Circuit Court for Wicomico County
Case No. C-22-CR-21-000198

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 560

September Term, 2023

FRANCISCO BARRALES-AGUIRRE

v.

STATE OF MARYLAND

Reed,
Shaw,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: May 20, 2024

*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).

A jury in the Circuit Court for Wicomico County convicted Francisco Barrales-Aguirre, appellant, of sexual abuse of a minor and a variety of related offenses, including multiple counts of attempted second degree rape, sexual solicitation of a minor, third degree sexual offense, fourth degree sexual offense, and indecent exposure.[1] At sentencing, the court stated that the sentences imposed for five of the convictions were all to be served consecutive to the sentence imposed on Count One. Thirteen days after the sentencing hearing, the court issued an order stating that the consecutive sentences were to be served consecutive to each other.

Appellant presents the following three questions:

1. Did the court err in denying appellant an opportunity to depose the social worker who testified to the child victim's out-of-court statement?

2. Did the court err by not allowing testimony of the child victim's character for untruthfulness?

3. Did the court illegally increase appellant's sentence?

For the following reasons, we shall affirm the convictions. Because we shall conclude that the sentence announced by the court was ambiguous, we shall vacate the court's order that purportedly modified appellant's sentence and remand with instructions to order the issuance of an amended commitment record consistent with this opinion.

[1] Specifically, appellant was convicted of two counts of sexual abuse of a minor, three counts of attempted second degree rape, three counts of sexual solicitation of a minor, three counts of third degree sexual offense, three counts of fourth degree sexual offense, four counts of second degree assault, four counts of indecent exposure, and one count of displaying obscene material to a minor.

BACKGROUND

On April 17, 2021, the minor victim, A.M.,[2] who was then eight years old, disclosed to her mother that appellant, her mother's boyfriend, sent pornographic videos to her phone and sexually abused her. On April 20, 2021, A.M. was interviewed by Katie Beran, a licensed social worker employed by the Wicomico County Department of Social Services. In the statement to Ms. Beran, which was recorded, A.M. related several incidents in which appellant masturbated in her presence and verbally and/or physically attempted to get her to perform oral sex on him. On May 17, 2021, the State filed a twenty-six-count indictment, charging appellant with sexual abuse of a minor and related crimes.

Prior to trial, the State provided defense counsel with a DVD of A.M.'s recorded interview with Ms. Beran. The State filed a notice of its intention to use the statement as evidence at trial, pursuant to § 11-304 of the Criminal Procedure Article ("CP") of the Maryland Code, which is sometimes referred to as the "tender years" exception to the hearsay rule.[3] Appellant opposed the motion on grounds that, at the time A.M. made the statement, Ms. Beran was not acting in her professional capacity as a social worker, but rather, in anticipation of litigation and as a representative of the State.

[2] We refer to the minor victim by her initials to protect her identity.

[3] As we shall discuss in more detail later in this opinion, the tender years exception applies, in certain types of cases, to statements of a minor made to and offered "by a person acting lawfully in the course of the person's profession[,]" including but not limited to statements made to a medical doctor, nurse, teacher, or social worker. CP § 11-304(c).

A pre-trial hearing on the admissibility of the statement ("11-304 hearing") was scheduled for May 19, 2022. The State served Ms. Beran with a subpoena to appear at the hearing.

Prior to the 11-304 hearing, appellant filed a notice of deposition for Ms. Beran, to take place on April 26, 2022. The State moved to strike the notice of deposition, on the ground that, pursuant to Maryland Rule 4-261, which governs depositions in criminal cases, appellant could not depose Ms. Beran without an order of the court.[4] The court granted the State's motion without explanation.

At the scheduled 11-304 hearing on May 19, 2022, appellant requested a postponement, which the court granted. According to the hearing sheet, defense counsel was "to file [an] appropriate motion [for a court-ordered] deposition, or file [a] motion as to why Rule 4-261 does not apply[.]" The 11-304 hearing was rescheduled to June 23, 2022. The State again served Ms. Beran with a subpoena to appear at the hearing.

