Circuit Court for Wicomico County
Case No. 22-K-16-0388

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1440

September Term, 2017

BENOIT CONSTANT

v.

STATE OF MARYLAND

Nazarian,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: March 5, 2020

A jury convicted Benoit Constant of multiple counts in connection with two robberies of the same bank. The Circuit Court for Wicomico County sentenced Mr. Constant to multiple sentences totaling approximately forty years. During trial, the State called his sister, Milandra Constant, to testify against him. She had been implicated in the crime through testimonial and DNA evidence, and in exchange for her testimony, the State offered her use and derivative use immunity. When she took the stand, though, Ms. Constant invoked her Fifth Amendment privilege against self-incrimination in the presence of the jury. Mr. Constant objected and moved for a mistrial on the ground that Ms. Constant's invocation of her privilege was unfairly prejudicial to Mr. Constant's defense. The circuit court denied the motion.

Mr. Constant argues on appeal that the circuit court abused its discretion in denying his motion for mistrial. He argues also that the commitment record, docket entries, and criminal hearing sheet must be amended to strike language stating that the first ten years of his sentence for Count 1 (robbery with a dangerous weapon) are to be served "with limited possibility of parole." The State agrees. We affirm Mr. Constant's convictions and remand to the circuit court for the sole purpose of correcting the sentencing record.

I. BACKGROUND

The Hebron Savings Bank on Main Street in Sharpstown was robbed both on September 18, 2014 and December 12, 2014. After a two-day trial on July 25 and 26, 2017, the jury convicted Mr. Constant in connection with both robberies. With respect to the September 18 robbery, Mr. Constant was convicted of two counts of robbery with a

dangerous weapon, two counts of robbery, two counts of second-degree assault, threatening to explode a destructive device, theft, and openly carrying a dangerous weapon. With respect to the December 12 robbery, Mr. Constant was convicted of two counts of robbery with a dangerous weapon, two counts of robbery, two counts of second-degree assault, theft, and openly carrying a dangerous weapon.

The State *nol prossed* some of the counts, the court granted Mr. Constant's motion for judgment of acquittal on others, and seven counts remained for sentencing. The court imposed no sentence for two of those counts under the rule of lenity, and otherwise sentenced Mr. Constant to twenty years for Count 1 (robbery with a dangerous weapon on September 18), with a ten-year mandatory minimum; a consecutive ten years for Count 9 (robbery with a dangerous weapon on September 18); a consecutive one year for Count 13 (threatening to explode a destructive device on September 18); a concurrent twenty years for Count 16 (robbery with a dangerous weapon on December 12); and a consecutive ten years for Count 24 (robbery with a dangerous weapon on December 12). The commitment record and the docket entries and the criminal hearing sheet for July 27, 2017 indicate that the first ten years of the sentence for Count 1 are to be served "with limited possibility of parole."

We summarize the testimony and evidence admitted during the two-day trial.

A. September 18, 2014

Susie Pruitt, the head teller at Hebron Savings Bank on September 18, 2014, testified that she saw, through a window, a silver PT Cruiser pull up in front of the bank.

She did not recognize the car—she testified that "we know most of our customers"—so she "walked over by the window" and saw a man get out. When she first saw him, she "knew that something wasn't right [] with his face" and she testified that "didn't know if maybe he had been in an accident or something like that." She saw later that he was wearing a mask.

She saw the man pull out from the back seat what looked like a briefcase, then walk into the bank. She testified that she "had a sick feeling in [her] stomach," but she nevertheless "greeted him like we normally do with every customer." He told her he wanted to open a business account. She turned around to her desk and called her manager, Debbie Lowe, which is what she usually did when a customer wanted to open a business account. Ms. Lowe answered, and after Ms. Pruitt said "Debbie" into the phone, the man told her "put it down." Ms. Pruitt turned to the teller window and saw that the man "had a gun stuck up to the window." She hung up the phone, and the man walked to a glass door and told Ms. Pruitt to open it. She complied.

The man asked her where the vault was, so she led him to it and began filling the man's bag with money. In the meantime, Ms. Lowe came out of her office and saw them in the vault. The man told Ms. Pruitt to "hurry up" and asked, "Do you see this?" He opened the briefcase, and Ms. Pruitt saw what she described as "three barrels" "taped together with wires on it." When she finished filling up the bag, the man told her and Ms. Lowe "not to move or say or do anything or he'd blow the place up." He left in the PT Cruiser, and they pulled the alarm and called police.

