Circuit Court for Montgomery County
Case No. C-15-CR-22-000630

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1570

September Term, 2023

JOSHUA DENZEL GRICE

v.

STATE OF MARYLAND

Leahy,
Friedman,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Getty, J.

Filed: December 19, 2025

* 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).

Joshua Denzel Grice appeals his conviction in the Circuit Court for Montgomery County for first-degree rape and burglary-home invasion. Mr. Grice asks us to review the circuit court's decision on three evidentiary issues: a chain of custody issue regarding collection of the victim's underwear at the hospital where she was examined; admission of a statement by the nine-year-old victim ("A.")[1] under Maryland Code, Criminal Procedure Article ("CP") § 11-304, also known as the Tender Years Statute, which creates a hearsay exception in special circumstances involving a child under the age of thirteen; and a witness disclosure issue involving whether an expert consulted by the State was properly disclosed during discovery.

Mr. Grice presents three questions for our review, which we have rephrased and reordered as follows:[2]

1. Did the circuit court abuse its discretion when it admitted A.'s underwear and related evidence despite chain of custody issues acknowledged by the State?

[1] To protect the anonymity of the victim, we refer to the child by a letter selected at random. We will do the same for the victim's sister later in the opinion.

[2] Mr. Grice states his questions as follows:

1. Did the trial court abused [sic] its discretion when it admitted into evidence both A.'s underwear and evidence based on those underwear when the prosecution had failed to adequately establish the chain or custody of that garment?

2. Did the trial court erroneously deny Mr. Grice his constitutional right to present a closing argument that it was not him but another man who assaulted A.[?]

3. Did the trial court err when it failed to comply with Md Crim. Proc. Art. § 11-304 (g) and interview A. prior to ruling her recorded statement to clinical social worker Molly Cupid was admissible into evidence under § 11-304?

2. Did the circuit court err in admitting A.'s recorded statement to a social worker under CP § 11-304 without first interviewing A. or explicitly stating a finding on the record that no such interview was necessary?

3. Did the circuit court erroneously permit the State to introduce an expert on rebuttal who was not disclosed in discovery? Did this ruling deny Mr. Grice his constitutional right to present a closing argument or otherwise prejudice him?

We shall answer these questions in the negative and therefore affirm the decision of the circuit court.

BACKGROUND

Mr. Grice appeals his conviction on the basis of three evidentiary issues: A.'s underwear and the resultant DNA evidence linking him to the assault, a recorded statement A. made to a social worker on the night of the assault admitted under CP § 11-304, and a rebuttal witness improperly disclosed during discovery.

Mr. Grice was indicted by a grand jury for first-degree rape and burglary-home invasion on July 11, 2022. A jury trial was held in the Circuit Court for Montgomery County from April 18 to April 21, 2023.

A. A.'s Underwear and Accompanying DNA Evidence

On the night of November 29, 2021, an adult male broke into the home of A., then a nine-year-old girl. The trespasser held A. down, pulled down her underwear, and forced oral-genital contact on her. When the man left, A. woke up her older sister to tell her what happened. A.'s older sister then woke up their mother and called the police.

On the same night, A. was examined by a pediatric nurse, Vania Baioni, at Shady Grove Hospital. Nurse Baioni testified that a uniformed police officer took A.'s clothes,

but she did not know which officer. Jennifer Karschner, a forensic specialist with the crime scene unit of the Montgomery County Department of Police Crime Laboratory, testified that on the night of the incident she reported to the home of the victim and to Shady Grove Hospital to collect evidence from a pediatric nurse on duty who had examined A. Ms. Karschner identified the underwear as an item she collected from the pediatric nurse who examined A. Ms. Karschner testified that she sealed the item, a process called final packaging. She noted that the seal she originally placed on the package was present, but that the package had since been reopened, which she expected as the item would need to be removed for examination and testing. Ms. Karschner explained that after final packaging, the item was submitted to the evidence unit where the item would typically be held until it was called back up by the biology unit.

The underwear was later tested for DNA evidence and admitted at trial, which provided the only evidence linking Mr. Grice to this incident. Naomi LoBosco, a forensic scientist in the forensic biology unit at the Montgomery County Department of Police Crime Laboratory, identified the underwear as the same item she tested for this case, and testified that the underwear was in the same bag as presented to her for testing. She testified that after she collected the sample, she repackaged the evidence and placed it in her personal custody storage cabinet in the laboratory.

At trial, counsel for Mr. Grice objected to the admission of the underwear:

> [Ms.] Karschner[] testified that she did not recover the panties, that she got them from another person who she said was a nurse. At the time that they were being admitted, I did not object fully anticipating that the nurse examiner would be the one that said that she recovered them and handed

> them to the police. The nurse examiner yesterday specifically said she did not recover them, that a uniform officer actually took the clothes and went somewhere else . . . [W]e would object to those panties being admitted and any future evidence from those panties being admitted because there is a gap in that chain of custody.

