Circuit Court for Montgomery County
Case No.: 130232

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1062

September Term, 2017

ANDRE MARQUIS HOWARD

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon. J.

Filed: April 18, 2019

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

Appellant, Andre Marquis Howard, was indicted in the Circuit Court for Montgomery County, Maryland, and charged with second degree rape. Following a jury trial, appellant was convicted of second degree rape and sentenced to twenty (20) years' incarceration, with all but seven (7) years suspended. Appellant timely appealed and presents the following questions for our review:

> 1. Did the trial judge abuse her discretion by allowing into evidence State's Exhibit #5, medical records?
>
> 2. Did the trial judge err or abuse her discretion by admitting hearsay during the testimony of Officer Stefanie Hesse?
>
> 3. Is the evidence legally insufficient to sustain Mr. Howard's conviction of rape in the second degree?

For the following reasons, we shall affirm.

BACKGROUND

During most of 2015 and part of 2016, Ms. W. lived in the upstairs bedroom of a Germantown, Maryland townhome shared with her friend, Allison Howard, and Allison Howard's husband, the appellant.[1] The Howards occupied the basement level. On Thursday, March 10, 2016, the night before her 25th birthday, Ms. W. and the Howards began drinking after work in their shared living room. Ms. W. drank several glasses of wine, and, all three individuals enjoyed shots of a rum-flavored juice drink, called "jungle juice." After several hours, Ms. W. passed out on the living room couch, wearing pants and underwear, as well as a blue blouse and a thin camisole undershirt.

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[1] It is unnecessary to name the victim in this case. *See Hajireen v. State*, 203 Md. App. 537, 540 n.1, *cert. denied*, 429 Md. 306 (2012).

Ms. W. testified that the next thing she remembered was waking up in her bed, in pain, with the appellant's penis in her vagina. Ms. W. was confused and disoriented when she looked up to see appellant straddling her. She was wearing nothing but her undershirt. After then saying appellant's name "like a question," the appellant turned her over and penetrated her vagina again while she lay on her stomach. According to Ms. W.'s testimony, she then passed out again.

Ms. W. remembered waking the next morning and heard the appellant calling her name from downstairs to tell her she was late for her work. Although she remained confused about the preceding events, Ms. W. got dressed and went to her teaching job at a nearby school.

When she arrived late, Ms. W. was greeted by her director. The director looked at her and asked her "what's wrong[?]" Ms. W. asked her if she could use her office for a minute. When her director agreed, Ms. W. went into the office alone and started to cry. The director then came into the office where Ms. W. confided to her that the appellant raped her the prior evening.

After a brief conversation, the director left the office, and Ms. W. called Allison Howard and told her that her husband, the appellant, raped her. Mrs. Howard "cried and said I'm sorry." Ms. W. then went to her classroom, where she encountered another teacher. After also informing this person that she had been raped, Ms. W. gathered her belongings and left the school for the day.

Next, Ms. W. called her mother, with the intent of telling her about the rape. But when her mother told her she was no longer included on her health insurance policy, Ms. W. decided not to tell her about the rape, and decided not to go to the hospital because she could not afford it.

Ms. W. then went back home to the Germantown townhome. Her sister, Molly, arrived soon thereafter from Delaware, with plans to stay overnight for a previously planned birthday party the next day. After she told her sister about the rape, they stayed in her bedroom, with the door locked.[2]

The next morning, a Saturday, Ms. W. contacted the Victim's Assistance Sexual Assault Program, and then went to Shady Grove Adventist Hospital, where she was examined over the course of several hours by a sexual assault nurse. Ms. W. told the nurse details about the incident, and also brought along her underwear and a bed sheet. She testified that she had not shared any details about the incident with anyone prior to this.

Several hours later, Ms. W. and her sister returned to the townhome for her birthday party. Testifying that she did not want to disinvite her friends and then have to give them an explanation, Ms. W. went ahead with the party. She agreed that appellant was in attendance. Ms. W. testified that she did not discuss the incident with appellant because she feared some sort of retaliation, either from him or his friends.

[2] Molly W., Ms. W.'s sister, confirmed that Ms. W. told her that appellant raped her the night before. She also testified that Ms. W. was "very upset" but was "putting on a front" for the sake of the birthday party.

After spending the next day, Sunday, in her bedroom, Ms. W. went to work Monday morning. During a break, she left and met Allison Howard at the courthouse. Without testifying what occurred at the courthouse, Ms. W. agreed that the appellant moved out of the townhome that same day. Ms. W. moved out two to three months later.

