UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1397

September Term, 2015

MARCIAL ESCOBAR-GOMEZ

v.

STATE OF MARYLAND

Berger,
Friedman,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: January 5, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

After a jury trial in the Circuit Court for Montgomery County, Marcial Escobar-Gomez, appellant, was found guilty of sexual abuse of a minor, two counts of incest, and two counts of third-degree sexual offense. He was sentenced to a total of 45 years' incarceration. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents the following three questions for our consideration:

I. Did the trial court abandon its objective role when it extensively questioned two State witnesses and demonstrated a bias towards the State?

II. Did the trial court err in allowing the State to impeach its own witness with statements made by the witness's attorney at a different trial?

III. Should the Appellant's convictions for incest have merged into the corresponding convictions for third-degree sexual offense?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

Appellant's daughter, whom we shall refer to as A.E., was born in Guatemala on February 8, 1993.[1] Two days after A.E. was born, appellant moved to the United States and, ten years later, his wife, A.E.'s mother, also came to the United States. A.E. remained in Guatemala with her grandmother until 2007, when she, her siblings, and her grandparents joined her parents in the United States. A.E. and her family lived in Montgomery County, where she attended Montgomery Village Middle School and

[1] At trial, A.E. testified through a Spanish language translator.

Gaithersburg High School. According to A.E., her parents were strict and she was "rebellious" and unruly. She did not obey her parents and ran away from home. Appellant punished her by taking away her phone and grounding her. On one occasion, A.E. was punished for incurring a $3,000 cell phone bill that resulted from long telephone conversations with friends in Guatemala. A.E., who was not working, used cocaine, which she obtained from her boyfriend, Jose Guzman.

In 2008, A.E. became pregnant. According to A.E., Guzman was the father of her child, but at one point she was not sure if the child was Guzman's or Elmer Villatoro's, another man with whom she had been intimate. When A.E. told Guzman that she was pregnant, he told her that there were pills she could take to induce an abortion, but she refused to have an abortion. Thereafter, she never "heard anything else" from Guzman, whom she believed had gone to El Salvador. On November 21, 2008, fifteen-year-old A.E. gave birth to a baby girl, whom we shall refer to as M.

A.E. acknowledged that, on various occasions, she told people both that appellant had had sexual intercourse with her and, conversely, that he never did. In the spring of 2008, A.E. was taking an English as a second language ("ESOL") class. She told Maribel de la Cruz, the coordinator of the ESOL program, that for several years, she had been having sexual intercourse with appellant and she was upset because her mother did not believe her. A.E. also told her mother and the police that appellant was abusing her, but her mother did not believe her. A.E. told police that Villatoro was the father of M., but according to A.E., the police pressured her to say that appellant was the father of her child.

In 2012, A.E. was charged with assaulting M. During the prosecution of that case, A.E. met with Montgomery County Police Detective Karen Carvajal. A.E. told Detective Carvajal that appellant had abused her in Guatemala, that he started having sexual intercourse with her shortly after her arrival in the United States, and that he had had sexual intercourse with her many times when she was fifteen years old. According to A.E., Detective Carvajal located the old police record and then suggested to A.E. that she had hit M. because of what she "had gone through in the past" with her father. A.E. "took advantage of that moment to continue blaming" appellant in order to deflect blame from herself and avoid going "to jail for a long time." During sentencing in the assault case involving M., A.E.'s attorney spoke about the sexual abuse A.E. had suffered at the hands of her father.

At trial in the instant case, A.E. claimed to have accused appellant of sexual abuse during the assault trial because she "was upset" at her mother for calling social services to have her children taken away. A.E. testified that her statements to Detective Carvajal were lies, that appellant had never had sexual intercourse with her and was innocent, and that Guzman was M.'s father.

Detective Carvajal testified at appellant's trial that in May 2013, she investigated A.E.'s assault of M. During the course of that investigation, she conducted a recorded interview with A.E. in Spanish. In that interview, A.E. stated that in 2007 or 2008, she had accused appellant of sexual abuse when she was fourteen, going on fifteen, years old. A.E. claimed that the investigation was not long and that she was already pregnant at the time it was conducted. A.E. told Detective Carvajal that appellant was M.'s father. Detective

Carvajal looked through the old police reports to see what had occurred in the prior investigation. She also obtained a buccal swab from A.E., and, pursuant to a search warrant, a buccal swab from appellant. Detective Carvajal determined that during the 2008 investigation, tests had been conducted that excluded Elmer Villatoro as M.'s father.