Ms. Pruitt described the man as wearing a mask and testified that he wore a ball cap, sunglasses, and black gloves. She testified that he was about five foot seven inches, tall, and "stocky." She reported that his voice was "real deep" and like a "man's voice." And she described the gun as "like a .9 mm or something size-wise" and that it looked real.[1]

Ms. Lowe testified that as the September 18 robbery began, Ms. Pruitt called her, said "Debbie," and then hung up. Ms. Lowe came out of her office, went to the vault, and saw Ms. Pruitt putting money into the man's bag. The man turned around, looked at Ms. Lowe, and said "do you think this is funny?" and "don't move." She testified that the man walked out of the vault with his gun pointed, and on his way to the bank's exit said "don't move, or I'll blow this place up." Ms. Lowe described the man as wearing a dark jacket, a cap with hair hanging down the back, gloves, and dark glasses. She explained that her "first instinct" was that the person was a man, but she admitted on cross-examination that she was not one hundred percent certain. Ms. Lowe testified that the man took approximately $45,000.

Trooper Theodore Buck of the Maryland State Police testified that on September 18, 2014, he was assigned to check a license plate that witnesses to the robbery had seen. He located the car associated with the plate, a Nissan passenger vehicle, at a towing company, but saw that the license plates were missing.

[1] During Ms. Pruitt's testimony, the State introduced into evidence surveillance tapes of both the September 18 and the December 12 incidents. The videos were played for the jury while Ms. Pruitt narrated.

B. December 12, 2014

Ms. Pruitt was working as well on the date of the second robbery, December 12, 2014. She testified that she saw the same man as before ride up on a bicycle and come into the bank. She testified that she "knew it was the same person because of the mask and the sunglasses." She reported that "[t]his time he came up on a bike," "he came in the front door," and "he had his gun out as soon as he came in." He walked straight to the glass door by the teller area, and "again, we went in the vault, and I opened the vault" and "I emptied the vault, and with that, he turned and left." She described the man as having the same height and build, and the same voice, as the man she had seen on September 18.

Ms. Lowe was also at work that day. She testified that she was in her office, watched him as he came in, saw that he had a gun drawn, and immediately pushed the alarm button and dialed 911. She said that the man took approximately $55,000 to $60,000.

Alan Nichols, an employee of the State Highway Administration, was a bystander. He testified that he saw a "silver Chrysler Pacifica" with "Delaware tags" near the bank. He first noticed the car near the bank "sitting there kind of holding up traffic," and then it "proceeded to go by the bank and park."

Maryland State Police Officer Sam Woods responded to the scene of the December 12 robbery. Approximately a block from the bank, he located a bicycle and, about twenty feet from the bicycle, a cigarette butt. He swabbed the bicycle for DNA and sent the whole cigarette butt to the lab for analysis.

Melissa Harvey, a Maryland State Police crime scene tech, processed a silver

Chrysler Pacifica on January 5, 2015. From the trunk, she recovered a 4.5 mm BB gun, a "latex mask with cowl," one black glove, a plaid jacket with a gray hood, and a baseball style hat.

The DNA analysis of the mask, bicycle, and BB gun implicated Mr. Constant. The DNA analysis of the cigarette butt implicated Ms. Constant.

Finally, Latoya Milbourne testified about contacts she had with Mr. Constant after he was arrested and charged. These included a phone call from the facility where he was incarcerated and a letter she received from him. The phone call was recorded, and the transcript of the call was introduced into evidence and played for the jury. Ms. Milbourne testified that she had been an instructor at Delmarva Beauty Academy and had known Mr. Constant from his time as a student there around 2010. Ms. Milbourne testified that the last time she had seen Mr. Constant was years ago, but that he called her several months before his trial. She testified that he said that he had been incarcerated "under false pretenses" and asked her whether she would do him "a favor." Mr. Constant told her that he wanted her "[t]o say that [she] took him to BWI," even though she had never taken Mr. Constant to the airport.