Ms. W. explained that she remained in the townhome because she believed she was required to honor her lease, which did not expire until March of 2017. Nevertheless, after she got a peace order against appellant, and explained the circumstances to her landlord, the landlord allowed her to terminate the lease and move out in June 2016. According to Ms. W., it was at that point that she filed a report of the rape with the police.

Ms. W. testified that, from the time appellant moved out in March until she reported the rape to the police, the appellant was in contact with her via text messages.[3] Ms. W. remembered appellant just saying "he was sorry for what happened." She further testified that appellant contacted her on several more occasions, but she did not find the exchanges "helpful" and that she informed him that "[t]here is nothing that you can say to me. I'm not pursuing a friendship."

On cross-examination, Ms. W. agreed that, in addition to drinking wine and "jungle juice" on the night in question, she also smoked marijuana. She testified that she did not remember if she removed her clothing before she fell asleep on the couch. She also did not remember how she got to her bedroom, and agreed that she had never testified that appellant carried her.

[3] Photographs of some of these text messages were admitted into evidence.

Ms. W. also agreed that, although she told Allison Howard and several others about the rape on the morning following the occurrence, she did not call the police until approximately two to three months later, in late May or early June. Defense counsel emphasized in his cross-examination that Ms. W. did not call the police when she went to work; she did not call them when she stayed in the townhome Friday night; and, she went to the hospital Saturday morning for several hours before returning to the townhome for her birthday party and did not call the police.

Ms. W. was then asked, on further cross-examination, about her report to the police, and testified as follows:

> Q. And didn't you inform the police that you now wanted to go forward on May 25th?
>
> A. I don't remember if that is the date I reported it. I thought it was in June. But at the time of reporting, I told them I did not want to move forward until I moved.
>
> Q. Well, didn't you tell them you didn't want to go forward to Detective Hesse at this time?
>
> A. In speaking with Hesse?
>
> Q. Yeah.
>
> A. Yes. I did say I did not want to go forward at that time.
>
> Q. Are you telling me you told Detective Hesse you didn't want to go forward and actually told her that you didn't want to go forward because you didn't want – you had nowhere to move?
>
> A. I believe at the time yes. I didn't have anywhere that I was moving to.
>
> Q. Did you tell Detective Hesse about not wanting to go forward until you had a place to move?

A. Yes.

During cross-examination, Ms. W. was again asked about her memory about coming upstairs and agreed she did not remember what happened between falling asleep on the couch and waking up. Defense counsel then asked "You can't remember whether you said yes or no. Can you?" to which Ms. W. replied "I don't remember any conversation."

Asked about the exchange of text messages between herself and appellant, Ms. W. denied threatening appellant in those exchanges, but acknowledged that she was "near or around him" prior to vacating the townhouse. In fact, Ms. W. acknowledged that appellant moved into the townhome next door and that she saw him at a party after the incident, and also while the two were walking their dogs in the neighborhood.

On redirect examination, Ms. W. addressed the peace order she obtained against appellant, testifying that it was never served. Asked why she got a peace order, Ms. W. testified that "I think I distinctly remember saying I am afraid and want a protective order because I'm going to move forward with this and I wanted that in place first." She agreed, however, that appellant never "attacked" her during this time frame.

Sid Sutsakhan testified that he was the forensic nurse that examined Ms. W. at Shady Grove Adventist Hospital on March 12, 2016 at around 11:00 a.m. Sutsakhan explained that, when he met her, he gave her three options:

> Option one consists of just undergoing medical treatment. Option two is where the patient wants medical treatment and then wants the evidence collected as a Jane Doe. And then option three is where the patient gets

> medical treatment and then the evidence is collected as what we call standard reporting where the police and investigation is involved.

Ms. W. chose option two. Sutsakhan wrote down her medical history in what was identified at trial as State's Exhibit #5. He testified that Ms. W. told him that "she was having drinks earlier that evening. She does not recall going to the bedroom. But then she woke up to the feeling that someone is penetrating her and somebody was on top of her." Ms. W. told Sutsakhan that appellant's penis was penetrating her. The State then moved to admit State's Exhibit #5, and, as will be discussed in more detail, the report was admitted over defense counsel's objection.

Sutsakhan then testified, without objection, to the details contained in the report. He testified that Ms. W. was "crying" and "distraught" while she recounted the incident, and seemed "shocked" and in "disbelief." Sutsakhan further testified that she told him that "[s]he woke up in pain and the penis was penetrating her." She also complained that she was sore in her genital area. Sutsakhan documented a number of injuries to Ms. W.'s body, including redness and inflammation in her vaginal area. DNA evidence was also collected from Ms. W.'s vagina. Sutsakhan testified that Ms. W.'s injuries were "consistent with trauma associated with sexual assault."

