Circuit Court for Harford County
Case No. C-12-CR-22-000172

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 642

September Term, 2023

STEVEN JAY FRIEDMAN

v.

STATE OF MARYLAND

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

JJ.

Opinion by Nazarian, J.

Filed: May 31, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

In February 2022, Steven Jay Friedman digitally penetrated and performed oral sex on a sixteen-year-old girl while she was mentally incapacitated from alcohol that he provided to her. After a bench trial in the Circuit Court for Harford County, Mr. Friedman was found guilty of second-degree rape, third-degree sexual offense, second-degree assault, and allowing the underage consumption of alcohol. On appeal, Mr. Friedman argues that (1) there was insufficient evidence to support a finding that the victim didn't or couldn't consent to Mr. Friedman's sexual advances, (2) there was insufficient evidence to support separate convictions for second-degree rape and third-degree sexual offense, (3) the court applied the sentencing guidelines incorrectly, and (4) the court abused its discretion in preventing cross-examination on the victim's alleged internet search about the age of consent. We see no error and affirm.

I. BACKGROUND

On February 18, 2022, at about 5:00 p.m., K[1] went for a walk in her neighborhood. As she walked by Mr. Friedman's house, he came outside and approached her. He asked K what her plans were for that night and K responded that she was going out to drink with her friends. Mr. Friedman then asked her if she wanted "a head start" on drinking and K said yes. Mr. Friedman went inside his home and returned with a bottle of vodka and a cup. He filled up the "entire cup" with vodka for her and they continued their conversation outside.

[1] We will refer to the victim by a random initial to protect her privacy.

During the conversation, Mr. Friedman told K that he "had sexual relations without being in a relationship" when he was K's age. He also shared that "he had a vasectomy" and that "him and his wife [we]re always arguing over him talking to other women." Before this instance, Mr. Friedman had approached K three or four times while she was walking. In their previous conversations, Mr. Friedman shared that he "had sex with multiple women in college" and that his wife was jealous of the conversations he had with K.

As they talked outside on February 18, Mr. Friedman filled up K's cup with vodka "four or five times." He told K that "he had more alcohol down in [his] basement" and asked her if she would like to come inside. K agreed to go in. She sat in a chair in the basement and Mr. Friedman gave her Bacardi to drink. Mr. Friedman "kept exchanging drink after drink" in the basement until K had about five more drinks.

K began to feel intoxicated. She "couldn't feel anything" and was "lifeless." She was coming "in and out," which she described as being "aware and then all of a sudden not aware." At that point, Mr. Friedman got "on his knees in front of [K] while [she] was sitting down" and started calling her "beautiful" and "pretty." He then pulled down K's leggings and underwear. K "tried to pull [her] pants up the best [she] could because of how intoxicated [she] was, but [she] couldn't. And he kept taking them down anyways."

After Mr. Friedman pulled K's pants down successfully, he "licked" and "put his finger in [her] vagina." He also "kissed on" her neck, but K "did not kiss him back." K could not tell Mr. Friedman to stop or push him away "because [she] was so incoherent," "was coming in and out," and "wasn't able to move barely."

Mr. Friedman then stood up and removed his pants, but was interrupted by the sound of his wife and children walking into the upper floor of the house. He told K "[y]ou need to leave" and she left through the back door. K "had been so intoxicated, to the point where [she] was falling all over the place in the backyard . . . ," but she made it home.

The next day, K reported the incident to police. Detectives interviewed Mr. Friedman later that day. Mr. Friedman denied giving any alcohol to K and insisted that he only gave her water to drink. He also denied having any sexual contact with her. After further questioning from the detectives, however, Mr. Friedman admitted that he had given K alcohol. He admitted as well that he kissed K and that he touched her chest but claimed that he did so only because K was the "aggressor" who kissed him and pulled her shirt down first. He also claimed that K pulled her pants down by herself and maintained initially that "[n]othing happened" afterwards and that he did not touch her genitals. But again, after detectives pressed him for answers, he admitted that "[he] performed oral sex on [K]."