At the outset of the hearing on June 23, 2022, defense counsel asserted that, because the notice of deposition for Ms. Beran had been stricken, she was unable to present any argument with respect to "the context in which the statement was given." The court advised defense counsel that Ms. Beran was present and would be subject to cross-examination. The court proposed that, if defense counsel needed more time to consider Ms. Beran's

[4] In pertinent part, Maryland Rule 4-261 provides that, in the absence of an agreement between the parties, "the court, on motion of a party, may order that the testimony of a witness be taken by deposition if the court is satisfied that the witness may be unable to attend a trial or hearing, that the testimony may be material, and that the taking of the deposition is necessary to prevent a failure of justice." Md. Rule 4-261(a).

testimony before closing argument, that phase of the hearing could be postponed to a later date.

Defense counsel stated that she had expected to be able to depose Ms. Beran prior to the hearing, and did not realize that Ms. Beran would testify at the 11-304 hearing. Defense counsel requested that the hearing be postponed in its entirety, so that she could prepare to cross-examine Ms. Beran. Over the State's objection, the court postponed the 11-304 hearing a second time. The hearing was rescheduled to September 8, 2023, and Ms. Beran was again subpoenaed by the State to appear.

On August 3, 2022, appellant filed a notice of deposition for Ms. Beran, to take place on August 25, 2022. The State moved to strike the notice of deposition, reasserting its claim that appellant was required to first obtain an order of court to allow the deposition pursuant to Rule 4-261. The court granted the State's motion without explanation.

On August 11, 2022, appellant filed a motion requesting an order allowing the deposition of Ms. Beran to go forward. In opposition, the State asserted that Rule 4-261 was expressly applicable to a deposition taken under CP § 11-304, and that, under the Rule, a party is not entitled to a deposition of a witness unless the witness is unable to attend the trial or hearing. The State argued that appellant's motion to permit the deposition should be denied because Ms. Beran was available for both the 11-304 hearing and the trial. On August 29, 2022, the court denied appellant's motion for an order allowing the deposition.

Also on August 29, 2022, the court issued the following order:

> UPON CONSIDERATION of the State's Notice to Admit 11-304 [sic], [appellant's] response thereto and the entire record in this matter; and the [c]ourt being fully informed in the premises; it is . . . hereby

> **ORDERED,** that a hearing on this issue has already been scheduled [for] September 8, 2022[,] at which the 11 factors for admissibility shall be considered and this [c]ourt will speak with the child accuser in person. Further, the social worker will be present at the hearing to provide testimony and be subject to cross-examination by [appellant].

11-304 Hearing

The evidentiary portion of the 11-304 hearing went forward on September 8, 2022. Ms. Beran was the only witness. She explained that she was assigned to the Child Advocacy Center ("CAC"), which she described as a "multidisciplinary agency[,]" comprised of social workers, law enforcement, a doctor with training in child abuse, and a family advocate, who collectively "interview, prosecute, and treat victims of child abuse and neglect." She said that the CAC also works with the State's Attorneys' Office.

Ms. Beran explained that interviews with victims of child abuse are typically conducted by a social worker, with no one else present. She described each step of the interview method, which was designed to encourage a "narrative discussion[,]" without the use of leading questions. She said that law enforcement personnel have the ability to hear and observe the interview from an adjacent room, and that the social worker will sometimes speak to the observer before an interview with a victim is concluded.

Ms. Beran testified that A.M.'s case was referred to the CAC on April 19, 2021. She interviewed A.M. the following day. Sergeant Thomas Funk, the detective assigned to the case, observed the interview from an adjacent room. Before concluding the interview with A.M., Ms. Beran went into the observation room and spoke briefly with Sergeant

Funk. When the interview resumed, Ms. Beran, at the suggestion of Sergeant Funk, asked A.M. a follow-up question.

Defense counsel cross-examined Ms. Beran at length. Ms. Beran agreed with defense counsel that her job was to "help the State[.]"

At the conclusion of Ms. Beran's testimony, the court interviewed A.M. in chambers. When the hearing resumed in open court, the court announced:

> So, it's my understanding the interview is roughly about 50 minutes long. What I would be inclined to do is to have [c]ounsel come back in a couple weeks, [to] give me an opportunity to watch that, [and] give [counsel] an opportunity to prepare your arguments, and then have you come back for your arguments at that point.

The prosecutor and defense counsel agreed with the court's proposed course of action.