Montgomery County Police Officer Stefanie Hesse met with Ms. W. on May 25, 2016 at the Germantown police station. Ms. W. informed Officer Hesse that appellant raped her after a night of drinking in their townhome on March 11, 2016. Ms. W. indicated that she passed out in the living room, then woke in her bedroom to find appellant on top

of her having sexual intercourse. Ms. W. did not want to pursue charges at that time, wanting first to move from the townhouse to feel safer.

Ms. W. eventually contacted Officer Hesse again on June 7, 2016 and indicated that she wanted to bring charges against appellant. Officer Hesse attempted to arrange a controlled phone call between appellant and Ms. W., but those attempts were unsuccessful.

Officer Hesse obtained the results of Ms. W.'s sexual assault examination from March 12, 2016. Those results were subsequently compared against appellant's known DNA profile. As a result of that comparison, the parties stipulated at trial that "the defendant's[,] Andre Howard, DNA was found inside [Ms. W.'s] vagina on March 12, 2016."

Officer Hesse interviewed appellant on June 23, 2016 at the Germantown Police Station. After appellant waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), appellant spoke with the officer and the interview was video and audio recorded. That taped interview was played for the jury at trial.

During the interview, appellant stated that, after Ms. W. took off her shirt and passed out on the living room couch, he went downstairs with his wife. Later, when he returned to the living room and saw Ms. W. on the couch, he tried to wake her by shaking her but she "wouldn't wake up." And, when she eventually did wake and stand up, she "couldn't walk." He agreed with the detective that Ms. W. was "really trashed."

He then assisted Ms. W. up the stairs, noting that she was holding on to the railing and was "swaying" and "wobbly." He admitted that he had to keep his hands on her the

entire way up the stairs so that she would not fall down. He reiterated this account during trial.

Once up the stairs at the threshold of her bedroom, Ms. W. took off her pants, and pulled him into her bedroom. He agreed that they then had sexual intercourse "and it wasn't forced." He remembered turning her over at one point, and remembered Ms. W. calling out his name. He then realized that "this is not right," and left the room.

Appellant called Allison Howard to the stand. Ms. Howard agreed that she, appellant and Ms. W. drank on the night of March 10, 2016, until 1:00 or 2:00 a.m. on March 11, 2016. Towards the end of the evening, Ms. W. took off her shirt, wearing just her bra, and fell asleep on the living room couch.[4] At that point, Ms. Howard and appellant retired to their basement bedroom. Ms. Howard did not find out about the incident until the next day when Ms. W. called her.

Ms. Howard also testified that, after appellant moved out, Ms. W. held parties at the residence. Ms. Howard identified a photograph of one such occasion, taken on June 11, 2016 after the alleged rape, that showed both appellant and Ms. W. in close proximity to one another. Ms. Howard saw Ms. W. speak to appellant at that time.

On cross-examination, Ms. Howard agreed that, she and appellant had an argument after Ms. W. passed out on the couch. The argument occurred in their bedroom after appellant tried to "initiate sex" with Ms. Howard, and she declined.

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[4] Ms. Howard maintained that Ms. W. was wearing only a bra at that time, and not a camisole.

Ms. Howard confirmed that when she spoke to Ms. W. the next day on the phone, Ms. W. was upset and crying. According to Ms. Howard, Ms. W. apologized because she and appellant had sexual intercourse. Ms. Howard agreed that she suggested that Ms. W. continue with her plans for her birthday party that weekend, despite the incident. And, she also testified that Ms. W. did not want to file charges until she was sure that appellant had moved from the townhome. In fact, Ms. Howard also obtained a protective order against appellant but claimed that she did so after Ms. W. threatened to have appellant arrested unless she obtained a protective order.

Appellant testified on his own behalf, indicating that the three roommates were drinking and smoking marijuana on the night in question. At around 1:00 or 2:00 a.m., shortly after Ms. W. removed her shirt and passed out on the living room couch, appellant and Ms. Howard went downstairs. After the couple got into an argument, Ms. Howard decided to sleep on a couch downstairs. Appellant went back upstairs to get a drink of water.

Noticing that Ms. W. was still on the living room couch, he woke her and assisted her up the stairs to her bedroom. According to appellant's testimony, when they reached Ms. W.'s bedroom, she pulled down her pants, grabbed him, and then fell onto the bed. Appellant claimed that Ms. W. was touching him and "moaning my name," and so he engaged in sexual intercourse with her. When she again said his name during the encounter, he became startled, ended the intercourse, and left Ms. W.'s bedroom. He testified that she was conscious when he left the room.

Appellant agreed he had to move out of the townhome shortly after the incident, but maintained contact with Ms. W. via text message. He denied that he ever admitted raping her in those messages. He explained that, when he texted her that something was "wrong," he was referring to cheating on his wife. He also testified that he saw Ms. W. a few weeks later at a neighborhood party, and that Ms. W. came over to speak to him.

