Circuit Court for Wicomico County
Case No. C-22-CR-17-000783

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2379

September Term, 2018

BRUCE BILAL ANDING

v.

STATE OF MARYLAND

Graeff,
Beachley,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: October 23, 2019

A jury in the Circuit Court for Wicomico County convicted appellant, Bruce Bilal Anding, of one count of sexual abuse of a minor by a household member and three counts of third-degree sexual offense. The trial court sentenced appellant to a total of 35 years in prison—25 years for sexual abuse of a minor; five years, consecutive, for each of two sexual offense charges; five years, concurrent, for the third sexual offense charge—after which he timely noted this appeal, asking us to consider the following questions:

1. Did the trial court err in admitting the video-taped interview of D.M.?
2. Are the multiple, separate convictions and sentences for third-degree sex offense improper?

For the reasons that follow, we affirm the judgments of the trial court.

FACTS AND LEGAL PROCEEDINGS

In September 2017, appellant lived with his girlfriend, J.M., and her two children, D.M., aged six, and A.M., aged ten, in J.M.'s Salisbury, Wicomico County, house.[1] On September 9, 2017, J.M. spent the day cleaning and rearranging the children's room, and appellant, after helping J.M. break down a set of bunk beds in the room, left the home to travel to Delaware.

J.M. put D.M. to bed at approximately 11:00 p.m.,[2] but later that night, D.M. woke her mother to tell her that appellant had come into her room and touched her "private area," her "butt," and her "boobs." J.M. told her daughter that she must have been dreaming

[1] For some period of time, J.M.'s friend and the friend's boyfriend also lived in the house, but they had moved out by the time of the incident in question.

[2] A.M. was not home that night.

because appellant was not home, but D.M. insisted he was. When J.M. called for appellant, she was surprised when he answered her from the first floor of the house.

In an attempt to calm the child down, J.M. agreed to stay with D.M. in her room the rest of the night; when she entered the room, she saw appellant's watch, which she had last seen him wearing earlier that day. J.M confronted appellant, who denied that anything had happened with D.M. and said that his watch must have fallen out of his pocket when he had helped her move the children's furniture.

The next morning, J.M. and D.M. embarked on a pre-planned trip to Virginia. Based on her conversation with D.M. during the trip, J.M. called appellant and told him to move out of her house, which he did without incident. As soon as she and D.M. returned from Virginia, J.M. contacted Child Protective Services, who referred D.M. for an interview with a social worker.[3]

Devan Sample, a licensed social worker with the Salisbury Child Advocacy Center, received the report of sexual abuse of D.M. on September 11, 2017, and interviewed the child on September 14, 2017. During the interview, which was recorded and played for the jury over defense objection, Sample used anatomically correct dolls and drawings so D.M. could show where she had been touched. Therein, D.M. said she understood that she was at the Child Advocacy Center because her mother's boyfriend Bruce "did something nasty to [her]" while her mother was sleeping. She explained that he had put his hand in

[3] J.M. took the child to the doctor several weeks later. The social worker and investigating detective indicated that more urgency in getting the child examined was not required, as there had been no allegation of penetration and the perpetrator was no longer in the child's home.

her pants, touched her, and kissed her while his pants were "almost down," showing his "butt." D.M. told Sample that Bruce had touched her "boobies," "pee pee" and "butt" while "huffing," that is, breathing hard. In response to Sample's question of whether anyone had told her what to say, D.M. said, "no," but she acknowledged she was "scared to say it."

At trial, D.M. testified that she got out of bed to use the bathroom one night, and when she turned around, appellant "was just holding on to [her] hands" before coming into her bedroom. She said appellant touched her mouth with his lips and grabbed her belly and her arms and made a "gross" "breathing noise." D.M. denied having been touched by him anywhere else or touching any part of his body, and she said she did not remember telling a social worker he had touched her vagina.

DISCUSSION

I.

Appellant contends that the trial court erred when it admitted into evidence the videotaped interview of D.M., pursuant to Md. Code, § 11-304 of the Criminal Procedure Article ("CP"), which provides that a court may admit for its truth an out-of-court statement by a child victim as an exception to the rule against the admission of hearsay. In his view, because the recorded interview did not contain the required guarantees of trustworthiness, the resulting statements should not have been admitted into evidence under the so-called "tender years" hearsay exception. And, he continues, because D.M. testified at trial that appellant had touched her only on her arms, hands, belly, and mouth, the error in the admission of the recording cannot be deemed harmless beyond a reasonable doubt.

