UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2752

September Term, 2014

TYCHEIKA HARTWILL

v.

STATE OF MARYLAND

Graeff,
Friedman,
Thieme, Raymond, G. Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: March 27, 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.

After a jury trial in the Circuit Court for Baltimore City, Tycheika Hartwill, appellant, was convicted of two counts of first-degree rape and one count of attempted second-degree rape as an accomplice, and of one count of attempted first-degree sexual offense, as a principal. The court imposed concurrent sentences of 30 years for each of the first-degree rape convictions, 20 years for the second-degree rape conviction, and 30 years for the first-degree sexual offense conviction.

QUESTIONS PRESENTED

Appellant presents the following five questions for our review:

1. Did the trial court commit plain error in instructing the jury that Bernard Bell was an accomplice?
2. Did the trial court abuse its discretion in admitting the victim's testimony concerning the emotional impact of the alleged assault?
3. Did the trial court err in excluding evidence that the complaining witness was "flirting" prior to the events at issue?
4. Did the trial court err in admitting hearsay evidence?
5. Was the evidence legally insufficient to sustain the conviction for attempted first-degree sexual offense?

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

FACTUAL AND PROCEDURAL BACKGROUND

In October 2013, 17-year-old A.B. worked at a McDonald's restaurant. Mariah Butler, appellant's sister, also worked there, and she invited A.B. to a Halloween party at appellant's house. On the evening of October 31, 2013, A.B. arrived at appellant's home. Ms. Butler was not yet at the party. A.B. saw that there was food in the kitchen, music playing in the basement, and children watching cartoons in the living room.

About twenty or thirty minutes after A.B. arrived, appellant told her that the children were going upstairs to sleep, and the party she had come for was in the basement. A.B. went down to the basement and sat on a couch. There were several other people there, music was playing, and the lighting was dim. A.B. met a man, later identified as Bernard Bell, who told her that he was a comedian, and they spoke for a while.

Eventually, appellant entered the basement and asked A.B. to get up and dance. A.B. declined, stating that she did not dance. A short time later, appellant approached A.B. again and gave her "a shot" containing an alcoholic beverage. After drinking the shot, A.B. got up and danced with appellant. She later sat down again, but appellant gave her another shot, and A.B. started dancing again. Thereafter, appellant gave A.B. a cup of fruit that had been soaked in alcohol.

At some time after 11:00 p.m., Ms. Butler, two managers from the McDonald's, and one of the manager's sisters arrived at the party and A.B. began to socialize and dance with them. As A.B. was dancing, she hit her head on "some type of pipe" and had to sit down.

The next thing A.B. remembered was waking up in appellant's bedroom. Although she had no recollection of taking her clothes off, she was naked. Her knees were on the floor, her body was lying across the bed, and a heavyset man wearing a hoodie, whom she did not know, was behind her with his penis inside her vagina. Appellant was in front of A.B., holding A.B.'s arms and pulling A.B. toward her. Appellant's legs were open and she rubbed A.B.'s face in her vagina.

When A.B. tried to move, appellant held her wrists tightly. Eventually, appellant moved beside A.B. and held down her shoulder, pulled her legs, and told her to open her "f-ing legs." Appellant became "really aggressive" physically and cursed at A.B.

After the first man finished having sex with her, A.B. vomited. Appellant became angry and told A.B. to "look at this nasty-ass shit, you going to clean this up." Appellant grabbed A.B. by the hair, pulled her into the bathroom, and put her in the shower. Appellant said "this little bitch" is going to pay for throwing up on my bed, and she told A.B. that "now all my brothers going to fuck you."

When appellant brought A.B. back to the bedroom, she stood at A.B.'s side and held her down. A man tried to get A.B. to have oral sex with him and rubbed his penis across her lips while appellant told her to open her mouth. When A.B. refused, the man got behind her and put his penis in her vagina.

After that man finished having sex with A.B., Mr. Bell, the man who had identified himself as a comedian earlier that evening, stood behind her and attempted to get an erection while appellant held her down. Other people were in the room watching. When Mr. Bell was unable to get an erection, appellant told him "to, like, get up," "she don't want you." A.B. saw Mr. Bell's face and described him as being "disappointed and embarrassed." Appellant made Mr. Bell leave the room, and she took A.B. to the shower again.

While A.B. was in the shower, some other girls entered the bathroom. Appellant told the girls not to "mess with the girl in the shower, just ignore her." A.B. opened the shower curtain and asked the girls, whom she recognized from her high school, to help her.

