Circuit Court for Washington County
Case No. C-21-CR-20-000451

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 458

September Term, 2024

DONALD MONROE MITCHELL, JR.

v.

STATE OF MARYLAND

Shaw,
Arthur,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: April 6, 2026

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

Appellant, Donald Mitchell, Jr., was convicted by a jury in the Circuit Court for Washington County of second-degree rape and incest.

Appellant presents the following questions for our review:

> 1. Did the circuit court err in permitting an officer to provide testimony about whether the complainant's demeanor at the hospital was "unusual"?
>
> 2. Did the circuit court err in permitting a forensic nurse to testify that the complainant did not engage in "drug-seeking behavior" at the hospital?
>
> 3. Did the circuit court err in imposing separate sentences for Count 1 and Count 3?

Finding no error, we shall affirm.

I.

By criminal information, appellant was charged with two counts of second-degree rape and one count of incest. The State *nolle prossed* one count of second-degree rape, and after a trial in December of 2022, a jury convicted appellant of one count of second-degree rape and one count of incest.

On April 24, 2024, appellant, represented by new counsel,[1] was sentenced to thirty-five years of incarceration for second-degree rape due to his status as a subsequent offender and 5 years' incarceration for incest, to run consecutive to the rape charge.

[1] Appellant discharged his counsel after the jury verdict and before sentencing. He has not raised any issue about the discharge of his counsel in this appeal.

The State charged appellant with raping K.M.[2], his biological daughter, at his apartment in Hagerstown in September 2019. We glean the following facts from the trial.

K.M., who was nineteen at the time of the event and twenty-two at the time of trial, testified at trial and identified appellant as her father. She testified that she did not have much contact with her father prior to her turning eighteen but that, once she turned eighteen and got her own vehicle, she began to interact more with him. K.M. testified that, on September 4, 2019, she had an appointment with her psychiatrist, where "there was some miscommunication with them as far as with [her] prescriptions being filled and just seeing them in general." At the time, K.M. had prescriptions for Xanax, Lithium, and Seroquel. On cross-examination, K.M. acknowledged that her grandmother had called her psychiatrist, and her psychiatrist refused to provide K.M. with her medications because of concerns that K.M. was abusing them. K.M. testified that her doctor was screaming and cursing at her and threatened to call the police to have her involuntarily committed if she did not leave his office.

K.M. testified that she left her psychiatrist and called appellant. She asked to see him and talk to him because she was "pretty upset about what had happened at—at [her] psychiatrist's office." She then went to her boyfriend's house, where they watched a movie. She left her boyfriend's house around 3 p.m. and went to appellant's house. Appellant

[2] Pursuant to Md. Rule 8–125(a)(2)-(b)(1), the name of "a victim of crime that would require the defendant, if convicted, to register as a sex offender . . . "shall not be used in any opinion, oral argument, [or] brief . . . pertaining to the appeal that is generally available to the public." Other information from which the victim could be identified is not required to be excluded. Md. Rule 8–125(b)(2).

asked if they could go to the liquor store to "grab a couple of beers." K.M. responded "'Yes, that's fine,'" and they went to purchase the drinks and then returned to appellant's apartment. K.M. testified that drinking together was something the pair frequently did. K.M. had a "Natty Daddy" beer, which appellant purchased for her because K.M. was underage for purchasing alcohol. Over the course of the night, K.M. testified that appellant "had been buzzed."

Appellant and K.M. hung out for the rest of the day. Around 8 or 9 p.m., K.M.'s mother stopped by for about an hour, got into an argument with appellant and then left.

K.M. testified that after her mother left, she smoked "Spice," a form of synthetic cannabis which two men had dropped off earlier that afternoon. K.M. testified that when she smoked the Spice, she had consumed 4 "Natty Daddy" beers, each of which is 8% alcohol, and she may have smoked some cannabis earlier, but she could not recall exactly. K.M. testified that after she exhaled the Spice, her mental state changed until she felt that she "just wasn't really there anymore." The next thing she remembered was sitting in the kitchen with appellant in front of her talking for a few seconds, and then her memory went blank again. She next recalled being in a dark room and seeing "what had looked like three separate people standing in the room." She thought one of them was female. She felt someone try to remove her pants but had difficulty moving her arms and felt stuck. She testified that she tried and failed to pull her pants up, and then everything went blank again.