Mr. Friedman was charged with five counts related to his interaction with K: (1) second-degree rape; (2) third-degree sexual offense; (3) second-degree assault; (4) fourth-degree sexual contact; and (5) allowing underage consumption of alcohol. A bench trial was held on January 30–31, 2023. In addition to K's testimony and Mr. Friedman's recorded interview with police, the State entered into evidence three videos that K had recorded on the day of the incident. The first video showed Mr. Friedman pouring vodka in a cup for K outside of his house. The second and third videos depicted K's state of intoxication as soon as she got home after the incident. The court found that in

those videos, "[K] appear[ed] incoherent. She [wa]s singing some phrase over and over, not focusing at the camera, but looking off in the distance . . . ." Moreover, the court found that K was slurring her words, her cheeks were flushed, and her pupils were dilated. The court noted as well that K stated in one video, "I just let my [expletive] neighbor" perform oral sex, but the court found that "she was relaying an account of something that just happened to her. She was in disbelief and not boasting."

Ultimately, the court believed K's testimony that she did not consent to Mr. Friedman's sexual advances:

> [The court] found [K]'s testimony credible. That while in the basement, [Mr. Friedman] touched her. He kissed her. He performed cunnilingus, and digitally penetrated her. And at the time that it happened, she did not consent. And that in fact, because of her intoxicated state, she was mentally incapacitated to the point that she was substantially unable to understand the nature of her conduct and that she was in and out of what was happening to her at the hands of [Mr. Friedman].

By contrast, the court found that Mr. Friedman's recorded statements lacked credibility:

> With the exception of finally admitting to performing oral sex on [K], no other statement that was made by [Mr. Friedman] was believable by this [c]ourt.

At the end of the trial, the court found Mr. Friedman guilty on all counts.[2] The court sentenced Mr. Friedman to twenty years' incarceration, suspending all but eighteen years, for the second-degree rape conviction; a consecutive but suspended term of ten years'

[2] Count four, fourth-degree sexual contact, was not tried.

incarceration for the third-degree sex offense conviction; and a suspended $1,000 fine for providing alcohol to a minor. The assault conviction merged into the sex offense conviction for sentencing purposes.

We provide additional facts as necessary below.

II. DISCUSSION

Mr. Friedman raises four issues on appeal:[3] (1) whether the evidence was sufficient

[3] Mr. Friedman phrased his Questions Presented as:

1. Did the Circuit Court inappropriately find that the victim did not give consent, or, in the alternative, was too incapacitated to give consent? In other words, was the evidence sufficient for the Court to render guilty verdicts as to Count 1 and Count 2?
2. Did the trial court err in finding that the *actus reus* elements of Count 1 and Count 2 had been independently proven beyond a reasonable doubt? Should the verdict on Count 2 have been not guilty, or, in the alternative, should Count 2 have merged with Count 1?
3. Did the Circuit Court impose sentence based on an inaccurate calculation of the sentencing guidelines?
4. Did the Circuit Court err in denying the defense attempt to question the victim about her Google search about age of consent?

The State phrased its Questions Presented as:

1. Was the evidence sufficient to support the findings that Friedman used force against one who did not or could not consent and, therefore, to support the guilty verdicts for rape in the second degree and sexual offense in the third degree?
2. Was the evidence sufficient to support the separate convictions for rape in the second degree and for sexual offense in the third degree?
3. To the extend addressed, did the trial court properly sentence Friedman?
4. If preserved, did the trial court soundly exercise its discretion by controlling cross-examination to exclude irrelevant testimony?

to support a finding that the victim did not or could not consent to Mr. Friedman's sexual advances; (2) whether the evidence was sufficient to support the separate convictions for second-degree rape and third-degree sex offense; (3) whether the court sentenced Mr. Friedman properly; and (4) whether the court abused its discretion in excluding cross-examination on the victim's Google search about the age of consent. We hold that the evidence was sufficient to support the court's findings and Mr. Friedman's separate convictions, that Mr. Friedman's challenge to his sentence was not preserved for appellate review, and that the court did not abuse its discretion in preventing cross-examination on the victim's internet search because the search was not relevant.