She asked the girls to get her clothes from the bedroom, but they "were scared to go in the room," so she asked them to go tell one of the manager's from McDonald's that she was upstairs and needed help. Appellant started banging on the bathroom door and told the girls to "hurry the fuck up," so they left.

Appellant pulled A.B. out of the shower and brought her back into the bedroom where she saw a man named Artez, later identified as Artez Watson, whom she had met earlier at the party. Mr. Watson told appellant she did not need to hold down A.B. Mr. Watson held A.B.'s waist and shoulder and was very rough with her as he put his penis inside A.B.'s vagina and ejaculated. Appellant became angry because Mr. Watson had not used a condom.

After Mr. Watson finished, appellant brought A.B. back to the shower. Appellant told A.B. "we're not done, where the rest of the niggas at, get them from the basement." Appellant tried to take A.B. down the steps to the basement, but when they got to the first floor, some older women asked why A.B. was naked.

At the same time, Juwanna Jones, one of A.B.'s managers at the McDonald's, arrived at the party and saw A.B. naked, wet, and "not herself." Ms. Jones, who had been called and asked to come to the party, grabbed A.B. and asked where her clothes were. According to Jones, the party was still going on, with more than twenty people present, including a woman who was acting "outrageous" and speaking badly of A.B. When no one disclosed where A.B.'s clothes were, Ms. Jones took A.B. outside to her car and gave her clothes to wear. A.B. told one of the other managers from McDonald's where she had left her car keys, handbag and phone, and the manager retrieved those items. Ms. Jones

drove A.B. home and told her not to bathe or take a shower and that she would come back in the morning to take her to the hospital.

A.B. called her boyfriend, Thomas Reese, and told him what had happened to her. She also tried to tell her mother, but her mother did not seem to understand that A.B. "had been hurt." The next morning, A.B. went to school. She went straight to the office of Baltimore City School Police Officer Tiffany Wiggins and recounted what had happened to her the previous night. Officer Wiggins called the police, and an officer picked up A.B. and took her to Mercy Hospital, where she was examined by Sharon Smith, a forensic nurse.

Nurse Smith, who examined A.B. and prepared a report, testified as an expert in forensic nurse examinations of victims. Her examination revealed that A.B. had scratches on the left and back of her neck, bruising on her wrists, and a small tear measuring .5 centimeter on her genitals. Nurse Smith concluded that A.B.'s injuries were consistent with her history of what occurred, although she acknowledged that they could have been caused by consensual sex. Nurse Smith took swabs from A.B.'s internal and external genitalia. Further testing identified DNA obtained from those swabs as belonging to Mr. Watson.

Baltimore City Police Detective Christopher Rivera conducted a search of appellant's home on November 1, 2013. He observed trash bags inside and outside the house that contained beer and liquor bottles and red plastic drinking cups containing alcohol and fruit. He also located A.B.'s Halloween costume in appellant's bedroom. Detective Rivera also interviewed A.B. at the police station. A.B. was shown photographic

arrays from which she selected photographs of appellant, Mr. Watson, and Mr. Bell.

On November 2, 2013, Mr. Bell arrived at appellant's house while detectives were there. He admitted to detectives that he had been at the party and had met appellant and A.B., who was "pretty intoxicated." He also admitted that he stood in the doorway of an upstairs bedroom where he saw A.B. repeatedly raped by "like five" people while appellant was holding her down by her wrists. He stated that A.B. was trying to get away and was saying, "no, stop." Mr. Bell was shown photographs and identified appellant as "the one who did everything that took place at her residence in my statement." Mr. Bell denied having intercourse with A.B. or pulling out his penis and rubbing it on her while she was in the bedroom, but he admitted to watching.

Mr. Bell ultimately was charged with first and second-degree rape, third and fourth-degree sex offense, and second-degree assault. He testified that he was "railroaded" into entering into a plea agreement, based on an agreed statement of facts, where he was found guilty of third-degree sex offense and agreed to testify truthfully at appellant's trial. The State agreed to cap Mr. Bell's sentence at eight years, with all but time served suspended, and Mr. Bell was required to register as a sex offender for life. Mr. Bell had not been sentenced at the time of appellant's trial.

Appellant's mother, brother, sister, and her brother's ex-girlfriend, testified for the defense. Appellant's mother, Chandra Isaac, who left the party between 11 p.m. and midnight, testified that she met A.B. at the party, and A.B. was wearing a black top and tutu.

