JEREMY S. COCHRAN	*	**IN THE**
	*	**COURT OF APPEALS**
	*	**OF MARYLAND**
v.	*	**COA-PET-0436-2018**
	*	**CSA-REG-0086-2013**
STATE OF MARYLAND	*	**(No. 12-K-12-000458, Circuit Court for Harford County)**

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the supplement filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and the supplement be, and they are hereby, dismissed on the grounds of lateness.

/s/ Mary Ellen Barbera
Chief Judge

DATE: July 26, 2019

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 86

September Term, 2013

JEREMY S. COCHRAN

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Nazarian,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 2, 2014

Jeremy Shane Cochran, the appellant, was convicted by a jury in the Circuit Court for Harford County of sexual abuse of a minor - continuing course of conduct, sexual abuse of a minor, and conspiracy to commit sexual abuse of a minor. The court sentenced Cochran to 85 years' incarceration. He appeals, posing eight questions for review, which we have rephrased slightly:

I. Did the trial court err in admitting evidence of telephone conversations Cochran placed while in jail?

II. Did the trial court err in finding the victim competent to testify?

III. Did the trial court err in permitting hearsay testimony concerning the victim's claims of abuse?

IV. Did the trial court err in limiting cross-examination of the victim?

V. Did the trial court err in limiting the testimony of the defense expert?

VI. Did the trial court commit plain error by instructing the jurors they were the judges of the law?

VII. Did the State's closing argument improperly appeal to passion and emotion?

VIII. Did the State's discussion of reasonable doubt during its rebuttal closing argument constitute plain error?

For the following reasons, we shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

The following facts were adduced at trial, which took place between December 10 and 17, 2012.[1] S. is the child of Harold Harris ("Father") and Angeline Feazelle ("Mother"). She

---

[1]Cochran had been tried in September 2012, but the jury hung and a mistrial was (continued...)

was 10 years old at the time of trial. Father and Mother were married in 2002, around the time S. was born. They separated in 2003, and were divorced in 2005. Father and Mother shared custody of S., with Father having custody every Wednesday night and every weekend, and Mother having custody the rest of the time.

Father testified that, after the separation, Mother moved three or four times, and he became concerned that S. was not in a stable environment when she was staying with Mother. There was drug activity in one of the apartments Mother lived in. S. was not living in a clean environment or sleeping in a clean bed.

According to Father, when S. was three years old, she told him that David Hurst, whom Mother was dating at the time, "had rubbed himself on the oustide [sic] of [S.] before he was getting ready to put her in the bathtub." Father immediately took S. to the hospital for an examination. The results were normal. Father claimed that Hurst was a "known child molester." An investigation of Hurst was undertaken but he disappeared after he was ordered to give a DNA sample.

Mother began a relationship with Cochran sometime in 2006. In 2007, the two began living together at Cochran's mother's house in Jarrettsville. S. lived in that house with Cochran and Mother when she was in Mother's custody. S. was five at the time, and had started elementary school. S. sometimes called Cochran "daddy," which Father found

---

[1](...continued)
declared.

upsetting. In 2008, S. stopped living with Mother and Cochran, and had no contact with Mother and Cochran after that. She lived in protective care for a time before moving in with Father full time.

S. testified that Mother met Cochran on the internet, and she and Mother went to live with Cochran and Cochran's mother. S. was in kindergarten and first grade when she lived in the house with Cochran and Mother. She slept in her own bedroom, and Cochran and Mother shared another bedroom. The State introduced photographs of the exterior and interior of the house, including photographs of Mother and Cochran's bedroom, and of S.'s bedroom. The photographs show a sign Mother made that was hung outside S.'s bedroom door. It read: "Beware, [S.'s] room, no boys allowed and that includes daddies." Mother and Cochran both had guns in the house.

Using drawings depicting the front and back of a naked male and female human figure, S. testified that Cochran touched her chest and her leg with his hand.[2] She also testified that Cochran touched her vagina – which she called her "beanie hole" – and her mouth and bottom with his "private part," indicating his penis. She testified that Cochran touched her lips and her chest with his lips, and touched her lips and her "beanie hole" with his tongue. S. said that this happened on her bed in her room in the house she was sharing with Cochran and Mother. She said it happened "[l]ike three or four times."

---

[2] Throughout her testimony, S. referred to Cochran as "Shane." For the sake of consistency, we shall refer to him throughout our opinion as Cochran, unless there is a direct quote that refers to Cochran as Shane.

S. testified that she told Mother what Cochran did. Mother questioned Cochran, who said he did not do anything. S. testified that Mother knew what Cochran was doing to her, because she (Mother) "was doing it, too . . . she was doing like kissing me and stuff." According to S., Mother was in the room while Cochran was doing these things to her, and "after [Cochran] was done [Mother] kept on doing it . . . [l]ike kissing me and stuff."

S. further testified that when Cochran's "private part" touched her "private part," "[i]t didn't feel real comfortable" and it "felt like rubber was going in me," but his "private" did not go "all the way in." She said he was "pushing" and "rubbing" his penis underneath her "private part." She also said that when Cochran's penis touched her bottom, "[i]t felt weird . . . like cold just running through me. . . . It felt cold and wet." She said that when Cochran's penis touched her lips "[i]t tasted like rubber." She testified that Cochran would touch his penis "when these things would happen," and that he "peed" on her mouth.

S. also testified that Cochran told her that if she told Father what he had done to her, he would kill Father. She believed him. She told her school counselor about the things Cochran had done to her, however. She said she told her counselor that Cochran had "humped" her, and by that she meant "laying on top of each over [sic]. His private thing in [her] private thing."

Theresa Mitchell was the school counselor at the elementary school S. was attending while living with Mother and Cochran. Mitchell testified that she met with S. on October 1, 2007, when S. was in kindergarten. The meeting took place because S. was exhibiting

behavioral problems in the classroom. While in Mitchell's office, S. began playing with the dolls Mitchell kept, and narrated scenes of sexual abuse. Specifically, S. told Mitchell that the daddy doll took the girl doll's clothes off, including her panties, and the girl doll took the daddy's clothes off, including his underwear. S. said the daddy then humped the girl. Mitchell asked where the daddy humped the girl, and S. pointed to the crotch of the girl doll. Mitchell asked what the daddy humped the girl with, and S. responded "his humper." Mitchell asked S. where the daddy's humper was, and S. pointed to the crotch of the daddy doll. S "then put the daddy doll on the girl doll and said see, he's humping her as she demonstrated with the dolls the daddy repeatedly thrusting in the little girl."

Mitchell asked S. if "this happened every night," but S. did not respond. Then Mitchell asked how many times it happened, and S. "held up four fingers indicating multiple times." Mitchell asked S. to give the name of the daddy doll, and S. Responded "Joe-Joe and then nonsensical partial vocalizations." Mitchell reported this meeting to Harford County Child Protective Services ("CPS"), and also submitted a written report.

Mitchell again met with S. on January 16, 2008, after S. told her teacher about the sexual abuse and asked to speak with Mitchell. During that meeting, Mitchell asked S. why she was so tired. S. responded "he took my hand. He woke me up. He humped me." Mitchell asked her who had humped her, and S. responded, "his name is Shane. He woke me up and kissed my kitty. And she demonstrated with the doll as she talked. He humped my privates, indicating with the dolls that she had been approached from behind." Mitchell

asked S. where she was when this happened. S. said, "I was in the bed. . . . He humped me with his pee-pee." Mitchell asked where Mother was at the time, and S. responded "my mommy watched how he did it. He took me in his bed and mommy's bed and mommy watched." S. told Mitchell she was afraid of Cochran.

