Circuit Court for Howard County
Case No.: C-13-CR-23-000192

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 1592

September Term, 2023

DERON DAVE BARNETT

v.

STATE OF MARYLAND

Arthur,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: March 12, 2026

Appellant Deron Dave Barnett was indicted in the Circuit Court for Howard County and charged with second degree rape of his daughter, a minor, and other related counts. Appellant waived his right to a jury trial and was convicted by the court on all counts. After he was sentenced to an aggregate term of 80 years' incarceration, Appellant timely appealed and asks us to address the following questions:

> 1. Did the circuit court err in finding that Appellant's waiver of his right to a jury trial was knowing?
>
> 2. Did the circuit court impose an illegal sentence?

For the following reasons, we shall vacate one of Appellant's convictions for incest, vacate the term of confinement making his sentences in this case consecutive to any and all sentences currently being served, and otherwise affirm.[1]

BACKGROUND

Appellant does not challenge the sufficiency of the evidence to sustain the convictions. Therefore, our summary of the trial record is intended to provide context for the issues raised in this appeal, rather than a comprehensive review of the evidence presented. *See Thomas v. State*, 454 Md. 495, 498-99 (2017) ("Because the issue dispositive of this appeal does not require a detailed recitation of the facts, we include only

[1] Prior to the start of this trial, Appellant was convicted following a bench trial of second-degree rape and related counts of his other daughter, also a minor, as detailed in our recent unreported opinion, *Barnett v. State*, No. 1125, Sept. Term 2023 (filed June 13, 2025) (Circuit Court Case No. C-13-CR-22-000536). There, we reversed Appellant's convictions and remanded for further proceedings because his waiver of his right to a jury trial there was not made knowingly and voluntarily. *Id*.

a brief summary of the underlying evidence that was established at trial."); *accord Parks v. State*, 259 Md. App. 109, 113 (2023).

Appellant's then-nineteen-year-old daughter testified that, when she was seventeen, her father raped her by placing his penis into her vagina. This occurred at a motel while the victim's mother was at work and her younger sister was taking a shower. The victim testified that she was "nervous" and "scared" because she "knew that he could hurt me." She elaborated that Appellant physically abused her, her mother, and her sister on a regular basis. According to the victim, Appellant hit, choked, punched, and kicked her "[p]robably every week at least." The victim also testified to two additional instances of sexual abuse, including when Appellant forced her to perform fellatio, and another instance of vaginal intercourse. The victim's younger sister also testified, over a continuing objection, that, on other occasions, Appellant raped her by inserting his penis into her vagina. Appellant testified on his own behalf and denied these allegations.

We include additional detail as necessary in the following discussion.

DISCUSSION

I.

Appellant's first contention is that he was misinformed about his constitutional right to a jury trial, and therefore, his waiver of that right was not knowing. More specifically, Appellant asserts: (1) defense counsel incorrectly advised him that the State would decide whether he was guilty at a jury trial; (2) he decided he wanted a bench trial based on a misunderstanding of the law; and (3) he was never advised of the presumption of

innocence. The State responds that the record does not support Appellant's claims because he knowingly waived his right to a jury trial. We concur with the State.

Prior to trial, defense counsel advised Appellant of his right to a jury trial. We shall emphasize the portions of that colloquy that are at issue:

> [DEFENSE COUNSEL]: Thank you. Okay, Mr. Barnett, I know you've already elected a trial. But the last thing that you have to tell Judge McCrone is based on our discussions you say that you want a bench trial. That means you want -- I just have to go over it -- you want Judge McCrone to be both the trier of fact and the person who determines the law, what is permitted and what is allowed into evidence in this case.
>
> THE DEFENDANT: Correct.
>
> [DEFENSE COUNSEL]: Now, because you're in a circuit court you have a right to have a jury trial. If we had a jury trial you and I along with the State's Attorney would select 12 citizens of Howard County to fill that box. They would be chosen from a larger pool of randomly selected Howard County citizens pulled from the voter and motor vehicle rolls. We would get to ask them questions about possible biases they may have. We would have a certain number of strikes that we would be allowed to use to excuse jurors that we didn't want on the jury for any reason. We would be able to ask for some of them to be removed for cause if there was a reason that a juror should not sit to hear this case. And in a jury trial the jury would have to agree on a verdict of guilty or not guilty in each of the charges that you are facing. So they would have to have a unanimous verdict. If they did not have a unanimous verdict, if it was 11 versus 1 or any other number that wasn't all together, then it would be a hung trial. There would not be a finding of guilty of not guilty, and at that point the State could choose to retry your case. *But in a jury trial the State would make the determination of whether you are guilty or not guilty. The judge would have nothing to do with making that determination.*

(emphasis added).

Defense counsel continued:

> [DEFENSE COUNSEL]: . . . It is my understanding that you wish to waive your right to a jury trial and you wish to have this case heard and decided by a judge. Is that correct?

THE DEFENDANT: Correct. *Because the judge has other information. All of the evidence to be able to go with. The jury doesn't have that.* The State tried to cover up a lot of things last time around. And the judge had all of the evidence in front of him. I don't know why.

THE COURT: But it's your choice.

THE DEFENDANT: That's what I want.

THE COURT: Would you rather have a court trial –

THE DEFENDANT: Yes.

THE COURT: -- or a jury trial?

THE DEFENDANT: Court.

THE COURT: Court trial. All right. And do you have any questions about what a jury trial is?

THE DEFENDANT: No.

THE COURT: Okay. All right. The Defendant has elected a court trial. . . .

(emphasis added).

The State then asked the court to confirm that Appellant understood his rights and the following ensued:

[PROSECUTOR]: Your Honor, I just have one more request just because of the long conversation we had about the plea offer in this case. I just want to make sure that the Defendant -- that it is stated on the record that he knowingly, voluntarily, and intelligently waives his right to a jury trial. I just wanted to make sure –

THE COURT: Well, I think I have to find that.