On cross-examination, appellant agreed that he tried to have sex with his wife before this incident but she declined his invitation. He also agreed that when he helped Ms. W. up the stairs, he was holding her around her hip area.

Appellant testified that when Ms. W. pulled her pants and her underwear down, just outside her bedroom, he thought this was an "invitation" for sexual intercourse. And, claiming that Ms. W's legs were "open" and she was "moaning" "sexually-wise" when she fell onto the bed, appellant testified that "that was the invitation I thought for me to go in there, I was wrong, and started to have sex with her." Appellant denied that he went upstairs planning to have sex with Ms. W.

Appellant further explained that when Ms. W. said his name, he realized "I was doing something wrong. I was messing with, you know, my wife and having, I guess an affair or cheating." He testified, "[w]hen I was hitting it from the back, she said my name and that's when I left." Appellant maintained that the intercourse was consensual and that he was concerned about his wife finding out.

Appellant and Ms. W. exchanged text messages around March 20, 2016, and appellant agreed that, as part of that conversation, he wrote "I'm so sorry for what happened

that night and I did not mean for it to happen." He denied that he ever admitted raping Ms. W.

We shall include additional detail as needed to answer the questions presented.

DISCUSSION

I.

Appellant first contends that the court erred in admitting State's Exhibit #5, Ms. W.'s medical records taken during the sexual assault exam, because the evidence was cumulative of both Ms. W.'s and the nurse's testimony under Maryland Rule 5-403. The State responds that, at trial, the only objection was that the report was cumulative of the nurse's testimony, therefore, the claim is unpreserved as to Ms. W.'s testimony. Even if preserved, the State continues, the trial court properly exercised its discretion in admitting the report and its admission was harmless in any event.

When the State sought to admit State's Exhibit #5, the following exchange occurred:

> [DEFENSE COUNSEL]: I object to that – first of all he is not the records custodian at Shady Grove Adventist Hospital. Number two, the records are full of references to all kinds of scientific terms and phraseology that the jurors are not going to understand. And he has also testified to the salient points of the report. I think the admission of the report is cumulative.
>
> THE COURT: How do these come in at this point?
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> [PROSECUTOR]: Well, they are certified business records that we filed. He admitted under the hearsay exception for such records.
>
> THE COURT: I thought you said that they were not.
>
> [DEFENSE COUNSEL]: I haven't seen anything that said they were certified yet.

[PROSECUTOR]: There is a certification on the front page and they were provided in discovery to [defense counsel].

THE COURT: Can I see those please? Why would these not then qualify, at least from an authenticity perspective –

[DEFENSE COUNSEL]: They would, Your Honor.

THE COURT: -- as a self-authenticating document?

[DEFENSE COUNSEL]: They would.

THE COURT: Okay.

[DEFENSE COUNSEL]: Then you go to another argument.

THE COURT: Okay. What is the other argument?

[DEFENSE COUNSEL]: The other argument is the argument we have with experts all the time or ones that she has already admitted as a forensic nurse. She is – this document is cumulative. She has already asked him about what he did and what he found and her comments and quotes. There is no purpose in giving the jury just the entire document . . . without the proper explanation all these documents.

It doesn't mean they are not authenticated. I just don't think they are probative to the case. They are just being given as a way to – you know I don't know what benefit the jury will get from reading such a report when she already brought out the points which she thought was important. So to me it's cumulative. It's like an orthopedic report being admitted after the orthopedic has already testified as to this to a reasonable degree of medical probability whether or not he has done something.

THE COURT: Okay. If the basis for the objection is that they are cumulative –

[DEFENSE COUNSEL]: Now, they're cumulative.

THE COURT: I mean there is far more in here than what he has simply said. So on that basis the objection is overruled.

We agree with the State that defense counsel's objection was that the report was cumulative of the nurse's testimony. To the extent that appellant now contends that the

evidence was cumulative of Ms. W.'s testimony, that ground was not adequately preserved. *See Perry v. State*, 229 Md. App. 687, 709 (2016) ("[W]here an appellant states specific grounds when objecting to evidence at trial, the appellant has forfeited all other grounds for objection on appeal") (citing *Klauenberg v. State*, 355 Md. 528, 541 (1999)), *cert. dismissed*, 453 Md. 25 (2017).

