Circuit Court for Anne Arundel County
Case No. 02-K-07-000533

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 101

September Term, 2017

WILLIAM NATHANIEL JOHNSON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Kehoe,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: June 21, 2018

Following a bench trial in the Circuit Court for Anne Arundel County on March 13, 2008, the court convicted appellant William Johnson of sexual abuse of a minor; second-degree sex offense; sodomy; unnatural or perverted practice; second-degree assault; reckless endangerment; sexual abuse of a minor as a continuing course of conduct; and failure to register as a sex offender. Appellant filed a Notice of Indigent Appeal on June 27, 2008. On March 24, 2009, this Court dismissed the appeal due to appellant's appellate counsel's failure to timely file an appellate brief.

On September 20, 2010, appellant filed a Petition for Post-Conviction Relief, alleging twenty-two instances of ineffective assistance of counsel. After multiple hearings, the post-conviction court vacated appellant's conviction for sexual abuse of a minor as a continuing course of conduct, but otherwise denied his petition. On March 14, 2013, appellant filed an application for leave to appeal the court's denial of his post-conviction petition. This Court granted the application and transferred the case to the direct appeal docket, instructing appellant to address whether his trial counsel rendered ineffective assistance by failing to present evidence that the victim had been coached in testifying at his trial. We rejected this argument in an unreported opinion. *Johnson v. State*, No. 103, Sept. Term 2013 (filed Nov. 6, 2014).

On April 7, 2016, appellant filed a Petition to Reopen Post-Conviction Proceeding based on his appellate counsel's failure to file an appellate brief, which resulted in the dismissal of the appeal on March 24, 2009. In response, the State and appellant filed a Joint Motion to Resolve Re-Opening of Post-Conviction without a Hearing, wherein the

parties agreed that appellant should be allowed to file a belated notice of appeal from his conviction in exchange for appellant agreeing to "withdraw any and all current or future post-conviction claims with prejudice, with the limited exception of future claims that arise out of the representation of appellate counsel on the direct appeal." The circuit court granted the joint motion, and restricted appellant's future claims accordingly. Appellant timely appealed pursuant to the court's order permitting a belated appeal and presents two questions for our review:

1. Did the trial court commit plain error by admitting the [victim's] mother's hearsay testimony beyond the prompt complaint exception of Md. Rule 5-802.1(d) in that her testimony was 1) taken prior to validating its consistency with the declarant and 2) included inadmissible details?

2. Did trial counsel prejudice [a]ppellant by committing ineffective assistance of counsel in failing to sever the failure to register as a sex offender count from the other counts which allowed the State to discuss at length his prior sex offense conviction that would have not otherwise been admissible?

The State has moved to dismiss, arguing that appellant's claim of ineffective assistance of counsel should be dismissed under *res judicata* and acquiescence, and that to the extent appellant's plain error argument "sounds in ineffective assistance, it should also be dismissed."

We hold that the trial court did not commit plain error in admitting the mother's testimony about her minor daughter's disclosure of the sexual assault. Regarding the Motion to Dismiss, we agree with the State that the doctrine of *res judicata* bars appellant's ineffective assistance claim related to severance of the charges. Assuming, *arguendo*, that

the ineffective assistance claim were properly before us, we conclude that any error did not prejudice appellant. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Due to the lurid nature of the offenses in this case, we shall provide only a brief recitation of the facts. One night, Francesca J. ("Francesca") intended to watch a movie with A.J., her minor child. A.J. accidentally started playing the DVD for the film American Pie II, which, according to Francesca, began with a naked woman making noises. A.J. informed Francesca that she understood what was being depicted in the film, and ultimately revealed to Francesca that appellant, A.J.'s uncle, had sexually assaulted her. As stated above, appellant was ultimately convicted of various sex offenses, and of failing to register as a sex offender stemming from a previous incident. We shall provide additional facts as necessary to resolve this appeal.

DISCUSSION

I. Plain Error

Appellant first argues that the trial court committed plain error in admitting Francesca's testimony because it included inadmissible hearsay statements both Francesca and A.J. made in violation of Md. Rule 5-802.1(d). The Court of Appeals has explained that "plain error review is 'reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial.'" *Newton v. State*, 455 Md. 341, 364 (2017) (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)). Before an appellate court will reverse for plain error, four conditions must be met:

1. There must be a legal error that has not been intentionally relinquished or abandoned by the appellant.

2. The error must be clear or obvious, and not subject to reasonable dispute.

3. The error must have affected the appellant's substantial rights, which in the ordinary case means that it affected the outcome of the proceedings.