Closing argument on the issue of the admissibility of the statement under CP § 11-304 was held on October 6, 2022. Defense counsel argued that A.M.'s statement to Ms. Beran was not admissible under CP § 11-304 because it did not satisfy subsection (e) of the statute, which requires a finding that the statement has "particularized guarantees of trustworthiness." According to defense counsel, CP § 11-304 was intended to apply only to a spontaneous disclosure of abuse and not, as in this case, a statement made in the context of an investigative interview. Defense counsel suggested that A.M had motive to fabricate the allegations "for her mom[,]" and that A.M.'s "very detailed" description of sexual abuse was the result of coaching by her mother.

Ruling from the bench, the court determined that the statement was admissible. The court found that the statement was made to a social worker in the course of their profession, as required by CP § 11-304(c), and that the statement had particularized guarantees of

trustworthiness, as required by CP § 11-304(e).[5] In addressing the factors in subsection (e), the court stated that there did not appear to be any motive to fabricate the allegations; the statement was spontaneous and was provided primarily in response to open-ended questions; and the "graphic detailed account" of sexual abuse was beyond the expected knowledge of an eight-year-old child.

Trial

A four-day jury trial began on November 1, 2022. A.M.'s mother, whom we shall refer to as "Ms. M.", was the State's first witness. She testified, through an interpreter, that she began dating appellant in 2018, and that appellant moved in with her and A.M. in 2019. On April 17, 2021, Ms. M. discovered a link to a pornographic website on A.M.'s phone. When she asked A.M. about it, A.M. told her that appellant sent her videos to watch. A.M. then disclosed "what was going on." According to Ms. M., A.M. was "crying" and "really scared." Ms. M. then confronted appellant, who was in another room in the apartment. According to Ms. M., appellant "left running." She then called the police.

A.M., who was ten years old at the time of trial, testified to incidents of sexual abuse that were essentially consistent with what she described to Ms. Beran in the recorded interview. She said that, on one occasion, appellant drove her to Walgreens, in her

[5] "A child victim's or witness's out of court statement is admissible under [CP § 11-304] only if the statement has particularized guarantees of trustworthiness." CP § 11-304(e)(1). In making that determination, the court must consider a non-exclusive list of factors set forth in CP § 11-304(e)(2) (discussed *infra*).

mother's car, to rent a movie from Redbox.[6] While parked at Walgreens, appellant got into the back seat with her, pulled his pants down halfway, pushed her head down and asked her to "suck on his thing." Appellant's "thing" touched her lips and, at one point, went inside her mouth. A.M. told appellant to stop. Appellant pulled his pants up and returned to the front seat of the car.

A.M. then described two incidents that took place in the parking lot of a restaurant. She said that appellant got into the back seat with her, pulled his pants down and pushed her head down onto his "thing." During one of these incidents, appellant "grabbed his thing" with his hand, "started moving his hand up and down[,]" and "then white stuff started coming out."

A.M. also testified to an incident that occurred in a closet in the apartment where they lived. She said that appellant called her into the closet, pulled his pants down and pushed her head down toward "his thing," but she managed to avoid contact. A.M. said that, on another occasion, appellant "showed [her] something" on his phone that she "shouldn't be watching." She described it as a video of two unclothed adults. She told her mother about the abuse because she "couldn't let [appellant] do that to [her]" anymore.

The audiovisual recording of A.M.'s interview with Ms. Beran, and a transcript of the interview, were admitted into evidence. In addition to describing the incidents of abuse,

[6] Redbox is a company that "rents movies in DVD and Blu-ray disc format to consumers through automated touch-screen rental kiosks located in various retail outlets throughout the United States." *Wilson v. Redbox Automated Retail, LLC*, 448 F. Supp. 3d 873, 877 (N.D. Ill. 2020).

A.M. told Ms. Beran that appellant's penis had a "brown thing" on it. Ms. Beran testified at trial and was cross-examined by defense counsel.

Sergeant Funk testified that records subpoenaed from Redbox showed that an account in Ms. M.'s name had been charged with the rental of a DVD at a Walgreens store in Wicomico County just after four o'clock on February 28, 2021, which corresponded generally with when A.M. said the abuse had occurred.[7] Sergeant Funk then reviewed video footage recorded on that date by security cameras at Walgreens. The security camera footage was admitted into evidence and was played for the jury. According to Ms. Beran's trial testimony, the footage showed appellant getting out of the front seat of a vehicle and into the backseat.[8] Sergeant Funk testified that the vehicle in the security footage matched the description of Ms. M.'s vehicle, which he described as an "easy to identify" white passenger car with a "distinctive," black "C-pillar" in the area of the rear window.