A. The Evidence Was Sufficient To Support The Court's Finding That K Did Not Or Could Not Consent To Mr. Friedman's Sexual Advances.

Mr. Friedman contends *first* that "[t]he trial court's finding of lack of consent and/or incapacity of the victim was contrary to the facts presented at trial" and that the evidence "at best should have left the reasonable factfinder in equipoise" as to the second-degree rape and third-degree sex offense counts. He argues that the State failed to prove that he used force during his interaction with K because he did not use any "frightening word[s]." Mr. Friedman argues further that no evidence "bolstered [K]'s bald assertion that she was incapacitated" and that K's ability to use her phone to record videos during and after the incident contradicts her assertion that she was too intoxicated to offer resistance.

The State responds that "[Mr.] Friedman's arguments concern the *weight* that should be afforded evidence, not its *sufficiency*." The relevant question on appeal, the State argues,

is whether any rational factfinder could find that there was sufficient evidence to support the essential elements of Mr. Friedman's charges. Based on K's testimony and the video evidence of her state of intoxication, the State contends that a rational factfinder could conclude that Mr. Friedman performed the sexual acts on K without her consent.

"When reviewing the sufficiency of evidence, this Court does not retry the case." *Koushall v. State*, 479 Md. 124, 148 (2022) (*citing Dawson v. State*, 329 Md. 275, 281 (1993)). "It is simply not the province of the appellate court to determine whether it could have drawn other inferences from the evidence." *Id.* (cleaned up). Instead, we determine "'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.'" *Id.* (*quoting State v. Manion*, 442 Md. 419, 430 (2015)). We "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c).

Second-degree rape can be established by evidence that a person engaged in a "sexual act"[4] with another individual through "force" or while the individual was "mentally incapacitated:"

> (a) A person may not engage in vaginal intercourse or a sexual act with another:
>
> (1) by force, or the threat of force, without the consent of the other; [or]

[4] As used in CR § 3-304(a), the term "sexual act" includes cunnilingus and digital penetration. CR § 3-301(d)(1).

> (2) if the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual[.]

Maryland Code (2002, 2021 Repl. Vol.), § 3-304(a)(1)–(2) of the Criminal Law Article ("CR").

Similarly, sexual offense in the third-degree can be proven by evidence that a person engaged in "sexual contact"[5] with a "mentally incapacitated individual" and the person knew or reasonably should have known of the individual's impaired condition. CR § 3-307(a)(2). A "mentally incapacitated individual" is someone who, because of the influence of an intoxicating substance, is "substantially incapable of (1) appraising the nature of [his or her] conduct; or (2) resisting . . . a sexual act, or sexual contact." CR § 3-301(b)(1)–(2).

1. The evidence was sufficient to support a finding that Mr. Friedman used force to engage in a sexual act with K.

With regard to Mr. Friedman's second-degree rape conviction, a rational factfinder could find that he engaged in a sexual act with K "by force" under CR § 3-304(a)(1). The element of "force" is satisfied where the defendant "1) exert[s] enough physical force to overcome any resistance that is offered or 2) generate[s] enough of a threat of force to make a victim's decision not to resist reasonable." *Martin v. State*, 113 Md. App. 190, 244

[5] As used in CR § 3-307(a), the term "sexual contact" means "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." CR § 3-301(e)(1).

(1996). "'[N]o particular amount of force, either actual or constructive, is required to constitute rape.'" *State v. Mayers*, 417 Md. 449, 470 (2010) (*quoting Hazel v. State*, 221 Md. 464, 469 (1960)). Indeed, "'force may exist without violence.'" *Id.* (*quoting Hazel*, 221 Md. at 469). "[R]esistance is relative and should be measured by the fact-finder." *Id.* at 468.