4. If the previous three parts are satisfied, the appellate court has discretion to remedy the error, but it should exercise that discretion only if the error affects the fairness, integrity or reputation of judicial proceedings.

Winston v. State, 235 Md. App. 540, 567 (2018). "Because each one of the four conditions is, in itself, a necessary condition for plain error review, the appellate court may not review the unpreserved error if any one of the four has not been met." *Id.* at 568. We shall assume, for purposes of our analysis in this case, that the first and third conditions are met, but hold that it is neither clear nor obvious that Francesca's testimony was inadmissible pursuant to the second condition.

A. The "Error" was Neither Clear nor Obvious

First, we address whether the trial court committed clear or obvious error in admitting Francesca's testimony pursuant to Rule 5-802.1(d), an exception to the rule against the admission of hearsay. That Rule provides that,

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule . . .
>
> (d) A statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony[.]

In *Muhammad v. State*, 223 Md. App. 255 (2015), we considered whether the details of an alleged victim's statements went beyond the scope of Rule 5-802.1(d).[1] There, police responded to a call at a vacant row house in Baltimore. *Id*. at 258. When a detective observed a naked male crouched near the row house, the male, later identified as Muhammad, took off running. *Id*. Meanwhile, inside the row house, other detectives came upon a badly injured female victim who appeared to have been stabbed. *Id*. at 259.

At Muhammad's jury trial, the following colloquy took place between the prosecutor and a detective:

> [PROSECUTOR]: And can you tell the ladies and gentleman of the jury what [the victim] related to you [in the interview at Shock Trauma]?
>
> [DETECTIVE BELL]: Yes. She told me on the 21st of July around 6 p.m., she has [sic] been speaking to her sister on the phone. She was walking on the street near Argyle Avenue at West Lafayette near a grassy area which had some woods with some trees and a black male came out of the bushes, approached her—
>
> [DEFENSE COUNSEL]: Your Honor, we object to this.
>
> THE COURT: Overruled.

[1] Although *Muhammad* was decided seven years after appellant's trial,

> the question of whether a new constitutional or statutory decision in the criminal law area should be applied prospectively or retroactively arises only when the decision declares a new principle of law, as distinguished from applying settled principles to new facts. If it does not declare a new principle, it is fully retroactive and applies to all cases.

Allen v. State, 204 Md. App. 701, 721 (2012) (citing *Denisyuk v. State*, 422 Md. 462, 478-79 (2011)). Because *Muhammad* did not declare a new legal principle, we may apply its analysis here.

> [DETECTIVE BELL]: Told her he was BGF, a bushwacker, put her in what she described as a sleeper hold. She then stated she woke up in a vacant house and she was naked, and he told her [to perform oral sex], and if she did as he wanted he wouldn't injure her. So she started performing oral sex on him and at some point bit his penis. He then screamed and started to beet [sic] her about the head and face. She further stated that she attempted to defend herself by scratching him in the face and she may have grabbed onto a lamp and she was pushed onto the ground and beaten further. And then she recalls speaking to a paramedic and then after that she doesn't remember anything else.

Id. at 264-65.

On appeal, Muhammad argued that the trial court erred by admitting into evidence the details from the victim's statement to the detective that went beyond the fact that she was sexually assaulted. *Id*. at 265. We noted that, regarding the admissibility of hearsay statements pursuant to Rule 5-802.1(d), "The narrative details of the complaint are not admissible, as they exceed the limited corroborative scope of [Rule 5-802.1(d)]." *Id*. at 268 (citing *Cole v. State*, 83 Md. App. 279, 294 (1990)). We stated,

> Thus, in summary, the prompt complaint of sexual assault exception to the rule against hearsay
>
> > is subject to limitations such as 1) the requirement that the victim actually testify; 2) the timeliness of the complaint; and 3) the extent to which the reference may be restricted to the fact that the complaint was made, the circumstances under which it was made, and the identification of the culprit, rather than recounting the substance of the complaint in full detail.

Id. at 269 (quoting *Nelson v. State*, 137 Md. App. 402, 411 (2001)).