The State first raises a preservation argument, on the ground that the bases of error provided in appellant's brief differ from the objections he raised on the issue in the court below. Even if preserved, the State continues, appellant has failed to prove that the trial court clearly erred in determining that D.M.'s statement to the social worker was trustworthy.

At the April 19, 2018, hearing to determine the admissibility of D.M.'s recorded statement into evidence at trial, defense counsel objected on the grounds that, "with respect to the 13 factors that are listed in 11-304, I do believe that there are some issues with the way in which the interview was conducted; and, more specifically, the person who was, in fact, conducting the interview." He argued that Sample, who admittedly was "employed as a social worker," was nonetheless "not functioning as a social worker during the course of the questioning." Instead, counsel insisted, she was functioning as "a quasi law enforcement officer."[4] In addition, he continued, D.M. had a motive to fabricate a sexual offense, because of the breakup between her mother and appellant. Finally, he claimed that Sample's questions to D.M. were leading, and that the "harping" by the social worker negatively affected her credibility.

In his brief, however, appellant avers that the court's conclusion that there were particularized guarantees of trustworthiness sufficient to justify admission of the recorded statement was clearly erroneous because: the statement was not spontaneous but was

[4] The out-of-court statement may be admissible only if made to, and offered by, a physician, psychologist, nurse, social worker, principal, vice principal, teacher, school counselor, licensed counselor, or licensed therapist "acting lawfully in the course of the person's profession when the statement was made[.]" CP § 11-304(c).

"directly responsive to questions;" D.M.'s demeanor during the interview was calm with no sign of physical distress, and; the State had produced no extrinsic evidence at the hearing to show that appellant had the opportunity to commit the alleged crimes.

Pursuant to Maryland Rule 8-131(a), an appellate court ordinarily will not decide an issue unless it was raised in or decided by the trial court. Because the reasons presented in appellant's brief in support of his allegation of clear error by the trial court were not raised in that court, we need not decide them here. The use of the word "ordinarily" in the Rule, however, permits us to exercise our discretion to decide an unpreserved issue. *See Boulden v. State*, 414 Md. 284, 297 (2010). Because appellant, at the § 11-304 hearing, did make clear that he was challenging the court's overall finding of a guarantee of trustworthiness in the child's statement to the social worker, we will consider his argument.

Out-of-court statements, offered for the truth of the matter contained therein, generally are excluded from evidence as hearsay, but "'[m]any states, including Maryland, have enacted statutes, sometimes known as the tender years exception, designed to protect the emotional and psychological health of young children alleged to be victims of sexual abuse and to provide for the admissibility of *ex parte* statements . . . under particular circumstances.'" *In re J.J.*, 231 Md. App. 304, 323 (2016), *aff'd*, 456 Md. 428 (2017), *cert. denied*, 139 S.Ct. 310 (2018) (quoting *Myer v. State*, 403 Md. 463, 479 (2008)). Maryland's statute, CP § 11-304, governs the "'the admissibility of hearsay statements by

a child abuse victim under [13] in juvenile and criminal court proceedings.'"[5] *Id*. at 323-24 (quoting *Montgomery Cty. Dep't of Health & Human Servs. v. P.F.*, 137 Md. App. 243, 272 (2001)). The statute "'balances the need to protect child victims from the trauma of court proceedings with the fundamental right of the accused to test the reliability of evidence proffered against him or her.'" *Id.* (quoting *P.F.*, 137 Md. App. at 272).

Pursuant to CP § 11-304, an out-of-court statement to a social worker by a child, who is under the age of 13 and alleged to be a victim of sexual abuse, is admissible if certain conditions are met. One of the conditions is that the statement must have particularized guarantees of trustworthiness.