There was enough evidence in this case to support the conclusion that K offered physical resistance to Mr. Friedman's sexual advances and that her resistance was overcome by Mr. Friedman's use of force. K testified that she tried to fend off Mr. Friedman's efforts to pull down her pants "multiple times." She explained that "[she] had tried to pull [her] pants up the best [she] could because of how intoxicated [she] was, but [she] couldn't. And he kept taking them down anyways." She also stated that "I kept tugging my pants up and [Mr. Friedman] didn't let me." Based on K's testimony, a rational factfinder readily could have concluded that K and Mr. Friedman had a struggle—K was trying her "best" to pull her pants up while Mr. Friedman "didn't let [her]" and "kept taking them down"—and that Mr. Friedman won the struggle through his use of force. *Id.* at 476 (element of force satisfied where the defendant engaged in a sexual act with a victim even after the victim resisted physically "by pushing [the defendant]'s hands away from her breast and vagina").

Mr. Friedman argues nonetheless that the evidence "should have left the reasonable factfinder in equipoise" about whether his interaction with K was consensual because he did not use any "frightening word[s]" and K did not "rebuff" any of his kisses. Mr.

Friedman also points to the fact that in one of the videos that K recorded after the incident, she stated that "I just let my [expletive] neighbor" perform oral sex. He contends that K's statement "was an act more of pure braggadocio than victimhood" and should have led the factfinder to believe that their interaction was consensual. Mr. Friedman's arguments overlook our role as an appellate court. "Appellate concern is not with what **should** be believed, but only with what **could** be believed." *Travis v. State*, 218 Md. App. 410, 423 (2014). "[We] 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." *Mayers*, 417 Md. at 466. "All that matters at this juncture is that the factfinding judge believed the victim's story." *Travis*, 218 Md. App. at 423.

There is no dispute here that the court believed K's story. The court stated explicitly that it "found [K]'s testimony credible." The court found that Mr. Friedman "pulled down [K's] leggings, and she tried to pull them back up repeatedly" and that "[t]hat was enough to signal to [Mr. Friedman] that she was not agreeing to have him perform any sexual act on her" and "[wa]s enough to establish that [Mr. Friedman] used force to perform a sexual act on [K]." Contrary to Mr. Friedman's view, the court did not see the statement that K made in the video as "pure braggadocio." The court found that K was merely "relaying an account of something that just happened to her" and that "[s]he was in disbelief and not boasting." We will not re-weigh K's credibility because "it is not our role to retry the case . . . ." *Mayers*, 417 Md. at 475. Instead, and viewing the evidence in the light most favorable to the prosecution, *Koushall*, 479 Md. at 149, we conclude that there was sufficient

evidence to support the court's finding that Mr. Friedman used force to engage in a sexual act with K in violation of CR § 3-304(a)(1).

2. The evidence was sufficient to support a finding that Mr. Friedman engaged in a sexual act or contact with K while she was "mentally incapacitated."

We turn *next* to whether there was sufficient evidence to support Mr. Friedman's second-degree rape conviction under CR § 3-304(a)(2) and his third-degree sexual offense conviction under CR § 3-307(a)(2). We hold that there was. K testified that while she was in Mr. Friedman's basement, she was "lifeless" and "couldn't feel anything." She also stated that she started coming "in and out," a sensation she described as being "aware and then all of a sudden not aware." Moreover, K testified that she could not push Mr. Friedman away or tell him to stop his sexual advances because "[she] was so intoxicated and [she] kept coming in and out" and "wasn't able to move barely."

The court found that the videos K recorded after the incident "corroborate[d] her level of intoxication," noting that K's pupils were dilated, she was slurring her words, her cheeks were flushed, she was singing some phrase over and over, and "[s]he appear[ed] incoherent." In light of the evidence, the court found that "because of [K's] intoxicated state, she was mentally incapacitated to the point that she was substantially unable to understand the nature of her conduct and that she was in and out of what was happening to her at the hands of [Mr. Friedman]." Further, the court had "no doubt in [its] mind that [K] was intoxicated to the point that any reasonable person would know that she was not

mentally capable of consenting to anything, let alone a sexual act." We see no clear error in the court's findings.