[PROSECUTOR]: Okay.

> THE COURT: But that's why I said do you have any questions about what a jury trial entails. *You know it's 12 people, they have to be unanimously –*
>
> THE DEFENDANT: *I understand.*
>
> THE COURT: -- *convinced of your guilt beyond a reasonable doubt. Beyond a reasonable doubt. All of them have to come to that same conclusion as to each and every element of each and every crime charged before you could be convicted.* You'd have some limited say in their selection, with counsel. You would have some strikes that you could exercise. And you could ask that people be struck for cause if you think that that is warranted. And you would also have the option in a jury trial to have a certain number of alternate jurors selected so that if for any reason some of the jurors became unavailable the alternates could be substituted for those that for one reason or another could not continue.
>
> *Do you understand those things?*
>
> THE DEFENDANT: *Yes*.
>
> THE COURT: Okay.
>
> THE DEFENDANT: *I just believe the judge is highly trained and educated to handle a trial like this. So that's why I'm picking a judge*.
>
> THE COURT: All right. I do find that the Defendant has freely, voluntarily, knowingly, and intelligently waived his right to a jury trial and elected a court trial.

(emphasis added).

The Sixth Amendment of the United States, as well as Articles 5 and 21 of the Maryland Constitution, ensure a criminal defendant a right to a jury trial. *Abeokuto v. State*, 391 Md. 289, 316 (2006).[2] A defendant may elect to waive their right to a jury trial and

[2] Maryland Declaration of Rights Articles 21 and 24 also guarantee a party's right to a jury trial in Maryland. *See also Kang v. State*, 393 Md. 97, 105 (2006); *Abeokuto*, 391 Md. at 316; Maryland Rule 4-246 (procedures for jury trial waiver).

instead be tried by the court. *Id*. However, a defendant may only properly waive their right to a jury trial if they waive this right knowingly and voluntarily. *Id.* at 316; *Smith v. State*, 375 Md. 365, 377-80 (2003).[3] According to the Supreme Court of the United States, a waiver constitutes "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *accord Winters v. State*, 434 Md. 527, 537 (2013) (citation omitted); *Hammond v. State*, 257 Md. App. 99, 121 (2023). Courts have defined "knowingly" as synonymous with "intelligently" and "having or showing awareness or understanding." *Nalls v. State*, 437 Md. 674, 689 (2014) (citation omitted).

Although the defendant must have knowledge about the jury trial before waiving this right, full knowledge is not required. *State v. Bell*, 351 Md. 709, 720 (1998). As such, the court need not recite "any fixed incantation" to ensure that the defendant knowingly waives their jury trial right. *Martinez v. State*, 309 Md. 124, 134 (1987); *Hammond*, 257 Md. App. at 121. Whether an accused has made an intelligent and knowing waiver of the right to a jury trial depends on the facts and circumstances of each case. *Walker v. State*, 406 Md. 369, 380 (2008) (quotation marks and citations omitted).[4] *Accord Abeokuto*, 391 Md. at 320; *Hammond*, 257 Md. App. at 121.

[3] There is no claim that Appellant's waiver in this case was involuntary.

[4] *Walker* was superseded on other grounds in *Valonis v. State*, 431 Md. 551 (2013), wherein our Supreme Court mandated that strict compliance with Maryland Rule 4-246 (b) required a reversal for failure of the circuit court to announce on the record whether the defendant's waiver was made knowingly and voluntarily. *Valonis*, 431 Md. at 563-64, 570. *Valonis*, in turn, was modified by *Nalls v. State*, 437 Md. 674 (2015), to the extent that (continued)

In *Walker*, *supra*, the Maryland Supreme Court stated what is required to determine whether a waiver was knowingly made:

> [A]n on-the-record showing that the defendant knows that (1) a criminal defendant is presumed to be innocent and cannot be convicted unless the trier of fact is persuaded beyond a reasonable doubt of the defendant's guilt, and (2) if the defendant did not waive a jury trial, his or her case would be tried by a jury of twelve persons[.]

406 Md. at 385. Moreover, a defendant's knowledge of the right to a jury trial need not be "full" or "complete" or "entire" in order to be "knowing." *Bell*, 351 Md. at 730 ("'Knowledge,' in this context means 'acquaintance' with the principles of a jury and 'knowingly' means acting consciously or intentionally in waiving the right to a jury."). The Committee Note to Maryland Rule 4-246 is instructive as to the inquiry the court should perform before accepting a waiver:

> **Committee note**: Although the law does not require the court to use a specific form of inquiry in determining whether a defendant's waiver of a jury trial is knowing and voluntary, the record must demonstrate an intentional relinquishment of a known right. What questions must be asked will depend upon the facts and circumstances of the particular case.
>
> In determining whether a waiver is *knowing*, the court should seek to ensure that the defendant understands that: (1) the defendant has the right to a trial by jury; (2) unless the defendant waives a trial by jury, the case will be tried by a jury; (3) a jury consists of 12 individuals who reside in the county where the court is sitting, selected at random from a list that includes registered voters, licensed drivers, and holders of identification cards issued by the Motor Vehicle Administration, seated as jurors at the conclusion of a selection process in which the defendant, the defendant's attorney, and the State participate; (4) all 12 jurors must agree on whether the defendant is guilty or not guilty and may only convict upon proof beyond a reasonable doubt; (5) if the jury is unable to reach a unanimous decision, a mistrial will be declared and the State will then have the option of retrying the defendant;

Nalls made clear that a contemporaneous objection is required to preserve the issue of compliance with Md. Rule 4-246 (b). *Nalls*, 437 Md. at 693-94.

> and (6) if the defendant waives a jury trial, the court will not permit the defendant to change the election unless the court finds good cause to permit the change.