Sergeant Funk testified that a search warrant was issued for appellant's body, "[t]o corroborate information" that had been provided about appellant's "person." A photograph of appellant's penis was admitted into evidence.

Appellant testified in the defense portion of the case, with the assistance of an interpreter. He maintained that he was never alone with A.M. in a car, and he denied A.M.'s claims of sexual abuse. Appellant agreed that the vehicle in the Walgreens security

[7] In the interview on April 20, 2021, which was played for the jury, A.M. said that the incidents of abuse had happened that year, and that the weather was cold at the time.

[8] The record on appeal includes a digital file containing the security camera footage (State's Exhibit 23), however, the file is encrypted such that it could not be opened or viewed by this Court.

footage belonged to Ms. M., but he denied that he was the person seen getting out of the front seat and into the back seat. He said that he had several moles on his penis, but denied that A.M. had ever seen his penis.

Additional facts will be included in the discussion that follows.

DISCUSSION

I. Right to a Deposition Under CP § 11-304(d)(4)

Appellant contends that the court committed reversible error in denying him an opportunity to depose Ms. Beran. Specifically, he asserts that the court erred in interpreting CP § 11-304(d)(4) to require a defendant to seek and obtain court approval before a deposition is allowed.

The State contends that the court had a "valid basis" to strike the notices of deposition because it gave assurances that defense counsel would have the opportunity to cross-examine Ms. Beran at the 11-304 hearing.[9] Alternatively, the State asserts that, even if the court erred in striking the notices of deposition, any prejudice to appellant was eliminated because he had the opportunity to cross-examine Ms. Beran at the 11-304 hearing, which, according to the State, "served the same purpose." Therefore, the State argues, any error was harmless.

[9] The State claims, initially, that it is "not clear that a social worker [is] appropriately the subject of a deposition" pursuant to CP § 11-304(d)(4). This claim is unfounded. *See State v. Snowden*, 385 Md. 64, 77 (2005) ("The defendant also has an opportunity [under CP § 11-304(d)(4)] to depose the health or social work professional whose testimony the State intends to offer."). *Accord Lawson v. State*, 389 Md. 570, 587 (2005).

The issue before us is a matter of statutory interpretation, which we review de novo. *Johnson v. State*, 467 Md. 362, 371 (2020). "The cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature." *State v. Bey*, 452 Md. 255, 265 (2017) (quotation marks and citation omitted). "[T]o determine [the General Assembly's] purpose or policy, we look first to the language of the statute . . . on the tacit theory that the General Assembly is presumed to have meant what it said and said what it meant." *Peterson v. State*, 467 Md. 713, 727 (2020) (quotation marks and citation omitted). "We read 'the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory.'" *Johnson*, 467 Md. at 372 (quoting *Phillips v. State*, 451 Md. 180, 196-97 (2017)). "[W]e neither add nor delete words to a clear and unambiguous statute to give it a meaning not reflected by the words that the General Assembly used or engage in forced or subtle interpretation in an attempt to extend or limit the statute's meaning." *Peterson*, 467 Md. at 727 (quotation marks and citation omitted). "If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to the legislative intent ends ordinarily and we apply the statute as written without resort to other rules of construction." *Bey*, 452 Md. at 265 (quotation marks and citation omitted).

The General Assembly enacted CP § 11-304 as an exception to the rule that generally prohibits the admission of hearsay evidence at trial.[10] *See Prince George's Cnty.*

[10] Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c).

Dep't of Soc. Servs. v. Taharaka, 254 Md. App. 155, 170 n.8 (2022). The statute, sometimes referred to as the "tender years exception," conditionally allows for the admission of an out-of-court statement made by a child who is younger than thirteen years old and is an alleged victim in a criminal prosecution for specified offenses, including rape and certain other sexual offenses.[11] CP § 11-304(b)(1). "The legislation was enacted in response to concerns that child abuse and sexual offenses were not being prosecuted adequately due to many child victims' inability to testify as a result of their young age or fragile emotional state." *Snowden*, 385 Md. at 76.