Mr. Friedman counters that the "factfinder should have drawn the opposite conclusion," based on K's "ability to use her phone to record videos . . . ," her ability "to recall with substantial clarity the makeup of Mr. Friedman's basement," and her ability to "leave the house in a hurried fashion once Mr. Friedman's family arrive[d]." But Mr. Friedman's argument urges us to re-weigh the evidence and draw a different inference than the factfinder, and "[t]he factfinding job has already been done by someone else." *Travis*, 218 Md. App. at 423. And "'we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence.'" *Mayers*, 417 Md. at 466 (*quoting Smith v. State*, 415 Md. 174, 185 (2010)).

B. There Was Sufficient Evidence To Support Separate Convictions For Second-Degree Rape And Third-Degree Sex Offense.

Second, Mr. Friedman contends that "the [c]ourt found no act, independent of the acts of second-degree rape, to satisfy the third-degree sex offense charge." He argues that his third-degree sex offense conviction should therefore be vacated or merged with his second-degree rape conviction because "the [c]ourt failed to differentiate which act or acts distinctly made up the sexual contact prong of third-degree sex offense." The State responds that the evidence was sufficient to show that Mr. Friedman committed two acts that would support the convictions separately and that the court was not required to enunciate which acts supported the distinct convictions. The State is right.

Before convicting Mr. Friedman of any charges, the court recounted the evidence at length and stated its factual findings on the record. In doing so, the court stated separate findings that Mr. Friedman "digitally penetrated" and "performed cunnilingus" on K without her consent:

> [The court] found [K]'s testimony credible. That while in the basement, [Mr. Friedman] touched her. He kissed her. He performed cunnilingus, and digitally penetrated her. And at the time that it happened, she did not consent.

After finding that Mr. Friedman committed two separate sexual acts, the court convicted Mr. Friedman of both second-degree rape and third-degree sexual offense, although it did not specify which sexual act supported each conviction:

> Therefore, based on my evaluation of the evidence, this [c]ourt finds that the State has proven, beyond a reasonable doubt, [Mr. Friedman] guilty of second-degree rape.
>
> On the charge of third-degree sex offense, the State has also proven beyond a reasonable doubt, based on my previous assessment of the evidence, [Mr. Friedman] had sexual contact, which means he intentionally touched the genital area of [K] for the purpose of sexual arousal or gratification.
>
> As noted previously, [K] was mentally incapacitated at the time of the act and [Mr. Friedman] knew or reasonably should have known of her condition.

At the threshold, we note that a court sitting without a jury "is not required to explain its reasoning in arriving at the verdict. The verdict is permitted to speak for itself." *Chisum v. State*, 227 Md. App. 118, 139 (2016); Md. Rule 4-328 ("[A] circuit court sitting without a jury shall render a verdict upon the facts and the law. Although not required, the court may state the grounds for its decision either in open court or by written memorandum."). But the court's rationale for a conviction must be "readily apparent." *Cortez v. State*, 104

Md. App. 358, 368 (1995). If the record is unclear as to whether a defendant's convictions were based on separate acts, we resolve the ambiguity in favor of the defendant and merge the convictions. *Id.* at 366–68 (battery conviction merged into fourth-degree sexual offense conviction where it was unclear "whether grabbing the victim and holding her down in order to fondle her breasts was a separate and distinct battery from the sexual conduct of touching her breasts"); *Snowden v. State*, 321 Md. 612, 619 (1991) (assault and battery conviction merged into robbery conviction where there was an ambiguity as to whether the defendant's act of shooting a victim before beginning a robbery constituted a separate battery or was a lesser included offense of the robbery conviction).

This case presents no such ambiguity. The court found expressly that Mr. Friedman committed two separate and distinct acts: cunnilingus and digital penetration. Either act could satisfy the "sexual act" element for a second-degree rape conviction as well as the "sexual contact" element for a third-degree sexual offense conviction. CR § 3-301(d) & (e). We can ascertain from the record that the convictions at issue were supported by separate acts, and the court's rationale for the convictions is "readily apparent." *Cortez*, 104 Md. App. at 369 (A merger "can be avoided in a case in which separate convictions and sentences might be sustainable on the evidence. In a bench trial, the solution is simple: the trial judge need only articulate for the record the basis for the dual verdicts, stating the separate acts justifying both convictions.").