Naomi LoBosco, a forensic scientist for the Montgomery County Police Department, tested samples from the buccal swabs obtained from appellant, M., and A.E. LoBosco obtained DNA profile data and sent it to Bode Technology, now known as Bode Cellmark Forensics, a private laboratory, for a statistical calculation with regard to M.'s paternity. Jennifer Sampson, a DNA analyst at Bode Cellmark Forensics, testified as an expert in DNA analysis, statistical comparison, and evaluation. She opined that based on the DNA profiles submitted, appellant could not be excluded as a possible father of M. Sampson gave the following testimony concerning the probability of relatedness, specifically the probability that M. is the child of appellant and A.E.:

> [SAMPSON]: Once it was determined that [appellant] could not be excluded, I ran the statistics. The results were based on the DNA profiles I obtained. It is 18.9 million times more likely that sample item 2, [M.], is a biological child of samples from [A.E.] and Marcial Escobar-Gomez as compared to unrelated individuals of Caucasian descent in the U.S. population.
>
> [PROSECUTOR]: Why do we segregate that way?
>
> [SAMPSON]: So when I do the statistical analysis, I, I do the analysis for three different populations, U.S. Caucasian, U.S. African-American, and U.S. Hispanic,

because the calculations are using the frequency of each allele within the population and they're slightly different between each population. So I do a calculation using the three different databases.

* * *

[PROSECUTOR]:	And so let's move to what that, what the statistical significance was of that 18.9 million times. What did you then – what was your next result?
[SAMPSON]:	So based on prior odds of one and two, which is just he is the father or he's not the father, those are the two scenarios, the probability of relatedness is 99.999995 percent, and that's as compared to unrelated individuals in the U.S. Caucasian database.
[PROSECUTOR]:	Okay. That was five nines after the decimal point?
[SAMPSON]:	Yes.
[PROSECUTOR]:	Okay. Let's go to the next result you obtained.
[SAMPSON]:	Okay. So based on the nuclear DNA profiles of the submitted specimens, it is 21.3 million times more likely that sample item 2, which is [M.], is from a biological child of samples item 1, [A.E.], and item 4, Marcial Escobar-Gomez, as compared to unrelated individuals of the [sic] African-American descent in the U.S. population. And –
[PROSECUTOR]:	Please go on.

[SAMPSON]:	– and based on the prior odds of one and two, the probability of relatedness is 99.999995 percent.
[PROSECUTOR]:	And that's as compared to unrelated individuals of African-American descent in the U.S. population?
[SAMPSON]:	Yes.
[PROSECUTOR]:	All right. Did you do additional testing with respect to Hispanic, individuals of Hispanic descent?
[SAMPSON]:	Yes.
[PROSECUTOR]:	And what were your results with respect to that?
[SAMPSON]:	Based on the testing, it is 2.27 million times more likely that sample item 2, which is [M.], is from a biological child of samples item 1, [A.E.], and item 4, Marcial Escobar-Gomez, as compared to unrelated individuals of the – of the [sic] Hispanic descent in the U.S. population, and –
[PROSECUTOR]:	Okay. And moving your attention to the conclusions on page 2.
[SAMPSON]:	– and based on the prior odds of one and two, the probability of relatedness is 99.99996 percent.

Sampson clarified that the phrase "the probability of relatedness" referred to the probability that M. was the biological child of A.E. and appellant.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

Appellant contends that the trial court abandoned its objective role by questioning two witnesses extensively and demonstrating a bias in favor of the State. We shall address the questioning of each witness separately.

A. Questioning of A.E.

The first instance of questioning by the court occurred at the conclusion of the State's re-direct examination of A.E.:

THE COURT:	I just have a couple questions. Ma'am, this fellow, Jose Guzman, that you told the jury is the father of the child, did you say he lived in El Salvador?
A.E.:	That's what I –
[THE COURT]:	And when did you say he went to El Salvador?
[A.E.]	I said about 2008 and I did say to [Detective] Carvajal.
[THE COURT]:	You did say what to [Detective] Carvajal?
[A.E.]	That, that my daughter's dad his name was Jose, and that we had had a relation for a long time.
[THE COURT]:	When, in 2008, did he go to El Salvador?
[A.E.]:	(No audible response.)
[THE COURT]:	May, June, July?
[A.E.]:	I don't remember, but I was about five months pregnant I think.