S. then demonstrated what had happened, using the dolls in Mitchell's office. S. told Mitchell that Cochran made her hold his hand and showed her where his bed was. "Then when he goes in his room, and then he humps me. He didn't let go. He just threw me down. He hit me in the eye with a branch." S. told Mitchell she was going to hide because Cochran might hump her again. Mitchell again reported the matter to CPS.

Mitchell's next meeting with S. took place on March 19, 2008, after S. again requested to speak with her. S. told Mitchell that "something bad" had happened to her. She said she wanted to play a video game but "daddy" took her pants, underpants and shirt off, then took his shirt off, and "humped" her. Mitchell asked her who daddy was and S. replied that it was Cochran. S. drew a picture for Mitchell depicting what had happened. The drawing was published for the jury. Mitchell explained that S. told her the drawing depicted S.'s bed, and S. and Cochran, and Cochran's "humper" in S.'s "kitty," which was S.'s term for her vagina. S. said Cochran was angry with her because he humped her and she did not like it. S. also told Mitchell that Mother

> had to stop my Daddy Shane from humping me and Shane went to jail and I told the cop I'm all right but I don't want Shane to hump me anymore. I don't like it. And I have another daddy who doesn't hump me or don't do nothing to me 'cause he likes me.

S. again requested to speak with Mitchell on April 1, 2008, and told her that Cochran had humped her, and someone named "Joey." S. was "unable to tell [Mitchell] exactly who Joey was." S. told Mitchell that Joey was humping her when Mother came in to the bedroom and "saved" her, and S. said she "wish[ed] that Joey wouldn't hump me anymore. I will never, never come back and I would go to mommy's house. I wish that mommy saved me."

Mitchell again spoke with S. on May 5, 2008. S. told Mitchell that she felt very angry when Cochran humped her. S. enacted "humping" using two stuffed bears in Mitchell's office, and said "[t]he man smells your neck while you are humping." Mitchell again made a report to CPS.

Mitchell did not see S. during the following summer, but met with her on September 2, 2008, when S. returned to school to begin the first grade. S. told Mitchell that that morning, Cochran had "kissed her at the bus stop . . . with his tongue." S. also told Mitchell that Cochran had had sex with her that morning. When Mitchell asked S. what that meant, S. said "it means he humped me." She demonstrated using two puppets in Mitchell's office, placing one on top of the other. Mitchell asked S. where Mother was during the incident. S. said she was "in bed sleeping." S. told Mitchell that Cochran "came into her bedroom and said come here, I want to enjoy you."

Mitchell again met with S. on September 17, 2008. S. told Mitchell that Cochran had had sex with her that morning, explaining that "he put his peepeenis on my pee-pee." S. also reported that an incident had happened the previous night in her bedroom "while mommy

was sleeping in the other room." S. told Mitchell that Cochran had kissed her with his tongue, and that he had told her she "would get in trouble, deep trouble if she told anyone." S. also told Mitchell that Cochran "let [her] lick his pee-pee" and that she was "upset and scared."

Another meeting took place on September 23, 2008. S. told Mitchell that Cochran had "humped" her the previous night, and put his "pee-pee" in her mouth. He then took her to her bed, and took his shirt off and pulled his pants and boxers down. Cochran let S. "lick his boob." S. said Mother did not know, and she did not tell Mother because Cochran "won't let me out." Mitchell asked S. to make a drawing of what happened. While S. was drawing, she told Mitchell that she was "standing on my knees and [Cochran] put his pee-pee in my butt all the way to the front and it hurt." S. also used the dolls in Mitchell's office to demonstrate what had happened. S. narrated "here is me with my legs open and he did this. And he said open my legs. Then he took his pee-pee and hold onto it and pushed it all the way in there." S. took the dolls and "demonstrated kneeling down and being mounted from behind." Mitchell again made a report to CPS. She testified that her reports always went to both the Harford County Department of Social Services ("DSS") and the Harford County State's Attorney's Office. After this last meeting, Mitchell placed a telephone call to the State's Attorney's Office. At some point thereafter, S. was removed from school. Mitchell did not see her again.

On cross-examination, Mitchell testified that she met with S. on September 25, 2007, because of S.'s behavioral problems in school. This was shortly before S. first reported the abuse to Mitchell. In her report from that meeting, Mitchell wrote that S. had been diagnosed with a urinary tract infection. Mitchell testified that S. had not told her about the infection, however. It is unclear who did tell her about the infection. Mitchell also reported that S. had told her "that she slaps and spanks her one year old brother because she doesn't want a baby. She said I'm always mean to him, I don't like him, I don't want a baby brother, I don't like boys at all, I only like girls, I don't like my baby brother." Mitchell said that, in total, she made nine reports concerning S. to DSS.

Dione White, a social worker with CPS, testified that she became involved with the investigation concerning S. in October 2008. She referred S. to Paul Lomonico, M.D., for an examination. S. was seen by him on October 2, 2008.

Dr. Lomonico was accepted by the court as an expert in pediatric medicine with a specialty in conducting examinations of children for suspected sexual abuse. Dr. Lomonico examined S. on October 2, 2008, with a foster mother present. His examination of S.'s genitals revealed a "three millimeter pimple or papule or a little tuft" on the edge of S.'s hymen. Near that, Dr. Lomonico observed a "little red erythematous patch," and, in addition, "an area that sort of looked like a little plaque, but it was fairly white." Dr. Lomonico stated the "little red patch" looked "rather haggered" and indicated a "trauma type episode" and "irritation of some sort." The white area "looked like a little bit of healing tissue." Dr.

Lomonico illustrated his findings on a drawing of female genitalia, which was admitted into evidence. He opined that "there was some type of trauma to that specific area." He stated there was "no indication" that what he had observed on S.'s genitalia was due to a rash, infection, or poor hygiene. He testified that he conducted a rectal exam of S., which was normal. He did not diagnosis S. with a urinary tract infection.

On October 16, 2008, Dr. Lomonico performed a follow-up examination of S. He observed that the papule had "disappeared" and the red and white area had grown "very, very faint to the point that you couldn't see it at all." On January 17, 2008, Dr. Lomonico performed a third examination of S. The results were "entirely normal." Dr. Lomonico opined that a normal examination does not "rule out sexual abuse" because "[t]he area can heal very, very quickly." Also, the nature of the abuse -- for example, "having a penis rub the outside of the child's genitalia" or "slight penetration of the labia majora of a child by an adult male" or "slight penetration of the penis into the rectum of the anus of a child [of S.'s] age" -- might not cause an abnormality.

Detective Keith Roach and Detective Kenneth Smith, of the Harford County Sheriff's Office, testified that on October 1, 2008, they executed a search warrant on the Jarrettsville home where S. was residing with Mother and Cochran. The warrant had been issued as part of an ongoing investigation by the Harford County Child Advocacy Unit ("CAC"). Detective Smith took photographs of the exterior and interior of the home, including of S.'s bedroom,

S.'s bed, Cochran and Mother's bedroom, and the guns Cochran and Mother kept inside the house. These photographs were admitted into evidence.

While conducting his search, Smith used a UV light and protective goggles to detect the presence of "certain types of bodily fluids" on S.'s bed. If such fluids were present, they would fluoresce under the UV light. Smith testified that the UV light detected several areas that fluoresced on S.'s wood bed frame, box spring, and on the sheet covering the mattress. Smith swabbed these areas to collect samples. He also seized several items from S.'s bedroom, including a pink princess comforter from S.'s bed; three pillows and some items of clothing on the bed; a washcloth from S.'s bedside night stand; and a pair of underwear from the floor of S.'s bedroom.