C. Mr. Friedman's Challenge To His Sentence Is Not Preserved For Appellate Review.

Mr. Friedman argues *third* that the court relied on an "incorrect and inflated" computation of the sentencing guidelines because it added a point to Mr. Friedman's offense score based on an erroneous assumption that K had suffered a psychological injury. The State counters that Mr. Friedman's challenge fails because it is unpreserved, and that even if the court calculated the sentencing guidelines improperly, "nothing about the trial court's sentence was illegal or improper." We agree with the State that Mr. Friedman's challenge is unpreserved.

During the sentencing hearing, Mr. Friedman stated that he had "a little issue" with the offense score used to compute the guideline range, but conceded that the "guideline range is probably correct:"

> With regard to the guideline range, I have a little issue with the offense score. There's no physical injury in this case, but there certainly would seem to be some emotional and mental health injuries. I assume the court has assumed that that would be an injury under the guideline. So I'm assuming that's why the State pursued that at one point.
>
> . . . So, I think the guideline range is probably correct, as well.

We are not persuaded that Mr. Friedman's statements amounted to an objection to the guideline range at all, let alone an objection that articulated the argument he raises on appeal. Mr. Friedman argues before us that the court's assumption that K suffered a psychological injury "ma[de] the computation of [his] guidelines highly suspect—indeed incorrect." But at the sentencing hearing, he argued (or acknowledged, rather) that "there certainly would seem to be some emotional and mental health injuries" to K and "the

guideline range is probably correct." The purpose of the preservation rule is "so that the trial court can pass upon, and possibly correct any errors in the proceedings." *Bryant v. State*, 436 Md. 653, 659 (2014) (cleaned up). Mr. Friedman's comments did not allege that the guideline range was incorrect and consequently, so the court never had a chance to correct it (if there was any correcting to do). *See* Md. Rule 8-131(a) (an issue is not preserved for appellate review "unless it plainly appears by the record to have been raised in or decided by the trial court."); *Bryant*, 436 Md. at 660 ("[C]hallenges to sentencing determinations are generally waived if not raised during the sentencing proceeding.").

Maryland Rule 8-131(a) acknowledges our discretion to address an unpreserved issue, but we exercise that discretion "rarely" and "only when doing so furthers, rather than undermines, the purposes of the rule." *Robinson v. State*, 410 Md. 91, 104 (2009). And even if we were to address this unpreserved issue, it would not be "an impermissible consideration, within the contemplation of our cases, for a trial judge not to apply the Guidelines, or to apply them improperly" because "[n]othing in the law requires that Guidelines sentences or principles be applied." *Teasley v. State*, 298 Md. 364, 370–71 (1984).

D. The Court Did Not Err In Excluding Cross-Examination On K's Google Search About The Age Of Consent.

Fourth, Mr. Friedman argues that "[t]he trial court erred in not allowing testimony about [K]'s internet search about the age of consent." The State responds that Mr. Friedman's argument is not preserved because he "intentionally abandoned" any argument that the testimony was excluded erroneously. Further, the State argues that even if Mr.

Friedman's argument was preserved, the court did not abuse its discretion in excluding the testimony because the information was irrelevant.

We begin by assessing whether Mr. Friedman waived appellate review of this issue. During the cross-examination of K, defense counsel inquired as to K's alleged Google search of the age of consent to sex. The State objected, arguing that the line of questioning violated the "rape shield law." But the court sustained the objection on relevance grounds instead:

> THE COURT: Well, why is that relevant?
>
> [COUNSEL FOR MR. FRIEDMAN:] Because I think it's interesting a person checks to see when they can have sex when they're 15.
>
> [THE STATE:] I think the purpose is to get into the implication that the rape shield law is designed to prevent.
>
> THE COURT: I don't know why it would be relevant here, whether or not a few months before she spoke to him she checked to see consent, like I'm not sure if you could tie that in why that would be relevant as to what happened on February 18th.
>
> [COUNSEL FOR MR. FRIEDMAN:] Well, where I'm going with all this is I think she's becoming involved with this guy, and one of the thing[s] she does, because she's getting involved with this guy, is to find out when she can have sex.
>
> THE COURT: Well she's already 16, right?
>
> [COUNSEL FOR MR. FRIEDMAN:] You're right.
>
> THE COURT: Okay. So I don't find it's relevant.
>
> [COUNSEL FOR MR. FRIEDMAN:] Withdrawn.