[THE COURT]:	When he went?
[A.E.]:	That was [what] I was told by a person that knew him, but I never saw again that person or himself, and I didn't know anything. I didn't have, I didn't have any news from him anymore. I didn't care.
[THE COURT]:	Well, did you call him on that cell phone?
[A.E.]:	No.
[THE COURT]:	Why not?
[A.E.]:	Because he changed his number. He moved to another place.
[THE COURT]:	How did you know that?
[A.E.]:	Because I was looking for him to get a hug with my daughter, with the girl.
[THE COURT]:	So, you had his cell phone number?
[A.E.]:	At that time, yes.
[THE COURT]:	But you were never able to tell him that he was the father?
[A.E.]:	That's correct. Yes. Yes, I did tell him.
[THE COURT]:	I thought you just said you didn't tell him.
[A.E.]:	I, no, what I said is, yes, I did tell him. And then he told me that he was going to get some pills to get an abortion, because I was still in time to abort that girl.
[THE COURT]:	Oh, so, you forgot about that when you said you never told him who's the father?

[A.E.]:	I did say, yes. I did answer him that, yes, he, I told him what was the reason that I didn't keep going with him, because I wasn't going to abort my baby. I didn't even know if it was a girl or a boy. And then I had to tell my parents.
[THE COURT]:	Then why would you try and get in touch with him in El Salvador?
[A.E.]:	I didn't get in contact with him. I had a (unintelligible 4:32:04) there, we went to school together, and through her I did meet Jose. That's the way I met Jose, and I didn't know that he was having a relation with her, too.
[THE COURT]:	You're from Guatemala, and he's from El Salvador?
[A.E.]:	That's correct.
[THE COURT]:	He's absolutely no blood relative to you, right?
[A.E.]:	No.

As appellant did not lodge any objection to this line of questioning by the trial judge, his argument was not preserved for our consideration. Md. Rule 8-131(a); *see also Smith v. State*, 182 Md. App. 444, 478 (2008) ("In the context of a trial court's interrogation of a witness, trial counsel must, at the very least, object to the court's question or comment in order to preserve appellate review of the interrogation.") (and cases cited therein).

We decline appellant's invitation to exercise our discretion to grant plain error review because we discern no error in the trial court's questioning of A.E. "Plain error is error that vitally affects a defendant's right to a fair and impartial trial." *Hammersla v.*

State, 184 Md. App. 295, 306 (2009). While we may invoke the plain error doctrine in support of our review of allegations of unobjected to error, we reserve such gratuitous exercises of discretion for those cases where the "'unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Smith v. State*, 64 Md. App. 625, 632 (1985) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). Of course, absent plain error, "'we lack even the discretionary authority to analyze an unpreserved issue.'" *Morris v. State*, 153 Md. App. 480, 507 n.1 (2003) (quoting *Stockton v. State*, 107 Md. App. 395, 398 (1995)).

In the case before us, the record clearly reveals that the trial judge was simply attempting to clarify A.E.'s confusing testimony. There was nothing in the judge's questioning of A.E. to show a tendency to influence the jury toward the trial judge's view and nothing that would lead a reasonable person to question the judge's impartiality. *See generally Smith*, 182 Md. App. at 483-87. As a result, we find no error, much less plain error, in the trial court's questioning of A.E.

Immediately following the court's interrogation of A.E., the trial judge asked counsel if, in light of his questioning of A.E., they had any questions. Defense counsel proceeded to ask several follow up questions pertaining to Guzman, to which A.E. responded that she had no idea when Guzman had left the area, where he was, or what had happened to him. The trial judge then questioned A.E. again, as follows:

THE COURT:	But didn't you just tell me that you were about five months pregnant when he went to El Salvador[?] And you called and tried to get in touch with him to

	get some help, and he changed his number, right? Didn't you tell me all that?
DEFENSE COUNSEL:	Objection to the mischaracterization of the witness' testimony.
THE COURT:	Overruled.
THE COURT:	Isn't that what you just told me that you were about five months pregnant, you tried to get in touch with him, and he had changed his number, and he moved? That's when you found out he moved to another place. Is that what you told me, or did you tell me something different?
A.E.:	So, I told him, I told him that I didn't have my period, and I have had a test, and I was pregnant. And he told me that I should have an abortion. I told him I wasn't going to have an abortion, and I didn't know anything, anything more about him.
THE COURT:	Okay. That's not the question I asked you. Any other questions?
A.E.:	(Untranslated).
THE COURT:	Any other questions, counsel?
[DEFENSE COUNSEL]:	Objection. There's no question pending. Nothing.
THE COURT:	Any questions?
[DEFENSE COUNSEL]:	Nothing.

[PROSECUTOR]: No, sir.