Trooper Michelle Workman of the Maryland State Police was assigned to the CAC and was involved in the abuse investigation concerning S. In July 2011, she obtained search warrants to collect DNA from Mother and Cochran. She obtained samples from both of them on August 1, 2011. A few days later, she obtained a DNA sample from S., after Father provided his consent. Trooper Workman submitted the samples to the Maryland State Police Forensic Science Division for analysis. She also submitted the evidence that had been gathered from S.'s bedroom during the 2008 search. After receiving the results of the analysis, she applied for an arrest warrant for Cochran.

Jessi Brown, a forensic scientist with the Maryland State Police was accepted by the court as an expert in serology. Brown tested the items seized from S.'s bedroom, including

a pair of child's underwear, a washcloth, a comforter, and swabs from the box spring and wooden frame of S.'s bed, for the presence of bodily fluids such as urine, semen, blood, saliva, and fecal matter. The tests revealed fecal matter on the washcloth, but no blood or semen. The swabs taken from the side of the box spring and the wooden bed frame revealed the presence of semen and sperm cells. Brown forwarded these swabs for DNA analysis. Brown found areas of the comforter that were stained with semen, sperm cells, and blood. She took four cuttings from these areas of the comforter and forwarded them for DNA analysis. Brown opined that the sperm cells on the comforter had been deposited there, and were not secondary transfer, meaning "[i]t did not rub off from another item or in the wash." In her opinion, the comforter had not been laundered after these stains were deposited.

Tiffany Keener, a forensic scientist with the Maryland State Police, testified that she performed DNA analysis on the items forwarded by Brown. The DNA profile from the swabs taken from the box spring and bedframe matched Cochran's DNA profile. The DNA profile for the sperm fractions of certain cuttings taken from the comforter also matched Cochran. The non-sperm fractions of those cuttings contained DNA profiles consistent with both Cochran and S.

Trooper Workman was recalled to the stand and testified that she had monitored Cochran's telephone calls while he was being held at the Harford County Detention Center after his arrest. On September 27, 2012, and October 1, 2012 (during the course of the first trial in this case), Cochran placed calls to his mother. Recordings of the two phone calls

were moved into evidence and played for the jury. The jurors also were given transcripts of the phone calls.

In the first call, Cochran told his mother that the "DNA really hurt us." He continued:

> tomorrow, when you get up on the stand, when [Defense counsel] asks you how long was that bed in [S.'s] room before they took her, make sure you say a month, a month and a half before they took [S.] away from us . . . and if he asks you about the comforter, say yes, me [Cochran] and Angie [Mother] had it on our bed from when we's getting ready to do clothes and we made love on it. And if he asks you if I was ever alone with [S.] or take, giving her a bath, you say no.

In the second phone call, Cochran's mother mentioned something about the "detail work" on S.'s dresser and bed, and said "how does [the State's Attorney] know that I didn't have my nephew Robby do the detail work? He has a pinstriper and shit." Cochran responded that he just told his attorney that he, Cochran, did the detail work and the "woodworking and everything."

The defense called Theodore Hariton, M.D., who was accepted as an expert in the field of forensic gynecology. In relevant part, Dr. Hariton testified that he had reviewed Dr. Lomonico's examination of S. on January 17, 2008, which took place the day after S. had told Mitchell that Cochran had abused her the previous night (January 15, 2008). Dr. Hariton opined that that examination showed "no medical evidence of any penetration of [S.] by anybody." He defined "penetration" as "[t]he tip of the penis going to and into the hymenal ring." He further opined that "if [S.] had been penetrated less than forty-eight hours [before Dr. Lomonico's examination on January 17, 2008], she would have a history of bleeding, a

history of pain and she would have had physical finding of redness, swelling, bruising or some variation thereof."

Dr. Hariton also reviewed Dr. Lomonico's October 2, 2008 examination of S., in which Dr. Lomonico had found the red and white patches and the red papule on S.'s genitalia. Dr. Hariton opined that anything could have caused such signs, including irritation from "bubble baths" or "poor hygiene" or laundry soap. In Dr. Hariton's opinion, the condition was unlikely to have been caused by trauma, because trauma "gives you injuries, gives you tears, bruising." Dr. Hariton opined that there was no evidence of sexual abuse in S.'s October 2, 2008 examination.

On cross-examination, Dr. Hariton acknowledged that he is not a pediatrician, has never performed an abuse examination on a prepubescent child, and did not speak with or examine S.

S. was called to testify in the defense case. She stated that she did not remember telling a Ms. Francis that someone named David touched her "kitty" or put his penis in her "butt-butt," although she did remember saying that David took her clothes off. She did not remember saying that someone named James did these things to her.

S. testified that she remembered telling a "Ms. Sera" that David Hurst and Father had humped her, and that Cochran had never humped her. S. remembered telling a Ms. Alethea Miller that a David Albert had touched her, but she did not remember saying that David

Albert had kissed and humped her. She also did not remember telling Ms. Miller that Cochran's penis had the words pee-pee written on the side of it.

On cross-examination, S. explained that David Albert "knew my mom after all this happened . . . my mom told me to say that my dad . . . did it and that Shane didn't do it and that David Albert did it." S. said she had been lying when she told Ms. Miller that David Albert kissed and humped her, and that it was David Hurst who had done these things instead. S. further explained that she was lying when she told Ms. Sera that Father humped her and that Cochran never humped her; she said she told Ms. Sera those things because Mother had told her to.

The defense called Sera Rothwell, a social worker with the DSS who had interviewed S. at the CAC in January of 2008. Rothwell testified that when she asked S. "did anything happen last night with Daddy Shane," S. responded "Nope." Rothwell further testified that S. responded "No" when asked "has anyone else ever done this to you other than [Father]." On cross examination, Rothwell stated that S. said David had humped her a "long time ago." She also stated that Mother had driven S. to the interview.

The defense also called Alethea Miller, a forensic interviewer and family advocate at the CAC who had interviewed S. in October 2008. S. told Miller that she had seen Cochran's penis and that "[i]t looked like it has brown and it says pee-pee on the side of it." S. also told Miller that when Cochran humped her, "he says do you want to like suck my pee-pee and [she] said no."

Cochran testified in his own defense. He met Mother in September 2006 through a telephone "chatline." Mother moved in with him a few days later. They both were unemployed. S. moved in with Cochran and Mother in May 2007. Also living in the same house were Cochran's mother, aunt and uncle, and two cousins. S. lived with Cochran for a little more than a year. Eventually, Mother and Cochran were married and had two children together.

With regard to S.'s comforter, on which his DNA was found, Cochran stated that Mother removed it from S.'s bed to wash it and placed it on their bed, along with other clothes. He and Mother "wound up making love on it twice." His mother put it back on S.'s bed, even though it had not been washed. This all happened about two weeks before the house was searched.

Cochran explained that the bed frame and box spring that S. used had been in his room since 2005, before he met Mother, and that he and his then-wife had been "intimate" on that furniture about two times per week before it was moved to S.'s room. Cochran modified the furniture for use in S.'s room by "ma[king] the bedposts . . . for a canopy to make it a princess bed and I painted the princess and the fairies on the bed."

Cochran heard the telephone calls that were played in court, and claimed that he "wasn't telling my mom what to say." Rather, he "was trying to remind her what she was going to say." He claimed that his mother "had a brain tumor the size of a golf ball."

Cochran denied having had any inappropriate contact with S.

On cross-examination, Cochran stated that he had been married before he met Mother, and that the twin bed in S.'s bedroom had originally been purchased in 2005 by his mother for use by him and his then-wife, Jessica. He and Jessica had used that bed for about nine months before Jessica moved out. He claimed they had "made love" in it.

Cochran stated that about three months before S. moved in, he had moved the box spring and the bedframe into S.'s room. He claimed that had happened in 2008. When reminded that S. had moved in during 2007, Cochran claimed that S. had slept on a blowup mattress between the time she moved in and the time he moved the bed into her room in 2008. He and Mother had been sleeping in the bed in the meantime, for "a little over a year."