Committee Note to Md. Rule 4-246 (b).

Both parties direct our attention to *Winters v. State*, 434 Md. 527 (2013). In *Winters*, once the court learned of the defendant's desire to have a bench trial, it conducted a colloquy to examine whether his waiver of a jury trial was knowing and voluntary. *Id*. at 530-31. The court asked numerous questions, but in pertinent part, it asked:

> And do you understand that for such a jury to convict you or to find you either criminally responsible or not criminally responsible, they must unanimously, all together, vote to convict you or find you criminally responsible or not criminally responsible upon which the evidence they feel proves same by a reason—beyond a reasonable doubt? Do you understand that?

Id. at 532.

Our Supreme Court found this advice misleading, primarily because it misstated the burden of proof to show that he was not criminally responsible. *Id.* at 538. It held that the defendant's jury trial waiver could not have been knowing and voluntary because the court's erroneous advice "may have misled [the defendant] to believe that the task of proving that he was not criminally responsible in a jury trial would be a more difficult task than it actually is under Maryland law." *Id*. It explained that this erroneous advice made "a jury trial appear less attractive and would reasonably influence Winters's decision to waive his right." *Id*. The Court also noted that, according to the hearing record, no one corrected the court's erroneous advice. *Id*. at 539-40. The Court concluded that the erroneous advice made the waiver unknowing even though "without the erroneous statement, there would have been sufficient information for a knowing waiver[.]" *Id*. at 542.

In contrast, in *Walker*, *supra*, Walker argued his waiver was not made knowingly because he was not informed of the nature of a jury trial. 406 Md. at 376. Our Supreme Court held Walker had some knowledge of the right to a jury trial because: (1) he made a decision to pray a jury trial rather than stand trial in the District Court on the charges of violation of the controlled dangerous substance abuse laws; (2) he had been a criminal defendant in at least one jury trial presided over by the very same circuit court judge; (3) he was represented by counsel, who reached an agreement with the State to drop all but one of several pending charges; (4) he elected to proceed on a "not guilty agreed statement of facts" in order to preserve some issues for appellate review; and (5) he advised the circuit court that he understood he was waiving "any right to have a jury trial of this matter, as well as a court trial[.]" *Id.* at 382-83. This provided an adequate basis for the lower court to find that Walker's waiver was knowing and voluntary. *Id*. at 383.

Following these cases, in *Hammond*, *supra*, this Court set forth the pertinent on-the-record inquiry as follows:

> THE COURT: All right. We are back on the record for the Hammond case. The court – what I'm going to do is I'm going to recess – I'm going to make some decisions in the morning. But what I need to also address though is, [defense counsel], your client's interest or lack of interest in a trial by jury. What's your -- what's your intentions of tomorrow?
>
> [DEFENSE COUNSEL]: We just decided to go with a bench trial, your honor, without a jury.
>
> THE COURT: All right. So, Mr. Hammond, you understand you have the right to have trial by jury. A jury is twelve people. They'd hear the case. You can do that. The jury would hear all — the [S]tate has the burden of proof, proof beyond a reasonable doubt. They present the evidence. They would present the evidence to the jury; and end of the day, the primary difference between a judge trial and a jury trial is those twelve have to make a unanimous decision as to your — you being guilty or not guilty as to each

> count. If they can't all agree it's something called a hung jury. If it's a mistrial you can be tried over again with a different jury until you have a jury that agrees; versus that one person who hears it, and then I'll make a decision as to each count, if you were guilty or not. Do you agree to waive that right to have a trial by jury and be heard by a judge?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: All right. So the court will note the jury waiver.

Hammond, 257 Md. App. at 118-19.

After concluding that Hammond's challenge under Maryland Rule 4-246 (b) was unpreserved, *id.* at 120, this Court addressed his claim that he was denied his constitutional right to a jury trial under the Sixth Amendment because that claim does not require an objection to preserve the right for further review, *id*. at 121. We held that the inquiry cited above established Hammond had knowingly and voluntarily waived his right to a jury trial under the totality of the circumstances. *Id*. at 122. We stated:

> The court advised appellant of his right to have a trial by jury, which "is twelve people" who would have to make a unanimous decision that he was guilty beyond a reasonable doubt. If he waived that right, the court, as one person, would decide if he was guilty or not. At the end of the court's advisement, appellant indicated that he wanted to waive his right to a jury trial and be tried by the court.

Id. (citing *State v. Hall*, 321 Md. 178, 183 (1990)).

We further noted that the record reflected Hammond had discussed the waiver with his counsel. In such instances, we noted a presumption that "when an attorney states in court that the defendant wants to waive the right to a jury trial, that the attorney has advised of the advantages and disadvantages of having the case evaluated by a judge instead of a jury. *Id.* at 123 (citing *Kang v. State*, 163 Md. App. 22, 36 (2005)).

In this case, Appellant's first claim is that his attorney misadvised him that the State would make the determination of his guilt or innocence. Although we agree defense

counsel's advisement was wrong, we note that immediately before defense counsel's misadvisement, counsel informed Appellant that the jury would have to agree on a verdict unanimously. Moreover, a mere moment later, the court advised Appellant that a jury trial meant twelve people unanimously would have to be convinced of his guilt beyond a reasonable doubt. We are satisfied the court's correction accurately conveyed the burden of proof, an advisement that Appellant stated he understood on the record.

Appellant continues that he misunderstood the law with respect to the reception of evidence as he stated his belief on the record that a judge would have "other information" and "[a]ll of the evidence" that the jury did not have. The State responds that, shortly after this, Appellant stated he was electing a bench trial because he believed the judge "is highly trained and educated to handle a trial like this." According to the State, this indicated Appellant did not believe that a judge would receive different evidence than the jury, but that he was referring to the judge's experience and training and specialized knowledge in making these comments.