That being said, our analysis of the merits would be the same even if it were preserved. "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." *Perry v. Asphalt & Concrete Services, Inc.*, 447 Md. 31, 48 (2016) (quotation marks and citation omitted). We note that appellant is not challenging admission of the report on the grounds of authentication or hearsay, as the law on admission of certified hospital records under such claims is clear. *See State v. Bryant*, 361 Md. 420, 428 (2000) (concerning self-authentication of medical records under Md. Rule 5-902(b)); *see also State v. Coates*, 405 Md. 131, 141-42 (2008) (concerning the medical treatment exception to the rule against hearsay under Md. Rule 5-803(b)(4)); *Hall v. University of Maryland Medical System Corp.*, 398 Md. 67, 88-90, 93-95 (2007) (addressing admission of hospital records under the business records exception set forth in Md. Rule 5-803(b)(6)).

Instead, appellant's argument concerns Maryland Rule 5-403, whether the evidence should have been excluded because it was cumulative of other evidence admitted at trial. "Generally, in order for evidence to be admissible, it must be relevant." *Thomas v. State*,

429 Md. 85, 95 (2012). "Pursuant to 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.'" *Id.* at 95-96.

Even if the proffered evidence was relevant, that would not prevent exclusion:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Maryland Rule 5-403; *see Decker v. State*, 408 Md. 631, 640 (2009) ("Relevant evidence may be excluded, however, if it is unfairly prejudicial, confusing to the fact finder, or a waste of time"). Further:

> When weighing the probative value of proffered evidence against its potentially prejudicial nature, a court abuses its discretion "where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Webster v. State*, 221 Md. App. 100, 112, 108 A.3d 480 (2015) (citations and quotation marks omitted). For the court to have abused its discretion, "[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *King v. State*, 407 Md. 682, 697, 967 A.2d 790 (2009). The decision "will not be reversed simply because the appellate court would not have made the same ruling." *Id.*

Williams v. State, 232 Md. App. 342, 355-56 (2017), *aff'd*, 457 Md. 551 (2018).

It is certainly true that a trial court has the discretion to exclude needlessly cumulative evidence. *See Merzbacher v. State*, 346 Md. 391, 414-15 (1997) ("A trial judge always acts within his or her discretion by prohibiting the introduction of relevant but otherwise cumulative evidence"); *Marshall v. State*, 174 Md. App. 572, 581 (stating that

trial court has discretion to exclude cumulative evidence pursuant to Md. Rule 5-403), *cert. denied*, 399 Md. 596 (2007). The State asserts that the evidence in the medical report was not needlessly cumulative. We agree. The medical report includes statements from the victim indicating that appellant grabbed her arm and that she may have scratched him. It also included detailed information about the victim's genital examination and other physical injuries. The report also included a written narrative history which indicated that the victim pushed appellant and said his name, to no response. That same narrative further indicated that there may have been at least three penetrations of the victim's vagina during the incident. In addition, the report included the victim's stated reason for not contacting the police, that she was "afraid of him," that they were "kicking him out this weekend," and that "I am not confident that I have the evidence and he will tell me that I am crazy." The report also included information that appellant attempted to sexually assault Ms. Howard before he accosted Ms. W.

Ultimately, the issue of whether the report was cumulative was properly left to the trial judge's sound discretion. As the Court of Appeals has explained:

> [A] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. That kind of distance can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective. That, we think, is included within the notion of "untenable grounds," "violative of fact and logic," and "against the logic and effect of facts and inferences before the court."

McLennan v. State, 418 Md. 335, 353-54 (2011) (additional citations omitted).

We are not persuaded that the trial court's decision strayed from the center mark of what we deem an acceptable exercise of discretion. Accordingly, we hold that the court did not err in admitting the medical report.

II.

Appellant next asserts that the court erred in allowing Officer Hesse to repeat the contents of the victim's statement made during the interview she conducted two months after the rape because it was inadmissible hearsay. The State responds that the issue is unpreserved inasmuch as immediately before any defense objection, Officer Hesse testified to the same matter. As to the merits, the State argues that the victim's statement was admissible as a prompt complaint of sexually assaultive behavior, or, in the alternative, as non-hearsay to show the subsequent course of the police investigation. The State also contends that any preserved error in the statement's admission was harmless beyond a reasonable doubt because it was cumulative of other evidence that was properly admitted.

Pertinent to our discussion is the following testimony from Officer Hesse's direct examination:

> Q. How long did you speak to her?
>
> A. I spoke to her for about an hour, a recorded interview with her where she described to me that she was the victim of a rape by an unknown [sic] suspect within her own residence.
>
> Q. And who did she identify that person to be?
>
> A. She identified that person to be a Mr. Andre Howard who happened to be a roommate of hers at the same residence.
>
> Q. Okay. And did she indicate to you what happened in that incident?

A. Yes. She advised me that after a night of drinking with the suspect, Mr. Andre Howard, herself and Mr. Andre Howard's wife –

[DEFENSE COUNSEL]: Objection, Your Honor. That's hearsay. She's given – sorry. Your Honor.