CP § 11-304(e)(2) sets forth a non-exhaustive list of factors for the trial court to consider in determining whether a statement meets the requirement of trustworthiness:

> (2) To determine whether the statement has particularized guarantees of trustworthiness under this section, the court shall consider, but is not limited to, the following factors:
>
> (i) the child victim's personal knowledge of the event;
>
> (ii) the certainty that the statement was made;
>
> (iii) any apparent motive to fabricate or exhibit partiality by the child victim, including interest, bias, corruption, or coercion;
>
> (iv) whether the statement was spontaneous or directly responsive to questions;
>
> (v) the timing of the statement;

[5] In 2011, the age was changed from "under the age of 12 years" to "under the age of 13 years." 2011 Md. Laws, Ch. 87 (H.B. 859); 2011 Md. Laws, Ch. 88 (S.B. 768).

> (vi) whether the child victim's young age makes it unlikely that the child victim fabricated the statement that represents a graphic, detailed account beyond the child victim's expected knowledge and experience;
>
> (vii) the appropriateness of the terminology of the statement to the child victim's age;
>
> (viii) the nature and duration of the abuse or neglect;
>
> (ix) the inner consistency and coherence of the statement;
>
> (x) whether the child victim was suffering pain or distress when making the statement;
>
> (xi) whether extrinsic evidence exists to show the defendant or child respondent had an opportunity to commit the act complained of in the child victim's statement;
>
> (xii) whether the statement was suggested by the use of leading questions; and
>
> (xiii) the credibility of the person testifying about the statement.

Subsection (f) requires the court to make an on-the-record finding, outside the presence of the jury, "as to the specific guarantees of trustworthiness that are in the statement" and to "determine the admissibility of the statement." CP § 11-304(f). Pursuant to subsection (g), the court, in making the determination under subsection (f), "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[.]" CP § 11-304(g)(1).

Because the statute directs that such hearsay may be admissible only if the statement possesses particularized guarantees of trustworthiness, the trial court must determine whether "the totality of the circumstances that surround the making of the statement . . . render the declarant particularly worthy of belief," that is, "whether the child was likely to

be telling the truth when making the statements." *Prince v. State*, 131 Md. App. 296, 301-02 (2000). Section 11-304 builds in the 13-factor test "to guarantee the trustworthiness of the child's statements[.]" *Id.* at 302. In reviewing the trial court's factual findings pursuant to the statute, we apply the "clearly erroneous" standard of review. *Reece v. State*, 220 Md. App. 309, 319 (2014).

We turn to a determination of whether the trial court's ruling complied with the requirements of CP § 11-304. We conclude that it did.

At the conclusion of the § 11-304 hearing, the court first found that D.M.'s statement was made to a social worker *qua* social worker (rather than quasi law enforcement officer) and met the requirements of the statute in that regard. The court, having interviewed the child in chambers, further found that D.M. was "very intelligent" and "[s]eemed to be aware of what was going on."

The court then addressed the § 11-304 factors to be considered in determining whether there were particularized guarantees of trustworthiness, as follows:

> **(i) The child victim's personal knowledge of the event**
>
> "The Court finds that the child did have personal knowledge of the events to which she referred in her statement."
>
> **(ii) The certainty that the statement was made**
>
> "Certainly the statement was made."
>
> **(iii) Any apparent motive to fabricate or exhibit partiality by the child victim, including interest, bias, corruption, or coercion**
>
> "As far as the child having a motive to fabricate, the fact that they, the parties broke up, they broke up, I believe, from what I read in the transcript, because

of this incident that occurred and right after this incident occurred, I don't think this gave the child a motive to fabricate."

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

"And the statement was in response to questions, but generally not in response to leading questions."

(v) The timing of the statement

"The statement was taken not long in time after the incident."

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

"The child is young. The child is six years old. But the child appeared to be a very intelligent child. Seemed to be aware of what was going on. Seemed to be honest in her statements."

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

"The child used language that was appropriate for a child of that age in referring to body parts and things of that nature."

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

"The duration of the abuse was not over a lengthy period of time but was limited in scope to an event."

(ix) The inner consistency and coherence of the statement

No specific finding.

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

No specific finding, but the court had heard Sample's testimony that D.M. was "very calm, very comfortable" talking to the social worker and that the child did not appear to be in any physical distress.

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

"There certainly is evidence that the Respondent had the opportunity to commit the act that is complained of."

