Circuit Court for Frederick County
Case No. C-10-CR-20-000503

UNREPORTED*

IN THE APPELLATE COURT**

OF MARYLAND

No. 1482

September Term, 2021

STEWARD E. PUMPHREY

v.

STATE OF MARYLAND

Zic,
Tang,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: April 24, 2023

*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.

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Steward E. Pumphrey, appellant, was charged with various offenses based on allegations that he entered the home of his estranged wife ("Ms. M."), in violation of a protective order, and assaulted her, her male friend, and her 16-year-old son ("S."). Prior to trial, the State filed notice of its intent to seek an enhanced penalty for the commission of a crime of violence in the presence of a minor, pursuant to Md. Code (2002, 2012 Repl. Vol., 2019 Supp.), Criminal Law Article, § 3-601.1.

Following a jury trial, appellant was convicted of third-degree burglary, two counts of second-degree assault upon Ms. M. and S., and two counts of violating a protective order. In addition to the findings of guilt, the jury made a separate finding that the burglary and the assault upon Ms. M. (which are both crimes of violence within the meaning of § 3-601.1) were committed in the presence of a minor.

At sentencing, the Circuit Court for Frederick County imposed the maximum penalty of 10 years for the burglary conviction, plus five years, consecutive, for committing that crime in the presence of a minor. The court suspended five years of that sentence. In addition, the court sentenced appellant to a consecutive term of 10 years for one assault conviction, all but five years suspended; and a consecutive 10-year sentence, all suspended, for the other assault conviction. Finally, for each of the two convictions for violation of a protective order, appellant was sentenced to 90 days, all suspended, consecutive to the other counts.

On appeal, appellant presents two questions for our review, which we quote:

1. Are the conviction and sentence for committing a crime of violence in the presence of a minor in a residence illegal, because that crime was not charged?

2. Did the judge rely on impermissible considerations when imposing a sentence that was double the maximum guidelines range?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

In a ten-count indictment filed in September 2020, the State charged appellant with two counts of first-degree assault, three counts of second-degree assault, two counts of violation of a protective order, home invasion, and third-degree burglary.[1] In October 2020, the State filed the following notice:

STATE'S NOTICE OF INTENTION TO SEEK ENHANCED PENALTY CRIME OF VIOLENCE IN PRESENCE OF MINOR

> The State of Maryland, by and through [the State's attorney] hereby notes its intention to seek enhanced penalty, pursuant to § 3-601.1 of the Criminal Law Article. The State will seek an enhanced penalty upon conviction and will present facts to establish beyond a reasonable doubt that the Defendant committed a crime of violence in the presence of a minor.
>
> TO THE DEFENDANT:
>
> You are hereby notified that if the State provides timely notice of its intention to seek an enhanced penalty, the Defendant is subject to imprisonment not exceeding 5 years in addition to any other sentence imposed for the crime of violence. The enhanced penalty imposed shall be separate from and consecutive to a sentence for the underlying crime.

[1] Appellant was also charged with second-degree escape. That charge was dismissed by the court on a motion for judgment of acquittal at the close of the State's case and is not relevant to the issues on appeal.

A three-day jury trial was held in October 2021. Ms. M. testified that she met appellant in February 2017. Soon thereafter, appellant moved into the home where Ms. M. lived with her three children. Ms. M. and appellant were married in April 2017.

December 2019 Assault

Over objection, Ms. M. described an incident that occurred on December 14, 2019. She testified that appellant accused her of adultery, then "grabbed" her, held her to the ground, and "choked" her with both hands "as hard as he could." She was unable to speak or breathe. Appellant let go when one of Ms. M.'s children walked into the room.

Appellant left the house, and Ms. M. locked all the doors. He subsequently returned to the house. Ms. M. "panicked" and texted her next-door neighbor for help. She stated:

> . . . I texted my neighbor, my next door neighbor. I've never, prior, told anybody of all the abuse, but I was scared for my life, so I texted my next door neighbor, and I told him, I've never told anybody, but I'm scared.
>
> He just tried to kill me and he's back. Please, you know, I wanted him to come over and help.

Appellant was charged in connection with that incident and pleaded guilty to second-degree assault. Appellant and Ms. M. started living together again after appellant promised to participate in what Ms. M. described as a "batterer's intervention program."