Mr. Grice's counsel later reiterated this objection, pointing to Nurse Baioni's testimony that she did not collect the underwear, but rather saw a uniformed officer take the underwear, while Ms. Karschner, the forensic specialist who in fact collected the underwear, was not a uniformed officer. According to Mr. Grice's counsel, "we don't know where the clothes are being kept from the time that [A.] took them off until they were recovered."

The mother of A. testified that she recognized the underwear as belonging to A. A. herself identified two pictures of the underwear as the underwear that she was wearing on the night of the incident. A. indicated that "an older lady" at the hospital asked her questions, swabbed her genitals, and told her to put the clothes she was wearing into a bag. Nurse Baioni clarified that she did not consider herself to have collected the underwear because she did not seal the bag or send it to the laboratory.

The judge admitted the underwear over defense objection, explaining:

> Ms. Karschner testified that she collected the underwear from a nurse. Ms. Baioni said that a uniformed officer came to the hospital and took the underwear . . . I don't see any reason to assume that anybody else was involved in it . . . [I]t's clearly not the best chain of custody evidence. I'm not prepared to exclude the evidence based on that.

The State also entered into evidence a DNA report that showed Mr. Grice's DNA on A.'s underwear.

B. A.'s Recorded Statement to a Social Worker

On the night of the incident, a licensed clinical social worker, Molly Cupid, interviewed A., which was recorded in audio and video. During the interview, A. initially stated that she was tired and did not want to answer Ms. Cupid's questions. As the interview proceeded, A. recounted the details of the assault.

Mr. Grice filed a pre-trial motion to suppress A.'s recorded statement. The court held a hearing on this motion on March 17, 2023. At the hearing, Ms. Cupid testified that A. demonstrated during the interview that she had personal knowledge of the incident by using specific information, sensory details, and a consistent chronology of events without contradicting herself. Ms. Cupid stated that A. was able to provide information that a nine-year-old would not know about sexual contact absent her exposure through a sexual assault. Ms. Cupid noted that only hours had passed between the assault and the interview, indicating that A. disclosed this information while it was still fresh in her mind. In addition, A. gave no indication that she had been coached or led to fabricate the information she shared.

The hearing judge issued an oral ruling granting the State's motion to admit A.'s statement as substantive evidence at trial under CP § 11-304. The judge found that A.'s statement to Ms. Cupid had particularized guarantees of trustworthiness as required by the statute, and referenced each factor in making this ruling, including the details with which A. described the assault, the consistency of her story, the fact that the statement was recorded, the statement's close proximity in time to the assault, and the circumstances

supporting that A. had no motive to fabricate her story. The judge also noted that this situation is beyond the knowledge of most nine-year-olds and that A. used age-appropriate terminology to describe what happened. Finally, the judge noted that Ms. Cupid conducted the interview in comportment with her professional training and did not ask leading questions.

At trial, the State called Ms. Cupid to testify. The State played a short portion of the recorded interview, and Ms. Cupid testified that she recognized it as such. The court entered the recording into evidence as State's Exhibit 3 over Mr. Grice's reiterated objection. The jury then heard the majority of the recorded interview. On cross-examination, counsel for Mr. Grice questioned Ms. Cupid about the remainder of the interview, and in response to his questions, Ms. Cupid testified that A. also spoke about her stepbrother, Abel Cortez ("Mr. Cortez").[3] She testified that A. revealed in their interview that Mr. Cortez used to live in the house with A. but had been kicked out because of a sexual relationship between Mr. Cortez and A.'s older sister.

A. also testified at trial. During cross-examination, counsel for Mr. Grice asked A. if she went anywhere else that night or made statements to anyone besides the nurses or the police. A. responded, "Not that I remember." Mr. Grice's counsel argued that this prevented him from cross-examining A. on the truthfulness of the recorded interview.

[3] While Ms. Cupid confirms here that Abel Cortez is A.'s stepbrother, at other points in the record he is referred to as her half-brother.

Defense counsel asked for the statement to the social worker to be retroactively excluded as a result of A.'s inability to testify to the statement.

The trial judge found there was "already sufficient evidence that she made the statement because they've seen the video and it's obviously the same little girl who appeared to testify today," but offered to allow the defense to bring A. back to refresh her recollection and cross-examine her. Rather than recalling A. to testify further, the State and defense counsel agreed to the following stipulated facts:

> 1. [A.] has no memory of making any statements to Molly Cupid at the Tree House Child Advocacy Center.
> 2. [A.] would not be able to answer any questions regarding any statement made to Molly Cupid due to her lack of memory.
> 3. [A.] has no memory of going to the Tree House Child Advocacy Center.