We need not speculate or resolve these different interpretations of Appellant's statements. What we are required to do under the law is look to the totality of the circumstances and determine if Appellant had "some knowledge" of the right to a jury trial prior to his waiver.

In making that assessment, we note that prior to Appellant's statements about the evidence, defense counsel confirmed that Appellant wanted the judge "to be both the trier of fact and the person who determines the law, what is permitted and what is allowed into evidence in this case," and Appellant replied affirmatively. A fair reading of the record is

that Appellant understood the rules of evidence and the different roles of the judge and the jury. Indeed, this conforms to Maryland law on the subject. *See State v. Hutchinson*, 260 Md. 227, 231 (1970) ("Inherent in his capacity of trial judge is the dual role of not only trier of facts (judging the credibility and weight of the evidence) but also that of judge of the law of the case (passing upon the admissibility of evidence).") (citation omitted). As this Court has explained:

> It is precisely because of a judge's ability to make these fine distinctions that the law routinely allows a judge, in a non-jury case, to rule that a confession is inadmissible, that physical evidence is inadmissible, that an identification is inadmissible, or that any piece of evidence is inadmissible and yet still go on to render a verdict on the merits of the case, notwithstanding having heard perhaps mountains of inadmissible but damning testimony. We trust the judge to compartmentalize.

Polk v. State, 183 Md. App. 299, 307 (2008).

Furthermore, this was not Appellant's first trial on allegations that he raped one of his daughters. We take judicial notice that, on May 10, 2023, approximately three months before the waiver inquiry in this case (August 1, 2023), Appellant was convicted of second-degree rape and related counts of his younger daughter following a bench trial. *See State v. Barnett*, Case No. C-13-CR-22-000536 (Howard County Circuit Court, May 10, 2023). *See* Md. Rule 5-201 (judicial notice); *Stovall v. State*, 144 Md. App. 711, 717 n. 2 (2002) (taking judicial notice of official entries in circuit court records), *cert. denied*, 371 Md. 71 (2002). Although this Court reversed Appellant's first case because of erroneous advice regarding the burden of proof applied by a jury (reasonable doubt standard) during the jury waiver colloquy, *see State v. Barnett*, No. 1125, Sept. Term, 2023 (filed June 13, 2025), we do note that the circuit court there made clear that the judge would listen to all of the

evidence and make a determination of his guilt or innocence beyond a reasonable doubt, *State v. Barnett*, Case No. C-13-CR-22-000536 (Howard County Circuit Court, May 10, 2023).

And, although the circuit court in the prior trial also did not advise Appellant of the presumption of innocence—the next claim raised by Appellant on this issue—we take judicial notice that, in the prior trial, defense counsel explained the presumption as follows during its opening statement:

> Mr. Barnett is presumed innocent of these charges. That presumption remains from every stage of this process. And unless the State can prove their case beyond a reasonable doubt, that presumption continues to rest on him.
>
> That presumption requires that nothing be taken simply at face value but instead examined and questioned carefully, thoughtfully, thoroughly. It is the contention of the defense today that the State at the close of trial will be unable to meet its high burden.
>
> Proof beyond a reasonable doubt requires the State to build a wall out of bricks. Each brick is a fact, facts from material evidence, facts given by witnesses, facts that must be used to build a wall that is so impenetrable that your Honor believes there's absolutely no reasonable doubt that can shine through.
>
> If there are cracks in the wall, if there are bricks missing, then doubt requires your Honor to find Mr. Barnett not guilty.

State v. Barnett, Case Number C-13-CR-22-000536 (Howard County Circuit Court, May 10, 2023).

In the present case, although it is true that the court did not advise Appellant of the presumption of innocence, we are persuaded that, under a totality of the circumstances approach, Appellant had "some knowledge" of his right to a jury trial before he made his election to be tried by the court. He was tried just three months earlier on similar charges

against his younger daughter, and his counsel in that case clearly and correctly explained the presumption of innocence. Moreover, as to Appellant's other claims herein, the court's advisements corrected any misstatements by defense counsel during the waiver inquiry, and we conclude this record shows that Appellant's waiver was made knowingly. *Cf. Walker*, 406 Md. at 385 (observing that the petitioner had been a criminal defendant in a jury trial presided by the same judge and that his "knowledge of his jury trial right is hardly 'unspecified'").[5]

Finally, we further note that in electing a bench trial, Appellant did not waive the requirement that the State establish his guilt beyond a reasonable doubt or that he be presumed innocent. These legal precepts applied regardless of whether he was tried by a jury or by a judge. *See generally, Commonwealth v. Quarles*, 456 A.2d 188, 191 (Pa. 1983) ("By definition, a waiver is a relinquishment of a right or remedy . . . . The [defendant] never relinquished his right to have a factfinder determine his guilt beyond a reasonable doubt . . . [but] merely relinquished his right to have a jury as a factfinder as opposed to a judge."). We hold that Appellant's waiver of his right to jury trial was made knowingly.

II.

Barnett next asserts the court imposed an illegal sentence on the following grounds: (1) he was convicted twice of the same offense, i.e., incest; (2) the sentences for his incest convictions merged under the rule of lenity with his second-degree rape sentences; and (3)

[5] Although not an issue raised on appeal, we note that, in *Hammond*, *supra*, this Court concluded that the waiver was made knowingly and voluntarily in a case where the defendant was not advised of the presumption of innocence. *Hammond*, 257 Md. App. at 118-19.

the court illegally increased his sentences by making them consecutive to a sentence in another related case after disposition concluded. The State agrees that the court illegally increased Appellant's sentence after he left the courtroom but disputes the other contentions.