THE COURT: The objection is overruled.

BY [PROSECUTOR]:

Q. Go ahead.

A. She had been drinking with Mr. Andre Howard, his wife Ms. Allison Howard at their residence the night before [Ms. W.'s] birthday. At some point in time she had passed out due to the alcohol consumption and she had woken up to Mr. Andre Howard having sexual intercourse with her to which she woke to a brief period and then passed out again. Unsure if she [sic] continued raping her or if he had stopped at that point.

Q. Okay. Did she indicate to you the date of this incident?

A. Yes. She advised me that it happened in the early morning of March 12. I'm sorry. March 11, 2016.

Q. Okay. And when she was relating to you what happened that night, meaning the portion that she remembered regarding the rape, did she tell you where that was?

A. She advised that although she had passed out on [the] couch in the living room she recalled waking up in her own bed with Mr. Andre Howard on top of her already having sexual intercourse with her.

Q. Okay. Did you – okay. At the time that you spoke to [Ms. W.] on May 25th – is that right?

A. Correct.

Q. Of 2016?

A. Correct.

Q. Did she want to go forward with pressing charges against the defendant?

> A. No. She advised me towards the end of the interview that she did not want to go forward at that time because she wanted to move and ultimately she indicated that she wanted to feel more safe in her location prior to moving forward with the investigation and criminal charges.

Maryland Rule 4-323(a) provides, in part, that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." "[I]t is fundamental that a party opposing the admission of evidence must object at the time that evidence is offered." *Klauenberg*, 355 Md. at 545. The case of *Williams v. State*, 99 Md. App. 711 (1994), *aff'd*, 344 Md. 358 (1996), is instructive. There, the appellant contended that the trial court erred in permitting evidence of appellant's post-arrest, pre-*Miranda* silence. *Williams*, 99 Md. App. at 716. This Court concluded the issue was not preserved based on the following exchange:

> [Prosecutor]: Did you tell the police officers that Miss Jones could vouch for your whereabouts?
>
> [Appellant]: No, I haven't. I told my lawyer.
>
> [Prosecutor]: Did you tell the State's Attorney's Office?
>
> [Appellant]: No.
>
> [Defense Counsel]: Objection, Your Honor; the defendant has no necessity of talking to the police or the State.
>
> The Court: I realize that. The objection is overruled.

Id. at 716-17.

We observed that appellant failed to object after the first question on the subject was asked and failed to timely object after the second question was asked. *Id*. at 717. We then cited *Bruce v. State*, 328 Md. 594, 628-29 (1992), noting "the preservation requirements

for this sort of objection are very strict," and that "if the objectionable nature of the question is clear, the objection must be immediately forthcoming before the answer is given." *Williams*, 99 Md. App. at 717. *See also Prince v. State*, 216 Md. App. 178, 194 ("[T]he objection must come quickly enough to allow the trial court to prevent mistakes or cure them in real time . . ."), *cert. denied*, 438 Md. 741 (2014).

Here, prior to any defense objection, Officer Hesse testified that: (1) she spoke to the victim; (2) the victim said she was raped by a suspect in her own residence; and, (3) that person was the appellant. The defense failed to timely object to this testimony that concerned that same subject matter as that to which appellant now complains. The issue is therefore unpreserved. *See Benton v. State*, 224 Md. App. 612, 627 (2015) ("Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection" (quotation marks and citation omitted)). Moreover, after appellant's lone objection was overruled, counsel failed to object to a series of follow-up questions concerning what the victim told Officer Hesse that covered the same material as the objected to question. That too constituted a waiver. *Id.*[5]

[5] Although not raised by the parties, it appears that the statement objected to was admissible under Md. Rule 5-802.1(b) as a prior consistent statement because it tended to rehabilitate the witness after she was impeached during opening statement and cross-examination. *See* Md. Rule 5-802.1(b) (indicating that prior consistent statements by a testifying witness, who is subject to cross-examination, "if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive"); *see also Thomas v. State*, 429 Md. 85, 17 (2012) (recognizing that if a witness's "credibility has been attacked," a prior consistent statement may be introduced purely to rehabilitate the witness's credibility, pursuant to Md. Rule 5-616(c)(2), if the statement's having been made "detracts from the impeachment").

In any event, even if preserved, and even if the objection should have been sustained, we also agree with the State that Officer Hesse's testimony, recounting the victim's statement that the appellant raped her in her townhome, was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) ("[A]n error will be considered harmless if the appellate court is 'satisfied that there is no reasonable possibility that the evidence complained of - whether erroneously admitted or excluded - may have contributed to the rendition of the guilty verdict'") (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). Ms. W. testified and identified appellant, in court, as the man who raped her on the night in question. This evidence was also elicited during testimony from the sexual assault nurse and the victim's sister, prior to the same recitation by Officer Hesse. By that point, the evidence was cumulative, and any error was harmless beyond a reasonable doubt.