Mr. Grice's counsel accepted this while preserving the objection to the admission of the recorded interview, arguing that A.'s lapse in memory weighed against her credibility and "goes to the heart of [CP]11-304" because "it's the equivalent of her testifying on direct. And then when I cross-examine her saying she forgets everything she just said on direct."

The trial judge nonetheless found that the stipulated facts satisfied the requirements of CP § 11-304.

C. The Undisclosed Witness

On the night of the incident when the police reported to A.'s home, they interviewed A.'s older sister, L. She informed Detectives Robert Onorio and Theresa Durham that after A. woke her up, L. went to look out of the apartment window and saw a man standing

outside. Initially, L. repeatedly denied that the man outside was Mr. Cortez, but eventually said that it was Mr. Cortez.

As a result, the police initially identified Mr. Cortez as the suspect in this case, arrested him, and charged him with the offense. After seizing his cell phone and examining the cell phone data, however, the police determined that Mr. Cortez could not have been at the scene of the crime at the time of the offense. Based upon this investigation, the State entered a *nolle prosequi*, effectively dropping the charges against Mr. Cortez.

At trial, however, Mr. Grice's main defense was that Mr. Cortez was the perpetrator of the sexual assault. Officer Kevin Crowley, who also reported to the scene of the crime, testified for the State. During cross-examination, counsel for Mr. Grice asked if he could recall L. saying that she saw Mr. Cortez standing outside their window. Officer Crowley responded that he did not remember.

In response to this testimony elicited by Mr. Grice's counsel, the State sought to introduce a new witness, Detective Onorio, who had examined Mr. Cortez's cell phone records. Mr. Grice's counsel objected on the basis that analyzing the cell phone data requires an expert witness and the State did not identify such an expert during discovery.

The State conceded that it failed to provide expert notice during discovery because it did not intend to discuss Mr. Cortez, but only did so after Mr. Grice opened the door. In discovery, the State provided screenshots from Mr. Cortez's cell phone with GPS data, which Detective Onorio used to determine that Mr. Cortez was not at the scene of the crime. Detective Onorio did not create a supplemental report on his conclusions, and thus no

report was provided to defense counsel. The State also claimed that it had orally disclosed to defense counsel that Detective Onorio determined Mr. Cortez could not have been at the scene of the crime because of his cell phone records. At trial, counsel for Mr. Grice did not remember the specifics of this conversation but did not deny that it occurred.

Defense counsel argued that they never received any materials exculpating Mr. Cortez. If they had, "it very well may have changed a large part of the Defense's strategy as far as how much and how to talk about Abel Cortez."

The trial judge ruled that Detective Onorio would not be permitted to testify as to why Mr. Cortez was not a suspect because he was not designated as an expert and an expert was needed to interpret the GPS coordinates. However, the judge elaborated:

> [T]here is no requirement that they designate experts for rebuttal. If the Defense raises the defense of saying that it wasn't me, it was Abel Cortez, then the State would be permitted if they have an expert . . . to address that on rebuttal. I don't think you can raise it now in the case-in-chief, because I think it requires expert testimony . . . It may be Detective Onorio, they may go get somebody tonight from the FBI. They don't have to designate their expert for rebuttal . . . I think that's only fair that you know that should you raise that defense, I will permit the State on rebuttal to introduce evidence through experts, but it would have to be expert testimony . . . [A] layperson can't look at this data and tell what it means.

Later in the trial, the judge reiterated:

> You have the right to argue it was Abel [Cortez] and not me . . . [I]f you're going to argue that, then I'm going to let the State introduce whatever their rebuttal is . . . I think they have to have expert testimony if it's going to be about the phone dump. But that's the choice that I'm giving you, and I will allow you to raise it.

The judge determined that defense counsel opened the door "by questioning [Officer Crowley] and [the State] responded by trying to put in evidence that [Mr. Cortez] was

considered and then he was rejected." The State then sought to introduce Detective Onorio to testify as an expert witness on the GPS locations in Mr. Cortez's cell phone data, but the court found that Detective Onorio was not qualified to testify as an expert in this matter. The judge instead permitted Detective Onorio to testify as a fact witness that Mr. Cortez was a suspect early on, but based on the police investigation, which included a search of Mr. Cortez's cell phone, he was no longer a suspect.