"The exception is intended to balance the fundamental rights of the accused with the need to protect child victims from further trauma. *Taharaka*, 254 Md. App. at 170 n.8. In a criminal matter, the out-of-court statement is not admissible unless the child victim testifies at trial. CP § 11-304(d)(1)(ii). The exception is limited in scope to statements made to social workers, teachers, and medical professionals acting in the course of their profession. CP § 11-304(c). In addition, to be admissible under the exception, the court must first find, in a hearing held outside the presence of the jury, that the statement has "particularized guarantees of trustworthiness." CP § 11-304(e)(1). In making that determination, the court must consider the following factors:

> (i) the child victim's or witness's personal knowledge of the event;
> (ii) the certainty that the statement was made;
> (iii) any apparent motive to fabricate or exhibit partiality by the child victim or witness, including interest, bias, corruption, or coercion;

[11] The statute also allows for the admission of a child's out-of-court statement in a juvenile court proceeding. CP § 11-304(b)(1)(ii)(4).

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

CP § 11-304(e)(2).

The statutory provision we are called upon to interpret is CP § 11-304(d)(4), which allows for a deposition of a witness who will testify as to the child's out-of-court statement and sets forth procedural rules and requirements governing such depositions. It provides:

> (i) The defendant, child respondent, or alleged offender may depose a witness who will testify under this section.
>
> (ii) Unless the State and the defendant, child respondent, or alleged offender agree or the court orders otherwise, the defendant, child respondent, or alleged offender shall file a notice of deposition:
> 1. in a criminal proceeding, at least 5 days before the date of the deposition; or
> 2. in a juvenile court proceeding, within a reasonable time before the date of the deposition.
>
> (iii) *Except where inconsistent with this paragraph*, Maryland Rule 4-261 applies to a deposition taken under this paragraph.

CP § 11-304(d)(4) (emphasis added).[12]

Maryland Rule 4-261(a), which is cross-referenced in subsection (iii), above, provides, that, unless the parties agree to a deposition, the court, "on motion of a party, may order that the testimony of a witness be taken by deposition if the court is satisfied that the witness may be *unable to attend a trial or hearing*, that the testimony may be material, and that the taking of the deposition is necessary to prevent a failure of justice." Md. Rule 4-261(a) (emphasis added). As the Supreme Court of Maryland has noted, "[b]y requiring that if depositions are to be taken they be of those witnesses unable to attend trial, [Rule 4-261(a)] implies that the depositions are for the introduction of evidence at trial and not for mere discovery or trial preparation[.]" *Tharp v. State*, 362 Md. 77, 111 (2000).

Appellant contends that Rule 4-261(a) is inconsistent with CP § 11-304(d)(4). We agree. Section 11-304(d)(4) permits a criminal defendant to depose a witness who is *expected to testify* in court regarding a child victim's out-of-court statement. But, under Rule 4-261(a), a defendant cannot obtain a court order for a deposition unless the court finds that the witness may be *unable to attend the trial or hearing*. As appellant points out, correctly, we conclude, if Rule 4-261(a) applied to a deposition under CP § 11-304(d), a defendant would never be able to depose a witness through whom the State intends to offer

[12] The State contends that the phrase "or the court orders otherwise" in CP § 11-304(d)(4)(ii) vests the court with discretion to order that a defendant's right to question a witness who will testify as to the child's out-of-court statement be accomplished by means other than a deposition. We do not agree. CP § 11-304(d)(4)(ii) pertains solely to the time frame for filing a notice of deposition and does not create an exception to the right to a deposition set forth in subsection (i).

the out-of-court statement (unless the State agreed), because there could be no finding that the witness was unavailable for trial.

In sum, we hold that Rule 4-261(a) is inconsistent with a defendant's right to depose a witness who will testify to an out-of-court statement pursuant to CP § 11-304. By operation of the exception set forth in CP § 11-304(d)(4)(iii), the inconsistency renders Rule 4-261(a) inapplicable to a deposition taken pursuant to CP § 11-304(d)(4). Consequently, appellant was not required to obtain a court order pursuant to Rule 4-261(a) prior to taking the deposition of Ms. Beran. We are thus constrained to conclude that the court erred as a matter of law in striking the notices of deposition.