Appellant's brother, Trevin Stewart, testified that his younger sister, Ms. Butler, introduced him to A.B., who was "drinking and dancing," but did not appear to be drunk. At one point during the party, Mr. Stewart and others decided to walk to a nearby store. Before leaving the house, Mr. Stewart went upstairs to use the bathroom. As he was coming down the steps, A.B. was going up the stairs. Mr. Stewart heard her scream, "I want some dick." When the group returned from the store, there was a lot of commotion. A.B. was naked and people were looking for her belongings. A.B. "was directing people where things was," and someone gave her a hoodie or shirt to wear. Mr. Stewart admitted telling the police that A.B. had been drinking at the party, and "[s]he was a little too intoxicated." He also told police that he could tell that A.B. was drunk "because she was like, you know, you know how drunk people are. They just talk to everybody and they can't walk."

Ms. Butler testified that, when she returned from the store with Mr. Stewart and others, she saw A.B. coming down the stairs naked. A.B. was not crying. Ms. Butler took her upstairs and asked why she was naked and where her clothes were, and A.B. responded that she wanted to go home. According to Ms. Butler, A.B. became embarrassed when some managers from McDonald's arrived at the house and saw her naked. One of the managers put a jacket on A.B.

Mr. Stewart's former girlfriend, Ashley Dixon, testified that she met A.B. when she was sitting on a couch in the basement. At that time, A.B. "seemed pretty sober" and "[e]verything was fine." When Ms. Dixon returned from the store, she saw A.B. leaving

the house with co-workers or managers from McDonald's. A.B. had clothes on when she walked out the front door, but her hair was wet. Someone else drove A.B. from the party.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

Appellant's first contention involves the following instruction that the trial court gave to the jury:

> Now, you heard the testimony of one witness, a gentleman by the name of [Mr.] Bell, and he was an accomplice. He admitted that he had plead [sic] guilty to a crime involved in this case. An accomplice is one who knowingly and voluntarily cooperated with, aided, advised or encouraged another person in the commission of a crime. The Defendant cannot be convicted solely on the uncorroborated testimony of an accomplice.

Appellant argues that "the court committed plain error in instructing the jury that [Mr.] Bell was an accomplice," asserting that the question whether Mr. Bell was an accomplice was a question for the jury.

The State argues that this Court should decline to review this contention because there was no objection to it below, and "there was no error in the instruction, much less plain error." It asserts that, because Mr. Bell pleaded not guilty to an agreed statement of facts, which constitutes a "judicial confession," Mr. Bell was an accomplice as a matter of law. Moreover, Mr. Bell's testimony, that appellant held A.B. down while A.B. repeatedly was raped, was very damaging to appellant, and therefore, the instruction, which cautioned

the jury that Mr. Bell's testimony needed to be corroborated, was helpful, not prejudicial, to appellant.

Maryland Rule 4-325(e) provides that "[n]o 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." Acknowledging that no objection was lodged below, appellant asks us to exercise our discretion to grant plain error review. Appellant asserts that she was prejudiced by the instruction because labelling Mr. Bell an accomplice assumed that a crime was committed, in contradiction to the defense theory that no crime was committed.

In *Kelly v. State*, 195 Md. App. 403 (2010), *cert. denied*, 417 Md. 502, *cert. denied*, 131 S. Ct. 2119 (2011), we noted that, although we have discretion under Md. Rule 8-131(a) to address an unpreserved issue:

> It is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

Id. at 431 (citations and quotations omitted). We further stated:

> Plain error is "error which vitally affects a defendant's right to a fair and impartial trial." Appellate courts will exercise their discretion to review an unpreserved error under the plain error doctrine "only when the 'unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" "[A]ppellate review under the plain error doctrine '1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'"

Id. at 431-32 (citations omitted). We decline in this case to engage in plain error review of appellant's challenge to the jury instruction.

II.

Appellant next contends that "the trial court erred in admitting A.B.'s testimony concerning the emotional impact" she experienced as a result of the alleged assault. She asserts that the testimony was prejudicial because it was admitted before any evidence regarding consent had been offered. Moreover, she contends that the question regarding how the incident affected A.B. was a question that required expert testimony.

The State contends that these claims are not preserved for review because they were not argued below. In any event, it asserts that "the trial court did not abuse its discretion to admit the testimony, which tended to show that the sexual offenses occurred and that they took place without A.B.'s consent."

During the State's examination of A.B., the prosecutor asked, "how did this incident affect you?" A.B. stated that "[i]t affected me drastically. I pretty much stopped going." At that point, defense counsel objected and a bench conference ensued. Relying on *Parker v.* State, 156 Md. App. 252 (2004), the State argued that evidence of post-rape behavior was admissible to rebut the defense of consent. Defense counsel countered that "if it's affecting her school or affecting her work, that has nothing to do . . . that doesn't prove or disprove the incident occurring." The State proffered that A.B. would testify that

> [s]he had to drop out of school. She had to stop working at McDonald's. She had to, I think, it's affected currently her school at Frostburg. Taken in conjunction with the school police officer's testimony that she had known her to be a stellar student, I think that shows that her behavior changed in the weeks and days and months after the alleged rape.