In closing arguments, Mr. Grice's counsel argued that Mr. Cortez was the more likely perpetrator:

> What we also heard and know is Abel Cortez did live in that house. Abel Cortez lived there and got kicked out. He got kicked out of the home because he was having a sexual affair with [L.]. . . . We also know that he smokes and was regularly drinking in his car outside. . . . [T]he person that covered her mouth was not wearing gloves and his hand smelled strongly of cigarettes. . . . What doesn't make sense is a person who has absolutely no knowledge of the people, never met him . . . has had no communication with them, decided to break into their house through a window over the stairwell, go directly to the child's room and commit a sexual assault. . . . What is more likely: that or the half-brother who used to live in the house, possibly still has a key, we don't know, had a sexual relationship with one of the other people in that room, came in through the front door, went possibly to the wrong bed, then left, went back out the front door?

The jury convicted Mr. Grice of one count of first-degree rape and one count of burglary-home invasion. Mr. Grice was sentenced to life for the first-degree rape conviction and 25 years for the first-degree burglary conviction to run consecutively to the life sentence.

Mr. Grice now appeals.

DISCUSSION

I. The trial judge did not err in admitting A.'s underwear because the chain of custody was sufficiently established.

Mr. Grice argues that the court abused its discretion when it admitted A.'s underwear and the resultant DNA analysis into evidence. According to Mr. Grice, because different witnesses gave conflicting testimony on who collected the underwear at the hospital, the State cannot establish with any reasonable probability that the tested underwear was worn by A. during the assault. Mr. Grice asks that his convictions be reversed on this ground.

The State responds that the trial court properly exercised its discretion in admitting the underwear over Mr. Grice's chain of custody objection because the State's proof established the chain of custody without any gap. Moreover, the State argues that even if there was a gap in the chain of custody, the evidence was nonetheless admissible because the State established a "reasonable probability that no tampering occurred."

Admissibility of evidence generally falls within the sound discretion of the trial court. *Easter v. State*, 223 Md. App. 65, 74–75 (2015). This Court will "not disturb a trial court's evidentiary ruling unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Bey v. State*, 228 Md. App. 521, 535 (2016) (quoting *Moreland v. State*, 207 Md. App. 563, 568–69 (2012)). "A trial court abuses its discretion only when '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.'" *Easter*, 223 Md. App. at 75 (quoting *King v. State*, 407 Md. 682, 697 (2009)).

The authentication of evidence is governed by Maryland Rule 5-901, which requires "evidence sufficient to support a finding that the matter in question is what its proponent claims." Md. Rule 5-901(a). "The proponent of a particular tangible item of evidence must establish its 'chain of custody,' *i.e.*, must 'account for its handling from the time it was seized until it is offered into evidence.'" *Jones v. State*, 172 Md. App. 444, 462 (2007) (quoting *Lester v. State*, 82 Md. App. 391, 394 (1990)). The court need only determine whether there is a "reasonable probability that no tampering occurred." *Cooper v. State*, 434 Md. 209, 227 (2013) (quoting *Breeding v. State*, 220 Md. 193, 199 (1959)). In most cases, this reasonable probability "is established by responsible parties who can negate a possibility of tampering and thus preclude a likelihood that the thing's condition was changed." *Id.* at 228 (quoting *Wagner v. State*, 160 Md. App. 531, 552 (2005)).

In *Irwin Industrial Tool Company v. Pifer*, a civil case that discussed chain of custody authentication in Maryland criminal law, our Supreme Court explained:

> Our case law demonstrates that a chain of custody as to controlled dangerous substances or a DNA sample in a criminal case starts with the seizing officer, not with . . . anyone who may have handled the evidence before it came into the possession of the officer who collected it. Although the proof negating the probability of changed conditions between the crime and the trial is described as proof of the chain of custody, the State is required to establish a chain of custody from the point at which evidence is collected or seized, not from the precise moment of the crime . . . Any alleged variance in the condition of the evidence between the time of the crime and the State having collected it would go to the weight to be accorded the evidence by the trier of fact, not admissibility.

478 Md. 645, 677–78 (2022). *See also Easter*, 223 Md. App. at 75 ("[T]he existence of gaps or weaknesses in the chain of custody generally go to the weight of the evidence and do not require exclusion of the evidence as a matter of law."). Furthermore, in *Bey v. State*, 228 Md. App. at 537–38, this Court held that a witness's inability to recall the seizing officer's name was insufficient to disrupt the State's chain of custody because "[a] tangential lapse in a witness's memory is not enough to discount the chain of custody established by the State."

In this case, A. testified that "an older lady" asked her questions, swabbed her genitals, and told her to put her clothing in a bag. Nurse Baioni, who examined A. on the night of the assault, testified that she did not collect A.'s clothing, but instead a uniformed officer took A.'s clothes, although she did not know exactly which officer. Ms. Karschner, a forensic specialist, testified that she collected the underwear from the pediatric nurse who had examined A. She further testified that she sealed and put her name on the item, which was then submitted to the evidence unit where it was held until it was called back up by the biology unit. Ms. LoBosco, a forensic scientist, testified that the underwear came to her in the same package in which it was presented at trial, the same package that Ms. Karschner testified to sealing. After she tested the item, she repackaged the evidence and placed it in her personal custody storage cabinet in the laboratory. Both A. and her mother also identified the underwear as belonging to A.