Cochran and his mother purchased the dressers and the night stand in S.'s room in 2008 from Penn Dutch Structures in Shrewsbury, Pennsylvania. Cochran put a princess, fairy, and flower design on the bed to match the new furniture. Cochran acknowledged that he did not have the invoices for the bed or for the other furniture, and had no medical evidence of his mother's alleged brain tumor or memory problems.

On rebuttal, the State called Melissa Hostler, owner of Hostler's Furniture Store in New Park, Pennsylvania. Hostler testified that on November 4, 2007, Cochran and his mother had visited her store and purchased several pieces of furniture, including a "little girl's bedroom suit [sic] which would have been a twin bed, a dresser, a mirror and nightstand." The invoice from that transaction was admitted into evidence. Hostler described the twin bed as consisting of four posters, with an attachment for a canopy, a

headboard, footboard, and rails. Hostler obtained a photograph of the bedroom set – called "Ashley Blossoms"– from the manufacturer, which was admitted into evidence.

We shall include additional facts as relevant to our discussion of the issues.

DISCUSSION

I.

Recorded Telephone Calls

As discussed, the State moved into evidence and played for the jury a recording of two telephone calls between Cochran and his mother that Cochran placed from the Harford County Detention Center during the first trial in this case. Each call is prefaced by an automated message that alerts the participants that "this call will be recorded and is subject to monitoring at any time," and also identifies Cochran as an "inmate."

After jury selection, the prosecutor brought to the court's attention that the State intended to move the recorded telephone calls between Cochran and his mother into evidence. The prosecutor argued that Cochran was "coaching" his mother's testimony, which tended to show a consciousness of guilt. Defense counsel objected. The court ruled that the recordings would come in, with certain portions excised. The following colloquy then took place:

> [DEFENSE COUNSEL]: Your Honor, there are two other points if I may. One, it is going to be obvious to the jury that Mr. Cochran is incarcerated. I think that is going to be prejudicial.

More importantly, the jury will know that there was some other proceeding and I think it is going to be obvious that there was, in fact, another trial. . . .

* * *

THE COURT: . . . I agree with [Defense Counsel] we don't want the jury sitting there speculating about a prior trial, mistrial or whatever. We can say a proceeding prior to this trial or something which would give the impression it was just a pretrial matter, not another trial. I think that kind of cleanses everything, doesn't it?

[PROSECUTOR]: I agree.

[DEFENSE ATTORNEY]: That's acceptable, Your Honor.

THE COURT: You still have the whole issue on the phones of where he is at the time and certainly I don't know any way around that. I know that this has come up in the past in trials and in a perfect world I would rather them not know it and we do everything in the courtroom so it does not appear that he is incarcerated, but Mr. Cochran is entitled to a fair trial and the State is entitled to a fair trial, and the statements are certainly highly probative. The probative value I believe does outweigh the prejudicial impact. I'm wide open for any creative way to sanitize it from that. I'm a willing audience if we can come up with something. I know that this has come up in the past and it has come out. Frankly . . . I would being [sic] shocked if there is any juror that doesn't think that somebody charged with something as serious as this isn't being detained.

The prosecutor went on to explain that the portions of the calls to be played for the jury needed to include the automated message alerting the participants that the calls were being recorded and monitored; otherwise, the jurors would speculate that the State had acted illegally by recording the telephone calls. The court agreed, stating, "I understand. Because if we didn't have that, [the jury] would [speculate]. They would be back there for three hours debating whether the State violated a wiretap statute or something. I agree with that."

Immediately before the State moved the recordings into evidence, the following colloquy took place:

> THE COURT: My only concern is I think we also discussed the other day and I wanted to remind everybody that obviously [the recording] interjects that Mr. Cochran was in jail, but you may want to . . . maybe phrase the question along the lines at a time when Mr. Cochran was being held on these charges. How do you want to do it [Defense counsel]?
>
> [DEFENSE COUNSEL]: It's obvious that [Cochran] is in the Detention Center. I guess that says it as well as anything else.
>
> THE COURT: I mean, we can just let it be what it is or what we have done in other cases is it was at a time when he was being held in the Detention Center pending charges. However you want to say it.
>
> [DEFENSE COUNSEL]: Right. I would ask that there be very little comment on that.
>
> * * *
>
> THE COURT: I'm talking about how it is that [Cochran] is in the Detention Center.
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: In other words, there was a period of time when he was being held on these charges at the Detention Center. Is that okay?
>
> [DEFENSE COUNSEL]: Yes, that's fine.

Before the recording was introduced, the prosecutor asked Trooper Workman if "there came a time . . . that you began monitoring telephone calls from the defendant while he was being held at the Harford County Detention Center." Trooper Workman responded yes, and the recorded calls were introduced and played for the jury. Defense counsel did not object

when Trooper Workman was asked about Cochran being held at the Detention Center, or when the recording was introduced and played.

On appeal, Cochran contends the trial court erred in admitting the recording of the telephone conversations because it "obviously made the jury aware that Cochran was incarcerated. This was unduly prejudicial and outweighed any incremental probative value the content of the calls may have had for the State's case." Cochran asserts that "[a]ny concern over the propriety of the recording of the calls by the State could have been addressed by a neutral instruction or stipulation."

The State responds that Cochran did not preserve this issue for review because he did not renew his objection before the recording of the telephone calls was introduced at trial. We agree.

Rule 4-323, entitled "Method of making objections," states 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. Otherwise, the objection is waived." Md. Rule 4-323(a). The Court of Appeals often has stated its "commitment to the requirement of a contemporaneous objection to the admissibility of evidence in order to preserve an issue for appellate review." *Brown v. State*, 373 Md. 234, 242 (2003). And it has often

> reiterated the general rule in Maryland that "where a party makes a motion *in limine* to exclude irrelevant or otherwise inadmissible evidence, and that evidence is subsequently admitted, *the party who made the motion ordinarily must object at the time the evidence is actually offered to preserve [its] objection for appellate review*."

Id. (quoting *Reed v. State*, 353 Md. 628, 637 (1999)) (emphasis added) (alteration in *Brown*).

Here, defense counsel did not make a contemporaneous objection when the State sought to introduce the recording of the telephone calls through the testimony of Trooper Workman. It was the judge who raised the concern that the recording "interjects that Mr. Cochran was in jail."

Moreover, even if this issue were preserved, defense counsel agreed with the court's proposal to preface the introduction of the recording by stating "there was a period of time when [Cochran] was being held on these charges at the Detention Center." Obviously, that preface made clear that Cochran was incarcerated, quite apart from the automated message that prefaced each call. Defense counsel did not at any time argue for an alternative way to introduce the recording, such as with a "neutral instruction or stipulation," as he now argues on appeal. Thus, this issue has been waived.

Finally, the issue lacks merit in any event. The prefatory language merely stated that Cochran was in the Detention Center pending the charges in this case. This communicated to the jurors that he was incarcerated awaiting trial, not because he had been found guilty of any crime. The trial court did not err in allowing this prefatory language to be used to explain why and where the calls were recorded.

II.

S.'s Competence To Testify

Before S. testified, she was examined outside the presence of the jury to determine whether she was competent. She was sworn and the prosecutor asked her a number of questions, including her parents' names, the school she was attending, and the grade she was in. She answered the questions correctly. The prosecutor continued:

[PROSECUTOR]: What is a promise?

[S.]: A promise is something that you tell someone – you tell something that is true.

[PROSECUTOR]: And if you make a promise?

[S.]: It is something that you can keep.

* * *

[PROSECUTOR]: If you make a promise, does that mean that you can maybe do it or you have to do it?

[S.]: I have to do it.

[PROSECUTOR]: Now, you made a promise to tell the truth. Is that right?