(xii) Whether the statement was suggested by the use of leading questions

"And the statement was in response to questions, but generally not in response to leading questions."

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

"The person testifying, of course, is just the social worker, but I find the social worker to be credible."

After considering these factors, the court, pursuant to the statute, ruled on the admissibility of the statement:

> I believe that the, when the, the facts taken as a whole indicate that there's a. . .the statement had particularized guarantees of trustworthiness, and that the statement should be admissible.

The court held a full and proper hearing pursuant to the statute, received testimony, both in court and in chambers, considered all the evidence adduced, and specifically addressed the factors set forth in CP § 11–304. After doing that, it found that D.M.'s statement possessed "particularized guarantees of trustworthiness[.]" Because there was sufficient evidence to support the court's factual findings, they were not clearly erroneous. *See Kusi v. State*, 438 Md. 362, 380 (2014) (quoting *Biglari v. State*, 156 Md. App. 657, 668 (2004)) (A "'judge's decision is not clearly erroneous if the record shows that there is legally sufficient evidence to support it.'").

II.

Appellant also avers that the trial court improperly imposed separate sentences for the three third-degree sexual offense convictions, which were based on acts of touching three different body parts. Relying on *Cooksey v. State*, 359 Md. 1 (2000), he claims that because the touching of the three body parts occurred during a single encounter, the separate convictions and sentences subject him to multiple punishments for the same offense in violation of double jeopardy principles.[6]

The State responds that "[e]ach unlawful touching of an intimate area constituted a separate act and the trial court properly imposed a separate sentence for each offense." The State relies on *State v. Boozer*, 304 Md. 98 (1985), in support of its claim that appellant may be convicted and sentenced for the separate acts of touching D.M.'s breasts, vagina, and buttocks during the same encounter.

In *Boozer*, the issue before the Court of Appeals was

> whether a defendant once placed in jeopardy on a charge of committing a fourth degree sexual offense may be subjected to a second prosecution for attempted fourth degree sexual offense when both charges arose out of the same criminal episode but the State alleged separate acts by the defendant in each charging document.

[6] To the extent that appellant is arguing that the separate *convictions* violate double jeopardy principles, the issue is unpreserved because he did not raise it to the trial court during sentencing. *See Taylor v. State*, 381 Md. 602, 615 (2004) (Md. Rule 8-131 has "been applied to the failure of a defendant to raise constitutional rights in the trial court, including an issue regarding the right against double jeopardy"). We will therefore consider only whether the trial court's failure to merge the *sentences* imposed resulted in an illegal sentence, as an illegal sentence is reviewable at any time, even in the absence of an objection below. *See Pair v. State*, 202 Md. App. 617, 624 (2011) ("A failure to merge a sentence is considered to be an 'illegal sentence' within the contemplation of [Rule 4-345]" and enjoys an "exemption from the normal preservation requirements[.]").

304 Md. at 99.

Boozer was charged with engaging in a sexual act with an underage victim, in violation of Md. Code, Art. 27, § 464C, which prohibited the commission of a fourth-degree sexual offense that could be accomplished in several ways. The State initially charged Boozer with committing a "sexual act," which meant "cunnilingus, fellatio, analingus, or anal intercourse, but. . .not. . . vaginal intercourse." The definition of "sexual act" also included penetration by an object. Art. 27, § 461(e). Concerned that it could not prove the charge because Boozer had allegedly inserted his fingers into the victim's vagina, the State sought leave to amend to instead charge "sexual contact," which was defined as penetration by any part of the body, except the penis, mouth, or tongue. *Id*. at 100. The court declined to permit the amendment, agreeing with Boozer that offenses involving sexual contact and offenses involving a sexual act are "totally different offenses." *Id*.

The State therefore *nolle prossed* the charge without Boozer's consent and then filed a new statement of charges alleging the commission of an unlawful attempt to commit a fourth-degree sexual offense, by attempting to have vaginal intercourse with the victim. *Id*. at 100-01. Boozer moved to dismiss the new charge as violative of double jeopardy protections, arguing that the new prosecution was barred because the State could not bring more than "one charge of sexual offense in the fourth degree as a result of a single criminal transaction[.]" *Id*. at 101-02. The circuit court agreed with Boozer and granted the motion on double jeopardy grounds. *Id*. at 101.