Defense counsel argued that the only thing A.B. could testify to was that McDonald's "couldn't transfer her after a while, but that's not proving that it's post rape." The trial court stated that it would give the State a "little leeway," and the State asked A.B. to "briefly describe what, if any, changes to your behavior this incident had on you."

The following then occurred:

> So first like I wasn't able to sleep, like, with the lights off for a while. I wasn't sleeping with my lights off or with my door completely closed and I was staying up to maybe, like 3:00, 4:00 in the morning, almost every day just sitting there trying to find things to occupy myself because I would have real bad nightmares. I would wake up screaming or wake up really sweaty and eventually I started staying with my boyfriend and that didn't really go too well, because like if he would graze me or move, I'd wake up and I'd flinch or I'd be scared or I'm screaming, I'm thinking something's about to happen to me. Or like sometimes he's told me, like, I'll be asleep and sometimes I won't wake up, but I'm just, like, jumping. Or I might mumble something, but it's like I'm constantly in motion or like he can't do much because it scares me.
>
> I stopped going to school every day. I wound up not being able to have enough hours to be certified in cosmetology. I had to drop my AP Psychology class, my Probability and Statistics class. Because they were going to mess up my GPA, I couldn't keep up with the coursework anymore.
>
> I ultimately lost my job, because after being transferred from the McDonald's that's downtown to a different one because people from work knew, more people found out from there and the lady who was, like, in charge of moving people around, she said she didn't have anywhere else that she could put me that was close to my house.
>
> THE COURT: All right. I'll sustain the objection. We'll move on. Next question, okay.

Initially, we note that appellant objected to A.B.'s testimony only on the ground that it did not prove or disprove the incident and that testimony concerning her job at McDonald's had to be limited to the fact that the restaurant could not transfer A.B. after a

while. At no time did appellant argue that the probative value of A.B.'s testimony was outweighed by its unfair prejudice or that expert testimony was required. When a specific ground for an objection to evidence is made, all other grounds are deemed to be waived. *Peterson v. State*, 444 Md. 105, 148 (2015); *Klauenberg v. State*, 355 Md. 528, 541 (1999). As a result, appellant's arguments have not been preserved properly for our consideration.

Even if we were to address the issue, we would conclude that the trial court did not abuse its discretion in admitting A.B.'s testimony. It is well established in Maryland that trial judges are afforded broad discretion in the conduct of trials. *Hopkins v. State*, 352 Md. 146, 158 (1998). We "'extend the trial court great deference in determining the admissibility of evidence and will reverse only if the court abused its discretion.'" *Kelley v. State*, 392 Md. 511, 530 (2006)(quoting *Hopkins*, 352 Md. at 158).

In *Parker*, 156 Md. App. at 271-74, we considered the propriety of testimony concerning a victim's demeanor and behavior in the weeks and months after an alleged rape to rebut a contention that the sex was consensual. We held that such evidence was admissible, explaining as follows:

> In the present case, appellant's defense was that the victim [Latissa] and he had consensual sex. The evidence of Latissa's mood and actions following the (alleged) rape demonstrated, albeit circumstantially, that Latissa had not engaged in consensual sex with her ex-boyfriend. Latissa's testimony, if believed, provided direct evidence that the changes in her behavior post-rape were due to the rape. Latissa's grandmother, of course, had no personal knowledge as to what had caused the change in Latissa's behavior. Nevertheless, from the fact that the abrupt behavioral change occurred closely on the heels of the rape, the jury could infer, legitimately, that Latissa's behavior changed due to the rape.

Id. at 273.

Similarly, here, the evidence admitted at trial was admissible to show, both circumstantially and directly, that A.B. had not engaged in consensual sex as appellant maintained. Although appellant argues that the evidence was unfairly prejudicial because she had not yet offered evidence pertaining to consent, the issue of consent clearly had been raised. In opening statement, defense counsel stated that A.B. "voluntarily started having consensual sex with a person at the party," and appellant merely watched A.B. engage in consensual sexual activity.

Appellant's contention that an expert was required to testify about A.B.'s post-assault behavior similarly is without merit. A.B. simply testified about changes in her behavior that occurred after she was sexually assaulted, and her testimony was admissible to show, both circumstantially and directly, that the assaults occurred and that she did not consent to them. The circuit court did not abuse its discretion in admitting this evidence.

