Circuit Court for Baltimore County
Case No. 03-K-18-003803

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2033

September Term, 2019

JANET LATRICE JACKSON

v.

STATE OF MARYLAND

Graeff,
Wells,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: March 18, 2021

Following a bench trial in the Circuit Court for Baltimore County, the appellant, Janet Latrice Jackson, was convicted of first-degree child abuse and first-degree assault. The crimes of which Ms. Jackson was convicted arose from allegations that she and her co-defendant, Chanell Richardson, had abused the victim, to whom we shall refer as R.G., between March 1, 2017, and April 6, 2017. During that period, the State alleged, Ms. Jackson and Ms. Richardson had forcibly submerged R.G. in scalding water, resulting in severe burns to his feet and buttocks. The court sentenced Ms. Jackson to ten years' incarceration for first-degree child abuse and a concurrent ten-year term for first-degree assault. Ms. Jackson timely appealed, and presents a single question for our review, which we have rephrased slightly, as follows:[1]

> Did the circuit court violate Maryland Code (2001, 2018 Repl. Vol.), Criminal Procedure Article ("CP"), § 11–304(g) by admitting an audio-visual recording of R.G.'s out-of-court statement to Mia Shelton-Hyman—a Child Protective Service social worker—without first examining R.G. or making an on-the-record determination that the recording rendered such examination unnecessary?

As we shall explain, Ms. Jackson failed to preserve this question for our review. Even if it had been preserved, we would answer Ms. Jackson's question in the negative. We will, therefore, affirm the judgments of the circuit court.

[1] The appellant originally presented her question as follows:

> Did the trial court err in admitting R.G.'s out-of-court statement to a social worker under Md. Code (2001, 2018 Repl. Vol.) Criminal Procedure Article, § 11–304, without examining R.G. or determining that the audio-visual recording of the statement makes an examination of the child unnecessary, as required by § 11–304(g)(1)?

FACTS AND PROCEDURAL HISTORY[2]

Background

On June 17, 2018, Officer Jonathan Besaw, of the Baltimore County Police Department, responded to a 911 call placed by Shawn Morgan. In that call, Mr. Morgan reported having witnessed R.G. running across Reisterstown Road in the vicinity of Owings Mills Elementary School. Mr. Morgan further informed the 911 operator that he had stopped R.G., whereupon R.G. informed Mr. Morgan that he was fleeing his aunts, who, he claimed, had been physically abusing him. Upon arriving at the scene, Officer Besaw interviewed then-ten-year-old R.G. During that interview, R.G. accused his aunts (Ms. Jackson and Ms. Richardson) of having "hit [him] any time they fe[lt] like" doing so. He further reported that, when he was in third grade, his aunts had forcibly submerged his feet in scalding water. The removal of R.G.'s shoes revealed "abnormal" scarring and discoloration to R.G.'s feet and ankles, later attributed to his having sustained second, third, and fourth degree burns.[3]When Officer Besaw asked R.G. whether he had sustained any other injuries, R.G. showed him a scar on the back of his right hand. He claimed that the scar had been the result of his having been "burn[ed] by a lighter … when [he] was with

[2] We shall confine our recitation of the facts and procedural history to those necessary to provide context for the question presented and to those that are essential to the proper disposition of this appeal.

[3] A medical examination of R.G. further revealed second and third degree burns to R.G.'s buttocks, which, R.G. reported he had incurred when he was "forced to sit in the hot water."

[his] mom."[4] The Baltimore County Police Department promptly relayed R.G.'s allegations to the Baltimore County Department of Social Services and Child Protective Services. The case was initially assigned to Natasha Dunlap, a clinical social worker employed thereby. Ms. Dunlap met with Ms. Jackson and apprised her of R.G.'s allegations. Ms. Jackson claimed that the injuries to R.G.'s feet had been the result of grease burns, which R.G. had sustained while his sister and he "were playing around the stove." Ms. Jackson further denied that R.G. had run away because of physical abuse that he had endured while in her care, claiming instead that he fled because she had not permitted him to accompany her "to go pick up someone." Child Protective Services promptly removed R.G. from Ms. Jackson's custody, and on June 18th, placed him in shelter care.

On June 29, 2018, R.G. was transported to the Baltimore County Child Advocacy Center, where he was interviewed by Ms. Shelton-Hyman. During that interview (a recording of which was admitted into evidence, over objection, and played at trial), R.G. reported that when he was eight years old Ms. Richardson and Ms. Jackson had filled a bathtub with scalding water and "put [him] in [the] hot water" contained therein. When he attempted to escape the blistering bathwater, R.G. recounted, Ms. Richardson and Ms. Jackson "pushed [him] back in that water." Seeking to lower the water's temperature, R.G.