The State maintains that, if there was error, reversal is not warranted. The State asserts that, "even if the court did not precisely follow the statute by allowing the deposition," the court eliminated any possible prejudice by (1) allowing appellant to cross-examine Ms. Beran at the 11-304 hearing, (2) postponing the hearing to allow defense counsel an opportunity to prepare for cross-examination, and (3) holding oral argument on a later date, to allow defense counsel time to review the testimony at the hearing and prepare for oral argument. The State submits that any error in striking the notices of deposition was harmless because the "different mechanism" employed by the court was "not meaningfully different [from] and served the same purpose" as a deposition.

"In general, when an appellate court finds that the trial court erred—even in violation of a defendant's constitutional rights—it employs harmless error review to determine whether reversal is warranted." *Newton v. State*, 455 Md. 341, 353 (2017) (citing *Chapman v. California*, 386 U.S. 18, 22 (1967); *Arizona v. Fulminante*, 499 U.S.

279, 306-07 (1991)). "The harmless error doctrine is grounded in the notion that a defendant has the right to a fair trial, but not a perfect one." *State v. Jordan*, 480 Md. 490, 505 (2022) (citing *Dorsey v. State*, 276 Md. 638, 647 (1976)). An error is "harmless" when "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict[.]" *Dorsey*, 276 Md. at 659. The State has the burden of establishing beyond a reasonable doubt that an error was harmless. *Jordan*, 480 Md. at 506.

The purpose of discovery in criminal cases is generally to "avoid surprise at trial" and to provide the parties with sufficient time to prepare their cases. *Hutchinson v. State*, 406 Md. 219, 227 (2008). Here, the statement Ms. Beran would be testifying about was recorded, and a DVD of the recorded interview was provided to defense counsel in advance of the 11-304 hearing. Appellant was granted two postponements of the 11-304 hearing, giving defense counsel ample opportunity to prepare to question Ms. Beran about A.M.'s statement, the context in which it was given, and any other issues affecting the admissibility of the statement and Ms. Beran's own credibility. The cross-examination of Ms. Beran, which spans twenty pages of the transcript of the 11-304 hearing, was not limited in any way by the State or the court, and appellant does not claim otherwise. Although we recognize that conducting a deposition of a witness is different than conducting cross-

examination in the context of a court proceeding, we are persuaded beyond a reasonable doubt that, on these facts, the court's error in no way influenced the verdict.[13]

II. Exclusion of Character Evidence

In the defense portion of the case, appellant's nine-year-old niece, "S.B.," was called as a character witness. She testified that appellant had sometimes taken care of her and her sister while their mother went to work. S.B. agreed with defense counsel that appellant was a "proper person[,]" and she defined "proper" as "good or something[.]" Defense counsel then asked S.B. about A.M.'s reputation for being truthful. This prompted an objection from the prosecutor, which the court sustained:

> [DEFENSE COUNSEL:] And how long – okay, did you visit [A.M.], did you know [A.M.]?
>
> [S.B.:] How long –
>
> [DEFENSE COUNSEL:] How are you acquainted with [A.M.]?
>
> [S.B.:] For, like, how many years?
>
> [DEFENSE COUNSEL:] Okay. Did you visit her?

[13] In his reply brief, appellant argued for the first time that the denial of his right to depose the social worker should be treated as a "structural error" that cannot be deemed harmless. We are not persuaded. A "structural error" is one that infringes on a constitutional right that is "'so basic to a fair trial that [an] infraction can never be treated as harmless error.'" *Newton*, 455 Md. at 353 (quoting *Chapman*, 386 U.S. at 23). Structural errors have been found in only a limited number of situations, for example, where there has been a complete denial of counsel; a violation of a defendant's right to a public trial; interference with a defendant's right to self-representation; and the giving of a flawed reasonable doubt instruction. *See Jordan*, 480 Md. at 507-08 (collecting cases).

Under the facts of this case, where appellant had the opportunity to cross-examine Ms. Beran on matters related to A.M.'s out-of-court statement at the 11-304 hearing, we are not convinced that denying appellant the right to depose Ms. Beran amounts to structural error.

[S.B.:] Yeah.