III.

Appellant next contends that the trial court erred in excluding testimony by appellant's mother, Ms. Isaac, that she observed A.B. "flirting" with an older man at the party. She asserts that flirting was relevant because it had a "tendency to establish that [A.B.] was interested in engaging in sexual activity, and/or conveyed such an interest to others," and therefore, it was relevant to the issue of consent.

This issue is not preserved for this Court's review. Where evidence is excluded, a proffer of the substance and relevance of the evidence is required to preserve the issue for our consideration. *Pickett v. State*, 222 Md. App. 322, 345-46 (2015).

Here, when the State objected to Ms. Isaac's testimony that A.B. was flirting, the court stated that it did not "know what flirting is," and the prosecutor expressed concern that defense counsel was going to elicit "some sort of hearsay statement from the victim." When asked by the court to proffer what Ms. Isaac's expected testimony would be regarding how A.B. was flirting, defense counsel stated: "I don't know." The judge sustained the objection, struck Ms. Isaac's answer, and advised defense counsel that "[f]lirting is not coming in so if she's going to tell me what she was doing explicitly, fine." Defense counsel responded: "Yeah. I can do that," but counsel did not subsequently question Ms. Isaac further about what she observed A.B. and the older man doing at the party.

Under these circumstances, where defense counsel did not proffer the substance of the evidence that he sought to introduce, and counsel did not argue that Ms. Isaac's testimony should be admitted as a lay opinion, appellant's contentions on appeal regarding this testimony are not preserved for this Court's review.

Even if the issue had been preserved for review, we would conclude that the trial court did not err or abuse its discretion in sustaining the objection and striking Ms. Isaac's response. As the Court of Appeals has explained:

> Our standard of review on the admissibility of evidence depends on whether the "ruling under review was based on a discretionary weighing of relevance in relation to other factors or on a pure conclusion of law." *Parker*

> *v. State*, 408 Md. 428, 437, 970 A.2d 320, 325 (2009) (quoting *J.L. Matthews, Inc. v. Md.-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 92, 792 A.2d 288, 300 (2002)). Generally, "whether a particular item of evidence should be admitted or excluded is committed to the considerable and sound discretion of the trial court" and reviewed under an abuse of discretion standard. *Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594, 619, 17 A.3d 676, 691 (2011) (internal quotation marks omitted). However, we determine whether evidence is relevant as a matter of law. *State v. Simms*, 420 Md. 705, 725, 25 A.3d 144, 156 (2011). The *de novo* standard of review applies "[w]hen the trial judge's ruling involves a legal question." *Parker*, 408 Md. at 437, 970 A.2d at 325. Although trial judges have wide discretion "in weighing relevancy in light of unfairness or efficiency considerations, trial judges do not have discretion to admit irrelevant evidence." *Simms*, 420 Md. at 724, 25 A.3d at 155.

Perry v. Asphalt & Concrete Servs., Inc., 447 Md. 31, 48 (2016).

Ms. Isaac's testimony that A.B. was "flirting" with someone was not relevant because it did not make it more probable that she consented to engage in sexual activity with appellant, Mr. Bell, Mr. Watson, or anyone else. *See* Md. Rule 5-401 (evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). This evidence was irrelevant. The trial court did not abuse its discretion in striking that testimony.

IV.

Appellant next challenges several rulings by the trial court on the ground that hearsay evidence was improperly admitted. This Court has explained the law regarding hearsay as follows:

> "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Generally, hearsay evidence is not admissible, unless it falls within one of many exceptions. Md. Rule 5-802;

> *see also Thomas v. State*, 429 Md. 85, 96, 55 A.3d 10 (2012) ("Generally, statements made out of court that are offered for their truth are inadmissible as hearsay, absent circumstances bringing the statements within a recognized exception to the hearsay rule") (quoting *Su v. Weaver*, 313 Md. 370, 376, 545 A.2d 692 (1988)).

Benton v. State, 224 Md. App. 612, 628 (2015). Moreover, as the Court of Appeals has explained:

> [T]he 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* [*v. State*], 390 Md. [1,] 7-8, 887 A.2d [602,] 606 [(2005)], but the trial court's factual findings will not be disturbed absent clear error.

Gordon v. State, 431 Md. 527, 538 (2013). With that law in mind, we turn to appellant's claims in this case.

A.

Statements Made by A.B. to Juwanna Jones

Juwanna Jones, one of the managers at the McDonald's where A.B. worked, testified regarding what happened after she arrived at the home where the party was held. When the prosecutor asked Ms. Jones what A.B. said to her, defense counsel objected.

