without merit. We discern no abuse of discretion in the court's determination to give a flight instruction in this case.

Maryland Rule 4-325(c) provides: "The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." "We review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard." *Arthur v. State*, 420 Md. 512, 525 (2011). In determining whether a trial court has abused its discretion, we consider "'(1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given.'" *Bazzle v. State*, 426 Md. 541, 549 (2012) (quoting *Stabb v. State*, 423 Md. 454, 465 (2011)).

In *Thomas v. State*, 372 Md. 342, 351 (2002), the Court of Appeals explained that a person's behavior after the commission of a crime, such as flight from the scene or the jurisdiction and concealment of evidence, may tend to reveal a consciousness of guilt. "A person's post-crime behavior often is considered relevant to the question of guilt because the particular behavior provides clues to the person's state of mind." *Id.* at 352.

In *Thompson v. State*, 393 Md. 291, 312 (2006), the Court set forth a test to determine whether a flight instruction should be given:

> [F]or an instruction on flight to be given properly, the following four inferences must reasonably be able to be drawn from the facts of the case as ultimately tried: that the behavior of the defendant suggests flight; that the flight suggests a consciousness of guilt; that the consciousness of guilt is related to the crime charged or a clearly related crime; and that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.

Accord Page v. State, 222 Md. App. 648, 669, *cert. denied*, 445 Md. 6 (2015).

Here, appellant disputes only the third inference, that the flight establishes a consciousness of guilt related to the crimes alleged by B.J. In support of his argument,

appellant relies on *Thompson*. In that case, three men were robbed at gunpoint, and one was shot in the arm by one of two men on bicycles. *Thompson*, 393 Md. at 294. When a police officer located Thompson, who matched the description of the shooter, and yelled for him to stop, Thompson fled. He eventually was apprehended, and the police found a significant quantity of cocaine on him. *Id.* At trial, defense counsel objected to a flight instruction, arguing that there was an alternative explanation for Thompson's flight, i.e., that he had drugs on his person. *Id.* at 299.

The Court of Appeals discussed the problem with the third inference in that case, as follows:

> The gravamen of the issue is whether [the defendant] fled in an attempt to avoid apprehension for the crimes for which he was on trial. In the present case, the jury was not presented with evidence of what may have been an alternative and at least a cogent motive for [the defendant's] flight, specifically that drugs were found on his person . . . . We find that this fact, which was known to all parties involved although not revealed to the jury, undermines the confidence by which the inference could be drawn that [the defendant] was motivated by a consciousness of guilt with respect to the crimes for which he was on trial in the present case; it provides an alternate, and equally reasonable, inference that [the defendant] fled due to the cocaine in his possession, an action a person in his position may have taken irrespective of whether he also shot and attempted to rob [the victim].

Id. at 313-14 (footnotes omitted).

The Court recognized that the defendant was "forced to make a Hobson's choice" regarding whether to introduce prejudicial evidence about the drugs on his person, or instead, to "decline to explain his flight and risk that the jury would not infer an alternative explanation for his flight." *Id.* at 314. Because the defendant could not be expected to introduce evidence as to the basis for his flight, no evidence was adduced concerning the

other motivations that may have been fully consistent with innocence of the crimes for which the defendant was on trial. *Id.* The Court ultimately held:

> Where the defendant possesses an innocent explanation that does not risk prejudicing the jury against him, it would be expected that the defendant would present his purported reasons for his flight to the jury. It is error, however, for the trial judge to give such an instruction in a case like the case *sub judice* where the defendant would be prejudiced by the revelation of the "guilty" explanation for his flight. The circumstances of the case at bar impaired the confidence with which the inference that Mr. Thompson fled from police due to a consciousness of guilt with respect to the crimes charged could be drawn and rendered the instruction misleading as to the existence of an alternative basis for Mr. Thompson's flight from the police.
>
> Because Mr. Thompson could not be expected to introduce the independent basis for his flight, at the risk of prejudicing his position through the admission of being in possession of crack cocaine, no evidence was adduced concerning the other motivations that "may be fully consistent with innocence" of the crimes for which he was being tried. We cannot be sure whether this silence on his part in the face of the flight instruction impacted the jury's perception of the evidence of flight, such that we cannot assert a belief beyond a reasonable doubt that the erroneous flight instruction did not influence the jury's verdict. Therefore, we conclude that giving the flight instruction constituted an abuse of discretion.

Id. at 315.

This case is not similar to *Thompson*. Here, there was no alternative explanation given for appellant's flight, nor does appellant suggest one on appeal. *Thompson* is not support for appellant's argument.

With respect to appellant's argument that his flight from the police was eight days after the incident was reported to B.J.'s parents, that lapse of time does not prevent a flight instruction. "Flight does not have to be practically contemporaneous with the crime to be evidence of some consciousness of guilt, but the lapse of time between the crime and the flight goes to the weight to be accorded to the circumstance." *Hines v. State*, 58 Md. App.