As the quoted portions of the transcript show, defense counsel lodged only two objections to the trial court's interrogation of A.E. The first was an objection to the "mischaracterization" of A.E.'s testimony, and the other was an objection to an untranslated remark by A.E. that was given when there was no question pending. Defense counsel never objected to the trial judge's questioning of A.E. on the ground that the court was abandoning its neutral role or demonstrating a bias in favor of the State. As appellant points out in his brief, the appellate courts in Maryland have recognized that, in certain circumstances, it would be unreasonable to expect counsel to object to every question each time a trial judge interrogates a witness. *See Smith*, 182 Md. App. at 478. But in the instant case, defense counsel did not lodge any objection to the court's questioning on the grounds raised on appeal. Accordingly, appellant's argument with respect to the trial judge's second interrogation of A.E. was not preserved properly for our consideration. Md. Rule 8-131(a). For the reasons discussed above, we find no error, much less plain error, in the trial judge's interrogation of A.E. and, accordingly, decline to exercise our discretion to grant plain error review on this issue. *See Morris*, 153 Md. App. at 507 n.1.

B. Questioning of DNA Analyst

The second witness questioned by the trial judge was DNA analyst Jennifer Sampson. After direct examination by the State, the judge stated that "[s]cience was never my strong suit." He then proceeded to question Sampson about the statistical significance of the loci that were tested, the frequencies of certain alleles, and the purpose of providing

statistical analysis for Caucasian, African-American, and Hispanic populations. Thereafter, the following colloquy occurred:

[DEFENSE COUNSEL]:	Your Honor, Your Honor, I'd like to tender an objection and would like to be heard at the bench, if possible.
THE COURT:	Okay.
[DEFENSE COUNSEL]:	All right.
THE COURT:	Come on up.
(Bench conference follows:)	
[DEFENSE COUNSEL]:	Your Honor, I feel I have to tender an objection at this point as to the line of questioning that the Court's going into, because it's clearly –
THE COURT:	Well, I don't understand what she's testifying to. I don't understand why she's testifying about the white population and the black population.
[DEFENSE COUNSEL]:	Well, why don't you ask her that, I mean, because it's – what you're doing is favoring the State, in my opinion, sir.

THE COURT:	I’m not favoring the State. I’m trying to figure out what the heck’s, what, why would you do a statistical analysis for the white population if there’s, if there’s no evidence that there’s, that anybody white was involved. I think the answer is –
[DEFENSE COUNSEL]:	Yes.
THE COURT:	– because they have to assume for purposes of their statistical calculation that somebody white could have had sex with her during the time of conception or somebody black –
[DEFENSE COUNSEL]:	I understand that.
THE COURT:	– or in the case of Hispanics, somebody Hispanic. Otherwise, the odds don’t make any sense.
[DEFENSE COUNSEL]:	I understand that, but still, I think that you’re, the Court’s questions are favoring the State, and I don’t think it’s fair.
THE COURT:	How are they favoring the State?
[DEFENSE COUNSEL]:	Because it’s –

THE COURT:	It doesn't make any sense to me.
[DEFENSE COUNSEL]:	Well, let the jurors decide. That's for their – that's within their domain, sir. That's what I'm asking the Court to do. I'm –
THE COURT:	You're asking me to stop asking questions?
[DEFENSE COUNSEL]:	Yes.
THE COURT:	Okay.
[DEFENSE COUNSEL]:	Yes.
THE COURT:	All right.

(Bench conference concluded)

Immediately thereafter, the trial judge continued to question Sampson extensively as follows:

THE COURT:	All right. So for purposes of the calculation, you assume, do you not, if you – I mean, why would you do a comparison of the white population if you've been given a sample from somebody who's clearly Hispanic?
[SAMPSON]:	Because –
THE COURT:	Why would you do a sampling of genetic markers from the white population?
[DEFENSE COUNSEL]:	Please note my objection, Your Honor.