The prosecutor argued that the answer was admissible as an excited utterance. Defense counsel disagreed. When asked by the judge regarding the difference between Ms. Jones' testimony and that of Officer Wiggins, who testified about what A.B. told her on the morning following the incident, defense counsel responded:

> Well, this is the first person that [A.B.] talked to and I don't want this testimony in, I want the testimony to come from the person, you know, I want

> it to come from the alleged victim. And I don't see how it's a hearsay exception, just because I let it in before and didn't object to it.

After some discussion about the fact that A.B. had not yet testified, the following colloquy occurred:

> THE COURT: All right. So a statement – relevant startling event, (indiscernible) made while the declarant was under distress of excitement caused by the event. That's a classic excited utterance. I mean, I can't – I mean, I guess if it's not ultimately shown, I mean, there is a foundational issue here, we have certain – basically I just have the one report.
> [DEFENSE COUNSEL]: I don't think it's classic, Your Honor. I think it's more excited utterance to me is if someone shoots at you and you say, oh.
>
> THE COURT: Well, let's assume – I'm assuming for foundational purposes that someone's been raped by four individuals within a relatively short period of time, I'm kind of hard pressed that they would be more startled than that.
>
> [DEFENSE COUNSEL]: Well, the short period of time would be when she first walked in the room or if the rape was going on and she says, stop or these four guys are doing it and not that she's been with her ten, fifteen, twenty minutes and then they are walking around looking for clothes and then she walks outside and then –
>
> THE COURT: She's basically naked. I see her out wearing a hoodie, okay. That's fine. For the record, I assume this is going to be relatively short?
>
> [PROSECUTOR]: Yes.
>
> THE COURT: Okay. All right. All right. Your objection is noted. It's overruled.

Thereafter, Ms. Jones testified that, when she met A.B. at appellant's house, A.B. was shaking, stumbling as if she could not stand up, and slurring her speech. Once Ms. Jones got A.B. in the car, Ms. Jones questioned her about what happened. A.B. stated that she was not okay, that she was tired, and that her vagina hurt. When Ms. Jones asked if she had been "raped, did she have sex or anything like that," A.B. nodded affirmatively.

Ms. Jones asked A.B. if she had willingly engaged in sex and A.B. responded "[n]o." A.B. identified "one guy" as one of the persons who had assaulted her. She told Jones that she did not want to go to the hospital and asked Jones to "just take me home."

Appellant contends that none of Ms. Jones' testimony about what A.B. told her should have been admitted because A.B. was "highly intoxicated and said nothing spontaneously." She maintains that A.B.'s statements to Jones did not qualify as excited utterances because A.B. had not yet testified and her monosyllabic responses to Ms. Jones' questions "were the opposite of the near-involuntary spontaneous outburst contemplated by the excited utterance exception." We disagree.

Ms. Jones' testimony about what A.B. told her was admissible either as a prompt complaint of a sexual offense pursuant to Md. Rule 5-802.1(d)[1] or as an excited utterance under Md. Rule 5-803(b)(2).[2] Ms. Jones picked up A.B. from the party where the assaults

[1] Maryland Rule 5-802.1 provides, in pertinent part, as follows:

> 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.

[2] Maryland Rule 5-803(b)(2) provides that the following is not excluded by the hearsay rule: "Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

occurred, and she was the first person to whom A.B. reported the offenses. Thus, A.B.'s statements were admissible under Md. Rule 5-802.1(d). Her statements to Jones were also admissible under the excited utterance exception because they were made shortly after the offenses occurred, they related to the startling event of being raped and sexually assaulted, and A.B. was under the stress of excitement caused by the rapes and assaults, as indicated by the fact that Jones found her nude and shaking.

Even if the admission of A.B.'s statements through Ms. Jones was erroneous, any error was harmless beyond a reasonable doubt. *Dorsey v. State*, 276 Md. 638, 659 (1976). In *Yates v. State*, 429 Md. 112 (2012), the Court of Appeals stated that it "'will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury *without objection* through the prior testimony of other witnesses.'" *Id.* at 120 (quoting *Grandison v. State*, 341 Md. 175, 219 (1995)). Because virtually the same evidence was admitted through the testimony of Officer Wiggins, any error in admitting Ms. Jones' testimony was harmless beyond a reasonable doubt.

B.