To recap, Appellant was convicted on all counts in the indictment and sentenced as follows:

Count 1 (Sexual abuse of a minor) – 25 years

Count 2 (Second degree rape) – 10 years

Count 3 (Incest) – 5 years

Count 4 (Second degree rape) – 10 years

Count 5 (Second degree rape) – 10 years

Count 6 (Incest) – 5 years

Count 7 (Second degree child abuse) – 15 years.

Although the court did not specify whether these sentences were concurrent or consecutive, the court did state on the record that the total sentence was "80 years, flat." This is supported by the commitment record. [6]

Three minutes later, and notably after Appellant was excused from the courtroom, court reconvened and the following ensued:

[6] Appellant does not dispute that his individual sentences were consecutive to each other. *See generally*, *Robinson v. Lee*, 317 Md. 371, 380 (1989) (stating that, to fulfill its obligation, the court need only "spell out with reasonable specificity the punishment to be imposed"); *see also Dutton v. State*, 160 Md. App. 180, 191-92 (2004) (stressing the importance of the transcript and the commitment record in determining whether the sentencing court intended to impose concurrent or consecutive sentences).

> THE COURT: And ladies and gentlemen, I apologize -- I just stepped off the bench and I realized I neglected to mention that the sentence imposed today is consecutive to any and all other sentences currently being served. . . . Consecutive to any and all other sentences currently being served. And I apologize… we've been off the record probably no more than two minutes, but I apologize for not mentioning that when we were here a moment ago.
>
> Thank you so much.
>
> [DEFENSE COUNSEL]: Understood.
>
> [PROSECUTOR]: And Your Honor, just to be clear, as well -- that each count is also consecutive to each other?
>
> THE COURT: Consecutive to each other…
>
> [PROSECUTOR]: Because you said to any…?
>
> THE COURT: …And consecutive to any other, and all other sentences currently being served.

Standard of Review

Maryland Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time." Whether a sentence is illegal and whether "an alleged defect relating to a sentence is cognizable in a motion to correct an illegal sentence" are questions of law and this Court reviews both *de novo*. *Farmer v. State*, 481 Md. 203, 222–23 (2022).

Multiplicity of two incest convictions

Appellant was charged in both Counts 3 and 6 with the following identical language: that "on or about and in between July 8, 2021 through December 31, 2021" he did "knowingly engage in vaginal intercourse with [victim], a person whom the defendant may not marry under FL 2-202, in violation of CR 3-323 of the Annotated Code of Maryland[.]" In closing argument, the State suggested these identically worded counts related to separate

conduct, namely, the first time Appellant raped the victim, and the second time, when he raped her while she was on her period.

As Appellant observes, and as the State concedes, the court in its remarks convicting Appellant on these counts did not specifically relate the incest to these separate acts of vaginal intercourse. The court stated the following:

> With respect to Count two, I do find the Defendant guilty of rape in the 2nd degree and that he did insert his penis in her vagina. They had intercourse in July of 2021 and she was seventeen. I do accept that she was reasonably scared and frightened for the potential violence that could be heaped upon her by the Defendant depending on the extent of her resistance, that he would not hesitate to hurt her, that she did resist to some degree and that she never consented.
>
> With respect to count three, incest, of course having intercourse with your daughter, vaginal intercourse with your daughter is incest. Of course, he knew that he was her dad, that he was her father.
>
> * * *
>
> With respect to count five, I find the Defendant guilty of rape in the 2nd degree again. Vaginal intercourse with [the victim], this occasion was when she was on her period, when he put the towel down, I think on her bed, to protect any blood from staining the sheets of the bed. That he put his penis in her vagina without consent, that she tried to push him away and did not consent, and that she was fearful.
>
> Count six, incest. The evidence is compelling beyond a reasonable doubt that the Defendant had vaginal intercourse with his daughter during the specific time frame.

The State, while recognizing that "any ambiguity as to whether convictions are based on distinct acts is resolved in the defendant's favor," citing *Snowden v. State*, 321 Md. 612, 618-19 (1991), argues there was no ambiguity here because, although "the court

did not say which incest count related to each instance of intercourse, it unambiguously found two distinct acts of vaginal rape."

"Multiplicity is the charging of the same offense in more than one count." *Montgomery v. State*, 206 Md. App. 357, 398 (2012), *cert. denied*, 206 Md. App. 357 (2012) (quoting *Brown v. State*, 311 Md. 426, 432 n.5 (1988)). Case law permits challenges to "convictions on multiplicity grounds." *Moore v. State*, 198 Md. App. 655, 674 n.5 (2011) (although the defendant's multiplicity argument regarding the charging document was waived because she failed to file a pretrial motion, she could "challenge her convictions on multiplicity grounds"). *Accord Brown*, 311 Md. at 431 n.4 (reviewing Brown's claim of multiplicity despite the failure to object below); *Webb v. State*, 185 Md. App. 580, 598 (2009) (reviewing the defendant's multiplicity claim and reversing the defendant's convictions despite the defendant's failure to object below).

Determining whether two charged offenses are the same often depends on the unit of prosecution. *Brown*, 311 Md. at 432. This, in turn, requires an examination of legislative intent. *Purnell v. State*, 375 Md. 678, 692 (2003); *see also Brown*, 311 Md. at 434 ("The unit of prosecution of a statutory offense is generally a question of what the legislature intended to be the act or course of conduct prohibited by the statute for purposes of a single conviction and sentence."). The rules of statutory construction are well established:

> When tasked with statutory interpretation, this Court first looks to the "plain meaning of the language of the statute." *Evans v. State*, 420 Md. 391, 400 (2011) (quoting *Ray v. State*, 410 Md. 384, 404 (2009)). "If . . . the language [in the statute] is subject to more than one interpretation, it is ambiguous, and we endeavor to resolve that ambiguity by looking to the statute's legislative history, case law, statutory purpose, as well as the structure of the statute."