In reversing Muhammad's conviction, we held that

> Detective Bell's testimony was not limited to the circumstances in which [the victim] made her complaint of sexual assault to him or that [the victim] had

> identified [Muhammad] as the perpetrator and given the location, date, and time of the assault. *Detective Bell recited [the victim's] "substantial description of the assault."* He testified that [the victim] told him that [Muhammad] emerged from some bushes and approached her; that he identified himself as a member of BGF; that he put her in a "sleeper hold"; that he forced her into a vacant house; that he told her to "suck his dick"; that she tried to escape by biting his penis; that he beat her about the head; that she defended herself by scratching his face; that he pushed her to the ground and beat her more; and that she could not recall anything beyond that point in time until she woke up at Shock Trauma. *These details corroborated much more than [the victim's] testimony that she was sexually assaulted by [Muhammad] in a vacant row house on the afternoon of July 21, 2012.* Indeed, they corroborated [the victim's] entire narrative of events, from the moment she encountered [Muhammad] on the street to the moment she awoke at Shock Trauma.

Id. at 271 (emphasis added). We concluded that the portion of the detective's testimony providing a narrative of the events leading up to and after the assault, as well as a substantial description of the assault, was inadmissible.

According to appellant, Francesca's testimony was inadmissible under Rule 5-802.1(d) because the hearsay statements contained therein were "clearly beyond time, date, crime and identity"—the scope of the hearsay exception permitted by Rule 5-802.1(d). Our resolution of this issue requires careful scrutiny of the challenged evidence.

During the State's case-in-chief, Francesca provided the following testimony on direct examination:

> [PROSECUTOR]: Okay. What happened as you were getting ready to watch the animated movie?
>
> [FRANCESCA]: She put in the DVD, and she put in the wrong DVD.
>
> [PROSECUTOR]: What DVD did she put in, if you recall?
>
> [FRANCESCA]: American Pie II.

[PROSECUTOR]: Okay. And what happened when she put that DVD in?

[FRANCESCA]: The beginning of the movie, there was a woman naked, making noises.

[PROSECUTOR]: And what did you do when you saw that?

[FRANCESCA]: I told her to turn it off, that it was for adults, and she couldn't watch it.

[PROSECUTOR]: Okay. And what was her reaction?

[FRANCESCA]: She said that she could watch it, and she knew what it was.

[PROSECUTOR]: And what did you say when she said that to you?

[FRANCESCA]: I asked her what -- I asked her, "What do you mean, you know what that is?" And she said, "I know what they were doing."

[PROSECUTOR]: Okay. And did you ask her what they were doing?

[FRANCESCA]: Yes.

[PROSECUTOR]: And what was her response?

[FRANCESCA]: She covered her face, and she said, "You know what they were doing, Mommy. I know what they were doing, and you know what they were doing." And I said, "Well, what were they doing?" And she said, "You know," and she kept covering her face, and laughing, like she was embarrassed.

[PROSECUTOR]: Okay.

[FRANCESCA]: And I said, "Well, tell me what they were doing, because I don't know." And she said, "I'll write it down."

[PROSECUTOR]: Okay. And what did she write down?

[FRANCESCA]: She wrote on a piece of paper the word, "sex."

[PROSECUTOR]: Okay. And then what happened?

[FRANCESCA]: And I asked her, I said, "Well, what is that?" And she said, "Mommy, you know what that is," and I said, "No, I don't. Tell me what it is." She said, "You know, you know," and she just kept covering her face, like she was embarrassed. I said, "Well, tell me what it is." And she said, "No, because you'll be mad at me." I said, "I won't be mad. Just tell me what it is." And she said, "Mommy, you know I'm not stupid. I know what it is, too."

[PROSECUTOR]: Okay. And how did the conversation progress from there? Did she indicate whether anybody else would be mad if she told you?

[FRANCESCA]: She said -- well, I asked her how did she know what it was. And she said the kids in school talk about it. And I said, "Well, do kids in school do that?" And she said, "No." And I said, "You don't do that, do you?" And she said, "Well --" and she covered her face again, and she ran in her room.

[PROSECUTOR]: Okay. And then what happened?

[FRANCESCA]: And I asked her, I said, "Why are you covering your face? What's the matter?" And she said, "I can't tell you, because I'll get in trouble." I said, "You won't get in trouble. Just tell me." And she said, "Well, Aunt Tray might get mad at me." And I said, "Aunt Tray won't get mad at you. I won't tell Aunt Tray." And she said, "Well, Uncle Will told me what it was."

[PROSECUTOR]: Okay. And then what happened?