She next recalled waking up on the kitchen floor on her side with no memory of how she had gotten there. She testified that it was dark, and she did not see anyone. On cross-examination, K.M. acknowledged that she did encounter appellant before she left and

she asked him who had been there earlier. Appellant first responded, "a couple of his buddies," and then said K.M. had been tripping. She went to the bathroom and then went home in her car. At that point, it was the middle of the night, and K.M. went straight to bed when she got home.

The next morning, K.M. woke up and went to the bathroom. There, she noticed that her underwear was inside out and twisted. She went to the hospital before noon to "get checked out." On the way, she felt sick and stopped to throw up. She then continued on to the hospital so she could "get a rape kit done" because of what she recalled about the night before. At the hospital she received an exam and a Plan B pill to prevent pregnancy. K.M. had bruises on her arms and legs, which she said she did not have prior to being at appellant's house. K.M. testified that she was concerned her father had assaulted her and could not identify the others in the room because it was too dark. She expressed concern about contracting HIV and hepatitis, which she feared her father may have. She received medication to prevent STDs and underwent months of testing to discover any possible exposure. At the hospital, K.M. began "panicking," and once she calmed down, she requested Xanax for her anxiety. The hospital gave her one Xanax, which she took.

Officer Duane White of the Hagerstown City Police Department went to Meritus Medical Center on September 5, 2019, and spoke with K.M. He received information about a potential suspect and transferred the hospital SAFE kit to the police department. K.M. mentioned that she had smoked weed, appellant was smoking Spice, and both had been drinking. K. told Officer White that a male and female tried to pull her pants down. She

originally said the man could have been her father but then said she couldn't make out the faces.

Detective Anthony Fleegal interviewed K.M. on September 10th. She mentioned getting into an argument with her psychiatrist and her psychiatrist threatening to call the police. Detective Fleegal testified that he did not follow up with her psychiatrist because he did not "really think that that was relevant to the investigation. It had not—nothing to do with the actual allegations in this matter." She told Detective Fleegal that she smoked Spice but that she did not exhale it. K.M. "clearly identified" appellant as "the person that she thought might be involved." Detective Fleegal attempted to reach appellant to obtain a statement, but he was unsuccessful. Pursuant to a search warrant Detective Fleegal obtained DNA swabs of appellant to compare with K.M.'s SAFE kit. Detective Fleegal described K.M.'s demeanor as follows:

> "She was obviously upset about, you know, I mean she was nervous and upset about coming in and speaking with me about the nature of the investigation. But I would say she was very cooperative, very detail-oriented during our interview, I think."

Officer White described K.M.'s demeanor as follows: "She was speaking softly at the time, not very loud. She wasn't very—she wasn't showing much emotion but telling something that gone on."

On cross-examination the following exchange occurred:

> "[DEFENSE COUNSEL]: Okay. And then you meet with [K.M.]. How long did you talk to her? Do you know?
>
> OFFICER WHITE: Not off the top of my head, I can't recall.

[DEFENSE COUNSEL]: Okay. But you gave her opportunity to tell you her alleged story. Right?

OFFICER WHITE: Correct.

[DEFENSE COUNSEL]: Okay. And did you hurry her up in any way or anything like that?

OFFICER WHITE: No.

[DEFENSE COUNSEL]: You just listened to her and wrote things down. Correct?

OFFICER WHITE: Correct.

[DEFENSE COUNSEL]: Okay. And you said her demeanor was soft-spoken?

OFFICER WHITE: Yes.

[DEFENSE COUNSEL]: Okay. Was she crying?

OFFICER WHITE: No.

[DEFENSE COUNSEL]: Okay. But she—and you said she wasn't emotional.

OFFICER WHITE: Yeah, she was…

[DEFENSE COUNSEL]: Wasn't emotional?

[OFFICER WHITE]: She was like—her emotions were flat."

On redirect, Officer White testified that K.M.'s demeanor was not unusual:

THE STATE: Officer White, you indicated that she wasn't crying or anything like that. Have you had occasion to respond to reports of sexual assault before?

[DEFENSE COUNSEL]: Objection, not relevant.

THE COURT: Sustained. Next question.

THE STATE: Did you find anything unusual about her flat affect?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

OFFICER WHITE: No.