Before the Court of Appeals, Boozer argued that § 464C created a single offense—fourth-degree sexual offense—and that the State was prohibited from bringing more than

one charge of fourth-degree sexual offense "as a result of a single criminal transaction or episode." *Id*. at 101-02. The Court disagreed, reasoning that separate charges were authorized by the statute because the "vaginal intercourse prohibited by § 464C is not necessarily the same offense as the sexual act prohibited by the same section, and under the facts [before it] it was constitutionally permissible to charge them as separate offenses." *Id*. at 102. The Court pointed out that the various acts that would each constitute a violation of § 464C "historically and customarily have been considered sufficiently separate and distinct from each other to justify separate punishment, even though occurring in close temporal proximity and within the same criminal episode." *Id*. at 104.

Reviewing decisions in other jurisdictions, the Court noted that

> [t]he courts of this country have had little difficulty in concluding that separate acts resulting in separate insults to the person of the victim may be separately charged and punished even though they occur in very close proximity to each other and even though they are part of a single criminal episode or transaction.

Id. at 105.

The Court concluded:

> We have carefully examined the language, structure and legislative history of our recently revised rape and sexual offense statutes, and we find no evidence of an intent on the part of the Legislature to depart from the well established law of this and other states with respect to a defendant's liability for multiple acts committed against a victim during a single criminal transaction. In codifying the elements and penalties of rape and other sexual offenses into degrees the Legislature intended, among other things, to more carefully tailor the penalty prescribed for each crime to the seriousness of that crime. . . . As to other sexual offenses, there existed a need to distinguish between consensual and nonconsensual acts of sodomy, to define and classify "unnatural and perverted sexual practices," and to identify as sexual offenses a large and significant area of conduct which theretofore could be charged only as an assault or battery. With respect to the offense of rape the

> designation of two degrees of seriousness was found sufficient. However, with respect to the other sexual offenses, the Legislature determined that the breadth of the spectrum of prohibited activity was sufficient to justify the establishment of four levels of seriousness. Nowhere in the history of the legislation is there any indication of a desire on the part of the Legislature to curtail the number of charges that might be brought for the purpose of punishing separate acts of misconduct perpetrated upon a single victim.
>
> Other state courts considering claims of multiplicity or double jeopardy as a result of more than one charge brought under a classification or degree of sexual offense seriousness established by statute have reached the same result.

Id. at 108-09 (citations omitted).

In *Cooksey*, the defendant was charged in a single count with the commission of "'a' sexual offense in the second degree by engaging in a 'sexual act'" with a child victim "in a continuing course of conduct" over a one-year period. The indictment stated that the "sexual act" constituted cunnilingus, which occurred "'up to fifteen times"' during that time period. 359 Md. at 3. A second count alleged a similar pattern of behavior and charged Cooksey with the commission of "a" third-degree sexual offense, by engaging in "sexual contact" with the victim. *Id*. at 4.

The Court of Appeals entertained two issues: (1) whether a count that charges a person with having committed what is a single-act sexual offense on several occasions over a substantial period of time effectively charges more than one offense and is dismissible on the ground of duplicity, and (2) if so, whether sexual child abuse, as charged, is necessarily a single-act offense. *Id*. at 3.

The Court held that the two counts embraced by the first issue were duplicitous, as the single act offenses were not "course of conduct" crimes because the months of separate

acts that were descriptive of both the sexual act and sexual contact were separate and distinct offenses, committed when the proscribed acts occurred. *Id*. at 22-3. The Court explained that "a single count that charges multiple incidents of those offenses, committed other than in the course of a single criminal episode of relatively brief temporal duration, cannot be sustained as non-duplicitous on the theory of a continuing offense." *Id*. at 23.

In our view, the Court's analysis in *Boozer* is dispositive of the issue presented by appellant. During the acts of sexual offense in question, appellant clearly committed three "separate acts resulting in separate insults to the person of the victim [that] may be separately charged and punished even though they occur in very close proximity to each other and even though they are part of a single criminal episode or transaction." 304 Md. at 105. Accordingly, we conclude that merger is not required for the sentences for the separate acts of touching D.M.'s breasts, vagina, and buttocks during one episode.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.