After the phone call, Ms. Milbourne received a letter from Mr. Constant, that she read to the jury in part, laying out a story he wanted her to tell on the stand:

> Here's a story line for you.
>
> On December 12, 2014, when you called, in parenthesis or something, when you call a lawyer. You had to pick me up at 8:00 a.m. for my 11:00 a.m. flight on December 12, 2014. You wake up at 7:30. You overslept by 30 minutes because your grandson was playing with your phone while you were

> sleeping.
>
> You woke up in the middle of the night and took your phone out of his hands so he must have tripped your alarm.
>
> By 8:20, you are at the door after getting you and your grandson ready. After you drop your grandson off at his babysitter, you are at Canal Woods condo at 8:40.
>
> It says, Benoit comes out by 8:45 a.m., 45 minutes in parenthesis, 45 minutes behind schedule.
>
> You talked during the ride. I tell you I'm on my way to El Paso, Texas airport to meet my wife.
>
> ***
>
> You get to the airport BWI at 11:01 and we hugged, and I grabbed my stuff and ran to go check in for my flight. You drive off. By the time you are on 97, you get a call from Benoit at 11:30 a.m.
>
> Benoit tells you he missed his flight. You felt bad because you felt like it was your fault for the tardiness. You, Latoya, offer to turn around and pick up Benoit.
>
> Benoit tells you, it's all good because he's already on standby for an available seat on another, on another to El Paso, Texas.
>
> That was the last you heard or seen Benoit. You arrive in Salisbury by 1:20, and that's that.
>
> Hold on to this paper and just rehearse it until the trial. They won't be able to discredit you at all even if they tried.
>
> Thank you very much.
>
> I will have 5K for you upon my release, and then we can talk about other stuff as well.

Ms. Milbourne testified that none of what Mr. Constant described in the letter had happened, and she explained that if she had testified to it, she would not have been telling the truth. The State also called an administrative staff member from Delmarva Beauty Academy, who testified that she had reviewed Ms. Milbourne's timesheet for that day and it showed that Ms. Milbourne had worked from 8:32 a.m. to 5:15 p.m. on December 12,

2014.

Ms. Milbourne also testified that she received text messages from Ms. Constant. One message repeated the same false story they wanted her to tell:

> It was December 12, 2014. It was on a Friday. You picked him up at the condo. You dropped him off at BWI airport. You were supposed to pick him up at 7:30 but you came at 8:00 because you was running late because of your grandson. IC Solutions, [], inmate number [] to call to unblock him. He needs to talk to you.

The State also introduced certified motor vehicle records from the State of Delaware showing that a 2002 Chrysler PT Cruiser and a 2004 Chrysler Pacifica were owned by Milandra Constant.

II. DISCUSSION

Mr. Constant presents two questions[2] that we rephrase: (1) Did the circuit court

[2] Mr. Constant phrased the Questions Presented as follows:

> 1. Did the trial court abuse its discretion when it denied Mr. Constant's motion for a mistrial?
>
> 2. Must the docket entries, criminal hearing sheet, and commitment record be amended to strike the language that the first ten years of the sentence for count one are to be served "with limited possibility of parole"?

The State phrased the Questions Presented as follows:

> 1. Did the trial court properly deny Constant's motion for mistrial based on his sister's assertion of a Fifth Amendment right in the presence of the jury?
>
> 2. Should the docket entries, commitment record, and hearing sheet be amended to strike the statement that the mandatory-minimum portion of the sentence on Count One is "with limited possibility of parole"?

abuse its discretion in denying Mr. Constant's motion for mistrial based on Milandra Constant's invocation of her Fifth Amendment privilege against self-incrimination in the presence of the jury? and (2) Should the commitment record and docket entries and hearing sheet for July 27, 2017 be amended to strike the statement that the mandatory-minimum portion of the sentence on Count One is "with limited possibility of parole"? The State agrees that Mr. Constant's commitment record and docket entries and hearing sheet must be corrected, so we affirm Mr. Constant's convictions and remand to the circuit court with instructions to strike the phrase "with limited possibility of parole" from the relevant parts of the record.