THE COURT:	Okay. So noted.
[SAMPSON]:	I don't know the race of the profiles that I'm given. I'm not going to assume based on the name what their descent is. So it's standard practice that even if I did know, I would still do the calculations for each of the three populations. It's, it's standard practice within the community not to assume.
THE COURT:	Okay. And is it – here's what I don't know – is it standard practice because you have to assume for purposes of your calculations what are the odds that somebody in the white population had sexual intercourse with the mother – you know who the mother is, right?
[SAMPSON]:	Uh-huh.
[THE COURT]:	During the time of conception?
[SAMPSON]:	Yeah. I mean, that could be, that could be part of it.
[THE COURT]:	What other relevancy would it have?
[SAMPSON]:	It really, it's – we do the three different populations so as not, we aren't targeting the alleged father based on his descent. So we look at, we use – it's the same profile because those are what we're comparing, but we do it in all three populations so as to make it – it's more of a

	conservative type of calculation because we're not going to just assume the profile's descent based on their name.
[THE COURT]:	But for purposes of your calculations – this is what I don't – you have to assume, don't you –
[SAMPSON]:	No.
[THE COURT]:	– don't you have to assume that somebody, be it black, white, or Hispanic, somebody in one of those populations could have had sexual intercourse at the same time as the alleged father with the, with the mother? Isn't that, isn't that what the purpose of the statistics are?
[SAMPSON]:	The purpose of the statistics is, determine the likelihood that the alleged father, Mr. Gomez, is the father versus a random person, and that, yes, that random person –
[DEFENSE COUNSEL]:	Your Honor, I'd like to point out for the record that I'm Mr. Gomez and this is Mr. Escobar.
THE COURT:	Mr. Escobar. Okay.
[SAMPSON]:	I'm sorry. I'm, I apologize that Mr. Escobar is the alleged father of [M.] and –
THE COURT:	But, but –

[SAMPSON]:	– based on a random person, and that random could be any of those –
[THE COURT]:	What are the odds –
[SAMPSON]:	Right. Yes.
THE COURT:	– what are the odds that somebody else in the Hispanic population – let me run this back –
[SAMPSON]:	Uh-huh.
THE COURT:	– what are the odds that there's somebody else out there –
[SAMPSON]:	Uh-huh.
THE COURT:	– that could have had sexual intercourse –
[SAMPSON]:	Uh-huh.
THE COURT:	– with the mother at the time of conception, what are the odds, that's what you're trying to figure out. So –
[SAMPSON]:	Yeah.
THE COURT:	– for purposes of calculating your odds, you're assuming that somebody else of the Hispanic population could have had sexual intercourse at the same time as the alleged father –
[DEFENSE COUNSEL]:	Objection.
THE COURT:	– are you not?

[SAMPSON]:	Yes.
THE COURT:	Okay. That – then I think I'm understanding the purpose of the odds, because if you don't assume that, then that's the exact genetic makeup, right?
[SAMPSON]:	Right. So –
[DEFENSE COUNSEL]:	Objection.
[SAMPSON]:	Can – may I?
THE COURT:	Overruled.
[SAMPSON]:	Okay. So I use the same three profiles and calculate based on the frequencies of the three different populations, and so the number that I'm getting is the probability, the odds that he is the father versus someone else is the father. And so we do it for the three different populations to show the spectrum of the most common populations in the U.S.
THE COURT:	Okay. And the, and the percentages are somewhat – well, the odds are lower in the Hispanic populations, right? You said 2.27 million as opposed to the African-American population, which is 21.3 million, or 18.9 million in the white or Caucasian population. So the odds go down when you just look at what's the likelihood that there's somebody else out in the Hispanic population that could have

	fathered this child other than the alleged father, right?
[SAMPSON]:	Right. It goes down a little bit from the African-American population, and it's a little bit higher than the U.S. Caucasian population.
THE COURT:	Well, unless I misunderstood you, it goes, the odds go down quite a bit.
[SAMPSON]:	Oh, I'm sorry. No, you're correct. You're correct.
THE COURT:	It goes –
[SAMPSON]:	It goes – yeah.
THE COURT:	– from 21.3 –
[SAMPSON]:	Yes.
THE COURT:	– in the African-American to 18.9 –
[SAMPSON]:	Right. Sorry, you're correct, and that's –
THE COURT:	– and then 2.27 million in the Hispanic population.
[SAMPSON]:	Yes, you're correct.
THE COURT:	So that's the odds –
[DEFENSE COUNSEL]:	Objection. Objection to the testimonial nature of the questions.
THE COURT:	I'm asking a question, not – They're all 99.99, but the odds

	aren't the same. That's my next question. Why are the odds not the same if they're all 99.99? Do you get a couple more 995s or –
[SAMPSON]:	No. It's –
THE COURT:	– I don't understand.
[SAMPSON]:	Those numbers are based on, on the allele frequencies. So as I said before, there can be on average about a tenfold difference between the U.S. populations, and so that's what you're seeing there. There's a little bit of difference because a frequency of – say the 15 at that first D3 locations might be different between the different populations. So that's why there's some variation.
THE COURT:	So this 2.27 million, as Mr., Mr. Gomez the attorney was asking, if in fact you had a separate database for East Coast Hispanic men, the odds could be less than 2.27 million, right?
[SAMPSON]:	They would, they would be different. I don't know if they'd be less or more.
THE COURT:	Okay. They could be less –
[SAMPSON]:	Uh-huh.
THE COURT:	– if you had a more similar population, right?
[SAMPSON]:	Yes.