[S.]: Yes.

[PROSECUTOR]: What is the truth?

[S.]: The truth is something that you have to tell that you believe in.

[PROSECUTOR]: So, can you make up the truth?

[S.]: No.

[PROSECUTOR]: If I said to you, [S.], my jacket that I'm wearing is purple, would that be the truth or would that be a lie?

[S.]: A lie.

[PROSECUTOR]: Why is it a lie?

[S.]: Because you jacket is really red.

[PROSECUTOR]: So what does it mean to tell a lie? What is a lie?

[S.]: A lie is something that is not true.

[PROSECUTOR]: Is a lie something that is real or something that is made up?

[S.]: Something that is made up.

* * *

[PROSECUTOR]: . . . What happens to you if you were to tell a lie?

[S.]: If I told a lie here I would probably go to jail, but when I tell a lie at home I get punished . . .

* * *

[PROSECUTOR]: Now, there was just a holiday a few weeks ago. Is that right?

[S.]: Yes.

[PROSECUTOR]: Do you remember what it was?

[S.]: Thanksgiving.

[PROSECUTOR]: Did you go anywhere for Thanksgiving?

[S.]: I just stayed at home with just me and my dad.

[PROSECUTOR]: What did you do? Did you do anything special?

> [S.]: Well, we like had turkey and I had a casserole. I don't like onions, but he give [sic] me onions. It had onions on it and that is how the casserole was made. Then we watched T.V. and we watched a movie.

The prosecutor asked the court to find S. competent to testify. The court asked defense counsel if he wanted to be heard. Defense counsel stated, "Your Honor, just one statement concerned me where [S.] said truth is something that you believe. So, that could certainly imply something that she really believes, really believes to be true even if it is not the truth." The court responded "I agree with you I was a little concerned with that and then [the prosecutor] asked the follow-up and [S.] then said you can't make up the truth. I did hear that and my antennas were up. Is there anything else?" Defense counsel responded, "No, Your Honor."

The court found S. competent to testify, explaining

> That certainly got my attention when [S.] said that [about the truth being something you believe in], but then she immediately followed up and indicated that you can't make up the truth.
>
> The factors and standards are set forth in Perry versus State and Jones versus State. This young lady has indicated that she does know the difference between the truth and a lie. She has indicated through her testimony so far the ability to observe, to understand, to recall, to relate happenings while conscious of a duty to speak the truth, which are I think the factors set forth in those cases. So, the Court does find that [S.] is competent to testify.

After the jury returned to the courtroom, the prosecutor again asked S. the competency questions, and she gave substantially similar responses. The prosecutor asked the court to find S. "qualified to testify" and the court responded "[o]kay." S. then testified.

Cochran contends the trial court abused its discretion in finding S. competent to testify, because the questions posed elicited that S. "thought that her *belief* in a fact was a component if its [sic] truth," and also because the questions posed were "inadequate to support the finding that [S.] was sufficiently able to observe, recall, and relate events."

The State responds that defense counsel did not object to the court's competency finding, and that Cochran's argument is not preserved for review. Even if preserved, the court did not abuse its discretion in deciding that S. was competent to testify. We agree with the State on both points.

> Md. Rule 8-131(a) provides that appellate courts ordinarily will not decide an issue not raised in or decided by the trial court. In other words, the appellate courts will only address issues that are properly preserved for review, and issues that are not preserved are deemed to be waived.

Bryant v. State, 436 Md. 653, 659 (2014) (footnote omitted). As discussed in section I, *supra*, Rule 4-323(a) requires "[a]n objection to the admission of evidence" to be made "at the time the evidence is offered . . . . Otherwise, the objection is waived."

Defense counsel did not argue below that S. was not competent to testify. He stated instead that "just one statement concerned me where [S.] said truth is something . . . that she really believes, really believes to be true even if it is not the truth." The judge agreed that this statement was concerning, but noted that upon further questioning, S. had said "you can't make up the truth." Defense counsel had no further comment, and made no argument that S. was insufficiently able to observe, recall, and relate events, as Cochran now argues on

appeal. He also did not object when, in the presence of the jury, the prosecutor offered S. as competent to testify. Accordingly, Cochran's argument is not preserved for review.

Even if preserved, the trial court did not abuse its discretion in finding that S. was competent to testify.

> The determination of a child's competence to testify is generally left to the sound discretion of the trial judge, whose judgment will not be disturbed on appeal, absent an abuse of that discretion. . . . In determining a child's competency, the test is not the age of the child, but the child's reasonable ability to observe, to understand, to recall, and to relate happenings while conscious of a duty to speak the truth. When the issue is raised, the trial judge should conduct an examination out of the presence of the jury to develop the factual basis for a competency determination.

Matthews v. State, 106 Md. App. 725, 740-41(1995)(internal citations omitted). "A competency determination, based upon the application of a test, requires that the trial court make findings of fact. . . . We apply the 'clearly erroneous' standard of review to that factual finding." *Jones v. State*, 410 Md. 681, 699 (2009) (emphasis omitted).

Based on S.'s examination, the court found she "does know the difference between the truth and a lie. She has indicated through her testimony so far the ability to observe, to understand, to recall, to relate happenings while conscious of a duty to speak the truth." This finding was supported by the answers S. gave in response to the prosecutor's questions. S. correctly identified her parents, her school, and her grade. She stated that if she made a promise, she "[had] to do it," and acknowledged that she had promised to tell the truth. She said that one cannot "make up the truth," and correctly described as a lie the prosecutor's representation that she (the prosecutor) was wearing a purple jacket, when her jacket was red.

S. stated that she "would probably go to jail" if she told a lie in court. She was able to recall her recent Thanksgiving holiday, and narrated events that happened on that day. Based upon these responses, the court's factual findings regarding S.'s competency were not clearly erroneous, and it therefore did not abuse its discretion in finding S. competent to testify.

III.

Mitchell's Hearsay Testimony

Before Mitchell testified, the prosecutor informed the court that she was offering Mitchell's testimony about S.'s reports of abuse "as prompt reports of sexual assault," an exception to the rule against hearsay. *See* Md. Rule 5-802.1(d).[3] She proffered that "you will hear things like this morning and last night Shane humped me. It is that reason."

The prosecutor explained that Mitchell's testimony also was admissible "through the child hearsay statute," but that the statute only would apply if there were no other applicable hearsay exceptions. *See* Md. Code (2001, 2008 Repl. Vol., 2013 Supp.), section 11-304(d)(1)(i) of the Criminal Procedure Article ("CrP").[4] She suggested that the court conduct a hearing on the issue out of the presence of the jury, "just in case the Court decides

---

[3]That Rule provides as an exception to the rule against hearsay "[a] statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony."

[4]That statute provides, in relevant part, that "an out of court statement by a child victim may come into evidence in a criminal proceeding . . . to prove the truth of the matter asserted in the statement: (i) if the statement is not admissible under any other hearsay exception . . . ."

it is not a prompt report." The court agreed, explaining "it does sound like a prompt report," but noting that "[i]t doesn't hurt to have two basis [sic] for it, does it?"

The court then held a hearing outside the presence of the jury. Mitchell was examined about the various statements S. made to her concerning Cochran. At the conclusion of Mitchell's testimony, the following ensued:

> [PROSECUTOR]: Your Honor, I guess listening to the statements, I think there are several that are clearly coming in under the prompt report of a recent sexual assault. There were several where [S.] talked about it being last night.
>
> THE COURT: Right.
>
> [PROSECUTOR]: I think actually the majority of them would fall under that exception.