[FRANCESCA]: And I said, "Well, what did he tell you?" And she said, "Well, he -- he did something." And I said, "Well, what did he do?" And she said, "I'll write it down." And she drew me two pictures.

[PROSECUTOR]: Did she draw it on the same page that she had written the word "sex" on?

[FRANCESCA]: No, I don't -- no.

[PROSECUTOR]: Okay. I am going to show you what has been marked as State's Exhibit No. 1, and ask if you recognize what this is.

[FRANCESCA]: Yes.

[PROSECUTOR]: What is that?

[FRANCESCA]: That's the picture she drew.

[PROSECUTOR]: Okay. There are two words written on that page. What are those words?

[FRANCESCA]: "Sex."

[PROSECUTOR]: And who wrote those words?

[FRANCESCA]: She did.

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[PROSECUTOR]: When she made this drawing for you, what did -- I am sorry, --- present to the Court -- what did you do? Did you ask her about the drawing?

[FRANCESCA]: Yes, I asked her who the people were in the drawing?

[PROSECUTOR]: And who did she say the people in the drawing were?

[FRANCESCA]: That one was her and one was Uncle Will.

[PROSECUTOR]: Okay. And did she point to the specific people and tell you which one was which?

[FRANCESCA]: Yes.

[PROSECUTOR]: Okay. In the first picture, who did she point to and say was Uncle Will?

[FRANCESCA]: The one standing.

[PROSECUTOR]: Okay. And who was [A.J.] in the first picture?

[FRANCESCA]: The one laying down.

[PROSECUTOR]: Okay. And then in the second picture, which one did she point to indicating it was Uncle Will?

[FRANCESCA]: In the second picture?

[PROSECUTOR]: Yes.

[FRANCESCA]: The one laying, or however it was.

[PROSECUTOR]: Let me -- if I can show you the drawing, just so we are clear. There is one to the left and one to the right.

[FRANCESCA]: That's her, and that's him.

[PROSECUTOR]: Okay. So you are pointing to the one to the right as her --

[FRANCESCA]: Uh-huh.

[PROSECUTOR]: -- and the one to the left as Uncle Will?

[FRANCESCA]: Right.

[PROSECUTOR]: Thank you. When she told you all of this, what did you do?

[FRANCESCA]: I got -- I got kind of upset, and --

[PROSECUTOR]: When you say upset, were you yelling at her, or --

[FRANCESCA]: Well, I was about to cry, but I didn't want her to see my [sic] cry.

[PROSECUTOR]: Okay.

[FRANCESCA]: I asked her, did it happen, you know, that week, or when was the last time it happened. And she just said, "I don't know, Mommy, I don't know," and she just kept saying, "Please don't tell Aunt Tray, because she'll be mad at me." I said, "Don't worry about that." And she said that -- she kept asking me what was wrong. And I said, "That's not supposed to happen to you."

[PROSECUTOR]: Okay.

[FRANCESCA]: And she said, "What's not supposed to happen?" I said, "He's not supposed to do those kind of things to you, and that's why Mommy's upset."

As noted above, appellant's trial counsel failed to object at any point during this testimony. Nonetheless, it was neither clear nor obvious that the testimony was inadmissible under 5-802.1(d). Indeed, as we will explain, all of Francesca's testimony was arguably admissible.

At the outset, we note that many of the allegedly hearsay statements in Francesca's testimony are potentially not hearsay because they could have been admitted for a non-hearsay purpose. As we recently stated,

> An out-of-court declaration is not necessarily hearsay merely because it qualifies as an assertion (and thus as a "statement"). As [the hearsay] definition makes plain, whether an out-of-court statement is hearsay depends on the purpose for which it is offered at trial. Evidence of a statement is not hearsay unless it is offered in evidence to prove the truth of the matter asserted.

Wallace-Bey v. State, 234 Md. App. 501, 537 (2017) (internal citations and quotation marks omitted). Here, A.J.'s statements leading up to her disclosing the actual offenses were arguably not offered for the truth of the matter asserted. For example, A.J.'s statements

such as "Mommy, you know what that is" or "I can't tell you, because I'll get in trouble" were arguably offered to show their effect on Francesca, explaining why Francesca continued to ask her six-year-old daughter probing questions about whether something inappropriate had occurred. Indeed, Francesca was attempting to extract from A.J. the time, place, and crime, and identity of the perpetrator—all of which fall within the permissible scope of the Rule. *Muhammad*, 223 Md. App. at 268. Although there was a rather lengthy conversation between Francesca and A.J. leading up to A.J.'s disclosure, we recognize the practical difficulties of obtaining sensitive information from a six-year-old. Under these circumstances, A.J.'s statements were potentially admissible for their effect on Francesca and, as such, would not be hearsay.