> *Harrod v. State*, 423 Md. 24, 33 (2011) (quoting *Evans v. State*, 420 Md. 391, 400 (2011)).

Green v. State, 259 Md. App. 341, 354 (2023) (alterations in original).

The pertinent statute on the crime of incest provides as follows:

> (a) 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.
>
> (b) A person who violates this section is guilty of a felony and on conviction is subject to imprisonment for not less than 1 year and not exceeding 10 years.

Md. Code (2002, 2021 Repl. Vol.), § 3-323 of the Criminal Law Article ("Crim. Law").[7]

This statute derives from former Section 335 of Article 27:

> Every person who shall knowingly have carnal knowledge of another person, being within the degrees of consanguinity within which marriages are prohibited by law in this State, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary for a term not less than one nor more than ten years, in the discretion of the court.

Former Article 27 § 335 (superseded).

Neither the plain language of Crim. Law § 3-323 nor former Art. 27 § 335 address the unit of prosecution, namely whether the prohibited conduct applies to each act of vaginal intercourse or each relationship between a "person" and "anyone whom the person may not marry[.]" We conclude the statute is ambiguous on this question and will look beyond the plain language to other sources to aid our interpretation.

[7] Family Law § 2-202 delineates the types of marriages which are prohibited as void in Maryland. Md. Code (1984, 2019 Repl. Vol.), § 2-202 of the Family Law Article.

Unfortunately, we have not found, nor have the parties cited, any case law or legislative history that aids us in understanding the legislative intent on this question. We observe that, generally, *Wharton's Criminal Law* provides:

> At early common law, incest was not a crime; it was cognizable as an offense only in the ecclesiastical courts. However, incest soon came to be recognized as a crime by statute in Britain and in the United States.
>
> Incest is punished as a crime to promote family harmony, to protect children from the abuse of parental authority, and to prevent mutations which otherwise might occur in the children of incestuous relationships. Even in situations where the underlying policy rationales apply with less force, courts have still upheld convictions for incest, as in the case of adult consensual relationships between siblings.

Ohlin, 3 *Wharton's Criminal Law* § 49.1 at 451-52 (16th ed. 2021); *see also Tapscott v. State*, 343 Md. 650, 658 (1996) (recognizing the ecclesiastical origins of the crime of incest).

Looking beyond this historical understanding of the crime, we conclude that the statutory offense of sexual abuse of a minor, of which Appellant was also convicted, is somewhat instructive. *See* Crim. Law § 3-602. Notably, incest is listed among the crimes included in the definition of "sexual abuse." Crim. Law § 3-602(1)(4)(ii)(1). However, unlike Crim. Law § 3-323, the sexual abuse of a minor statute clearly provides that the sentence for sexual abuse "may be separate from and consecutive to or concurrent with" a sentence for "any crime based on the act establishing the violation" or child abuse. Crim. Law § 3-601(d). Indeed, Maryland law recognizes that the rule against multiple punishments for the same offense is subject to exception when the Legislature has expressly authorized multiple punishments. *See State v. Lancaster*, 332 Md. 385, 412

(1993) ("[S]pecific or express authorization by the Legislature is a pre-condition for multiple punishments when two offenses are deemed the same under the required evidence test.") (footnote and citations omitted); *accord White v. State*, 250 Md. App. 604, 641 (2021).

In addition, in *Bey v. State*, 259 Md. App. 324 (2023), *cert. denied*, 486 Md. 394 (2024), a case discussing units of prosecution, this Court held that the defendant did not receive multiple punishments for the same offense where he was convicted of five different counts of child sexual abuse. *Id.* at 331. We held that, under the plain language of the statute, "the unit of prosecution is each singular abusive act." *Id*. at 336. We further held that the rule of lenity did not apply. *Id*. at 337. We disagreed with the argument that child sexual abuse under the statute was a unitary crime and recognized that the State may charge it either as a continuous course of conduct or as separate acts. *Id*. at 340 (discussing *Crispino v. State*, 417 Md. 31 (2010), *Cooksey v. State*, 359 Md. 1 (2000), and *Warren v. State*, 226 Md. App. 596 (2016)).

Had there been a similar anti-merger provision in the incest statute, or frankly, a charging document that specifically set forth the separate incestuous acts at issue, our review would be less problematic. This is complicated by our research indicating that cases analyzing the unit of prosecution for incest are exceptionally rare. In *Sena v. State*, 510 P.3d 731 (Nev. 2022), the Supreme Court of Nevada applied the rule of lenity to an ambiguous incest statute and concluded, in a case involving multiple convictions for incest involving three victims, that "only three counts of incest, one for each victim, were appropriate." *Id*. at 747. The pertinent statute provided that it is a felony for "[p]ersons

being within the degree of consanguinity within which marriages are declared by law to be incestuous and void who intermarry with each other or who commit fornication or adultery." *Id.* at 745 (quoting Nev. Rev. Stat. Ann. § 201.180). Focusing on the part of the statute that prohibited fornication or adultery between persons within the degree of consanguinity, the court concluded that neither the legislative history nor the existing case law addressed the unit of prosecution. *Id.* at 746-47. The court then turned to public policy rationales, which appeared to justify both approaches:

> Some rationales behind the incest law are based on genetic concerns in resulting children, protecting traditional notions of family, and religious conformity. *See* 42 C.J.S. *Incest* § 4 (2017); *see also* 1 Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 2.9, at 152 (2d ed. 1987). Charging violations of NRS 201.180 based on the relationship, rather than each sexual interaction, would protect the notions the statute aims to protect. However, incest laws are, in part, also aimed at protecting child victims from sexual abuse. And while Sena asserts that each act is deterred by other criminal statutes that penalize sex crimes against children, thus obviating the need for incest to be charged on a per-act basis, he is only partially correct. For crimes that pertain to children who are below the age of consent, it is true that the statutory sexual assault laws would apply to each act with a child incapable of consent. However, in a situation where a child over the age of consent consents to sexual interactions with an older relative, that would be outside the purview of statutory sexual assault laws, and thus each instance would not be punished. In that instance, charging incest on a per-act basis would afford additional protection to the victim that charging on a per-relationship basis would not be able to provide. Thus, we conclude that even public policy considerations do not clarify the correct unit of prosecution for the crime of incest.