A.B.'s Statements to Sharon Smith

Appellant contends that the trial court erred in admitting "a lengthy and highly detailed history" provided by A.B. to forensic nurse Sharon Smith. The trial court admitted Nurse Smith's testimony as both a prompt report of a sexual assault under Md. Rule 5-802.1(d) and as a statement made to a treating medical professional in the course of seeking

medical treatment under Md. Rule 5-803(b)(4).[3] Appellant contends that A.B.'s statements were not admissible as a statement made for the purpose of obtaining medical treatment under Md. Rule 5-803(b)(4) because Nurse Smith's exam was performed in a forensic rather than treating capacity, and there was no evidence to show that A.B. believed that the primary purpose of the exam was to obtain treatment. She contends that the testimony was not admissible as a prompt report of a sexual assault because "narrative details are not permitted."

We perceive no error in the trial court's decision to admit the statement's A.B. made to Smith. A.B.'s statements to Smith were made for both forensic and medical purposes and were admissible pursuant to the medical treatment exception. In *Webster v. State*, 151 Md. App. 527 (2003), we stated:

> We agree with the State and the trial court that a sexual assault victim's statement describing the assault may be admissible under Rule 5-803(b)(4), even though it was taken and given for dual medical and forensic purposes. The rationale for admitting this type of hearsay – that statements in contemplation of medical diagnosis or treatment are inherently reliable – may still exist in such circumstances. If the challenged statement has some value in diagnosis or treatment, the patient would still have the requisite motive for providing the type of "sincere and reliable" information that is important to that diagnosis and treatment.

[3] Md. Rule 5-803(b)(4) provides that the following is not excluded by the hearsay rule:

> Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

> This rationale applies in the context of this case, when a hospital nurse trained in both emergency care and sexual assault forensic examination treats and forensically examines a child immediately following a sexual assault, and in doing so solicits a description of the incident. In these circumstances, the victim's statement may be "pathologically germane" to any injury or disease that the victim may have suffered in the assault. As [the nurse's] testimony illustrates, what happened to a sexual assault victim may be critically important in deciding where to examine her, what range of medical problems to look for, and, ultimately, how to treat her.

Id. at 545-46 (internal citations omitted).

Additionally, A.B.'s statements to Nurse Smith were admissible as a prompt complaint of a sexual offense. The assaults occurred late on October 31, 2013, into the early morning hours of November 1, 2013. A.B. was admitted to Mercy Hospital on the morning of November 1, 2013, reported her sexual assault, and was examined by Nurse Smith.

Although appellant argues on appeal that testimony regarding a prompt report of a sexual assault is limited to the fact that a complaint was made, the circumstances under which it was made, and the identification of the perpetrator, and that narrative details are not permitted, she did not make that argument below. As a result, those arguments are waived. *See Bowling v. State*, 227 Md. App. 460, 466 n.6 (declining to address argument not made below), *cert. denied*, 448 Md. 724 (2016); Md. Rule 8-131(a) (Ordinarily, an appellate court will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court."). Even if they had not been waived, however, any error in admitting the statements as a prompt complaint of a sexual assault was harmless because, as we have already discussed, the statements were properly admitted pursuant to the medical treatment exception.

C.

Prosecutor's Questioning of Mr. Bell on Re-Direct

Mr. Bell testified that he was a non-participating witness of the assaults on A.B. During the State's re-direct examination of Mr. Bell, the prosecutor asked: "You've always maintained that Ms. Hartwill facilitated a gang rape of [A.B.], correct?" Over objection, Mr. Bell responded: "Correct." Relying on *Elmer v. State*, 353 Md. 1 (1999), appellant argues that the prosecutor's question communicated hearsay, specifically that Mr. Bell, "in always maintaining that appellant [was] guilty, made extrajudicial statements to that effect." She maintains that the State clearly was offering Mr. Bell's assertions for their truth as substantive evidence of her guilt and that the jury was never instructed to the contrary.

Elmer is not applicable to the instant case. In *Elmer*, 353 Md. at 5-12, the prosecutor repeatedly questioned a witness when he could not prove that the witness had made the statement alleged, and questioned in such a way as to potentially mislead the jury into treating the question as actual evidence. In holding that the prosecutor's inquiry was "highly prejudicial and inadmissible," the Court of Appeals noted that a prosecutor may not ask questions that suggest the existence of facts he or she knows cannot be proven or when there is no good faith basis for the factual predicate implied in the question. *Id.* at 14-15.

Here, there was no repeated questioning, nor did the prosecutor suggest facts he knew could not be proven. The prosecutor simply inquired into whether Mr. Bell had changed his position with respect to appellant's culpability. Even if that inquiry could be

interpreted as communicating hearsay, there was no error in the trial court's decision to admit Mr. Bell's answer. Maryland Rule 5-616(c), which governs rehabilitation of a witness provides, in part:

> (c) **Rehabilitation**. A witness whose credibility has been attacked may be rehabilitated by:
>
> ***
>
> (2) Except as provided by statute, evidence of the witness's prior statements that are consistent with the witness's present testimony, when their having been made detracts from the impeachment.