The only gaps in the chain of custody exist prior to Ms. Karschner's collection of the underwear at the hospital. A.'s testimony that "an older lady" who examined her and

told her to put her clothes in a bag does not negate Nurse Baioni's testimony that she did not collect the clothing. Nurse Baioni clarified that if she considered herself to have collected the underwear, she would have been the one to seal the underwear in an evidence envelope and send it to the laboratory.

Mr. Grice argues that because Ms. Karschner is not a uniformed officer, this contradicts Nurse Baioni's testimony on the matter of who collected the underwear, and thus proves a lapse in the chain of custody. While it is true that Nurse Baioni described Ms. Karschner as a uniformed officer and was unable to remember her name, these are "tangential lapse[s] in a witness's memory" that do not discount the State's established chain of custody. *Bey*, 228 Md. App. at 537–38.

Most importantly, Mr. Grice's arguments target the time between when the crime occurred and when the evidence was collected by Ms. Karschner as an agent of the State. As our Supreme Court explained in *Irwin Industrial Tool Co.*, "[a]ny alleged variance in the condition of the evidence between the time of the crime and the State having collected it would go to the weight to be accorded the evidence by the trier of fact, not admissibility." 478 Md. at 678.

We agree with the State that the evidence presented at trial was sufficient to establish with reasonable probability that the underwear was substantially the same as when A. removed them at the hospital. Any uncertainty surrounding the transfer of the underwear from A. to Nurse Baioni and into the custody of Ms. Karschner was addressed by defense

counsel in questioning the weight of the evidence during closing arguments, and did not warrant exclusion.

II. The circuit court did not err in admitting A.'s statement to a social worker under CP § 11-304.

Mr. Grice argues that the trial court erred on two counts: (1) by failing to state explicitly on the record that it found no need to interview A. during the pre-trial hearing before assessing her recorded statement, and (2) by admitting A.'s statement based on a finding that the statement had the particular guarantees of trustworthiness required by CP § 11-304 without first interviewing A.

The State responds that Mr. Grice's first contention is not preserved because Mr. Grice never alerted the trial court that it had failed to make a necessary explicit finding. The State then adds that the court did not err because the court properly concluded from the recording of the statement that interviewing A. at the hearing was unnecessary. Moreover, the State adds, if any error occurred such error was harmless.

CP § 11-304, also known as the Tender Years Statute, provides a hearsay exception for out of court statements made by child victims. The statute was enacted "in response to concerns that child abuse and sexual offenses were not being prosecuted adequately due to many child victims' inability to testify as a result of their young age or fragile emotional state." *Collins v. State*, 164 Md. App. 582, 599 (2005) (citing *State v. Snowden*, 385 Md. 64, 76 (2005)).

Relevant to this appeal, the statute provides that the court may admit "an out of court statement to prove the truth of the matter asserted in the statement made by a child

victim or witness" when the child is under the age of thirteen and is either a "an alleged victim or a child alleged to need assistance in the case before the court" when that case concerns "rape or sexual offenses under §§ 3-303 through 3-307 of the Criminal Law Article[.]" Such a statement may be admissible if it was made to a social worker acting lawfully in the course of the social worker's profession. This hearsay exception may apply when the statement "is not admissible under any other hearsay exception; and [] the child victim or witness testifies." Such a statement is admissible under this exception "only if the statement has particularized guarantees of trustworthiness[,]" including:

> (i) the child victim's or witness's personal knowledge of the event;
> (ii) the certainty that the statement was made;
> (iii) any apparent motive to fabricate or exhibit partiality by the child victim or witness, 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 or witness's young age makes it unlikely that the child victim or witness fabricated the statement that represents a graphic, detailed account beyond the child victim's or witness's expected knowledge and experience;
> (vii) the appropriateness of the terminology of the statement to the child victim's or witness'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 or witness 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 or witness'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.

CP § 11-304(e).