"In case they [didn't]," the prosecutor argued that Mitchell's testimony about S.'s reports of abuse also met the factors set forth in Cr.P. section 11-304. The court asked for defense counsel's input. He responded, "Your Honor, I would just request of the Court if Your Honor does allow these reports in that I be allowed to question them in its entirety and be able to cross examine Ms. Mitchell regarding anything she may have written in that report." The prosecutor clarified that she was not introducing the "paper reports" but Mitchell's testimony about the reports. The court told defense counsel, "If [Mitchell] touches on certain things you can certainly cross examine it." Defense counsel responded, "Very well."

The court ruled as follows on the admission of Mitchell's testimony:

> . . . [T]he State is offering these statements under two basis [sic]. The first one is prompt report of rape or sexual offense. Certainly I think the vast majority of them do satisfy that exception to the hearsay rule and would be admissible under that. There may have been one of them in there where it is hard to tell if it was or wasn't, namely the context of the later ones that would seem to indicate that, yes, it would be when you take a look at all of them.

The court further explained that the statements also met the criteria for admission under Cr.P. section 11-304, in that they contained "specific guarantees of trustworthiness." The court concluded, "So . . . I will admit the statement[s] under both theories."

On appeal, Cochran contends Mitchell's testimony about the reports of abuse S. made to her was hearsay that "was not admissible under the statute [Cr.P. section 11-304] because the hearsay statements of [S.] lacked the particularized guarantee of trustworthiness required by § 11-304(e)."

The State counters that this issue is not preserved for review. It argues further that the court admitted Mitchell's testimony under Cr.P. section 11-304 *and* Rule 5-802.1(d) and Cochran did not object to the admission of Mitchell's testimony under the latter. Therefore, we need not consider whether the court's analysis of the relevant Cr.P. section 11-304 factors was correct. We agree with the State on both points.

Defense counsel did not object to the court's admission of Mitchell's testimony under either Cr.P. section 11-304 or Rule 5-802.1(d); rather, he requested only to "be able to cross examine Ms. Mitchell regarding anything she may have written" in her reports. For this reason, Mitchell's argument is not preserved for review.

Furthermore, Cochran only argues on appeal against the court's decision to admit Mitchell's testimony under Cr.P. section 11-304, leaving unchallenged the court's ruling that the testimony also was admissible under Rule 5-802.1(d).

IV.

Cross-Examination

On cross-examination of S., defense counsel asked, "When you were four years old, do you remember an interview when you were talking to someone about someone touching you?" The prosecutor objected and a bench conference ensued:

> [PROSECUTOR]: This is not relevant. When [S.] was four years old it was 2006. The testimony from her father is that [Cochran] wasn't even in the picture.
>
> * * *
>
> [DEFENSE ATTORNEY]: Your Honor, what this is intended to show is that she could have gained knowledge of inappropriate sexual knowledge at a very early age. At the last proceeding she indicated that she did remember that conversation when she was four.
>
> THE COURT: But let's assume that she had been victimized by David Hurst when she was – I thought the testimony from the father was when she was three.
>
> [PROSECUTOR]: Three.
>
> [THE COURT]: What is the relevance of that to her accusation against this man when she didn't even know him?
>
> [DEFENSE COUNSEL]: I understand that, Your Honor. The relevance is it would show age inappropriate knowledge, that at a very young age she is gaining this carnal knowledge. It could also show confusion.

THE COURT: Haven't you already developed that through the father?

[DEFENSE COUNSEL]: Well, yes, but it would be nice to reinforce it with this witness.

THE COURT: But in reenforcing it there has to be an element of fairness and I think all you are doing now is confusing her. She is still a ten year old girl on the stand. I mean, I understand the importance of that information, but have you not developed it so that you certainly can have that stocked away to argue in your closing?

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: I understand the value of that. So, I'm not taking that away from you. That is certainly an issue. As it pertains to asking this girl now as it relates to her direct examination, I think it would at least go beyond the scope of the direct if nothing else, not to mention some fundamental fairness in cross examining a ten year old girl.

[DEFENSE COUNSEL]: That is the difficult part.

THE COURT: And I don't envy you at all. But at this point it is at least beyond the scope of direct.

[DEFENSE COUNSEL]: That's fine.

THE COURT: It certainly deals with a timeframe where . . . Mr. Cochran wasn't even on the scene yet. So, I understand what you wanted to develop, but I think you have gotten it already out of one witness. So, it is there in your hip pocket for closing argument.

Cochran argues that the trial court erred in "unduly limiting cross-examination of [S.] as to her recollection of statements by her relating sexual abuse by others before Cochran and her mother met." He contends that this line of inquiry was relevant because it would have developed "evidence that would have supported [his] defense theory that there was a prior source for [S.'s] ability to relate details of abuse." He also argues that "[s]uch questions, in

the context of this case, were the equivalent of cross-examination questions directed as uncovering a witness's bias, which is always permissible and within the scope of direct."

The State responds that we need not address the question of error, because defense counsel asked these very questions of S. during his direct examination of her during the defense case. Therefore, regardless of whether the court erred in limiting the scope of Cochran's cross-examination of S. during the State's case in chief, there was no prejudice because the defense directly examined S. on the contested issue of S.'s reports of abuse before Mother met Cochran. We agree.

Defense counsel called S. to testify as the first witness for the defense. The following colloquy ensued:

> [DEFENSE ATTORNEY]: Now, [S.], I know that you have talked to a lot of people about what happened, about Mr. Shane and about other people. Right?
>
> [S]: Yes.
>
> [DEFENSE ATTORNEY]: I know that for some of those conversations you were pretty young. You were maybe four or five years old. Right?
>
> [S]: Yes.
>
> * * *
>
> [DEFENSE ATTORNEY]: I'm going to take you back a little ways to when you were about four or five years old. Do you remember saying that David and James did bad things to you?
>
> [S]: No, I do not.

[PROSECUTOR]: Your Honor, could I have a reference as to which one you are questioning her from?

A bench conference then took place, during which the following colloquy ensued:

[PROSECUTOR]: [Defense Counsel] is referring to the interview that was done about David Hurst. That's what he is referring to and that's what I was afraid of. It is going to confuse [S.], do you remember the one that happened before Shane was even in the picture.

[DEFENSE COUNSEL]: You Honor, it goes to age inappropriate knowledge. [S.] could have gained age inappropriate knowledge from these activities. If you recall, Mr. Harris the father testified –

THE COURT: I think it is only fair if you're going to do that that you point out to her that this was before she ever knew Mr. Cochran.

[DEFENSE COUNSEL]: That's fine.

Defense counsel then resumed his direct examination of S.:

[DEFENSE COUNSEL]: [S.], I know this can be a little confusing because you talked to so many people about this. Let me try to be as helpful as possible, because I know you want to be helpful. What I'm talking about now is when you spoke to a Ms. Francis, and you may not remember her, but you may remember talking about it. Now, this was before you met Mr. Shane. Do you remember saying that David touched your kitty?

[S]: No.

[DEFENSE COUNSEL]: Do you remember saying David took your close [sic] off?

[S]: Yes.

[DEFENSE COUNSEL]: Do you remember saying that David put his penis in your butt-butt?

[S]: No.

[DEFENSE COUNSEL]: Do you remember saying James did this, too, to you?

[S]: No, I do not.

[DEFENSE COUNSEL]: . . Now, this time I'm going to talk about something a little more recent after you met Mr. Shane. You were speaking to a Ms. Sera. . . . Did you say that David humped you?

[S]: Which David?

[DEFENSE COUNSEL]: David Hurst.

[S]: Yes.

[DEFENSE COUNSEL]: Do you remember saying Harold humped you?

[S]: Yes.

* * *

[DEFENSE COUNSEL]: . . . Now, another time . . . you spoke to a Ms. Miller and this was a little later in 2008. So, you were probably about six years old. Okay?

* * *

[DEFENSE COUNSEL]: . . . Do you remember saying that David Albert touched you?