We review a denial of a motion for mistrial for abuse of discretion. *Johnson v. State*, 228 Md. App. 391, 419 (2016). "The grant of a mistrial is considered an extraordinary remedy and should be granted only if necessary to serve the ends of justice." *Klauenberg v. State*, 355 Md. 528, 555 (1999) (cleaned up). Although the trial judge has discretion to grant a mistrial, they "may do so if only a high degree of necessity demands" it. *State v. Hart*, 449 Md. 246, 276 (2016) (cleaned up). The key to the inquiry is fairness, *id.*, and "a reviewing court will not reverse the trial court unless the defendant clearly was prejudiced by the trial court's abuse of discretion." *Klauenberg*, 355 Md. at 555.

A. The Circuit Court Did Not Err In Denying Mr. Constant's Motion For Mistrial.

Milandra Constant was named as a conspirator in the indictment filed against Mr. Constant in connection with the December 12 robbery. She also was charged in connection with that robbery, although they were not tried together. During Mr. Constant's

trial, when the State sought to call Ms. Constant as a witness, defense counsel objected and pointed out that she was charged as a conspirator, was represented by counsel, and would be able to invoke the right against self-incrimination. In response, the State advised the court that it would grant Ms. Constant use and derivative use immunity for her testimony and that it had filed a motion under Maryland Code, (2013 Repl. Vol., 2019 Supp.), § 9-123 of the Courts and Judicial Proceedings Article ("CJ").[3] The colloquy between the trial court and the defense went as follows:

> [DEFENSE COUNSEL]: Your Honor, the State has in count 3 of 16, of its indictment, has charged my client with did conspire [sic] with Milandra Constant to steal currency at the Hebron

[3] CJ § 9-123 authorizes a court to compel testimony under a grant of use and derivative use immunity. The statute states, in relevant part, that upon motion of the prosecutor, the court "shall issue" an order requiring a witness to give testimony that the witness has refused to give based on the privilege against self-incrimination:

> (c)(1) If an individual has been, or may be, called to testify or provide other information in a criminal prosecution or a proceeding before a grand jury of the State, the court in which the proceeding is or may be held shall issue, on the request of the prosecutor made in accordance with subsection (d) of this section, an order requiring the individual to give testimony or provide other information which the individual has refused to give or provide on the basis of the individual's privilege against self-incrimination.

Once the order issues, no information derived from the witness's testimony may be used against the witness in any criminal case, with limited exceptions that don't apply here:

> (b)(2) No testimony or other information compelled under the order, and no information directly or indirectly derived from the testimony or other information, may be used against the witness in any criminal case, except in a prosecution for perjury, obstruction of justice, or otherwise failing to comply with the order.

CJ § 9-123(b)(2); *see also State v. Rice*, 447 Md. 594, 604–05, 607–08 (2016).

> Savings Bank.
>
> She is therefore a codefendant. She is represented --
>
> THE COURT: Who is she represented by?
>
> [DEFENSE COUNSEL]: [counsel's name]
>
> THE COURT: I'm sorry?
>
> [DEFENSE COUNSEL]: She is represented by counsel, [counsel's name].
>
> I don't see how the State can call her as a witness without [her counsel] being present. I have received no information from the State that they have made any kind of agreement with her for her testimony. And she certainly has a right to remain silent, that [sic] she is a codefendant.
>
> THE COURT: Well, the State can nol pros that count.
>
> [THE STATE]: The State is going to offer Ms. Constant use and derivative use immunity for her testimony --
>
> THE COURT: Okay.
>
> [THE STATE]: -- which does not mean I can't prosecute her. It just means I can't use anything she says --
>
> THE COURT: Yes.
>
> [THE STATE]: -- here today or anything derived from it. And I have spoken with [Ms. Constant's counsel] and told him that I was going to do that.
>
> THE COURT: Problem solved.
>
> [THE STATE]: I actually filed the motion yesterday with MDEC, so you should have the Immunity Order.
>
> I have a written copy of it as well.
>
> [DEFENSE COUNSEL]: I haven't seen it yet, Your Honor.
>
> It was just filed yesterday.
>
> [THE STATE]: Things are happening quickly.