III.

Finally, appellant contends that the evidence was insufficient to sustain his conviction for second degree rape because the victim's story was inconsistent and because the State did not prove all the elements of the crime, specifically, that he knew that the victim was mentally incapacitated or physically helpless. The State responds that the latter argument is unpreserved and that both arguments are without merit in any event.

At the end of the State's case-in-chief, defense counsel moved for a judgment of acquittal, arguing only that the State "failed to establish the necessary elements of the crime. They've indicated pretty much – the State has failed to prove each and every element of the charge." The court denied the motion. The defense then called Allison

Howard and appellant to testify. Defense counsel renewed the motion at the close of all the evidence in the case, incorporating the earlier argument and adding the "State has failed to prove its case that at this stage that a reasonable juror couldn't make a decision. [The State has] not produced enough evidence so that a reasonable juror could actually make a decision[.]" That motion was denied as well.

At the time of the offense, Section 3-304 of the Criminal Law Article defined second degree rape as follows:

> A person may not engage in vaginal intercourse with another:
>
> (1) by force, or the threat of force, without the consent of another;
>
> (2) if the victim is a mentally defective 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 mentally defective individual, a mentally incapacitated individual, or a physically helpless individual; or
>
> (3) if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim.

Md. Code (2002, 2012 Repl. Vol.) § 3-304(a) of the Criminal Law Article ("Crim. Law")[6]

The State asserts that appellant did not properly preserve his argument that it failed to prove that he knew that Ms. W. was mentally incapacitated or physically helpless. "A

[6] Effective October 1, 2016, Chapter 633, Acts 2016, substituted "substantially cognitively impaired" for "mentally defective" twice in (a)(2). And, effective October 1, 2017, Chapters 161 and 162, Acts 2017, added "or a sexual act" in the introductory language of (a). There is no claim that Ms. W. was "mentally defective" under the 2016 statute in effect at the time of the crime, or "substantially cognitively impaired" under the statute as presently written.

criminal defendant who moves for judgment of acquittal is required by Md. Rule 4-324(a) to 'state with particularity all reasons why the motion should be granted[,]' and is not entitled to appellate review of reasons stated for the first time on appeal." *Starr v. State*, 405 Md. 293, 302 (2008) (quoting *State v. Lyles*, 308 Md. 129, 135 (1986)); *see also Montgomery v. State*, 206 Md. App. 357, 385-86 ("[A] motion which merely asserts that the evidence is insufficient to support a conviction, without specifying the deficiency, does not comply with [Md.] Rule [4-324(a),] and thus does not preserve the issue of sufficiency for appellate review") (quotation marks and citation omitted), *cert. denied*, 429 Md. 83 (2012). "This means that a defendant must 'argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient.'" *Poole v. State*, 207 Md. App. 614, 632 (2012) (quoting *Arthur v. State*, 420 Md. 512, 522 (2011)); *see also Kamara v. State*, 184 Md. App. 59, 73-74 (holding that argument that the State failed to prove an element of solicitation to murder was not preserved by motion that argued that there was not "enough evidence" of the crime and that the State failed to meet its burden of proof), *cert. denied*, 409 Md. 45 (2009).

Here, at the end of the State's case-in-chief, defense counsel argued that the State "failed to establish the necessary elements of the crime. They've indicated pretty much – the State has failed to prove each and every element of the charge." This argument was reincorporated at the close of the case. Although an argument can be made that this general argument was sufficient to alert the trial court to the issue presented, under the circumstances, we are persuaded that the appellant could have, and probably should have,

specified the parameters of the argument with more precision. Thus, we agree with the State that the issue concerning appellant's knowledge of the victim's mental incapacity and/or physical helplessness was not properly preserved under the rule.

Nevertheless, even if preserved, we also agree with the State that there was sufficient evidence to prove the elements of second degree rape. In considering such a challenge, we ask "'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.'" *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[W]e defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)), *cert. denied*, 448 Md. 726 (2016). We will not reverse a conviction on the evidence "'unless clearly erroneous.'" *Id.* (quoting *State v. Manion*, 442 Md. 419, 431 (2015)).

Furthermore, "[w]e defer to any possible reasonable inferences the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *State v. Mayers*, 417 Md. 449, 466 (2010); *accord Bible v. State*, 411 Md. 138, 156 (2009). A purpose of this rule is to give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."