The statute provides that, "[i]n a hearing outside of the presence of the jury[,]" the court must "make a finding on the record as to the specific guarantees of trustworthiness that are in the statement" and "determine the admissibility of the statement." The statute requires that the court examine the child victim or witness in making this determination, unless the child is deceased or absent from the jurisdiction for good cause shown, or, importantly, unless "the court determines that an audio or visual recording of the child victim's or witness's statement makes an examination of the child victim or witness unnecessary."[4]

During the pre-trial hearing, counsel for Mr. Grice did not object to the judge's decision not to examine A., nor to the judge's failure to find explicitly that such an interview was unnecessary. Instead, counsel objected to the decision not to allow cross-examination of A. during the pre-trial hearing in the following colloquy:

> [COUNSEL FOR GRICE]: We would ask that we would want to be able to cross examine the child, the alleged victim in this matter as to what happened, were there things outside of the presence, what else went on between the time of the incident? There'll be other questions that we could ask that alleged victim in order to find out the truth, the possible truthfulness of that statement that she made to the social worker.
>
> THE COURT: But how does that jive with (g)(1)(ii) which says, and it's under the subheading, Court examination of child, "In making a determination under subsection (f) of this section" which talks about the hearing, which we're having now . . . "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 the child victim is deceased or absent from the jurisdiction." That's not been presented to me,

[4] We note that CP § 11-304 was amended during the 2025 Session of the Maryland General Assembly. These amendments took effect October 1, 2025, after the trial in this case and therefore do not affect the provisions of the statute analyzed in this appeal.

> or under (ii), "The Court determines that an audio or visual recording" which I'm hearing there is an audio-visual recording, "Of the child victim statement makes an examination of the child victim unnecessary."
>
> [COUNSEL FOR GRICE]: Your Honor, one, we would just make sure, we'd like to note our objection, but also outside of the presence of the public, I would interpret that to meaning that the gallery would have to be cleared, not outside of the presence of the parties . . .
>
> THE COURT: . . . So I think in our case here, what I first have to do is observe this statement, whatever it is, and hear from [Ms. Cupid] to make a determination, whether it presents circumstances that support trustworthiness under those circumstances and then go from there. But I don't know that that all happens ahead of time. I think these are steps that the Court has to make because I couldn't decide trustworthiness until I know what is being offered for that purpose. And because as you know, if I'm making that determination, so it would be admissible as substantive evidence at trial. And then in that event, I believe the State is correct, that would be your opportunity for *Crawford*-type cross-examination of the witness to challenge her credibility – but all of that, just like any other witness. But this is whether or not the statement would be deemed by the Court to have suggestions of trustworthiness as it relates to admissibility. So your objection is noted for the record. It's overruled.

The hearing judge then heard testimony from Ms. Cupid and listened to a majority of the audio recording. A. did not testify and the judge did not examine A. before issuing factual findings on the record regarding particular guarantees of trustworthiness, referencing all the applicable factors, and ruling that "the State's motion to utilize this child's statement under CP § 11-304 is granted."

We agree with the State that Mr. Grice's argument is partially unpreserved. Maryland Rule 8-131(a) provides that "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" The purpose of Maryland Rule 8-131 "is to allow the court to correct trial

errors, obviating the necessity to retry cases had a potential error been brought to the attention of the trial judge." *Sydnor v. State*, 133 Md. App. 173, 183 (2000).

Here, while Mr. Grice's counsel objected to the admission of A.'s statement a number of times on various grounds, counsel did not bring to the court's attention a need to state explicitly on the record that it found no need to examine A. because there was an audio-video recording available. This issue could have been easily addressed by the trial court if defense counsel had objected on this ground. The trial court addressed Mr. Grice's various other objections under CP § 11-304, often including an explanation of the court's reasoning, and could have done the same on this issue if Mr. Grice had raised it below.

Even if this argument were preserved, the trial court did not err in failing to make an explicit finding that there was no need to interview A. to determine the admissibility of the recorded interview. Subsection (f) of CP § 11-304 requires the court to "*make a finding on the record* as to the specific guarantees of trustworthiness that are in the statement." (emphasis added). In contrast, subsection (g) requires the court to "examine the child victim . . . unless . . . the court determines that an audio or visual recording of the child victim's or witness's statement makes an examination of the child victim or witness unnecessary." The statute does not use the phrase "make a finding on the record" in subsection (g) as subsection (f) does, and we will not read this requirement into the statute. To do so would be to render the explicit language requiring a finding on the record in subsection (f) surplusage, adding language for a forced interpretation that limits the statute's application.

Although the judge did not explicitly state on the record that such an examination was unnecessary, it is clear from the transcript that this determination was implicit. The judge quoted the statute, observed A.'s statement by audio or video recording, and thoroughly analyzed and provided an explanation for each element that lends itself to a finding of particular guarantees of trustworthiness under the statute. The hearing judge correctly applied the statute in determining the admissibility of A.'s statement.

Mr. Grice next argues that the trial court erred in finding that A.'s statement had particular guarantees of trustworthiness. We review the circuit court's findings of fact for clear error. *Jones v. State*, 410 Md. 681, 700 (2009). A judge's factual findings are not clearly erroneous "if the record shows that there is legally sufficient evidence to support it." *Kusi v. State*, 438 Md. 362, 380 (2014) (quoting *Biglari v. State*, 156 Md. App. 657, 668 (2004)).