The trial judge granted the State's motion and later that day, the State called Ms. Constant to the stand. Ms. Constant confirmed that she had been charged as a co-defendant in the December 12 robbery, and the prosecutor instructed her that the State was

granting her use and derivative use immunity, "which means that anything you say here today and anything that we were to find out because of what you said here today cannot be used against you." Ms. Constant went on to confirm that Mr. Constant was her brother. But when the prosecutor continued to question her, she declined to testify further without her lawyer and said she was "plead[ing] the fifth":

> [THE STATE]: Do you own vehicles?
>
> [MS. CONSTANT]: My lawyer's not here, so I'm not talking. I plead the fifth.
>
> [THE STATE]: Well, you don't have a fifth amendment because you have immunity for whatever you testify to today.
>
> [MS. CONSTANT]: Well, I'm not talking without my lawyer.
>
> [THE STATE]: Okay.
>
> Did you send text messages to Latoya Milbourne?
>
> [MS. CONSTANT]: Again, I'm not talking without my lawyer.
>
> [THE STATE]: I don't have any other questions for this witness.
>
> [DEFENSE COUNSEL]: No questions.
>
> THE COURT: Well, approach here. Come up here, if you want, for a minute.

The parties approached the bench, and the following colloquy ensued, at the end of which defense counsel moved for a mistrial on the ground that Ms. Constant's refusal to testify and assertion of her Fifth Amendment privilege was prejudicial to Mr. Constant:

> THE COURT: You have given her use immunity?
>
> [THE STATE]: Yeah.
>
> I don't need her for anything else.
>
> I wanted them to see her.
>
> THE COURT: Okay.

> I'm new to this particular type of wrinkle in criminal law, but I could -- I was about ready to excuse the jury and tell her she had to --
>
> [THE STATE]: I know.
>
> Yeah. There's -- I'm not trying to elicit anything else from her.
>
> I just wanted the jury to see her. There is no way she is the man in the mask.
>
> THE COURT: She's what?
>
> [THE STATE]: There's no way she is the man in that mask.
>
> THE COURT: Oh, I got you.
>
> ***
>
> [DEFENSE COUNSEL]: Well, Your Honor, before we all go, if all the State wished to do was exhibit the size of this person visually to the jury, the State could have done that without going through the rigamarole of having her come up and refuse to testify.
>
> At this point, I move for a mistrial.
>
> [THE STATE]: She gave relevant information which was that she is charged with a crime and that she is the sister of the defendant.
>
> [DEFENSE COUNSEL]: The State put her up there and got her to refuse to testify, which is prejudicial to my client, Your Honor, because she is a codefendant, and I move for a mistrial.
>
> THE COURT: All right.
>
> Your motion for mistrial is denied.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor.

On appeal, Mr. Constant argues *first* that the trial court should have granted his motion for mistrial because "the jury was likely to infer from Ms. Constant's invocation that Mr. Constant was in fact guilty," and therefore that the invocation was unfairly prejudicial to his defense.

"[W]here a witness is asked about criminal activity in which he or she allegedly

participated together with a codefendant, an assertion of the Fifth Amendment privilege may suggest to the jury the guilt of both the witness and the defendant." *Johnson*, 228 Md. App. 421–22. In order to determine whether a trial witness's invocation of the Fifth Amendment was prejudicial error, courts consider five factors:

> 1. that the witness appears to have been so closely implicated in the defendant's alleged criminal activities that the invocation by the witness of a claim of privilege when asked a relevant question tending to establish the offense charged will create an inference of the witness' complicity, which will, in turn, prejudice the defendant in the eyes of the jury;
>
> 2. that the prosecutor knew in advance or had reason to anticipate that the witness would claim his privilege, or had no reasonable basis for expecting him to waive it, and therefore, called him in bad faith and for an improper purpose;
>
> 3. that the witness had a right to invoke his privilege;
>
> 4. that defense counsel made timely objection and took exception to the prosecutor's misconduct; and
>
> 5. that the trial court refused or failed to cure the error by an appropriate instruction or admonition to the jury.

Vandegrift v. State, 237 Md. 305, 308–09 (1965) (internal quotations and citation omitted). These factors serve as "guidelines" for determining whether the invocation was prejudicial. *Adkins v. State*, 316 Md. 1, 13 (1989). All five factors need not be satisfied to find the error prejudicial; instead, the key inquiry is whether the prosecutor "call[ed] the witness for the effect of the claim of privilege on the jury." *Vandegrift*, 237 Md. at 309; *see also Allen v. State*, 318 Md. 166, 177 (1989) ("We did not state that each [of the five *Vandegrift* factors] must be satisfied in order to find prejudicial error in a given case. Rather, we emphasized that the test to be applied in cases involving a witness is whether the State calls the witness for the effect of claiming the privilege in the presence of the jury."). As noted above, we

review a court's denial of a motion for mistrial for abuse of discretion, and the same standard applies as well to denials based on the trial court's evaluation of the *Vandegrift* factors. *Johnson*, 228 Md. App. at 419. We hold that the circuit court did not abuse its discretion in denying Mr. Constant's motion for mistrial or, put another way, that it was not an abuse of discretion for the trial court to find that Ms. Constant's invocation of her Fifth Amendment privilege did not unfairly prejudice Mr. Constant's defense.