637, 668, *cert. denied*, 300 Md. 794 (1984); *see also Rice v. State*, 89 Md. App. 133, 143 (1991) (A flight instruction may be given "where it may be inferred from the evidence that at the time of flight he knew he was or would be charged with the crime.") (quoting AARONSON, MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY § 2.24 at 123 (2d ed. 1988)), *cert. denied*, 325 Md. 397 (1992). Given the circumstances here, we conclude the trial court did not abuse its discretion in giving a flight instruction.

IV.

Appellant's last contention is that the evidence was insufficient to sustain his convictions. The State contends that the testimony of B.J., corroborated by Ms. Cooks and appellant's behavior, was sufficient to support the convictions. We agree with the State.

"In reviewing the sufficiency of the evidence we are mindful that '[t]he standard of review for appellate review of evidentiary sufficiency is whether any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.'" *State v. Gutierrez*, 446 Md. 221, 231-32 (2016) (quoting *Moye v. State*, 369 Md. 2, 12 (2002)). "We defer to any possible reasonable inferences the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *State v. Mayers*, 417 Md. 449, 466 (2010). "'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.'" *Tracy v. State*, 423 Md. 1, 12 (2011) (quoting *Smith v. State*, 415 Md. 174,

185 (2010)). Moreover, "[i]t is the well-established rule in Maryland that the testimony of a single eyewitness, if believed, is sufficient evidence to support a conviction." *Archer v. State*, 383 Md. 329, 372 (2004). *Accord Branch v. State*, 305 Md. 177, 184 (1986); *Reeves v. State*, 192 Md. App. 277, 306 (2010).

Starting with the conviction for attempted rape in the second degree, the State was required to prove that appellant took a substantial step beyond mere preparation to engage in vaginal intercourse with a victim under the age of 14 years, where appellant was at least 4 years older than the victim. Md. Code (2016 Supp.) § 3-304 (a) of the Criminal Law Article ("CL"); *State v. North*, 356 Md. 308, 312 (1999) (An attempt to commit a substantive offense is "when a person, with the intent to commit that substantive offense 'engages in conduct which constitutes a substantial step toward the commission of that crime, whether or not his [or her] intention is accomplished.'") (quoting *Lane v. State*, 348 Md. 272, 284 (1997)); *Peters v. State*, 224 Md. App. 306, 355, *cert. denied*, 445 Md. 127 (2015).

Here, appellant acknowledges that the requisite ages were proven, given that, at the time of the incident, B.J. was 7 years old and appellant was 32 years old. B.J. also testified that appellant touched her "private" with his "private part," and he put his penis "in [her] privacy" one night. Referring to anatomical drawings of a boy and a girl, Ms. Cooks explained that B.J.'s use of the word "privacy" meant "[o]n the female it was the vagina and on the male it was the penis." B.J.'s sister testified that B.J. told her that appellant "was pulling his pants down and making her do things with him," and B.J. told her that appellant "hurt her" in the bedroom. This evidence was sufficient to support the jury's

finding that appellant attempted to have vaginal intercourse with a 7-year-old girl, thus supporting the conviction for attempted rape in the second degree.[6]

With respect to the conviction for attempted sexual offense in the second degree (anal intercourse), appellant contends that, "notwithstanding B.J.'s statement to the social worker, Ms. Cooks, that '[h]e put his penis in my butt,' . . . the evidence is legally insufficient to sustain this conviction." B.J.'s credibility in stating that appellant "put his penis in [her] butt" was an issue for the jury, which obviously believed her. This evidence was sufficient to support the conviction of attempted sexual offense in the second degree.

With respect to the charge of attempted sexual offense in the second degree (fellatio), B.J. told A.B., but not Ms. Cooks, that appellant wanted to put his penis in her mouth. B.J. testified at trial that appellant asked her to put his "private" in her mouth, she did "nothing," and he "put it in her mouth." Appellant argues, however, that the evidence on this count was conflicting, noting that A.B. testified that B.J. told her that appellant "would try to get her to touch it and suck it," and B.J. "always told him no." Appellant acknowledges, however, that conflicts in the evidence and the credibility of witnesses are for the fact finder to resolve. *See Binnie v. State*, 321 Md. 572, 580 (1991). The evidence was sufficient to sustain appellant's conviction on this count.

With respect to the conviction of sexual offense in the third degree, appellant reiterates his claim about inconsistencies in B.J.'s statements. We reiterate that these

[6] Although B.J. testified that she and appellant were wearing clothes at the time, this testimony was for the jury to weigh, not the appellate court.

inconsistencies were for the jury to resolve. The evidence was sufficient to sustain appellant's conviction of sexual offense in the third degree.

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