The court played the audio of A.'s out of court statement, heard testimony from Ms. Cupid, and considered arguments from both sides. The court then made extensive findings on the record as to the guarantees of trustworthiness required in CP § 11-304 subsection (f) and explicitly discussed each factor enumerated in subsection (e). Mr. Grice argues that, contrary to the judge's finding, these factors weigh against the trustworthiness of A.'s statement, noting the following factors: (1) that nine years old is a relatively young age; (2) that although A. did not contradict herself, she stated that she was tired of talking; (3) that the statement was a product of direct questioning; and (4) that the account did not contain any graphic details beyond A.'s expected knowledge and experience.

First, the age of the victim is not in itself a factor under CP § 11-304. Age is only relevant to determine the likelihood that the victim's narrative or terminology were beyond the expected knowledge for a child of a certain age. Here, Ms. Cupid testified that A. "included details that a typically developing 9-year-old would not otherwise have known about" and "her sensory descriptions of the assault itself were very age appropriate." Thus, there was sufficient evidence to support the judge's finding on this factor.

The judge also found that A.'s initial reluctance to speak with Ms. Cupid suggested that A. had no motivation to invent a story. This is a rational interpretation of the evidence and thus does not constitute clear error. The judge likewise found that Ms. Cupid conducted the interview properly in alignment with her training and experience and did not ask leading questions. Thus, we see no evidence to support the assertion that A.'s statement as a result of direct questioning weighs against her credibility.[5]

Mr. Grice points to A.'s testimony at trial that she was unable to remember her interview with Ms. Cupid as the most important factor weighing against the trustworthiness of A.'s recorded statement. This was not established at the time of the hearing when the judge ruled on the admissibility of the statement; however, as the hearing judge explained,

[5] *See Prince George's County Dep't of Soc. Servs. v. Taharaka*, 254 Md. App. 155, 175 (2022) (holding that an Administrative Law Judge's finding that direct questioning weighed against a statement's credibility was arbitrary when the child was prompted to tell her story during a videorecorded forensic interview scheduled for the purpose of eliciting information about the abuse, it was the third time she recounted the abuse, it occurred in a Child Advocacy Center with a neutral interviewer, and interview protocols and methods controlled how the disclosure arose).

"it's very certain the statement was made . . . It's recorded, it's transcribed. We all have the benefit of that information."

A.'s inability to remember the interview may also speak to CP § 11-304(e) factor (i): the child victim's personal knowledge of the event. For this factor, the hearing judge pointed to the considerable detail A. provided to Ms. Cupid during the interview. At trial, when asked about her lapse in memory, A. testified:

> It's that I don't remember because I try to forget about it, and when I forget about stuff sometimes it completely goes, and some of the stuff that happened completely went out [of my brain] . . . After that happened and the next day after it happened, I was terrified. I couldn't sleep. I cried almost every night. I went to sleep with my mom because I just couldn't – it was scary for me since he was still loose. And that's why after I got the courage to go to sleep back onto my bed, I try to forget about it completely.

This testimony speaks to the very purpose for which CP § 11-304 was enacted. A. recounted the assault in great detail during her interview with Ms. Cupid within hours of the incident. That A. has, in the three years since the incident occurred, blocked parts of it from her memory does not justify excluding her recorded statement from the evidence at trial.

Our review of the record reflects that the hearing judge thoroughly analyzed the trustworthiness factors under CP § 11-304, adequately committed those findings to the record, and did not err in making those findings without first interviewing A. The hearing judge's findings were supported by legally sufficient evidence and the conclusions based on those findings were sound. Thus, the circuit court did not err.

III. The circuit court did not deny Mr. Grice his constitutional right to present the closing argument of his choosing.

Mr. Grice argues that the trial court erroneously ruled that the State did not need to disclose the names and opinions of experts called on rebuttal because Maryland Rule 4-263(d)(8) imposes a duty on the State to disclose information from each expert the State consulted. Because of this error, Mr. Grice contends that the court interfered with his constitutional right to present the closing argument of his choosing.

The State responds that the trial court did not err, and that Mr. Grice improperly frames this issue as a constitutional violation rather than an adverse ruling on a discovery violation. The State notes that Mr. Grice, in spite of his protests here, was able to present the closing argument of his choosing.

First, we note that while Mr. Grice frames his argument on appeal as a violation of his Sixth Amendment right to present the closing argument of his choosing, Mr. Grice did in fact present the closing argument of his choosing, and thus his Sixth Amendment right was not violated.