Even assuming that Francesca's testimony were offered for its truth, and was therefore hearsay, we cannot conclude that the admission of her testimony was clearly or obviously in violation of Rule 5-802.1(d) so as to constitute plain error. *Winston* 235 Md. App. at 567.

The first portion of Francesca's testimony, in which she recounted asking A.J. probing questions about A.J.'s familiarity with sexual intercourse, is arguably admissible because those "hearsay" statements provided the context under which A.J. made the prompt complaint. Rule 5-802.1(d) does not preclude contextual statements that are incidental to the victim's prompt complaint of sexual assault. *Choate v. State*, 214 Md.

App. 118, 148-149 (2013).[2] In *Choate*, the victim's sister testified at trial that the victim had called her and said, "[Choate] raped me." *Id*. at 143. The victim's sister then testified:

> She didn't sound like herself. She was crying. She was breathy. She wasn't able to talk to me in full sentences. I tried asking her where she was, and she just said, "The Exxon. The police are coming. The police are coming." And she couldn't get full sentences out. . . . And she just said, "Come here," and hung up. So it was very garbled and she was not making full sense.

Id. at 148. After establishing that the statement, "[Choate] raped me" met the requirements of a prompt complaint, we considered the victim's sister's other hearsay testimony. We noted that the sister's testimony did not include a substantive description of the assault; instead, the testimony "was limited thereafter to the circumstances under which the victim made the complaint[.]" *Id*. We concluded that "All of those contextual statements were properly admitted as incidental to the victim's prompt complaint of sexual assault." *Id*. at 149.

As in *Choate*, A.J.'s "hearsay" statements expressing her reluctance to reveal the sexual assault to Francesca were merely incidental to the prompt complaint. *Id*. Because these "hearsay" statements were limited in scope to explaining the circumstances that brought about A.J.'s prompt complaint, they were likely sufficiently limited so as not to violate Rule 5-802.1(d). In the context of plain error, these statements were not clearly or obviously inadmissible.

[2] As stated in footnote 1, because *Choate* did not declare a new legal principle, we may apply its analysis. *Allen*, 204 Md. App. at 721.

The portion of Francesca's testimony in which A.J. drew pictures and identified herself and appellant were also arguably admissible. While we held in *Muhammad* that the detective's testimony regarding the moments leading up to the attack, the threats the attacker made, and a description of the attack itself were beyond the scope of Rule 5-802.1(d), A.J. merely explained the offenses by drawing pictures and identifying the people in the drawings. 223 Md. App. at 271. Thus, A.J. ostensibly used her drawings to "report" the criminal offenses. Francesca's testimony of A.J.'s statements was much more limited in scope than the statements the detective testified to in *Muhammad*. In any event, we cannot conclude that any error was so clear and obvious as to constitute plain error. *Winston*, 235 Md. App. at 567.

Our holding is consistent with our view of the proper role of a trial judge:

> It is not for trial judges, *sua sponte*, to second-guess trial tactics, however ill-advised they might seem to the judge. Even the notion of "plain error" requires, as a rock-bottom minimum, a legal error by the judge, not a tactical miscalculation by defense counsel; the judge does not sit as co-counsel for the defense. Neither does the appellate court.

Nelson v. State, 137 Md. App. 402, 423 n.5 (2001) (citation omitted). We therefore disagree with the assertion that the trial judge in this case was required to *sua sponte* interrupt the State's examination of Francesca to exclude evidence that neither party sought to exclude.

B. Appellant's Cumulative Evidence and Procedural 5-802.1(d) Arguments Lack Merit

Additionally, appellant contends that Francesca's testimony should have been excluded as cumulative, and that Francesca's testimony was inadmissible under Rule 5-

802.1(d) because Francesca testified before A.J. We reject these contentions. First, appellant cites *Thomas v. State*, 429 Md. 85, 111 (2012), and argues "Cumulative hearsay statement bolsters [sic] the victim's credibility and this 'is the very nature of the harm.'" But *Thomas* dealt with prior consistent statements, and their cumulative effect. *Id*. *Thomas* is inapposite because the transcript shows that A.J.'s testimony was somewhat limited in nature; she simply affirmed that she was telling the truth, that she had drawn the pictures depicting appellant sexually abusing her, and that appellant had in fact sexually abused her.