THE STATE: Okay. No further questions."

Jennifer McNew, a nurse, testified as an expert in sexual assault forensic nursing. Ms. McNew detailed her formal education and her professional training, including "training around sexual assault, domestic violence, strangulation, those kinds of things, learning how to collect evidence and take proper photographs and properly documenting as well as ultimately testifying in court." Ms. McNew examined K.M. in the hospital. She testified that K.M. was "visibly shaking" and "had some tearful outbursts." K.M. informed Ms. McNew that she wanted law enforcement contacted and that her current medications were Xanax, Seroquel, and Lithium. While Ms. McNew attempted to conduct her exam, she had to stop because K.M. became emotional, explaining as follows:

> "[S]he was trying to remember all the details and not really understanding that if her father did this to her that she could not believe that that would have happened. "How—like how could he do this to me?" Another time, once I told her that she had had an injury, then that was a—a point where I actually had to stop my exam. She—let me see if I can see this, read it here. She began sobbing and yelling about, "How could this have happened, my own father?" And at that time, when we can tell patients are struggling with something, we stop and ask them if they want to take a break. She did want to take a break. She had asked if she could have some type of medication to help with her anxiety because she had not had her Xanax that day. So I had met with the doctor and got an order for Xanax, which we gave to her and then gave her a little bit of time for that to start working before we continued with the exam."

K.M. received one milligram of Xanax. She did not ask for and was not provided with any additional Xanax or any other medication.

K.M. told Ms. McNew that she had not had any type of sexual contact in the prior five days and that she had consumed alcohol, smoked cannabis, and had taken a hit of Spice on the date of the incident. Ms. McNew testified that the effects of substances could intensify if taken with alcohol. K.M. underwent urine and blood tests to determine the presence of drugs. K.M. told Ms. McNew that she did not recall much of what happened after she took a hit of Spice because "her whole brain was in space." K.M. indicated that she had not showered or changed her clothes between the incident and arriving at the hospital. In her report, Ms. McNew identified the assailant as "Unknown" because K.M. "really didn't 100% knowledge who the assailant would have been at that point."

Ms. McNew addressed "drug-seeking behavior," explaining as follows:

> "THE STATE: Are you aware of abuse of antibiotics by individuals to get high?
>
> MCNEW: No.
>
> THE STATE: Okay. Is that one of the things you're trained for as an ER nurse is to be conscious of and aware of like drug-seeking behavior by patients?
>
> MCNEW: Yes.
>
> THE STATE: Okay. Did you see anything or observe anything or hear anything during the course of your time treating [K.M.] that gave you concern that she was engaging in…
>
> [DEFENSE COUNSEL]: Objection.
>
> THE STATE: …drug-seeking behavior?

THE COURT: Overruled, if she can answer.

MCNEW: No, she did not.

THE STATE: Okay. What types of things do you look for?

MCNEW: For drug-seeking behavior?

THE STATE: For drug-seeking behavior.

> MCNEW: Typically people come in with chronic pain, where a lot of times we can't really find anything wrong. They come in frequently. It may be constant headaches or constant abdominal pain, where we may do X-rays, we may do CAT scans, bloodwork, but everything usually comes back okay. Or if they have an injury that really isn't that severe, they may sometimes come back and say, 'I need more medication. This wasn't good enough.' Or something like that."

During the exam, Ms. McNew noted that K.M. had bruises and an abrasion to her left arm and elbow. K.M. said she had preexisting injuries that were a cut on her right third finger, a cut on her left hand, and some bruises on her left shin. The anogenital exam revealed that K.M. had a laceration to her posterior fourchette and "copious amounts of white secretions to the vaginal fornix and around the cervix." Ms. McNew confirmed that she provided K.M. with medications to prevent STDs.

K.M. asked if she had an injury and Ms. McNew said there was. K.M. asked to see, and after she viewed photographs she "began sobbing, having emotional outburst (sic) and yelled, 'This is fucked up. How could this have happened? My own father.'"

Dr. Cynthia Morris-Kukoski testified as an expert witness in forensic toxicology. She examined K.M.'s blood and urine samples for alcohol, prescription medications, over-the-counter medications, and illicit medications. She could not test for Spice because their "testing was so outdated that it wouldn't get any of the new stuff that was on the street."