[DEFENSE COUNSEL:] Did you play with her, interact, did you –

[S.B.:] Yeah.

[DEFENSE COUNSEL:] And do you know how many times maybe you visited her?

[S.B.:] Probably, like . . .

[DEFENSE COUNSEL:] If you don't remember you can say you don't remember . . . .

[S.B.:] I'm not that sure.

[DEFENSE COUNSEL:] Okay. And during that time that you had visits with [A.M.], did you have the opportunity to become familiar with [A.M.]?

[S.B.:] Well, yeah.

[DEFENSE COUNSEL:] And if you know, is she known to be an honest and truthful person?

[PROSECUTOR]: Objection, Your Honor.

[S.B.]: Well –

THE COURT: Sustained. You don't have to answer.

Appellant claims that, because there was no physical or forensic evidence tending to prove that the abuse described by A.M. occurred, excluding S.B.'s testimony regarding A.M.'s reputation for being truthful amounted to an abuse of discretion. The State contends, preliminarily, that the issue was not preserved for appellate review because defense counsel did not make a proffer of the substance of S.B.'s testimony. Alternatively,

the State maintains that the court properly exercised its discretion in sustaining the objection.

A trial court's decision to admit or exclude character evidence is reviewed for abuse of discretion. *Devincentz v. State*, 460 Md. 518, 539 (2018). "'An abuse of discretion occurs where no reasonable person would take the view adopted by the circuit court.'" *Id.* (quoting *Williams v. State*, 457 Md. 551, 563 (2018)). "[T]o preserve a claim that a trial court erroneously excluded evidence, the party must be prejudiced by the ruling and 'the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered.'" *Id.* at 535 (emphasis omitted) (quoting Md. Rule 5-103(a)(2)).

Assuming, without deciding, that a formal proffer was not required to preserve the issue for review on appeal, we agree with the State that the court did not abuse its discretion in sustaining the objection to S.B.'s testimony regarding A.M.'s character for truthfulness. For character evidence to be admissible, "the witness must have an 'adequate basis' to form that opinion." *Id.* at 544 (quoting § 9-115 of the Courts and Judicial Proceedings Article ("CJP") of the Maryland Code).[14] "Reputation testimony requires showing that the witness

[14] CJP § 9-115 provides:

> Where character evidence is otherwise relevant to the proceeding, no person offered as a character witness who has an adequate basis for forming an opinion as to another person's character shall hereafter be excluded from giving evidence based on personal opinion to prove character, either in person or by deposition, in any suit, action or proceeding, civil or criminal, in any court or before any judge, or jury of the State.

is familiar with the individual's reputation in the relevant community." *Id.* (citing *Allison v. State*, 203 Md. 1, 7-8 (1953); *Braxton v. State*, 11 Md. App. 435, 440 (1971)).[15] "Specifically, [the witness] must have a 'sufficient acquaintance' with the individual and the community to ensure that [the witness's] testimony 'adequately reflects the community's assessment.'" *Id.* at n.10 (quoting *United States v. Watson*, 669 F.2d 1374, 1382 (11th Cir. 1982)). The "relevant community" is "the community in which [the individual] resides." *Caldwell v. State*, 276 Md. 612, 615 (1976).

The sum of S.B.'s testimony was that she had previously "visited" A.M. This foundation alone was insufficient to set forth an "adequate basis" for S.B. to testify to A.M.'s reputation in the community for being truthful. The court did not abuse its discretion in sustaining the State's objection to the question.[16]

III. Sentencing

Following the jury verdicts on November 4, 2022, the court conducted a sentencing hearing on May 12, 2023, at which the court announced the following sentences:

> The sentence as to count 1 is 25 years . . . ; the sentence as to count 3 is 20 years, that will be consecutive to count 1; count 4 is 20 years, that will be consecutive; count 5, 20 years, consecutive; . . . count 6, the

[15] By contrast, the foundation required for a witness who offers a personal opinion about another person's character is that the witness "must have personal knowledge of the individual." *Devincintz*, 460 Md. at 544.

[16] Appellant claims that the court excluded S.B.'s testimony regarding A.M.'s character on the basis that S.B. had not been previously disclosed as a witness. That does not appear to be the case. Although S.B. was not disclosed as a witness prior to trial, the court permitted her to testify as to appellant's character. When the State objected to questions about S.B.'s acquaintance with A.M., defense counsel explained that the line of questioning was relevant to A.M.'s reputation. The court overruled the State's objection and allowed defense counsel to proceed.