THE COURT: Okay. Because you would, you would expect that the, that what you found here you'd see more often?

[SAMPSON]: Yeah, I'm not sure how the frequencies would change but you can do these calculations with databases as long as they're validated and peer-reviewed, you can do these calculations with any database that's available, and it might, it might be slightly different, but on average it wouldn't be more than a tenfold difference.

THE COURT: So it can't be 100 percent because for purposes of your calculation you assume that there could be somebody else out there in the Hispanic population that had sexual intercourse at the same time, right.

[SAMPSON]: I don't know about sexual intercourse but could have fathered [M.]. That's what I'm looking at.

THE COURT: Well, there's no other way to do it, is there –

[DEFENSE COUNSEL]: Yes, there is.

[SAMPSON]: Yes, that's true.

THE COURT: – that I'm aware of? Artificially maybe, I don't know. All right. Any questions in light of the Court's questions?

Appellant contends that in questioning Sampson, the judge "re-established and reiterated what the State had just presented during its direct examination" and bolstered the State's case. He argues that the "protracted and inquisitorial nature of the court's questioning as a whole reflected partiality towards the State and a bias against" him. In addition, appellant "[b]y repeating questions made by the prosecutor, by forming questions in a prosecutorial manner and directly questioning the recanting witness's credibility, and by repeatedly emphasizing the statistical probabilities tying [appellant to M.], biologically, the court in effect became a second prosecutor." We disagree.

As a preliminary matter, we note that this particular issue is properly before us. Although defense counsel asserted on only one occasion an objection to the testimonial nature of the trial judge's questions, he also lodged several general objections that were overruled. The issue was clearly raised in the court below and the transcript demonstrates that the trial judge was not inclined to sustain defense counsel's objections to his continued questioning of Sampson.

Although the issue is properly before us, appellant's contention is without merit. Our review of the record convinces us that the trial judge was merely attempting to clarify the statistical evidence presented by Sampson and understand the purpose for the statistical evidence concerning African-American, Hispanic, and Caucasian populations. There is nothing in the judge's questions that would suggest to the jury that it should accept Sampson's testimony or the results of the DNA testing. The judge's questions were clearly intended to clarify a confusing area of testimony and did not demonstrate bias in favor of the State or partiality on the part of the judge. We also note that the protracted nature of

the judge's questioning of Sampson alone does not require reversal. The statistical and scientific evidence presented in this case was complex and the judge acted within his discretion in questioning Sampson to clarify her testimony.

C. Motion for Mistrial

Appellant repackages the prior argument and argues next that the trial court erred in denying his motion for mistrial based on the judge's questioning of Sampson. We disagree.

The decision to grant a motion for mistrial rests in the discretion of the trial judge. *Parker v. State*, 189 Md. App. 474, 493 (2009). "Our review 'is limited to determining whether there has been an abuse of discretion.'" *Id.* (quoting *Coffey v. State*, 100 Md. App. 587, 597 (1994)). A trial court's denial of a motion for mistrial will not be reversed "unless the defendant was so clearly prejudiced that the denial constituted an abuse of discretion." *Hunt v. State*, 321 Md. 387, 422 (1990) (citing *Johnson v. State*, 303 Md. 487, 516 (1985)). We are cognizant of the fact that a mistrial is "'an extreme sanction that sometimes must be resorted to when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice.'" *Coffey*, 100 Md. App. at 597 (quoting *Burks v. State*, 96 Md. App. 173, 187 (1993)).

In the instant case, the trial judge questioned Sampson for the purpose of clarifying her testimony as discussed in the previous section. The judge's questions did not demonstrate bias for or against the appellant. Moreover, the judge instructed the jury, stating:

> During the trial, I may have commented on the evidence or asked a question of a witness, and I know for a fact specifically that I asked several questions of the statistical

> expert that was called, Ms. Sampson, at the end of the case. In connection with that, I tell you, ladies and gentlemen, you should not draw any conclusion about my views of the case or of any witness from my comments or my questions.

It is well settled that the jury is presumed to follow the court's instructions in reaching its verdict. *See Alston v. State*, 414 Md. 92, 108 (2010) ("As this Court has often recognized, 'our legal system necessarily proceeds upon the assumption that jurors will follow the trial judge's instructions.'") (citation omitted).