Nor could she test for Lithium. Dr. Morris-Kukoski testified that the lab results indicated the presence of the metabolite of Seroquel in the urine sample, Clonazepam in the urine and blood sample, the metabolite of THC in the blood sample, acetaminophen in the urine sample, and the inactive metabolite of cocaine in the urine sample. There was no alcohol identified in K.'s system. Dr. Morris-Kukoski did not calculate how long it would take for 4 Natty Daddy beers to be expelled from one's system.

K.M. testified that she did not know why no alcohol was found in her system and that she did not take any pills the day of the incident, while at her father's house, or before she went to the hospital. She testified that to her knowledge, she had only taken Clonazepam in 2020, which was after this incident, and no other times. She did not mention taking Clonazepam or cocaine to Officer White or to Ms. McNew. She did not know why Clonazepam or cocaine would have been in her system.

Rebecca Levine, a forensic scientist with the Maryland State Police, testified as an expert in the field of forensic serology. Ms. Levine tested K.M.'s samples for semen and blood and testified that K.M.'s first vaginal sample tested positive for the presence of semen and negative for the presence of blood, her vaginal cervical swabs tested positive for semen and negative for blood, and her oral swabs tested negative for both.

Tiffany Keener, another forensic scientist with the Maryland State Police, testified as an expert in the field of forensic DNA analysis. Ms. Keener received and analyzed samples in the form of a "cutting" from Ms. Levine. Ms. Keener also analyzed cuttings from the known standard of K.M. and of appellant. For the non-sperm fraction of both the first vaginal swabs and the vaginal cervical swabs, K.M.'s DNA was present as a major

contributor, and appellant's DNA was present as a minor contributor. For the sperm fraction of both the first vaginal swabs and the vaginal cervical swabs, appellant's DNA was a major contributor, and K.M.'s DNA was a minor contributor.

During sentencing, defense counsel requested that the two sentences, one for second-degree rape and one for incest, merge. The court denied the request:

> "[DEFENSE COUNSEL]: Your Honor, I would ask that you consider merging the sentences because they do relate—I know that they're not—they don't merge on. . .
>
> THE COURT: They don't have the same elements. I don't think they merge.
>
> [DEFENSE COUNSEL]: Not the same elements. . .
>
> THE COURT: I've done the—I've—I've looked at it. I'm not going to do it. My goal was 40. I hit 40. The math works out to 40. Court costs of $1,015 are waived due to your indigency. I will recommend Patuxent. If the Patuxent Institute believes he's appropriate candidate, I'll—I'll make the recommendation.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor."
>
> As noted above, the Court imposed sentence. This timely appeal followed.

II.

Before this Court, appellant first argues that the circuit court erred in permitting Officer White to testify whether K.M.'s "flat affect" was unusual. Appellant asserts that this testimony was irrelevant and not probative because Officer White, as someone unfamiliar with K.M., was unable to testify meaningfully about whether K.M.'s affect was unusual. Appellant alleges that Officer White's testimony was improper lay opinion

because it was purely speculative, not rationally based on his perception and was not helpful to the jury. Appellant argues this error was not harmless beyond a reasonable doubt.

Second, appellant argues that the circuit court erred in permitting Ms. McNew to testify that K.M. did not engage in "drug-seeking" behavior at the hospital. Appellant asserts that this testimony exceeded the scope of Ms. McNew's expertise and constituted improper lay opinion. This error, appellant argues, was not harmless.

Third, appellant alleges that the circuit court erred in imposing separate sentences for second-degree rape and incest. Appellant concedes that the two charges do not merge under the required evidence test because each offense has an element the other does not. Nevertheless, appellant argues that the sentences should merge under the rule of lenity because the conduct underlying the convictions was the same and there is a lack of clarity whether the Legislature intended separate sentences.

On the first issue, the State argues that the lower court properly admitted Officer White's testimony concerning K.M.'s demeanor at the hospital. The State asserts that the testimony was relevant because it placed Officer White's statement that K.M.'s "emotions were flat" in context and offered the jury a clearer picture of K.'s credibility. The State maintains that Officer White did not offer improper lay opinion testimony because his statements related to rational perceptions of K.M.'s emotional state and did not call for the kind of specialized knowledge that is the realm of expert testimony.