[4] R.G. later revised his statement, testifying that it had been Ms. Jackson who had burned his hand. He explained that he had not initially told the truth because he had been afraid of accusing his aunts of an additional act of abuse. He further averred that corporal punishment was not among the disciplinary measures his mother, Rokea, had employed while he was in her care.

turn on the bathtub's cold-water faucet. According to R.G., Ms. Jackson promptly turned off the cold water and added additional burning-hot water to the tub. R.G. recalled having been crying and "[b]reathing hard" throughout the ordeal. His tears and labored breathing notwithstanding, R.G. remained forcibly confined to the tub. When he finally left the tub, Ms. Richardson dragged R.G by his legs throughout the house, pushed him, kicked him, and beat him with a backscratcher.

The morning after the bathtub incident, R.G recalled, he could not walk, and his feet were so swollen that he was unable to wear socks or shoes. The burns to his feet and ankles were so severe that he did not return to school for several months (until the academic year had nearly ended). Ms. Jackson attributed R.G.'s absenteeism to his having purportedly contracted the flu. During his interview, R.G. further claimed that, despite the severity of his injuries, Ms. Jackson had not sought medical treatment until months after he had sustained the burns at issue. When he was finally taken to a dermatologist months after the bathtub incident, R.G. relayed, Ms. Jackson again attributed his injuries to a grease burn. In addition to describing the physical abuse that he had endured, R.G. reported that Ms. Jackson had "tortured" him by forcing him to perform jumping jacks and "'run up and down the stairs'" on a daily basis.

The CP § 11–304 Hearing

After Ms. Jackson's arrest, the State filed a pre-trial motion to introduce into evidence an audio-visual recording of R.G.'s June 29th out-of-court interview with Ms. Shelton-Hyman pursuant to CP § 11–304. During a pre-trial hearing on that motion, the

State advised the court: [M]y reading of [CP § 11–304] requires the court to review that video and determine whether or not additional information is necessary … for you to make a finding that the video is allowed to be used." In response to an inquiry by the court, the State agreed that the statute required that the court review the recording in camera prior to ruling on its admissibility. Turning to defense counsel, the court asked: "Do you agree I'm supposed to do an in camera review first?" The defense answered in the affirmative. The following colloquy ensued:

> THE COURT: So where does it say I have to review it?
>
> [THE STATE]: So if you go to the guarantees of trustworthiness the court has --
>
> THE COURT: "The court shall consider."
>
> * * *
>
> [THE STATE]: -- "hearing to determine admissibility of statements."
>
> THE COURT: Yup.
>
> [THE STATE]: Under [CP § 11–304(f)]: "In a hearing outside the presence of the jury or before the juvenile court proceeding, the court shall: (i) [m]ake a finding on the record as to the specific guarantees of trustworthiness that are in the statement; and (ii) determine the admissibility of the statement."
>
> And if you continue forward the [court's] examination of the child … you can examine the child however under [CP § 11–304(g)(2)(ii)] there is an audio and visual statement in this case. Your Honor you may review it and if you can find that the recording itself provides sufficient information you do not need to actually meet with the child in camera as well.
>
> THE COURT: Okay.

> [THE STATE]: That is the State's reading of this Rule and I believe that the court has to do that prior to determining the admissibility of the statement itself.
>
> THE COURT: Do you all agree?
>
> [DEFENSE COUNSEL]: Agree.
>
> THE COURT: All right.

During a brief recess, the court reviewed the recording. After it had done so, the hearing reconvened, whereupon the court permitted the parties to present oral argument. The State argued that, particularly in light of corroborating evidence that it intended to introduce at trial, the content of the recording was both trustworthy and reliable. The defense, in turn, argued that the recorded statement was unreliable, needlessly cumulative, and that its prejudicial effect outweighed its probative value.

After addressing each of the applicable factors set forth in CP § 11–304(e), the court ruled: "I find that the statement was made in a trustworthy manner. The statement is trustworthy. I will admit it."[5]

[5] CP § 11–304(e) sets forth the "particularized guarantees of trustworthiness" that a court must consider prior to admitting otherwise inadmissible hearsay pursuant to the "tender years" exception, and provides:

> (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;

(continued . . .)