The parties essentially agree as to how to weigh the latter three *Vandegrift* factors. Mr. Constant admits that the *third* factor weighs against mistrial because Ms. Constant had no right to invoke the Fifth Amendment privilege after the State granted her use and derivative use immunity. The State agrees that the *fourth* factor weighs in favor of a mistrial because defense counsel promptly objected and moved for mistrial. And the State agrees that the *fifth* factor weighs slightly in favor of a mistrial because the court did not give any curative instruction to the jury. But the State's agreement on this factor is not whole-hearted—in its brief, the State points out that Mr. Constant never asked for a curative instruction, so this is not a situation in which a trial court "refused" to give one.

The *second* factor is disputed and lies at the heart of the *Vandegrift* analysis: whether the prosecutor "call[ed] the witness for the effect of the claim of privilege on the jury." *Vandegrift*, 237 Md. at 309. This factor weighs against Mr. Constant. The record does not support that the prosecutor "knew in advance or had reason to anticipate" that Ms. Constant would claim the privilege while on the stand. *Id.* at 308. The prosecutor had granted Ms. Constant use and derivative use immunity under CJ § 9-123, and had informed both

her and her lawyer of her immunity and her obligation to testify before calling her to the stand. Nothing else in the record suggests that the prosecutor had a reason to anticipate that Ms. Constant would claim the privilege, and the prosecutor ended the examination immediately after she did.

Mr. Constant argues that "the prosecutor at least suspected that Ms. Constant was going to invoke her privilege." Mr. Constant bases that argument on the prosecutor's representation to the trial court, after Ms. Constant's invocation, that it was not necessary for the court to order Ms. Constant to testify further because the prosecutor "just wanted the jury to see her" to demonstrate that "[t]here's no way she is the man in the mask." Mr. Constant characterizes that explanation as not plausible because another witness had already testified about Ms. Constant's appearance. He asks us to find that the circuit court should have inferred from the prosecutor's representation that she knew or had reason to believe that Ms. Constant would assert the Fifth Amendment on the stand. But a decision not to draw that inference is not an abuse of discretion. And Mr. Constant identifies nothing else in the record to support that the prosecutor acted in bad faith. *Cf. Vandegrift*, 237 Md. at 307, 307 (prosecutor did not act in good faith where "the only inference to be drawn from his comments is that he knew the witnesses would not answer his questions concerning the crime" where the prosecutor had said "I expected as much" when the witness he called invoked his privilege against self-incrimination). The second factor weighs against mistrial.

The *first* factor weighs in favor of mistrial because Ms. Constant's invocation of the

privilege could have created an inference of her complicity in the December 12 robbery. The State acknowledges as much, although it implies that this factor should weigh against mistrial because the invocation was not sufficiently prejudicial in light of the significant evidence of Mr. Constant's guilt. But the State's arguments about the degree of prejudice don't apply to the analysis of the first factor in isolation—they relate instead to how the five factors weigh together. And although three of the five factors weigh in favor of Mr. Constant, upon balance, they point against mistrial. The inquiry is not mathematical—the *Vandegrift* factors are guidelines used in determining whether the prosecutor "call[ed] the witness for the effect of the claim of privilege on the jury." 237 Md. at 309. As the Court of Appeals observed in *Vandegrift*, its holding didn't preclude a prosecutor from calling a codefendant as a witness or that a codefendant's invocation of the Fifth Amendment privilege must always result in a finding of prejudicial error. *Id.*

In this case, the trial court did not abuse its discretion when it found no prejudicial error after Ms. Constant invoked her right to remain silent. There was substantial independent evidence of Mr. Constant's guilt for the December 12 robbery, including his DNA on the bicycle identified by Ms. Pruitt as the one ridden by the December 12 robber; his DNA on the mask and the BB gun; and his efforts to persuade Ms. Milbourne to provide him a false alibi. Ms. Constant's brief appearance on the stand in a two-day trial also weighs against a finding of prejudicial error. *Johnson*, 228 Md. App. at 424 (the witness's "brief appearance on the stand was ultimately not prejudicial" after weighing all *Vandegrift* factors).