On the second issue, the State argues that the trial court properly exercised its discretion in admitting Ms. McNew's expert testimony on whether K.M. exhibited drug-seeking behavior during her treatment. The State asserts that, at the time of Ms. McNew's

testimony, she had been qualified as an expert in sexual assault forensic nursing, and she had been trained to be aware of drug-seeking behavior in patients.

On the third issue, the State argues that the trial court properly imposed separate sentences for incest and second-degree rape because there is no ambiguity in discerning whether the Legislature intended multiple punishments for these distinct crimes that punish distinct conduct and harms. An explicit anti-merger provision is not dispositive in a rule of lenity analysis. The fact that appellant's conduct underlying the two charges was the same does not negate the distinct legislative purposes underlying both statutes, which permit two charges.

III.

We address first Officer White's testimony. Appellant argues first that Officer White's testimony was not relevant and second that it constituted impermissible lay testimony.

We review the question of relevancy, a legal question, *de novo*. *State v. Simms*, 420 Md. 705, 725 (2011). Generally, relevancy is a low bar and evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence is relevant. Md. Rule 5-401. "Evidence that is relevant is admissible, but the trial court does not have discretion to admit evidence that is not relevant." *Smith v. State*, 218 Md. App. 689, 704 (2014) (citing Md. Rule 5-402). We review the trial court's decision for abuse of discretion. *Williams v. State*, 457 Md. 551, 563 (2018). Rule 5-403 provides: "Although relevant, evidence may be

excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" For the purposes of this balancing, "evidence is considered unfairly prejudicial when it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which the defendant is being charged." *Burris v. State*, 435 Md. 370, 392 (2013) (internal quotations omitted). Rule 5-602 provides: "[A] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony."

Rule 5-702 governs expert testimony and provides as follows:

> "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."

Rule 5-701 applies to lay testimony, and provides as follows:

> "If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."

We review the decision as to whether to require a witness to testify as an expert for an abuse of discretion. *Prince v. State*, 216 Md. App. 178, 198 (2014).

The Supreme Court of Maryland in *Ragland v. State*, 385 Md. 706, 717 (2005) elucidated the distinction, explaining as follows:

> "The language of the two Rules thus divides the universe of opinion testimony into two categories, each bearing restrictions that the other does not.
>
> Expert opinion testimony is testimony that is based on specialized knowledge, skill, experience, training, or education. Expert opinions need not be confined to matters actually perceived by the witness. Lay opinion testimony is testimony that is rationally based on the perception of the witness."

Rules 5-701 and 5-702 "prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or education." *Id*. at 725. In determining that the testimony at issue was expert testimony, the Court found significant that the prosecutor's questioning emphasized the connection between the officers' training and experience and their opinions, and that the officers offered their opinions that, among numerous possible explanations, the correct one was that a drug transaction had occurred. *Id*. at 725-26.

The Court in *Ragland* adopted the following description of lay testimony:

> "The prototypical example of the type of evidence contemplated by the adoption of Rule 701 relates to the appearance of persons or things, identity, the *manner of conduct*, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences. Other examples of this type of quintessential Rule 701 testimony include identification of an individual, the speed of a vehicle, the *mental state or responsibility of another*, whether another was healthy, the value of one's property." *Id*. at 718 (internal citations omitted) (emphasis added).

One determinative factor in distinguishing expert testimony from lay testimony is the so-called "ken" of a layperson. In *Freeman v. State*, 487 Md. 420, 431 (2024), the Supreme Court of Maryland explained as follows:

> "Expert testimony is required only when the subject of the inference is so particularly related to some science or profession that is beyond the ken of the average layperson; it is not required on matters of which the jurors would be aware by virtue of common knowledge. When a court considers whether testimony is beyond the 'ken' of the average layperson, the question is not whether the average person is already knowledgeable about a given subject, but whether it is within the range of perception and understanding."

In *Freeman*, the Court held that a detective's definition of the term "lick" as slang for a robbery was permissible lay testimony. *Id*. at 440.

Here, Officer White's testimony was relevant. We agree with the State that Officer White's statement that K.M.'s demeanor was not unusual put into context his prior statements about K.M.'s "flat affect." Such testimony impacts K.M.'s credibility as a witness. The Court in *Parker v. State* found that testimony of an alleged rape victim's demeanor was relevant to whether an attack occurred or whether consent was present. *Parker v. State*, 156 Md. App. 252, 271-74 (2004). So, too, here was Officer White's testimony relevant.