Jackson, 443 U.S. at 319. Further, "[a] valid conviction may be based solely on circumstantial evidence." *Smith*, 374 Md. at 534. Additionally, "[w]eighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder." *Id.* at 533-34 (quotation marks and citation omitted); *accord Jefferson*, 194 Md. App. at 214; *see also Bible*, 411 Md. at 156 (stating "[the appellate court] 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" (citation omitted)); *Sifrit v. State*, 383 Md. 116, 135 (2004) (the jury is "free to believe some, all, or none of the evidence presented").

Md. Code (2002, 2012 Rep. Vol., 2018 Supp.), Crim. Law § 3-301 defines the pertinent terms as follows:

> (b) "Mentally incapacitated individual" means an individual who, because of the influence of a drug, narcotic, or intoxicating substance, or because of an act committed on the individual without the individual's consent or awareness, is rendered substantially incapable of:
>
> (1) appraising the nature of the individual's conduct; or
>
> (2) resisting vaginal intercourse, a sexual act, or sexual contact.
>
> (c) "Physically helpless individual" means an individual who:
>
> (1) is unconscious; or
>
> (2)(i) does not consent to vaginal intercourse, a sexual act, or sexual contact; and
>
> (ii) is physically unable to resist, or communicate unwillingness to submit to, vaginal intercourse, a sexual act, or sexual contact.

Crim. Law § 3-301.

The evidence established that Ms. W. was drinking prior to the incident and remembered falling asleep on the living room couch. The next thing she remembered was waking up with appellant's penis inside her vagina. A rational inference from her testimony was that she was unconscious when the penetration began. Moreover, appellant's statement to the police supported the conclusion that Ms. W. was under the influence of alcohol at the time of the sexual intercourse, and was substantially incapable of giving her consent at that time.

Our conclusion that the evidence was sufficient to show that Ms. W. was either mentally incapacitated and/or physically helpless is informed by *Cranford v. State*, 36 Md. App. 393 (1977). There, this Court affirmed a conviction under the felony murder rule where the evidence supported the conclusion that the crimes were committed during the perpetration or attempted perpetration of a rape. *Cranford*, 36 Md. App. at 401. There, the female victim was unconscious due to excessive alcohol consumption at the time of the vaginal intercourse. This Court stated, "It is well settled that unlawful sexual intercourse with a female person without her consent constitutes the common-law felony of rape. It is also settled that unlawful sexual intercourse with a woman who is incapable of giving or withholding consent is rape." *Id.* at 400. The Court also noted:

> "One of the leading American cases on the law of rape involved unlawful sexual intercourse with a woman 'so drunk as to be utterly senseless.' She had given no consent prior to her insensibility, but counsel urged that it was not 'against her will' because her will was quite inactive one way or the other, and the wording of the statute was 'by force and against her will.' The court pointed out that 'against her will' means 'without her consent,' so far as the law of rape is concerned, and that unlawful intercourse 'with a woman, without her consent, while she was, as he knew, wholly insensible so as to be incapable of consenting, and with such force as was necessary to accomplish the purpose was rape.' It is to be emphasized that this was not a

> case in which defendant had made the woman drunk but merely one in which he had taken advantage of her helpless condition. The court mentioned with approval the 'established rule in England that unlawful and forcible connection with a woman in a state of unconsciousness at the time, whether the state has been produced by the act of the prisoner or not, is presumed to be without her consent, and is rape.' 'If it were otherwise,' the court added, 'any woman in a state of utter stupefaction, whether caused by drunkenness, sudden disease, the blow of a third person, or drugs which she had been persuaded to take even by the defendant himself, would be unprotected from personal dishonor. The law is not open to such a reproach.' In another case it was held that unlawful intercourse with a woman who had fainted was rape."

Id. at 400-01 (quoting Perkins, *Criminal Law*, ch. 2, § 5, at 163 (2d ed.)).

As for appellant's remaining sufficiency contention that Ms. W. was inconsistent in her account, or portions thereof, it is, of course, "the role of the jury to resolve any conflicts in the evidence and assess the credibility of the witnesses." *Gupta v. State*, 227 Md. App. 718, 746 (2016) (quotation marks and citations omitted), *aff'd*, 452 Md. 103, *cert. denied*, 138 S.Ct. 201 (2017). In doing so, the jury is free to "accept all, some, or none" of a witness's testimony. *Correll v. State*, 215 Md. App. 483, 502 (2013) (quotation marks and citation omitted), *cert. denied*, 437 Md. 638 (2014). Given Ms. W.'s own testimony, which was corroborated by her sister and the physical exam, we conclude that the evidence was sufficient for a rational fact finder to find appellant guilty beyond a reasonable doubt.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.