Regarding whether the court erred in allowing Francesca to testify prior to A.J., we note that Rule 5-802.1(d) requires that the statement of prompt complaint of sexual assault be consistent with the declarant's testimony. Appellant argues that A.J. would have had to testify before Francesca in order for Francesca's "hearsay" testimony to be admissible. We are aware of no authority explicitly requiring the declarant to testify first. Appellant cites to Rule 5-802.1(d) in support of his argument, but our case law only requires "that the victim actually testify[.]" *Muhammad*, 223 Md. App. at 269. Even assuming that appellant's counsel had objected, the trial court, in its discretion, could have simply reversed the order of the witnesses. Because the trial judge was the finder of fact, any impact related to the order of calling witnesses would be negligible.

C. Discretion to Remedy Plain Error

Finally, even if we were to find the existence of the first three factors required for plain error review, we would nevertheless decline to exercise our discretion to remedy any alleged error in this case. The post-conviction court has already considered whether the

allegedly erroneous admission of Francesca's hearsay testimony prejudiced appellant, and concluded that it did not affect the outcome of the trial. In light of the fact that appellant has already received thorough review of this issue, we would not exercise our discretion to take notice of plain error in this case. The error appellant alleges does not affect the fairness, integrity or reputation of judicial proceedings. *Winston*, 235 Md. App. at 567.

II. Ineffective Assistance of Counsel

In appellant's second question presented, he argues that his trial counsel rendered ineffective assistance in failing to sever his charge of failure to register as a sex offender from his other sex offense charges. In its Motion to Dismiss, the State argues that appellant's claim is barred by the doctrine of *res judicata* because the identical issue was raised and finally adjudicated in a prior post-conviction proceeding. We agree with the State.

The principle of *res judicata* precludes the re-litigation of an issue if

> (1) the parties in the present litigation are the same or in privity with the parties to the earlier action; (2) the claim in the current action is identical to the one determined in the prior adjudication; and (3) there was a final judgment on the merits in the previous action.

Jackson v. State, 448 Md. 387, 402 (2016) (citing *Powell v. Breslin*, 430 Md. 52, 64 (2013)).

Following his conviction, appellant filed a petition for post-conviction relief wherein appellant claimed, among other things, that his trial counsel "was ineffective in

not immediately filing a Motion to Sever the Offense of Count Eight of the Indictment[.]"[3] The post-conviction court denied appellant's petition on this issue, finding that "There was significant testimonial evidence against [appellant] in this case, and [appellant] failed to provide any particular evidence that the trial court was, or even possibly was, improperly influenced by the fact that he was a registered sex offender." Appellant sought leave to appeal the denial of his post-conviction petition. This Court granted the application, transferred the case to the direct appeal docket, and instructed appellant to brief an unrelated issue. In an unreported opinion, a panel of this Court affirmed the post-conviction court on that issue. *Johnson v. State*, No. 103, Sept. Term 2013 (filed Nov. 6, 2014).

All three elements of *res judicata* are present here. First, the parties in the prior litigation are identical to those in the present litigation, *i.e.* appellant and the State. Second, appellant seeks relief based on the same argument he raised in his post-conviction petition—that his trial counsel rendered ineffective assistance in failing to file the motion to sever. Finally, the post-conviction court issued a decision on that issue. Although our unreported opinion addressed an unrelated issue, our affirmance of the post-conviction court's judgment constituted a final judgment as to *all* issues raised and decided by the post-conviction court. The Court of Appeals thereafter denied appellant's petition for writ of certiorari. "A 'final judgment' is a judgment that 'disposes of all claims against all

[3] Count Eight charged appellant with failing to register as a sex offender.

parties and concludes the case.'" *Doe v. Sovereign Grace Ministries, Inc.*, 217 Md. App. 650, 660 (2014) (quoting *Miller & Smith at Quercus, LLC v. Casey PMN, LLC*, 412 Md. 230, 241 (2010)). Clearly, all of appellant's claims were adjudicated, and the case was concluded. All three elements of *res judicata* are satisfied and, accordingly, appellant is precluded from raising this issue on appeal.