DISCUSSION

Ms. Jackson contends that the circuit court erroneously admitted R.G.'s recorded statement to Ms. Shelton-Hyman. She claims that by admitting the recording without first having either conducted an in camera examination of R.G or made an on-the-record

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(ii) the certainty that the statement was made;

(iii) any apparent motive to fabricate or exhibit partiality by the child victim, including interest, bias, corruption, or coercion;

(iv) whether the statement was spontaneous or directly responsive to questions;

(v) the timing of the statement;

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

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

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

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

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

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

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

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

determination that the recording rendered such an examination unnecessary, the court violated the "foundational requirements" prescribed by CP § 11–304(g). She concludes that the court's failure to satisfy either requirement rendered the recorded statement inadmissible under the "tender years" exception to the Rule Against Hearsay.

The State counters that Ms. Jackson failed to preserve the issue for our review, arguing that "[a]t no point did [Ms.] Jackson alert the trial court that it had failed to specify that 'the recording … ma[de] an examination of [R.G.] unnecessary.'" Alternatively, the State contends that "[t]hrough its analysis and ruling, the trial court implicitly ruled that the demands of subsection (g)(1)(ii) were met," thereby making an examination of R.G. unnecessary. Finally, the State asserts that, even if the court had erroneously admitted the recording, any such error was harmless beyond a reasonable doubt. In so doing, it maintains that the record neither reflects that "further examination of the victim would have led the trial court to reach a different conclusion regarding the trustworthiness of [R.G.'s] statement," nor suggests "that the exclusion of the video would have led … to a different verdict[.]"

Preservation

Maryland Rule 8–131 governs the scope of appellate review and provides, in pertinent part: "Ordinarily, the appellate court will not decide any … issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8–131(a). The dual purposes of Rule 8–131(a) are to ensure 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.'" *Ray v. State*, 435 Md. 1, 23 (2013) (quoting *Chaney v. State*, 397 Md. 460, 468 (2007)). *See also Carroll v. State*, 202 Md. App. 487, 507 (2011) (Rule 8–131(a) "'serves to prevent the unfairness that could arise when a party raises an issue for the first time on appeal, thus depriving the opposing party from admitting evidence relating to that issue[.]'" (Citation omitted), *aff'd*, 428 Md. 679 (2012). Accordingly, "[w]hen an objection is made *with specificity* in the trial court, *only the specific objection* will be reviewed by this Court." *Matthews v. State*, 89 Md. App. 488, 499 (1991) (emphasis added). *See also In re Ryan S.*, 369 Md. 26, 35 (2002) ("[A]s long as the party… clearly makes the judge aware of the course of action he or she desires the court to take and the reasons for such course of action, the party shall have adequately preserved that issue for appellate review." (Citing *Everhart v. State*, 274 Md. 459, 472 (1975))); *Acquah v. State*, 113 Md. App. 29, 60 (1996) ("[I]t is incumbent upon counsel to state with clarity the specific objection to the conduct of the proceedings and make known the relief sought." (Quotation marks and citation omitted)).

At the hearing on the State's motion, defense counsel agreed that, prior to determining the admissibility of the hearsay at issue, the court was required to "make a finding on the record as to the specific guarantees of trustworthiness that are in the statement[.]" CP § 11–304(f)(1). It further acknowledged that, before admitting the recording of R.G.'s interview, the court was statutorily obligated either (1) to examine R.G. or (2) to determine that the recording made such an examination unnecessary. He did not, however, object to the court's ruling on the basis that the court had not first expressly ruled

that the recording rendered an in-person examination unnecessary, nor did he request that the court make any such on-the-record determination. By neglecting to do either, defense counsel failed to preserve this issue for our review.

Ms. Jackson attempts to counter the State's preservation challenge in her reply brief, arguing that the issue was "raised" when "the trial court was alerted by counsel for both the State and the defense that in determining the admissibility of R.G.'s out-of-court statement the court was required by statute to examine the child unless it determined that the recording makes an examination of the child unnecessary." Ms. Jackson's counterargument is unpersuasive.

As the Court of Appeals explained in *Ray, supra*, 435 Md. at 20, an "issue," as the term is used in Rule 8–131(a), refers to "'a point in dispute between two or more parties.'" (quoting Black's Law Dictionary 907 (9th ed. 2009)). For purposes of Rule 8–131(a), the Court continued, "raise" means "[t]o bring up for discussion or consideration; to introduce or put forward." *Id.* at 14, 20 (quoting Black's at 1373).

Defense counsel argued that the statement was unreliable and cumulative to R.G.'s anticipated testimony. Defense counsel did not argue that the court had failed to state that the recording made an examination of R.G. unnecessary.

Although unpreserved, we shall exercise our discretion and briefly address the merits of Ms. Jackson's contention.