Entry of Protective Order

On July 1, 2020, Ms. M. secured a protective order against appellant.[2] On July 10, 2020, Ms. M. filed for divorce. On July 31, 2020, a final protective order was issued. Appellant consented to the entry of the order, the terms of which provided that appellant

[2] The factual basis for the protective order is not clear from the record.

was to immediately vacate the home and was prohibited from entering that residence or contacting Ms. M. for a period of one year.

According to Ms. M., after the final protective order was issued, appellant made attempts to contact her by phone and drove by her house "constantly." She did not report the incidents because she was "confused about the process" and hoped that appellant would "just leave [her] alone and move on."

Instant Event

On August 9, 2020, Ms. M. went out to dinner with "Mr. J." They returned to Ms. M.'s home around 11:00 p.m. Ms. M.'s three children, who were then 16, 14, and 12 years old, were inside the home.

Ms. M. invited Mr. J. to sit by a firepit in the back yard of the house. She went into the house, through a sliding glass door, to get wood for the fire from the attached garage. Mr. J. remained outside.

At about the same time, appellant drove past Ms. M.'s home. Appellant testified, in the defense portion of the case, that he had been at a nearby bar for about an hour beforehand, where he consumed "two or three shots of Fireball" and an "Angry Orchard." While driving past Ms. M.'s home, appellant saw a car that he did not recognize. He parked his car in a neighbor's driveway and walked around Ms. M.'s house. He looked in the windows but did not see anyone. He went to the back of the house and entered the house through the sliding glass door because he "wanted to see what was going on" and "wanted to know . . . [w]ho was at [his] house."

Ms. M. testified that, as she was walking up the steps from the garage and back into the kitchen, she heard the sliding glass door "slam open." When she opened the door from the garage to the kitchen, appellant was standing there "with that same rage face." According to Ms. M., appellant grabbed her and threw her down the steps. Appellant put his hands around her neck as she lay on the concrete floor and repeatedly screamed, "Who are you fucking?"

Ms. M.'s 16-year-old son, S., testified that he was in the living room, watching a movie. He heard "a loud bang sound" that he recognized as the sound of the sliding glass door "being slammed open." He saw appellant "running as fast as he could" toward his mother, and then heard his mother scream. He ran into the kitchen and saw appellant on top of his mother, "choking her," while repeatedly screaming, "Who are you fucking?"

S. screamed at appellant to "get off" of Ms. M. Appellant "got up to go and get" S. S. punched appellant once or twice. Appellant then threw S. down the garage steps.

At that point, Mr. J. entered the house. Mr. J. testified that appellant "very aggressively ran up" to him and started hitting him. A struggle ensued between the two men and Mr. J. was eventually able to subdue appellant. Appellant left the house and was subsequently arrested.

Enhanced Penalty

At the close of the evidence, defense counsel pointed out that, although the State had filed notice of its intent to seek an enhanced penalty for committing a crime in the presence of a minor, in violation of § 3-601.1, the State had not charged appellant with that offense. The prosecutor stated that § 3-601.1 was "technically an enhanced

penalty[,] . . . not a charge[,]" and submitted that the court could impose an enhanced penalty if the statutory elements were proven beyond a reasonable doubt, which, the prosecutor explained, was a question for the jury.

Defense counsel insisted that, in the absence of a charge in the indictment, the imposition of an enhanced penalty under § 3-601.1 would violate appellant's due process rights because appellant had "no way to defend against it." Defense counsel asked the court to dismiss the "enhancement or charge, whatever it is."

The court ruled that the State had followed the proper procedure under the statute, and that, if the jury found that the State had proven the factual predicate for the enhanced penalty beyond a reasonable doubt, the court could consider an enhanced penalty. In accordance with that ruling, the court's instructions to the jury included the following:

> [A] person may not commit a crime of violence in the presence of a minor. In order to convict the defendant of committing a crime of violence in the presence of a minor, the State must prove . . . that the defendant knew or reasonably should have known that a minor was present in the residence . . . [and] also, that the minor was at least two years old. . . . A minor is present if the minor is within sight or hearing of the crime of violence. A crime of violence includes home invasion, third-degree burglary, first-degree assault, and second-degree assault.