Id. at 747.

Because there was no legislative history or pertinent case law on the question of whether the unit of prosecution for incest each relationship or each act was, and given the

ambiguity in the public policy rationales, the Nevada court applied the rule of lenity in Sena's favor and vacated all but three of the incest counts, one for each victim. *Id.*

We arrive at a similar result in this case. "[A]mbiguous units of prosecution and penalty provisions in criminal statutes, pursuant to the rule of lenity, must normally be construed in favor of the defendant," effectively merging the offenses. *Melton v. State*, 379 Md. 471, 488 (2004). *Accord Nichols v. State*, 461 Md. 572, 602 (2018). The rule of lenity is "an aid for dealing with ambiguity in a criminal statute." *Oglesby v. State*, 441 Md. 673, 681 (2015). The rule provides that "a court confronted with an otherwise unresolvable ambiguity in a criminal statute that allows for two possible interpretations of the statute will opt for the construction that favors the defendant." *Id*. "It is a tool of last resort, to be rarely deployed and applied only when all other tools of statutory construction fail to resolve an ambiguity." *Id*. (citation omitted).

Moreover, "[t]he burden of proving distinct acts or transactions for purposes of separate units of prosecution falls on the State." *Alexis v. State*, 437 Md. 457, 486 (2014) (quoting *Morris v. State*, 192 Md. App. 1, 39 (2010)). "Accordingly, when the indictment or jury's verdict reflects ambiguity as to whether the jury based its convictions on distinct acts, the ambiguity must be resolved in favor of the defendant." *Id*.

We are not persuaded by the State's argument that the court's verdict adequately explained that it based the two convictions of incest on two separate acts. Indeed, the State acknowledges as much by conceding that "the court did not say which incest count related to which instance of intercourse. And as stated, the general rule is that, absent a legislative exception, a person may not be punished multiple times for the same offense.

Here, there was no distinction whatsoever between the counts in the indictment, and there was no specific delineation by the court in rendering its verdict. In sum, we conclude that the two incest counts are the same.

Considering this, and given the ambiguous nature of the statute, the case law, and the competing public policy rationales as explained in *Sena*, we shall apply the rule of lenity in Appellant's favor in this case and remand for resentencing so the court may vacate one of his convictions and sentences for incest. *See* Md. Rule 8-604(d)(2) (remand for resentencing); *Twigg v. State*, 447 Md. 1, 20-21, 27-28 (2016) (recognizing that a remand for resentencing was appropriate because sentencing on multiple counts was akin to a "package" and the sentencing court was in the "best position" to redefine the terms of disposition); *see also Purnell*, 375 Md. at 704 (remanding to this Court with instructions to vacate one of the convictions for resisting arrest).

Rule of Lenity

Appellant next asserts that his remaining sentence for incest merges into one of the sentences for second degree rape under the rule of lenity.[8] Appellant concedes the sentences do not merge under the required elements test because "each offense has an element the other does not." [Id. at 17] *See Smith v. State*, 62 Md. App. 670, 686 (1985) (holding that crimes of second-degree rape and incest require proof of different elements and do not merge under required evidence test); *see also Scott v. State*, 2 Md. App. 709, 716 n. 2 (1968) (observing in dicta that force is not an element of incest, and holding that

[8] Appellant argues that both sentences for the two counts of incest merge. Because we held that only one count of incest is viable, we shall modify our discussion accordingly.

the conviction for assault and battery was separate from the convictions for incest and carnal knowledge).

The State responds that the sentences for incest and second-degree rape do not merge under the rule of lenity because "[t]here is no ambiguity about whether the legislature intended multiple punishments for these distinct crimes that punish distinct conduct and harms." We agree with the State. Unlike the previous issue, we discern no ambiguity as to the legislature's intent to allow separate punishments for incest and second-degree rape. Each offense protects different societal interests.

The law concerning second-degree rape generally protects against vaginal intercourse and sexual acts without consent, or against certain categories of victims, including, but not limited to, individuals of a certain age. Crim. Law § 3-304(a), (b). *See Travis v. State*, 218 Md. App. 410, 425 (2014) (recognizing that, at common law, the definition of rape was "the act of a man having unlawful carnal knowledge of a female over the age of ten years by force without the consent and against the will of the victim") (quoting *Goldberg v. State*, 41 Md. App. 58, 64 (1979)) (emphasis omitted); *see also* J. William Picher, Note, *Rape and Other Sexual Offense Law Reform in Maryland*, 7 U. Balt. L. Rev. 151, 166 (1977) (observing that Maryland laws prohibiting rape and sexual offenses into degrees "recognize that society has a duty to impose punishments on sexual offenders of both sexes which correspond to the violence of their acts and the effects upon their victims").

Comparatively, incest protects family relationships by prohibiting vaginal intercourse between closely related individuals. *See Tapscott v. State*, 106 Md. App. 109,

139 (1995) (stating that "the rationale behind punishing incest" is "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"), *aff'd*, 343 Md. 650 (1996).

We are not persuaded that the Legislature meant to punish these offenses as one offense. As the State argues, Appellant victimized his daughter by both exploiting his parental role and forcing vaginal intercourse on her, a nonconsenting victim. The rule of lenity does not apply, and Appellant may be sentenced for both incest and second-degree rape.