Considered as a whole, the circumstances of this case do not support a finding either that the prosecutor called Ms. Constant to allow her to invoke her privilege against self-incrimination in front of the jury or that Mr. Constant's defense was prejudiced to a degree that would necessitate a new trial. The circuit court did not abuse its discretion in denying Mr. Constant's motion for mistrial. *Hart*, 449 Md. at 276; (mistrial is "an extraordinary remedy" and should only be granted "if a high degree of necessity demands [it]"); *Klauenberg*, 355 Md. at 555 (trial court may not be reversed "unless the defendant clearly was prejudiced by the trial court's abuse of discretion").

B. The Circuit Court Should Amend Mr. Constant's Sentencing Documents To Strike The Phrase "With Limited Possibility Of Parole."

Second, Mr. Constant argues that his sentencing documents must be amended to remove the statement that the ten-year mandatory-minimum portion of the sentence on Count One is "with limited possibility of parole." The State agrees that the sentencing documents should be amended to remove that language, and so do we.

At the sentencing hearing on July 26, 2017, the trial court sentenced Mr. Constant to twenty years for Count One (robbery with a dangerous weapon in connection with the September 18 robbery), with a ten-year mandatory minimum:

> THE COURT: [] [N]ow I'm imposing a sentence under count 1, the sentence is 20 years in the Division of Corrections, 10 of which is the minimum mandatory sentence.

But the commitment record and the circuit court docket entries and hearing sheet for July 26, 2017 state that Mr. Constant's ten-year mandatory minimum sentence is "with limited possibility of parole." When there is a conflict between the transcript and the

commitment record and docket entries, the transcript controls unless the transcript is shown to be in error. *Potts v. State*, 231 Md. App. 398, 411 (2016); *Lawson v. State*, 187 Md. App. 101, 108–09 (2009); *Douglas v. State*, 130 Md. App. 666, 673 (2000); *Dedo v. State*, 105 Md. App. 438, 462 (1995), *rev'd on other grounds*, 343 Md. 2 (1996). We have no reason to believe that the same rule would not apply to the hearing sheet. The State does not contend that the transcript is in error. Because the trial court did not include any parole restriction in its sentencing pronouncement, that restriction was never part of Mr. Constant's sentence. Accordingly, we remand this case to the circuit court for the limited purpose of correcting the sentencing documents to remove the phrase "with limited possibility of parole."

In the alternative, Mr. Constant also argues that his sentence—as defined in the record documents—is illegal because at the time he was sentenced, the statute under which he was given the mandatory ten-year minimum sentence did not permit a parole restriction. Mr. Constant was sentenced under § 14-101(d) of the Criminal Law Article ("CL"). At the time of Mr. Constant's sentencing in July 2017, that section required that, upon a second conviction for a crime of violence, a person is subject to a mandatory minimum term of ten years *without* any restriction on eligibility for parole.[4] CL § 14-101 (2012 Repl. Vol., 2016 Supp.). Mr. Constant argues, therefore, that his sentence should be amended under Rule 4-345(a), which provides that "[t]he court may correct an illegal sentence at any time." The

[4] Effective October 1, 2018, which was over a year after Mr. Constant was sentenced, CL § 14-101(d)(2) now provides that the ten-year mandatory-minimum portion of the sentence for a second-time violent offender ordinarily be served without parole.

State agrees that, at the time Mr. Constant was sentenced, CL § 14-101 did not permit a parole restriction, but disagrees that Mr. Constant's sentence was illegal. As such, the State argues that Rule 4-345(a) does not apply, and that Rule 4-351, which concerns commitment records, applies instead.

We agree that Rule 4-345(a) does not apply here because Mr. Constant's sentence is not illegal. The sentence never included a parole restriction that would have been illegal under CL § 14-101. Apparently, the confusion about the parole restriction arose at the sentencing hearing because the prosecutor had argued that the ten-year mandatory minimum sentence under CL § 14-101 *should* be imposed with a parole restriction. But counsel's arguments about such a restriction do not have the effect of making it part of the sentence, and when the circuit court announced the sentence, it did not include such a restriction. The sentence was not illegal, so Rule 4-345(a) does not apply. *Lawson*, 187 Md. App. at 109.