* * *

[S]: Yes.

[DEFENSE COUNSEL]: Do you remember saying David Albert kissed and humped you?

[S]: No.

It is clear from the foregoing that defense counsel, on direct examination, asked S. about the abuse she reported that involved men other than Cochran, and before Mother met Cochran. This was the same line of inquiry the court prohibited defense counsel from pursuing during cross-examination in the State's case, and that defense counsel argued was relevant to show how S. may have gained "age inappropriate knowledge" apart from her experience with Cochran. Because the defense was permitted to pursue this inquiry on direct examination of S., Cochran could not have suffered prejudice even if the scope of his cross-examination of S. was unduly limited.

V.

Defense Expert's Testimony

As noted, Dr. Hariton testified for the defense as an expert in the field of forensic gynecology. Dr. Hariton was *voir dired* outside the presence of the jury. The following relevant information was adduced. Dr. Hariton is a licensed medical doctor who is board certified in the area of obstetrics and gynecology. He is not a pediatrician. He is a member of several gynecological associations, including the North American Society for Pediatric and Adolescent Gynecology, and the American Professional Society on the Abuse of Children. At that time, he had practiced for 44 years, and estimated that he had performed 100,000 gynecological exams, of which 250 to 300 involved prepubescent girls. He had examined these girls because they had suffered "trauma. Not sexual, but for trauma; they fall on

bicycle bars, they fell on a fence, infection." He never had performed a sexual abuse examination on a prepubescent girl.

Dr. Hariton had attended educational classes about the sexual abuse of children. He had been retained approximately 350 to 400 times in the past to review sexual abuse cases, at least a third of which concerned examinations for child sexual abuse. He had received training in sexual abuse examinations, and had lectured on the topic.

Defense counsel offered Dr. Hariton as an expert "specifically dealing with sexual abuse exams." The prosecutor objected, and the following colloquy ensued:

> THE COURT: Well, why don't you proffer to me what [Dr. Hariton] will opine.
>
> [DEFENSE COUNSEL]: Your Honor, what he would opine is, one, photographs should have been taken in [Dr. Lomonico's] exam [of S.]. That that is the standard of care. Dr. Lomonico simply made drawings and photographs are what should be used.
>
> Secondly, there could be other causes of the so-called trauma that was noted in the October exam and if there would have been sexual activity on January 16th, 2008, the day when [S.] reports the abuse to Ms. Mitchell at the school, that there would have been something showing up there in the exam from Dr. Lomonico on January 17th. That's it.
>
> * * *
>
> THE COURT: . . . [Dr. Hariton] certainly has qualifications, but here we're talking about he's going to critique the standard of care of a gynecological exam relating to sexual abuse of a prepubescent female child when he has never done that. So, how does he testify to the standard of care when he has never done that?
>
> * * *

[DEFENSE COUNSEL]: As a matter of routine in exams involving any kind of trauma, whether sexual or trauma, that photographs should be taken.

THE COURT: . . . I have had tons of these cases in the past twenty-five years and I have had plenty of them without photographs because it just further traumatizes the young girl. So, that doesn't even make sense to me. I mean, I don't see what that is based on.

What was the other thing? The standard of care is one thing. That's a medical malpractice issue.

[DEFENSE COUNSEL]: That there would have been some kind of physical evidence.

THE COURT: How does that tie into that [Dr. Lomonico] should have taken photographs? How does that tie in with the opinion?

[DEFENSE COUNSEL]: I can stay away from the photographs if Your Honor doesn't feel that is appropriate.

* * *

THE COURT: If you want to offer him, offer him in forensic gynecology. As to the standard of care for the photograph, I don't see where he is qualified to comment on that on sex abuse or alleged sex abuse examinations on victims who are prepubescent girls. That is why I have a problem with that. . . . I think he is qualified on [the issue of whether there would be physical evidence if abuse had occurred the night before] . . . but as to the photography I don't think he is qualified.

Cochran contends the trial court erred by prohibiting him from eliciting Dr. Hariton's opinion that Dr. Lomonico should have taken photographs during his examinations of S. He argues that, although Dr. Hariton had never performed a child sex abuse examination, he had "extensive experience reviewing sex abuse cases, including child sex abuse . . . had received training on the subject, and . . . had lectured and taught on the subject." Therefore, the court

should have found Dr. Hariton qualified to opine on the standard of care in child sex abuse examinations – including the taking of photographs – pursuant to Rule 5-702.

Cochran further argues that this error was not harmless because

> Dr. Lomonico's finding of physical evidence of trauma was a crucial element of the [S]tate's case. His failure to photograph what he claims to have seen made it impossible for Dr. Hariton to persuasively challenge his finding. The State relied on this inability in both cross examination and argument by stressing that Dr. Hariton had not personally examined [S.]. Given the lack of a photographic record of the examination, it was of course impossible for Dr. Hariton or the defense to respond. If, in fact, the defense had been able to persuade the jury that there were no physical signs whatever of any abuse, the jury's evaluation of the totality of the evidence, including the credibility of [S.] and Cochran, might have been different.

Rule 5-702, entitled "Testimony by experts," provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

"It is the general rule that the admissibility of expert testimony is within the sound discretion of the trial judge and will not be disturbed on appeal unless clearly erroneous." *Wilson v. State*, 370 Md. 191, 200 (2002).

The trial court's decision not to permit Dr. Hariton to testify that Dr. Lomonico breached the standard of care by failing to take photographs during his examinations of S. was not an abuse of discretion. The court pointed out, and emphasized, that Dr. Hariton never had performed a sexual abuse examination on a prepubescent girl. The court

concluded that, without having any experience actually performing such an examination, Dr. Hariton was not qualified to opine that the examination as performed by Dr. Lomonico -- who had extensive experience performing such examinations -- was substandard because it was documented by means of drawings, not photographs. The trial court concluded that, despite his other experience, Dr. Hariton was not qualified to offer such standard of care testimony. Having made that finding, the trial court appropriately concluded that the proposed opinion testimony would not assist the trier of fact in understanding the issues or the evidence, and ruled the proposed opinion inadmissable. This was not an abuse of discretion.

VI.

Jury Instruction

At the close of all the evidence, the court gave the following instructions, in relevant part:

> Members of the jury, the time has come to explain to you the law that applies to this case. **The instructions that I give you about the law are binding on you. In other words, you must apply the law as I explain it to you in arriving at your verdict. On the other hand, any comments that I may make about the facts are not binding upon you and are advisory only. It is your duty to decide the facts and apply the law to those facts.**
>
> * * *
>
> Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion

> of your fellow jurors, or for the mere purpose of returning a verdict. You are not partisans. **Since this is a criminal case, you are judges, judges of both the law and the facts.** Your sole interest is to ascertain the truth from the evidence in the case.
>
> The question of punishment or penalty in the event of conviction is no concern of the jury and should not enter into or influence your deliberations in any way. . . .

(Emphasis added.)

Cochran contends that by instructing the jurors that they were "judges of both the law and the facts" the court violated Cochran's right to due process and a fair trial. *See Unger v. State*, 427 Md. 383 (2012). He acknowledges that defense counsel did not object, but argues that we should recognize the instruction as plain error and grant him a new trial.

Article 23 of the Maryland Declaration of Rights states, in relevant part: "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact." At one time, based on this language, courts in criminal trials routinely instructed jurors that they were the "judges of the law," and that the court's instructions about the law were advisory only and not binding on them. However, in *Stevenson v. State*, 289 Md. 167 (1980), the Court of Appeals

> refused to interpret Article 23 in accordance with the plain meaning of its language. Instead, the *Stevenson* opinion construed Article 23 as limiting the jury's role of deciding the law to non-constitutional "disputes as to the substantive 'law of the crime,' as well as the 'legal effect of the evidence[.]'" The *Stevenson* opinion stated "that all other legal issues are for the judge alone to decide."