Officer White's testimony constituted permissible lay testimony. No specialized expertise was required to determine whether K.M.'s "flat" emotions were unusual. Unlike appellant's argument, prior familiarity with K.M. was not required to make this determination. His assessment was rationally based on his perception of K.M. and was helpful for a clear understanding of K.M.'s overall testimony. The determination as to

whether K.M.'s demeanor was unusual was within the ken of a layperson and within the *Ragland* Court's list of prototypical examples of lay testimony.

IV.

Next we address Ms. McNew's testimony. The law regarding expert and lay testimony discussed above applies here as well.

Ms. McNew's testimony was proper expert testimony. She was qualified by the court as an expert. Appellant alleges, however, that her testimony that K.M. did not exhibit "drug-seeking behavior" exceeded the scope of her expertise. We disagree.

Ms. McNew testified as to her extensive training as a forensic nurse. Prior to her testimony regarding K.M., she testified that she was trained in drug-seeking behavior in patients, making her qualified to deliver the testimony at issue here. Appellant attempts to distinguish this case from *Covel v. State*, 258 Md. App. 308 (2023). In that case, this Court held that an expert witness in the identification and operability of firearms did not exceed the scope of his expertise in testifying that his microscopic comparisons of cartridge casings bore similar characteristics of Glock type firearms. *Id*. at 330. In holding that the witness need not be admitted as an expert in tool markings, as appellant requested, the Court stated: "[t]his distinction is semantic and not significant enough to warrant a disturbance of the trial court's discretion." *Id*. We conclude that the case *sub judice* is more similar than different to *Covel*. The distinction between an expert in forensic nursing and in drug-seeking behavior is semantic, especially when the expert witness has displayed an expertise in drug-seeking behavior.

V.

Finally, we turn to appellant's merger argument. Appellant requests we merge the sentence for second-degree rape and the sentence for incest under the rule of lenity. We decline to do so. In *Clark v. State*, 473 Md. 607, 621-22 (2021), the Supreme Court of Maryland discussed the rule of lenity, explaining as follows:

> "Under the rule of lenity, convictions are merged for sentencing when there is an unresolvable ambiguity as to whether the General Assembly intended to allow or to prohibit sentences for multiple offenses based on the same acts. The rule of lenity is a tiebreaker that favors a defendant when a court using the tools of statutory construction despairs of determining legislative intent of ambiguous statutory provisions. The rule of lenity only informs our interpretation of a criminal statute when the standard tools of statutory interpretation fail to discern the intent of the Legislature."

Two crimes do not merge when they serve different purposes. *See Walker v. State*, 234 Md. App. 160, 172 (2017).

The Legislature defines second-degree rape, in pertinent part, as follows.

> "(a) A person may not engage in vaginal intercourse or a sexual act with another:
>
> (1) without the consent of the other;
>
> (2) if the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual; or
>
> (3) if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim."

Md. Code., Crim. Law ("CR") § 3-304(a).

The Legislature defines incest as follows: "A person may not knowingly engage in vaginal intercourse with anyone whom the person may not marry under § 2-202 of the Family Law Article." CR § 3-323(a).

Second-degree rape and incest are intended to prevent discrete harms. The Court in *Tapscott v. State*, 106 Md. App. 109, 139 (1995) identified the "rationale behind punishing incest" as "first, to avoid the danger of biological mutations that might occur in the issue of such relationships and second, to protect children from the abuse of parental authority." (internal citation omitted). *Aff'd* 343 Md. 650 (1996). This rationale, while related to that for punishing second-degree rape, is distinct to that behind punishing second-degree rape, which prohibits a nonconsensual sexual act regardless of any familial relation. The absence of an anti-merger provision in the statute is not evidence of ambiguity regarding the Legislature's intent to prohibit separate sentences: "Neither the Supreme Court nor this Court has required an explicit statutory provision barring merger of convictions for a court to impose consecutive sentences for convictions based on the same facts." *Clark*, 473 Md. at 621. Because second-degree rape and incest address disparate harms, the two sentences do not merge.

JUDGMENTS OF CONVICTION IN THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.