For these reasons we conclude that the trial court did not abuse its discretion in denying appellant's motion for mistrial.

II.

Appellant contends that the trial court erred in allowing the State to impeach its own witness, A.E., with statements made by her attorney during a different trial where A.E. was a defendant. At appellant's trial, A.E. testified that she had lied when she told Detective Carvajal that appellant had had sexual intercourse with her when she was fifteen years old. Thereafter, the State questioned A.E. as follows:

> [PROSECUTOR]: You remember when you took the guilty plea for assault on [M.], and you were asked whether you were under the influence of any drugs that would impair your ability to understand the proceedings, and you said no, correct?
>
> A.E.: They didn't ask me that.
>
> [PROSECUTOR]: They didn't ask you whether you were under the influence of

	anything that would prevent you from accepting a guilty plea?
[A.E.]:	No.
[PROSECUTOR]:	And do you recall, during the sentencing portion of that proceeding, when your attorney, Mr. Harris, representing your interests talked about the sexual abuse that you had suffered at the hands of your father?
[A.E.]:	When I said all, when I said all that, it's because I was upset, because my mom had called the Social Services for, in order for them to take my children from me, and that's why I did all that.
[PROSECUTOR]:	But you had said that before, in 2008, that your father had sexually abused you, too, correct?
[A.E.]:	Yes. That's correct. (In English) There was a –
[PROSECUTOR]:	And the person who was talking at your plea wasn't you, but it was your attorney, Mr. Harris, correct?
[A.E.]:	Well, I don't know, because I wasn't present at those hearings. I was on one of the sides.
[PROSECUTOR]:	You were sitting where the defendant is sitting when you accepted a guilty plea to second degree assault with your defense attorney standing next to you,

	Mr. Harris. Don't you remember?
[A.E.]:	About [M.], yes, because –
[PROSECUTOR]:	Okay.
[A.E.]:	– yes, because I asked [M.]. It's a different case.
[PROSECUTOR]:	That's the case I'm asking about, and did that case involving your physically hitting your child, [M.], your attorney, Adam Harris, spoke about your –
[DEFENSE COUNSEL]:	Objection to what Adam Harris spoke about.
THE COURT:	Overruled.
[PROSECUTOR]:	– being sexually abused for years by the defendant, correct?
A.E.:	(No audible response)
[PROSECUTOR]:	Yes or no?
A.E.:	Yes.

Appellant argues that statements made by A.E.'s prior attorney during a different trial constituted inadmissible hearsay. He asserts that the statements were not admissible as a statement by a party-opponent and were irrelevant. He also maintains that statements by A.E.'s prior attorney were inadmissible for impeachment purposes because they did not

constitute a statement by A.E. under Md. Rule 5-613.[2] In addition, appellant points out that, in the prior trial, A.E. was a defendant and may have been "attempting to curry favor and mercy from the court."

This issue was not preserved for our consideration. Appellant did not lodge an objection until the end of this line of questioning when the State asked A.E. whether her prior attorney in the assault case involving M. had spoken about A.E. being sexually abused for years by appellant. At the time the objection was lodged, the State had already asked A.E., without objection, if she recalled that during sentencing in the assault case, her attorney had "talked about the sexual abuse that [she] had suffered at the hands of [her] father." As a result, the issue was not preserved properly for our consideration. *See Yates v. State*, 429 Md. 112, 120-21 (2012) (where competent evidence of a matter is received, no prejudice is sustained where other objected-to evidence of the same matter is also

[2] Maryland Rule 5-613 provided then, as it does now:

> (a) **Examining witness concerning prior statement.** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.
>
> (b) **Extrinsic evidence of prior inconsistent statement of witness**. Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

received); *DeLeon v. State*, 407 Md. 16, 30-31 (2008) (objection waived where evidence on the same point was admitted without objection elsewhere at trial*); Grandison v. State*, 341 Md. 175, 218-19 (1995) (reversible error will not be found when objectionable testimony is admitted if the essential contents of that testimony were presented to the jury without objection through prior testimony).

Even if the issue had been preserved properly for our consideration, appellant would fare no better. The statements made by A.E.'s prior attorney in a different trial were not offered for their truth, but instead for the purpose of impeaching A.E. Maryland Rule 5-616(a)(1) allows for impeachment by a prior inconsistent statement: "The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at … [p]roving under Rule 5-613 that the witness has made statements that are inconsistent with the witness's present testimony."