The State contends that "[b]y telling the trial judge 'You're right' and then affirmatively withdrawing the proposed question, [Mr.] Friedman intentionally abandoned any claim that the proposed question was proper or relevant." We disagree.

It's true that "a party who validly waives a right may not complain on appeal that the court erred in denying him the right he waived." *Brockington v. Grimstead*, 176 Md. App. 327, 355 (2007), *aff'd*, 417 Md. 332 (2010); *Simms v. State*, 240 Md. App. 606, 617 (2019) ("[W]here a party acquiesces in a court's ruling, there is no basis for appeal from that ruling."). But under the circumstances here, Mr. Friedman didn't waive his argument that his proposed question was relevant. When Mr. Friedman stated, "[y]ou're right," he was replying to a specific question that the court asked him—whether it was correct that K was sixteen years old. In agreeing with the court's statement, Mr. Friedman did nothing more than acknowledge that K was sixteen years old; he was not, as the State implies, validating the court's position on the relevance of the question in a general sense. *See Sharp v. State*, 446 Md. 669, 684 (2016) (defendant did not waive appellate review of his contention that the sentencing court considered impermissibly his decision to plead not guilty even though defendant stated, "I would agree" in response to the court's statement that pleading guilty would have spared the State the risk of trial).

Moreover, and contrary to the State's argument, we don't see Mr. Friedman's withdrawal of the question as a forfeiture of his claim that the question was relevant. Mr. Friedman withdrew his question only after the court made its ruling that the question sought irrelevant information. He had made his argument for relevance known to the court and upon receiving an unfavorable ruling on the issue, he moved on. That was not a waiver of appellate review of his argument. Md. Rule 4-323(c) ("[I]t is sufficient that a party, at the

time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take . . . .").

On the merits, the question is whether the circuit court abused its discretion in preventing Mr. Friedman from cross-examining K about her alleged internet search as to the age of consent to sex. "A trial court does not abuse that discretion when it excludes cross-examination that is irrelevant." *Simmons v. State*, 392 Md. 279, 296 (2006). "The threshold question, therefore, is 'whether the evidence is legally relevant.'" *Calloway v. State*, 258 Md. App. 198, 216 (2023) (*quoting State v. Simms*, 420 Md. 705, 725 (2011). "We review that question *de novo*." *Id.*

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." Md. Rule 5-401. When asked why his proposed question was relevant, Mr. Friedman stated "I think it's interesting a person checks to see when they can have sex when they're 15." After further discussion with the court, he added that K was "becoming involved with [him], and one of the thing[s] she does, because she's getting involved with [him], is to find out when she can have sex."

Mr. Friedman's argument does not hold up, however, because the record reflects that K conducted the internet search before she ever met Mr. Friedman. K testified that she was sixteen years old at the time of the incident in February 2022 and that her birthday had been about nine months earlier, in May. She testified as well that she had known Mr. Friedman for about six months at the time of the incident, meaning that she had only known

Mr. Friedman as a sixteen-year-old. But as Mr. Friedman acknowledged, K conducted the alleged search when she was fifteen years old. Mr. Friedman's theory, then, that K conducted the internet search because she was "becoming involved with [him]" and wanted to "find out when she can have sex" with him falls apart because the evidence shows that K did not know Mr. Friedman when she conducted the search. We agree with the circuit court that the alleged search was not relevant in this case and the court did not abuse its discretion in preventing questioning about it.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. APPELLANT TO PAY COSTS.