On cross-examination, appellant suggested that Mr. Bell was implicating her only because he received a favorable plea agreement and was required to testify against her. Mr. Bell's response to the prosecutor's question was permitted as a prior consistent statement for the purpose of rehabilitation.

D.

Statement Accompanying Mr. Bell's Photographic Identification of Appellant

During direct examination, Mr. Bell identified State's Exhibit 4 as a photograph of appellant that he identified prior to trial. On that photograph, Mr. Bell wrote: "She is the one who did everything that took place at her residence in my statement." Appellant contends that the trial court erred in admitting the exhibit containing Mr. Bell's statement as a statement of identification, asserting that, because Mr. Bell's statement incorporated by reference his statement to the police, it "became in substance a prior consistent statement" that constituted inadmissible hearsay.

When the prosecutor moved to admit the photograph containing Mr. Bell's statement, he asked to approach the bench, and the following occurred:

> [PROSECUTOR]: Just for the record, each photo has a state identification ID number. Just to avoid any potential undo prejudice to Ms. Hartwill, I think the copy that should go back to the jury may – should probably have the SIDs number redacted.
>
> THE COURT: Okay. We'll redact. Okay?
>
> [PROSECUTOR]: Okay.
>
> THE COURT: Anything else?
>
> [PROSECUTOR]: Nothing further.

Defense counsel did not at that time, or at any other time, argue that Mr. Bell's reference to his statement was inadmissible as a prior consistent statement. Accordingly, this issue is not preserved for this Court's review. *See Bowling*, 227 Md. App. at 466 n.6 (declining to address argument not made below); Md. Rule 8-131(a) (Ordinarily, an appellate court will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court.").

Moreover, Mr. Bell testified that he wrote on appellant's photograph: "She is the one who did everything that took place at her residence in my statement." Because this testimony was admitted without objection, appellant waived any subsequent objection she might have had to admission of Mr. Bell's statement on the photograph. For this reason as well, the issue is waived and not properly before us. *See Yates*, 429 Md. at 120 (we will not find reversible error on appeal when objectionable testimony is admitted if the essential

contents of that objectionable testimony have already been established and presented to the jury without objection). Accordingly, we will not address this issue.

V.

Appellant's final contention is that the evidence was insufficient to support her conviction for attempted first-degree sexual offense. *See* Md. Code (2012 Repl. Vol.) § 3-305(a)(2)(iv) of the Criminal Law Article (a person may not "engage in a sexual act with another by force, or the threat of force, without the consent of the other" and "commit the crime while aided and abetted by another"). Appellant asserts that there was no evidence that she was aided and abetted by another person while she attempted to commit an act of cunnilingus on A.B. We disagree.

This Court has set forth the standard of review on a challenge to the sufficiency of the evidence as follows:

> The test of appellate review of evidentiary sufficiency is whether, "'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Coleman*, 423 Md. 666, 672, 33 A.3d 468 (2011) (quoting *Facon v. State*, 375 Md. 435, 454, 825 A.2d 1096 (2003)). The Court's concern is not whether the verdict is in accord with what appears to be the weight of the evidence, "but rather is only with whether the verdicts were supported with sufficient evidence-that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479, 649 A.2d 336 (1994). "We 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference.'" *Cox v. State*, 421 Md. 630, 657, 28 A.3d 687 (2011) (quoting *Bible v. State*, 411 Md. 138, 156, 982 A.2d 348 (2009)). Further, we do not "'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Montgomery v. State*, 206

> Md. App. 357, 385, 47 A.3d 1140 (quoting *Morris v. State*, 192 Md. App. 1, 31, 993 A.2d 716 (2010)), *cert. denied*, 429 Md. 83, 54 A.3d 761 (2012).

Donati v. State, 215 Md. App. 686, 718, *cert. denied*, 438 Md. 143 (2014).

Here, A.B. testified that when she awoke in appellant's bedroom naked and on her knees, appellant was pulling her arms and extending A.B. toward her. Appellant was naked from the waist down, her legs were open, and she was rubbing A.B.'s face in her vagina. At the same time, a heavy-set man was forcibly having sexual intercourse with A.B. from behind. A.B. testified that she was unable to get away because the man trapped her from behind and appellant prevented her from moving her arms. Based on this evidence, a reasonable jury could infer that the man was aiding and abetting appellant as she attempted to commit a sexual act on A.B. There was sufficient evidence to support appellant's conviction for attempted first-degree sexual offense.

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