Criminal Procedure Article § 11–304

"'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). Hearsay is generally inadmissible at trial "unless it falls within an exception to the hearsay rule," *Bernadyn v. State*, 390 Md. 1, 8 (2005), or is otherwise "permitted by applicable constitutional provisions or statutes." Md. Rule 5–802.

"'[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.'" *Traynham v. State*, 243 Md. App. 717, 725–26 (2019) (quoting *Gordon v. State*, 431 Md. 527, 538 (2013)).

Criminal Procedure Article § 11–304 governs "'the admissibility of hearsay statements by a child abuse victim … in juvenile and criminal court proceedings.'" *In re J.J.*, 231 Md. App. 304, 323–24 (2016) (quoting *Montgomery Cty. Dep't of Health & Human Servs. v. P.F.*, 137 Md. App. 243, 272 (2001)), *aff'd*, 456 Md. 428 (2017). The statute "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," *In re J.J.*, 231 Md. App. at 324 (quotation marks and citation omitted), and provides, in pertinent part:

> **Hearings to determine admissibility of statements**
>
> (f) 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.
>
> **Court examination of child victim**
>
> (g)(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).

"The interpretation of a statute is a question of law that this Court reviews *de novo*." *Berry v. Queen*, 469 Md. 674, 686 (2020). *See also Junek v. St. Mary's Cnty. Dept. of Soc. Servs.*, 464 Md. 350, 357 (2019) ("Matters of statutory interpretation and application are questions of law, reviewed *de novo*." (Citing *Schisler v. State*, 394 Md. 519, 535 (2006))). "The starting point of any statutory analysis is the plain language of the statute, viewed in the context of the statutory scheme to which it belongs[.]" *Kranz v. State*, 459 Md. 456, 474 (2018) (quotation marks and citations omitted). When construing the plain and unambiguous statutory language, "[w]e neither add nor delete language so as to reflect an intent not evidenced" thereby, nor do we "construe a statute with 'forced or subtle interpretations' that limit or extend its application." *State v. Bey*, 452 Md. 255, 265 (2017). Consistent with this bedrock principle of statutory construction, when the General

Assembly "includes particular language in one section of a statute but omits it in another ..., it is generally presumed that [it] acts intentionally and purposely in the disparate inclusion or exclusion.'" *Gardner v. State*, 420 Md. 1, 11 (2011) (citation omitted)). Absent any indication to the contrary, this hermeneutical principle applies with equal force to statutory subsections such as those at issue here.

In addressing the merits of Ms. Jackson's claim, we need only look to the plain language of CP § 11–304. As addressed above, prior to admitting an out-of-court statement under the "tender years" exception to the hearsay rule, the Legislature expressly required that a court "make a finding *on the record* as to the specific guarantees of trustworthiness." CP § 11–304(f)(1) (emphasis added). The plain language of CP § 11–304(g), by contrast, does not require that a court make any such on-the-record determination that "an audio or visual recording of the child victim's statement ma[de] an examination of the child victim unnecessary." Had the Legislature intended to impose such a requirement, it clearly knew how to do so. Accordingly, we agree with the State that the Legislature's "omission of any language requiring a[n] on-the-record finding for determinations made under [CP § 11–304(g)(1)(ii)] leads to the conclusion that a trial court can make that ruling *implicitly*[.]" (Emphasis retained).

In this case, the State expressly advised the court that prior to admitting the recording into evidence, it was statutorily required to conduct an examination of R.G. *unless*, upon reviewing the recording, the court found that such an examination was unnecessary. Upon having been so advised, the court took a brief recess during which it

reviewed the 27-minute-long recording. When the hearing reconvened and it had heard counsel's arguments, the court addressed each of the "guarantees of trustworthiness" set forth in CP § 11–304(e)(2), and found R.G.'s recorded statement to have been "made in a trustworthy manner." Although it had not yet examined R.G., the court ruled that the recording was admissible.

Ms. Jackson's assertion of error notwithstanding, she does not meaningfully rebut the presumption that the court knew and properly applied the law, and, in so doing, implicitly determined that the recording of R.G.'s interview rendered an examination unnecessary. *See, e.g.*, *Davis v. State*, 344 Md. 331, 346–50 (1996) ("[J]udges are presumed to know and, properly to have applied, the law, where the required foundation is itself independently admissible, it may be implicit." (Internal citation omitted)); *Jones v. State*, 178 Md. App. 123, 144 (2008) ("'There is a strong presumption that judges properly perform their duties.'" (Citation omitted)).

For the foregoing reasons, we affirm the judgments of the circuit court.

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