The verdict sheet guided the jury to make a finding of "guilty" or "not guilty" as to each of the charged crimes. For each of the counts that charged a crime of violence, the jury was asked to answer "yes" or "no" to the following question: "If [appellant] is guilty of [this count] was this crime committed in the presence of a minor?"

As mentioned, the jury found appellant guilty of third-degree burglary, second-degree assault upon Ms. M., second-degree assault upon S., and two violations of the

protective order.[3] The jury also found that the burglary and assault upon Ms. M. were committed in the presence of a minor.

Additional facts will be introduced later in this opinion, as they become relevant.

STANDARD OF REVIEW

A "sentencing judge is vested with 'virtually boundless discretion' in devising an appropriate sentence." *Cruz-Quintanilla v. State*, 455 Md. 35, 40 (2017) (quoting *Smith v. State*, 308 Md. 162, 166 (1986)). "The sentencing judge is afforded such discretion to best accomplish the objectives of sentencing—punishment, deterrence, and rehabilitation." *Id.* (quoting *Smith*, 308 Md. at 166).

"Appellate courts review sentences for only three forms of error: '(1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations; and (3) whether the sentence is within statutory limits.'" *Bishop v. State*, 218 Md. App. 472, 508 (2014) (quoting *Jackson v. State*, 364 Md. 192, 200 (2001) (italics and additional citation omitted)). "We review the circuit court's legal findings without deference." *Schmidt v. State*, 245 Md. App. 400, 408-09 (2020).

Appellant's claims fall within the first two categories of reviewable sentencing errors. He claims that (1) the five-year consecutive sentence that the court added to his sentence for third-degree burglary violates his right to due process because, according to

[3] The jury found appellant not guilty of home invasion, first-degree assault on Ms. M., and second-degree assault of Mr. J.

appellant, he was convicted of a violation of § 3-601.1 without having been charged; and (2) the court relied on impermissible considerations at sentencing.

DISCUSSION

I.

It is "a violation of due process to send an accused to prison following conviction . . . upon a charge that was never made." *Johnson v. State*, 427 Md. 356, 376 (2012) (citation omitted). Similarly, a sentence is inherently illegal where there "has been no conviction warranting any sentence for the particular offense." *Chaney v. State*, 397 Md. 460, 466 (2007).

Appellant contends that his right to due process was violated because he was convicted of and sentenced for a violation of § 3-601.1 without having been charged. The State maintains that appellant was not convicted of a violation of § 3-601.1, but rather, the jury was asked to make a factual finding that was pertinent to appellant's eligibility for an enhanced sentence pursuant to the statute. The State submits that the court was authorized to impose an enhanced sentence based on requisite notice and the jury's finding. We agree with the State.

The issue before this Court is a matter of statutory interpretation, which we review de novo. *Johnson v. State*, 467 Md. 362, 371 (2020). "The cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature." *State v. Bey*, 452 Md. 255, 265 (2017). "[T]o determine [the General Assembly's] purpose or policy, we look first to the language of the statute . . . on the tacit theory that the General Assembly is presumed to have meant what it said and said what it meant." *Peterson v.*

State, 467 Md. 713, 727 (2020) (citation omitted). "We read 'the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory.'" *Johnson*, 467 Md. at 372 (quoting *Phillips v. State*, 451 Md. 180, 196-97 (2017)). "[W]e neither add nor delete words to a clear and unambiguous statute to give it a meaning not reflected by the words that the General Assembly used or engage in forced or subtle interpretation in an attempt to extend or limit the statute's meaning." *Peterson*, 467 Md. at 727 (citation omitted). "If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to the legislative intent ends ordinarily and we apply the statute as written without resort to other rules of construction." *Bey*, 452 Md. at 265 (citation omitted).

The statute in question provides:[4]

> § 3-601.1
>
> (a)(1) A person may not commit a crime of violence as defined in § 5-101 of the Public Safety Article when the person knows or reasonably should know that a minor who is at least 2 years old is present in a residence.
>
> (2) For the purposes of paragraph (1) of this subsection, a minor is present if the minor is within sight or hearing of the crime of violence.
>
> (b) A person who violates this section is subject to imprisonment not exceeding 5 years in addition to any other sentence imposed for the crime of violence.
>
> (c) A court may impose an enhanced penalty under subsection (b) of this section if:

[4] We quote directly from the chapter law because it is "the words of the General Assembly that are law in Maryland and that we interpret and apply." *Carter v. State*, 236 Md. App. 456, 481 (2018). "[H]eadings or catchlines added by publishers . . . have no role whatsoever in our interpretation and application of Maryland law." *Id.* at 481-82.