Unger, 427 Md. at 387-88 (quoting *Stevenson*, 289 Md. at 179-80) (internal citation omitted).

"The 'failure to object to a jury instruction ordinarily constitutes a waiver of any later claim that the instruction was erroneous.'" *Unger*, 427 Md. at 390 (quoting *Walker v. State*, 343 Md. 629, 645 (1996)). However, "the failure to raise an issue at trial [is] not a waiver of the issue when there [is] a relevant post-trial United States Supreme Court or Maryland Court of Appeals ruling changing the applicable legal standard." *Id.* at 391. In *Unger*, the Court of Appeals held that its decision in *Stevenson* "substantially changed the state constitutional standard embodied in Article 23"; therefore, in criminal trials prior to *Stevenson*, the failure to object to instructions informing jurors that they were "judges of the law" and that the court's instructions on the law were "advisory only" and not binding did not constitute a waiver. *Id.* The obvious corollary to the Court's holding in *Unger* is that in criminal trials after *Stevenson*, the failure to object to a court's instruction informing jurors that they are "judges of the law" is a waiver of that issue for review on appeal.

Here, Cochran does not and cannot argue that he did not waive this issue; his trial took place in 2012, long after the Court's decision in *Stevenson*. Defense counsel's failure to object to the court's instruction to the jurors that they were "judges of both the law and the facts" therefore constitutes a waiver of the error.

Rule 4-325(e) provides that "[a]n appellate court, on its own initiative or on the suggestion of a party, may . . . take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object." "'[A]ppellate review under the plain error doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare

phenomenon.'" *Robinson v. State*, 209 Md. App. 174, 203 (2012), *cert. denied*, 431 Md. 221 (2013) (alteration and some internal quotation marks omitted) (quoting *Kelly v. State*, 195 Md. App. 403, 431-32 (2010)). This is so because

> both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

Id. at 202 (quoting *Kelly*, 195 Md. App. at 431). Accordingly, we will review an unpreserved error under the plain error doctrine "only when the unobjected to error is compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Id.* at 203 (quoting *Kelly*, 195 Md. App. at 432) (alteration and some internal quotation marks omitted).

We perceive no such error here. Although the judge did tell the jurors that they were the judges of both the law and the facts, this remark came after the judge had correctly informed them that the court's instructions on the law were "binding" and had to be applied as explained to them. The instructions were free from the "advisory only" language of concern to the *Stevenson* and *Unger* Courts.

Cochran argues that the court's erroneous remark "empowered [jurors] to decide the case in accordance with what they believed to be the truth and not in accordance with the due process requirement that the State prove its case beyond a reasonable doubt." We disagree. The remark was made after the judge correctly instructed the jury regarding the State's burden of proving Cochran's guilt beyond a reasonable doubt, and what that standard

entailed. It is highly unlikely that the court's isolated "judges of the law" remark would have led any juror to disregard the court's earlier admonition about the binding nature of the court's legal instructions, and the court's proper explication of the reasonable doubt standard.

VII.

Appeal to Passion or Prejudice During Closing Argument

Cochran contends the following portion of the prosecutor's closing argument was an impermissible appeal to the passion, prejudice, or emotion of the jury:

> [S.] is now ten years old and she has come to court to share with you her childhood memories, her childhood memories of being abused and molested and sodomized really and being raped by the Defendant over and over and over and over again. I told you in my opening that this was a case about a stolen childhood. [S.] had her childhood taken away from her and stolen by the Defendant and her mother, and now she has come here to court to ask all of you to give her I guess justice is the best word, to give her justice.
>
> Ladies and gentlemen, when you go back into the jury room deliberate, go over the evidence, go over the Defendant's evidence, his complete and total lack of credibility, review the case, review the facts, and when you come back for [S.'s] sake please find him guilty.

Defense counsel objected, arguing "[i]t's close to a public safety type argument. I don't think that last comment was necessary for [S.'s] sake." The judge overruled the objection, explaining that she "didn't hear it as a public safety argument," but as tying into the preceding portion of the closing argument in which the prosecutor was "asking for . . . justice."

Cochran also contends the following portion of the prosecutor's rebuttal closing argument was an improper appeal to the jury's passion or prejudice:

> You know, I know that you have been sitting here a long time and I know that you are ready to go back and deliberate on this case. I know that there is a lot to go over. But it is really very simple, ladies and gentlemen, because it comes down to this. As I said before, [S.] came into this court and she shared with you some of her earliest childhood memories. Her earliest childhood memories consist of being systematically brutalized by this man, Mr. Cochran. Those are her earliest childhood memories. That is something that she has to live with the rest of her life, the abuse and the brutal sexual behavior that she suffered at his hands.
>
> It's time, ladies and gentlemen. It's time. It's time for her to get justice for each and every time that Shane Cochran took her by the hand, took her into her bedroom, stripped her clothes off her, stripped his close [sic] off him, said to her I want to enjoy you and brutally and sexually assaulted her when she was five and six years old. It's time for her to get her justice. Go back in that jury room and find him guilty of each and every count.

Defense counsel did not object to that portion of the State's argument.

The State responds that this issue is not preserved for review, because defense counsel objected only to the first part of the State's closing argument, and stated a ground for his objection that is not the ground on which he seeks reversal on appeal. We agree.

Defense counsel objected only to the prosecutor's request to the jury to "review the case, review the facts, and when you come back for [S's] sake please find him guilty." He argued that this was "close to a public safety type argument." He did not argue that any of the prosecutor's comments impermissibly appealed to the passions, emotions, or prejudices of the jury.

"It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Klauenberg v. State*, 355 Md. 528, 541 (1999). Cochran

plainly waived the ground he now argues on appeal, *i.e.*, that the prosecutor impermissibly appealed to the passions, emotions, or prejudices of the jury.

Even if this issue were not waived, we would reject it on its merits. The prosecutor's request to the jurors that they find Cochran guilty on the evidence before them and give justice to S. for the acts perpetrated against her was not an appeal to emotion, passion, or prejudice.

VIII.

Reasonable Doubt Comment In Rebuttal Closing Argument

Cochran contends the prosecutor made an improper comment about reasonable doubt in her closing argument, as follows:

> You heard [defense counsel] talk to you about reasonable doubt. Proof beyond a reasonable doubt is the standard in this country and in this state. Reasonable doubt does not mean all doubt. It doesn't mean it is impossible for the State ever to prove a case, because certainly we do. Certainly we put cases on every day, every week in this courthouse where people are found guilty beyond a reasonable doubt. It is not an impossible burden. As the Court instructed you, it is not all doubt and it is not to a mathematical certainty, it is a doubt based on reason. There is no kind of magical formula for reasonable doubt. It is a decision that you need to make. I suggest to you and I submit to you that we have surpassed our burden in this case, that we have surpassed proof beyond a reasonable doubt in this case, because we have.

Cochran acknowledges that defense counsel did not object to the prosecutor's comment. He requests us to determine that it constitutes plain error. We already have discussed the rarity of recognizing plain error, *see* section VI, *supra*. We decline to recognize plain error on this issue.

The State did not misstate the law of reasonable doubt, as was the case in *Carrero-Vasquez v. State*, 210 Md. App. 504 (2013), upon which Cochran relies. There we held the prosecutor's remarks were improper because they equated reasonable doubt to "[t]rust[ing] your gut." 210 Md. App. at 510-11. Here, the State did little more than restate the court's own correct reasonable doubt instruction, *i.e.* that "the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence." To this correct explanation of the law, the prosecutor merely added the truism that reasonable doubt "is not an impossible burden" and has been satisfied in other cases. The comments were not error, let alone plain error.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.