Assuming, *arguendo*, that appellant's claim were not barred by *res judicata*, we would conclude that his trial counsel did not render ineffective assistance. In order to prevail on a claim of ineffective assistance of counsel, "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Taylor v. State*, 428 Md. 386, 399 (2012) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). In determining whether the deficient performance prejudiced the defense, "the standard to be used is whether there is a substantial or significant possibility that the verdict of the trier of fact would have been affected." *State v. Sanmartin Prado*, 448 Md. 664, 682 (2016) (quoting *Coleman v. State*, 434 Md. 320, 331 (2013)). Here, even assuming the deficiency prong of *Strickland*, we cannot conclude on this record that there is a substantial or significant possibility that the failure to sever affected the trier of fact's verdict.

Appellant, citing *McKnight v. State*, argues that the failure to sever offenses can cause prejudice "where a *jury* may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which he may also be found guilty of other crimes charged." 280 Md. 604, 609 (1977) (emphasis added). There, McKnight

received a single trial for "four independent and distinct offenses, where evidence as to each individual offense would not have been mutually admissible at separate trials." *Id*. at 605. Before trial, McKnight moved to sever the cases, but the trial judge denied his motion. Id. at 606. The jury convicted McKnight of all four offenses. *Id*. at 607.

This Court affirmed McKnight's convictions, but the Court of Appeals reversed, concluding that the trial court erred in denying McKnight's request to sever the cases. *Id*. at 605. In reaching this conclusion, the Court of Appeals noted that the joinder of offenses can potentially prejudice a criminal defendant in three ways: 1) the defendant "may become embarrassed, or confounded in presenting separate defenses"; 2) "the jury may cumulate the evidence of the various crimes charged and find guilt when, if the offenses were considered separately, it would not do so[;]" and 3) "the jury may use the evidence of one of the crimes charged . . . to infer a criminal disposition on the part of the defendant from which he may also be found guilty of other crimes charged." *Id*. at 609. The Court of Appeals stated that the third type of prejudice—that the jury might infer a criminal disposition and convict a defendant of other crimes charged—caused prejudice in McKnight's case, and that the trial court erred in denying his motion to sever the cases. *Id*.

In his brief, appellant only mentions the third type of prejudice from *McKnight*—the concern that the jury might infer a criminal disposition. That concern, however, does not apply to appellant, who elected a bench trial. In *Graves v. State*, 298 Md. 542, 545-46 (1984), the Court of Appeals noted that,

> The rationale underlying the *McKnight* holding was [the Court's] concern that a jury would be unable to set aside the likely prejudice engendered by

> the joinder. [The Court] even questioned the ability of a jury to disregard evidence which was inadmissible on one of the charges although limiting instructions were given by the court. . . .
>
> The rationale underlying the *McKnight* holding does not support the application of that holding to a court trial. [The Court has] noticed a fundamental distinction between a judge and a jury as the trier of fact. [The Court] declared in *State v. Babb*, 258 Md. 547, 550-551 (1970):
>
> > The assumed proposition that judges are men [and women] of discernment, learned and experienced in the law and capable of evaluating the materiality of evidence, lies at the very core of our judicial system. Such an assumption would be completely unwarranted with regard to a jury of laymen and the impact which evidence may have upon their deliberative powers.

In *Conyers v. State*, 345 Md. 525, 552-53 (1997), the Court of Appeals reiterated that there is less risk of prejudice in the joinder of charges in a bench trial, stating, "The law of trial joinder in bench trials is more flexible. A judge has discretion to permit joinder . . . because it may be presumed that a judge will not transfer evidence of guilt as to one offense to another offense."

Appellant acknowledges that the risk of prejudice is reduced in bench trials, but nonetheless states, "It would be tempting by this [C]ourt to say that, well, this was a bench trial and a judge is presumed to know how to apply the law." Appellant contends that under these circumstances, a defendant could rarely prove ineffective assistance of counsel at a bench trial.

Although he recognizes the presumption that trial judges will not transfer evidence of guilt for one offense to another offense, appellant fails to indicate any instance in the

record where the trial judge here relied on his failure to register as a sex offender as a basis for concluding that appellant sexually abused A.J. Instead, the trial judge stated,

> The State is obligated to prove to me this case beyond a reasonable doubt and to a moral certainty. Using that standard, the Court finds that the State has met its burden. The Court finds the Defendant guilty of all counts.

In light of the fact that the law of joinder is more flexible in bench trials because trial judges are presumed to correctly apply the law, appellant has failed to meet his burden of showing prejudice.

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