But we do not agree with the remainder of the State's position. The State contends that the transcript does not control over the sentencing record here, and that instead, the record should be corrected under Rule 4-351, which concerns commitment records.[5] The

[5] At the time Mr. Constant was sentenced in 2017, Rule 4-351 provided:

> (a) When a person is convicted of an offense and sentenced to imprisonment, the clerk shall deliver to the officer into whose custody the defendant has been placed a commitment record containing:
>
> (1) The name and date of birth of the defendant;
>
> (2) The docket reference of the action and the name of the sentencing judge;

State is mistaken to the extent it argues that the principle that the transcript prevails over sentencing record does not apply. Indeed, one of the cases cited by the State relies on that principle to reject the defendant's argument that he should have received credit for time served where that credit was reflected in his commitment record and docket entries. *Lawson*, 187 Md. App. at 108. In that case, because the transcript reflected that the defendant's sentence did not include such a credit, the court held that the credit was never part of the sentence. *Id.*

We recognize that the Court of Appeals and this Court have held or observed that Rule 4-351 applies to a trial court's correction of commitment records. *Scott v. State*, 379 Md. 170, 190–91 (2004); *Lawson*, 187 Md. App. at 108; *State v. Bratt*, 241 Md. App. 183,

> (3) The offense and each count for which the defendant was sentenced;
>
> (4) The sentence for each count, the date the sentence was imposed, the date from which the sentence runs, and any credit allowed to the defendant by law;
>
> (5) A statement whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of the preceding term or to any other outstanding or unserved sentence; and
>
> (6) the details or a copy of any order or judgment of restitution.
>
> (b) An omission or error in the commitment record or other failure to comply with this Rule does not invalidate imprisonment after conviction.

Effective January 1, 2019, the Rule was amended to include a seventh requirement to subsection (a):

> (7) the details or a copy of any request for victim notification.

195–97 (2019). But that doesn't overtake the common law principle that transcripts control records. Indeed, that principle must apply to the correction of the docket entries and hearing sheet because Rule 4-351 doesn't mention either. *See Potts*, 231 Md. App. at 411; *Douglas*, 130 Md. App. at 673; *Dedo*, 105 Md. App. at 462. And we see no reason why the applicability of Rule 4-351 should preclude or amend the principle that the transcript prevails over conflicts with the commitment record.

We also are not persuaded by the State's argument regarding Maryland Code (2018 Repl. Vol.), § 6-217 of the Criminal Procedure Article ("CP"), which requires that a court must "state in open court" a defendant's parole eligibility. That section also provides that a court's statement about a defendant's parole eligibility "is for information only and is not a part of the sentence," and that a court's failure to make a statement in open court about parole "does not affect the legality or efficacy of the sentence." *See Thomas v. State*, 465 Md. 288, 306 n.16 (2019) (observing that "[t]hese provisions simply recognize that eligibility for parole is set by statute once the sentencing court announces the specific terms of the sentence" and that "[t]his statute is an effort to have a sentencing court make plain to the defendant what is implicit in the sentence that the court pronounces"). As best we can discern, the State argues that the circuit court's failure to say anything about Mr. Constant's parole eligibility in open court does not make his sentence illegal, because a court's failure to comply with CP § 6-217(a)'s requirement that it state "the minimum time the defendant must serve before becoming eligible for parole" in open court does not affect the legality of the sentence. As an initial matter, the State's argument addresses an

issue not raised in this appeal—Mr. Constant does not argue that that his sentence is illegal for failure to comply with CP § 6-217. And again, there is nothing about CP § 6-217 to suggest that the principle that the transcript prevails over the sentencing documents would not apply here. As explained above, the correction of the record—to which the State itself agrees—can be made on that ground alone.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR THE SOLE PURPOSE OF CORRECTING THE COMMITMENT RECORD AND DOCKET ENTRIES AND HEARING SHEET FOR JULY 27, 2017. APPELLANT AND WICOMICO COUNTY TO SPLIT COSTS.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1440s17cn.pdf