We turn then to the issue of whether a discovery violation occurred. This is a question of law we review *de novo*. *Cole v. State*, 378 Md. 42, 56 (2003). "Where a discovery rule has been violated, the remedy is, 'in the first instance, within the sound discretion of the trial judge. The exercise of that discretion includes evaluating whether a discovery violation has caused prejudice. Generally, unless we find that the lower court abused its discretion, we will not reverse.'" *Id.* (quoting *Williams v. State*, 364 Md. 160, 178 (2001) (abrogated on other grounds)).

Maryland Rule 4-263(d)(8) requires the State to disclose during discovery the expert witnesses it consulted. The Rule requires the State to provide to the defense:

> As to each expert consulted by the State's attorney in connection with the action:
>
> (A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;
> (B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and
> (C) the substance of any oral report and conclusion by the expert[.]

Additionally, for each State's witness the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony, the State must provide the name, address and phone number, and all written statements of the witness that relate to the offense charged. Md. Rule 4-623(d)(3). The Rule also lists potential sanctions the court may consider when faced with a discovery violation; however, the list is not exhaustive and allows the court to "enter any other order appropriate under the circumstances" as a sanction. Md. Rule 4-623(n).

The purpose of Rule 4-263 is to "assist the defendant in preparing his defense, and to protect him from surprise." *Hutchins v. State*, 339 Md. 466, 473 (1995). In *Hutchins*, our Supreme Court held that Rule 4-263 required the State to disclose written reports and oral conclusions of each expert witness the State consulted, even if those witnesses only testified on rebuttal. *Cf. Hoey v. State*, 311 Md. 473, 489 (1988) (holding that an expert psychiatrist was not consulted by the State when all tests the psychiatrist conducted fell under his duty as the defendant's treating psychiatrist and not at the State's behest).

Here, we see no indication of surprise to the defendant against which the Rule is intended to guard. Indeed, we are not persuaded that Mr. Grice was prejudiced by the court's ruling at all. The State concedes that the trial judge may have erred in allowing Detective Onorio to testify as an expert on rebuttal when the State arguably consulted him as an expert prior to trial. At trial, the State's Attorney said that Detective Onorio "used [screenshots from Mr. Cortez's cell phone] to show [him] the GPS data was showing that Cortez was not at the scene of the crime and was using his cell phone during the time of the crime to text."

Neither side asserts that Mr. Cortez's cell phone data did not require an expert to interpret, and the State concedes that it collaborated with Detective Onorio on this case. Detective Onorio did not complete a written report on this matter, but presented his oral conclusions to the State, which the State then sought to elicit through his testimony at trial. The State did not initially intend to introduce Detective Onorio to testify on this matter, but nonetheless arguably consulted him as an expert prior to trial.

The parties disagree as to whether the State adequately disclosed Detective Onorio's oral conclusions during discovery. The State gave Mr. Grice's counsel access to screenshots of Mr. Cortez's cell phone that showed his GPS coordinates during the time of the offense, and the State alleges that it informed defense counsel of Detective Onorio's conclusions over a phone call. Mr. Grice's counsel does not refute this claim, but states that he does not remember the specifics of the phone call.

At trial, neither Detective Onorio nor any other witness testified as an expert regarding Mr. Cortez's cell phone data. The judge found that Detective Onorio did not

qualify as an expert on the necessary subject matter. Detective Onorio was called later as a fact witness, where he testified that Mr. Cortez was initially a suspect, but that after the detective searched Mr. Cortez's cell phone, he was no longer a suspect. Counsel for Mr. Grice objected to the inclusion of the reference to the search of the cell phone but assented to the rest of the testimony.

Finally, as stated above, Mr. Grice was not prevented from making the closing argument of his choosing, namely that Mr. Cortez was potentially the perpetrator of the sexual assault. During closing argument, counsel for Mr. Grice argued that Mr. Cortez was the more likely suspect due to his prior connection to the family. Thus, Mr. Grice faced no measurable prejudice as a result of the trial court's ruling.

Even if a discovery violation occurred, the trial court exercised its discretion to correct it by excluding Detective Onorio as an expert witness. Mr. Grice was not prejudiced by Detective Onorio's testimony because there is no evidence he was surprised by its contents, and because nothing prevented Mr. Grice from presenting the closing argument of his choosing. We therefore hold that the trial court did not err.

CONCLUSION

We hold that the evidentiary challenges raised in this appeal do not warrant reversal of the circuit court's decision. The State adequately established the chain of custody for the underwear. The circuit court did not abuse its discretion in ruling that A.'s statement was sufficiently trustworthy under CP § 11-304. Finally, if the circuit court erred in allowing testimony from an expert witness not disclosed by the State during discovery, this

error did not prejudice Mr. Grice, as Mr. Grice was able to present his desired closing argument. Accordingly, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.