> sentence is 10 years, that's consecutive; count 7 is ten years, that's concurrent to count 6; count 8 is ten years, that's concurrent to count 6; count 18 is ten years, that's concurrent; . . . count 23, three years concurrent; count 24 is three years concurrent; count 25 is three years concurrent; count 26 is three years consecutive.

After the sentences were announced, the clerk asked the court, "Just to confirm, all the consecutives are to count 1, and all the concurrents are to count 6?" The court responded, "Yes." The following colloquy ensued:

> [DEFENSE COUNSEL]: Ninety-eight years, is that what the [c]ourt gives?
>
> THE COURT: I didn't – yes?
>
> [PROSECUTOR]: Yes.
>
> THE COURT: Did you add it up?
>
> [PROSECUTOR]: Yes.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: Very well. Thank you.
>
> THE COURT: All right. We're adjourned.

On May 19, 2023, the Division of Correction ("DOC") sent a letter to the court stating that the commitment record indicated the total time to be served was ninety-eight years, but that, because counts 4, 5, and 6 were consecutive to count 1, the commitment record currently reflected a total of only forty-five years. DOC requested an amended commitment record "for the counts to be consecutive to other counts besides Count :1 to calculate the total of 98 years." On May 25, 2023, the court signed an order which stated: "The consecutive sentences were consecutive to each other, for a total of 98 years active.

The Clerk's Office to issue commitment reflecting the record." On May 25, 2023, the clerk's office issued an amended commitment record, which indicated that the consecutive sentences were consecutive to each other, rather than consecutive to Count 1.

Appellant asserts that the total active time imposed at disposition was forty-five years. He claims that the entry on the original commitment record, to the effect that the total time to be served was ninety-eight years, resulted from a misunderstanding, shared by defense counsel and the prosecutor, as to how the court ordered the sentence to be served. Appellant maintains that the court's response to DOC and the issuance of the amended commitment record resulted in an illegal increase in his sentence.

The State argues that, despite the sentencing court's express confirmation that all the consecutive sentences were to be served consecutive to Count 1, the "clear intent" of the court was to impose cumulative sentences of ninety-eight years, because the court "agreed" with what the parties understood to be the total time to be served. We cannot accept the premise of this argument, as it appears that the court had not itself calculated the total active time, but merely relied on counsels' arithmetic. In any event, the court's intent is immaterial. "[O]nce sentence has been imposed, there can be no inquiry into intention or inadvertence. The sentence . . . stands as pronounced." *State v. Sayre*, 314 Md. 559, 565 (1989). As the Supreme Court explained, this "bright line rule . . . may produce occasional hardship for the State, but it will avoid difficult questions of subjective intent and should encourage trial judges to use great care in pronouncing sentence – an obviously desirable practice." *Id.*

The DOC communication was indication of a misunderstanding or ambiguity in the announced sentence. That communication, having been brought to the court's attention, led the court to enter an order clarifying the terms and length of the sentences imposed. In our view, the need for such order demonstrates that, at the time of the imposition of sentence, there existed an ambiguity as to whether the several sentences were to be consecutive to Count 1, or consecutive each to the other.

In *Alston v. State*, 433 Md. 275 (2013) the Court wrote that "[i]t is a settled principle of Maryland criminal law that '[f]undamental fairness dictates that the defendant understand clearly what debt he must pay to society for his transgressions. If there is doubt as to the penalty, then the law directs that his punishment must be construed to favor a milder penalty over a harsher one.'" *Id.* at 292 (quoting *Robinson v. Lee*, 317 Md. 371, 379-80 (1989)).

Because we conclude that appellant's sentences are ambiguous, we are constrained to vacate the court's order of May 25, 2023, purporting to amend the commitment order. On remand, the court shall order that a new commitment record be issued to reflect that all the consecutive sentences are consecutive to Count 1, and that the total time to be served is forty-five years.

CONVICTIONS AFFIRMED. MAY 25, 2023 ORDER MODIFYING SENTENCE VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR WICOMICO COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE SHARED EQUALLY BETWEEN THE PARTIES.