The statements made by A.E.'s prior attorney were made in A.E.'s presence and on her behalf at a sentencing hearing. The statements of A.E.'s prior attorney were clearly directed at proving, under Md. Rule 5-613, that A.E. previously made statements that were inconsistent with her testimony in the present case. Consistent with Md. Rule 5-613(a)(2), A.E. was given an "opportunity to explain or deny" the prior inconsistent statements. She claimed, not that she did not make the statements, but that she made them because she was upset at her mother for calling social services on her and that she did not want to go to jail for a long time. We find no abuse of discretion on the part of the trial court in admitting the statements of A.E.'s prior attorney for impeachment purposes.

We also note that even if the court abused its discretion in admitting the statements made by A.E.'s prior attorney in another action, such error would be harmless. A.E. was impeached with other prior statements that her father had sexually abused her, including statements made to the police, her mother, and the director of the ESOL program. Thus, testimony about statements made by A.E.'s prior attorney were both cumulative and harmless beyond a reasonable doubt.

III.

Appellant contends that his convictions for incest should merge into his convictions for third-degree sexual offense. In support of this contention, appellant argues that both his incest and third-degree sexual offense convictions were based on having vaginal intercourse with A.E. Acknowledging that merger is not required under the required evidence test, appellant argues that his sentences should merge under either the rule of lenity or pursuant to principles of fundamental fairness.

With respect to his argument that merger is required pursuant to principles of fundamental fairness, appellant acknowledges that he did not preserve that issue for our consideration, and asks that we review the merits of his claim "under plain error and/or ineffective assistance of counsel." As we have already noted, while we may invoke the plain error doctrine in support of our review of allegations of unobjected to error, we reserve such gratuitous exercises of discretion for those cases where the "'unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Smith,* 64 Md. App. at 632 (quoting *Hutchinson*, 287 Md. at 203). Our review of the record before us convinces us that this is not such a case. Even if the issue of merger

pursuant to the doctrine of fundamental fairness had been preserved for our consideration, we would hold that there is nothing fundamentally unfair about punishing appellant for both the act of incest and third-degree sexual offense.

We also decline appellant's invitation to consider his claim of ineffective assistance of counsel in this direct appeal. "Generally, the appropriate avenue for the resolution of a claim of ineffective assistance of counsel is a post-conviction proceeding." *Washington v. State*, 191 Md. App. 48, 71 (2010). *See also Robinson v. State*, 404 Md. 208, 219 (2008) ("We have held repeatedly that a claim of ineffective assistance of counsel should be raised in a post-conviction proceeding[.]"); *Mosley v. State*, 378 Md. 548, 558-59 (2003) (claim of ineffective assistance of counsel should be raised in a post-conviction proceeding, subject to a few exceptions).

As for appellant's remaining argument, we recognize that the rule of lenity is an aid for dealing with ambiguity in a criminal statute "when the statute is open to more than one interpretation and the court is otherwise unable to determine which interpretation is intended by the Legislature." *Oglesby v. State*, 441 Md. 673, 676 (2015). The rule of lenity is "a maxim of statutory construction which serves only as an aid for resolving an ambiguity and it may not be used to create an ambiguity where none exists." *Jones v. State*, 336 Md. 255, 261 (1994). 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." *Oglesby*, 441 Md. at 681.

No ambiguity exists in the statutory language at issue. Appellant was convicted of third-degree sexual offense in violation of Md. Code (2002 Repl. Vol., 2008 Supp.), § 3-307(a)(5), of the Criminal Law Article ("CR"), which provided, as it does now:

> (a) *Prohibited.* – A person may not:
>
> *   *   *
>
> (5) engage in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old.

The penalty upon conviction of third-degree sexual assault is "imprisonment not exceeding 10 years." CR § 3-307(b).

Appellant was also convicted of incest in violation of CR §3-323(a), which provided, as it does now:

> (a) *Prohibited*. – 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.

The penalty upon conviction of incest is imprisonment "for not less than 1 year and not exceeding 10 years." CR §3-323(b).

The plain language of § 3-307(a)(5) makes clear that the purpose of the statute is to prohibit the act of vaginal intercourse with a minor who is 14 or 15 years old by a person at least 21 years old. Similarly, the clear purpose of § 3-323 is to prohibit acts of vaginal intercourse with certain family members regardless of age or consent. While § 3-323 contemplates that a violation of § 3-307 is also possible, the Legislature did not include

any provision for merger with respect to these two crimes. We find no ambiguity in the statutes that would lead us to conclude that merger is required by the rule of lenity.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.