Illegal Sentence Increase

Finally, we agree with both parties that the circuit court illegally increased Appellant's sentence. After Appellant left the courtroom, court reconvened and the court indicated that Appellant's sentences in this case were to be served consecutively to any and all sentences in other cases. Appellant argues this was an illegal increase. The State agrees, as do we.

Maryland Rule 4-345(c) provides that "[t]he court may correct an evident mistake in the announcement of a sentence if the correction is made on the record *before* the defendant leaves the courtroom following the sentencing proceeding." (emphasis added). *See Reyes v. State*, 264 Md. App. 616, 626-27 (2025) (recognizing that Rule 4-345 permits an increase under certain circumstances, but before the defendant leaves the courtroom), *affirmed*, 492 Md. 630 (2025). *See also State v. Brown*, 464 Md. 237, 243 (2019) (observing that for a mistake to be "evident" it must be "clear or obvious").

"Generally, a sentencing court may not increase a defendant's sentence after it is imposed." *Reyes*, 264 Md. App. at 621 (citations omitted). The change of a sentence from concurrent to consecutive constitutes an increase in sentence. *See State v. Sayre*, 314 Md. 559, 562 (1989) (interpreting Md. Rule 4-345(b) and holding that "[w]hen a sentence is changed from concurrent to consecutive, it is increased in length"); *Simpkins v. State*, 88 Md. App. 607, 624-25 (1991) (barring an increase after the sentence is imposed).[9]

After the briefs were filed in this case, this Court decided *Reyes, supra*. There, we discussed the *Sayre* case:

> In *State v. Sayre*, the Supreme Court of Maryland considered a court's power to increase a sentence pursuant to Rule 4-345. Robert Sayre was found guilty of battery, and the court sentenced him to five years' imprisonment, to be served concurrently with any sentence he was currently serving. After announcing the sentence, the court ordered that Sayre be remanded to custody. Shortly thereafter, the court indicated that it had misspoken and that it meant to say that Sayre's sentence was to run consecutively. The court then had Sayre returned to the trial table, and the court stated that Sayre's sentence was to run consecutively. On appeal, this Court reversed, holding that the trial court improperly increased Sayre's sentence. The Supreme Court affirmed this Court, holding that, once a sentence has been imposed, Rule 4-345 did not permit the sentencing court to alter Sayre's sentence in the manner it had, regardless of whether the court's original sentence had been a "slip of the tongue[.]" As to when Sayre's sentence was to be considered "imposed," the Court explained:
>
> > Ordinarily, sentencing may be considered as the last phase of a criminal trial. When sentence is pronounced or imposed, there is a final judgment for purposes of appeal. The sentencing phase, for purposes of Rule 4-345(b), is at least at an end when the court indicates that the particular case before it is terminated, as by calling, or directing the clerk to call, the next

[9] *Sayre* and *Simpkins* were superseded, but not expressly overruled, by amendments to Maryland Rule 4-345, as explained in *State v. Brown*, 464 Md. at 252-60. Maryland Rule 4-345(c) guides our analysis.

> case. Here, [the sentencing judge], after imposing the concurrent sentence on Sayre, said
>
> He is to be remanded to custody. Come, get him.
>
> Obviously, Sayre's case was over. There was nothing more to be done. The court was ready to proceed to the next case. We hold that under these circumstances sentence was imposed.

Reyes, 264 Md. App. at 622-23 (cleaned up). After recounting the facts in similar cases, we then held as follows:

> From that authority, we glean the following salient principles. First, the limits on a sentencing court's power to increase a sentence, as set forth in Rule 4-345, are not triggered until the sentence has been "imposed." For a sentence to be "imposed," the sentencing phase of the criminal trial must be concluded, which typically occurs "when 'the court indicates that the particular case before it is terminated, as by calling, or directing the clerk to call, the next case.' " In other words, a sentence is not considered "imposed" simply because it has been announced by the sentencing court. And, if a sentence has yet to be imposed, a court is generally free to change the sentence, including increasing it. *Once a sentence has been imposed, however, a sentencing court's power to increase that sentence is circumscribed by Rule 4-345, which permits such an increase only* if the original sentence was illegal, if there was some fraud, mistake, or irregularity, or *if the court is correcting an evident mistake in the announcement of the sentence before the defendant leaves the courtroom following the sentencing proceeding.*

Id. at 626-27 (emphasis added, cleaned up).[10]

[10] We held in *Reyes* that there was no illegal increase in Reyes' sentence because the change, increasing the sentence, was imposed before the sentencing proceeding concluded. *Reyes*, 264 Md. App. at 627-28. "At no time during that entire exchange was there a break in the proceeding, nor was there any indication, affirmative or otherwise, that the sentencing proceeding had terminated. Thus, . . . the court had not completed sentencing when it altered Reyes's sentence from one year to five years." *Id*. The Maryland Supreme Court affirmed our decision that Reyes' sentence was validly increased under Rule 4-345 because "a trial court retains authority to alter an announced sentence so long as the (continued)

We agree with Appellant and the State that Appellant's sentence was illegally increased from concurrent to consecutive to any and all other sentences currently being served. Accordingly, we shall vacate that provision and remand so the court can correct the commitment record. *See* Md. Rule 8-604(d)(2) (providing that, "[i]n a criminal case, if the appellate court reverses the judgment for error in the sentence or sentencing proceeding, the Court shall remand the case for resentencing").

CASE REMANDED TO THE CIRCUIT COURT FOR HOWARD COUNTY FOR FURTHER PROCEEDING CONSISTENT WITH THIS OPINION.

JUDGMENT OTHERWISE AFFIRMED.

COSTS TO BE PAID ONE HALF BY APPELLANT AND ONE HALF BY HOWARD COUNTY.

sentencing phase remains open, and the proceeding has not concluded." *Reyes v. State*, 492 Md. 630, 643 (2025).

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

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