(1) at least 30 days before trial in the circuit court, and 15 days before trial in the District Court, the State's Attorney notifies the defendant in writing of the State's intention to seek the enhanced penalty; and

(2) the elements of subsection (a)(1) of this section have been proven beyond a reasonable doubt.

(d) If the defendant is charged by indictment or criminal information, the State may include the notice required under subsection (c)(1) of this section in the indictment or information.

(e) An enhanced penalty imposed under this section shall be separate from and consecutive to a sentence for any crime based on the act establishing the violation of this section.

2014 Md. Laws, chs. 115 and 116.[5]

[5] The Legislature enacted this statute in 2014, acknowledging that "children who witness domestic violence may suffer emotional and developmental difficulties that are similar to those suffered by children who have been directly abused," and "approximately 15.5 million children are exposed to domestic violence every year." Fiscal and Policy Notes, H.B. 306 and S.B. 337 (Md. General Assembly, 2014 Reg. Sess.). It recognized that, prior to its enactment, "an offense classified as a crime of violence is subject to a criminal penalty, regardless of whether or not anyone witnessed the crime. Statute does not impose enhanced penalties based on whether a particular person, regardless of age, witnessed a crime." *Id*. In enacting the statute, the Legislature stated it was made:

> FOR the purpose of prohibiting a person from committing a certain crime of violence when the person knows or reasonably should know that a minor of a certain age is present in a residence; establishing certain circumstances under which a minor is present; establishing a certain enhanced penalty for a violation of this Act; authorizing a court to impose an enhanced penalty if the State's Attorney provides certain notice to the defendant in a certain manner and if certain elements have been proven beyond a reasonable doubt; authorizing the State to include a certain notice in a certain indictment or information; providing that a penalty imposed under this Act shall be separate from and consecutive to a sentence for any crime based on the act establishing the violation of this Act; and generally relating to the commission of crimes of violence in the presence of minors.

2014 Md. Laws, chs. 115 and 116.

We perceive no illegality in appellant's sentence. The plain language of subsection (c) of the statute authorizes a court to impose an enhanced penalty for a crime of violence provided that the State complies with the notice requirement and satisfies its burden of proving the factual predicate giving rise to the increased sentence. Here, the State satisfied both requirements.

Appellant argues that, because subsection (a) prohibits conduct and subsection (b) attaches a penalty to that conduct, § 3-601.1 is a standalone crime that must be charged by the State. He asserts that his sentence is illegal and deprives him of his right to due process because he was not charged with a violation of § 3-601.1.

Appellant further claims that the consecutive sentence provision in subsection (e) operates as the "enhanced penalty." He argues that "the 'enhanced penalty' is the anti-merger clause, which is a sentencing enhancement, and which the Legislature has decided should be permissible only if the defendant has been given advanced notice." Thus, he argues, when read as a whole, "the statute prohibits certain conduct (committing a crime of violence in the presence of a minor in a residence) [under subsection (a)]; provides a penalty for that conduct (five years of incarceration) [under subsection (b)]; and provides an optional *enhancement* [under subsection (e)] of making that sentence *consecutive*, so long as the State complies with certain pretrial notice requirements [under subsections (c) and (d)]." (Emphasis in original).

We do not agree with appellant's interpretation of the statute. There is nothing in the plain language of the statute that requires that the defendant be convicted of a violation of § 3-601.1 to be subject to the enhanced penalty. If, as appellant suggests, the State is

required to charge a defendant with a violation of § 3-601.1 and obtain a conviction before the court may impose an enhanced penalty, subsection (c)(2) of the statute, which requires that the elements of subsection (a)(1) be proven beyond a reasonable doubt, becomes superfluous. A conviction necessarily entails a finding that the elements establishing a violation of a criminal statute have been proven beyond a reasonable doubt. There would have been no reason for the Legislature to spell that out in the language of the statute if it intended for an enhanced penalty to be based on a conviction.

Moreover, if we were to adopt appellant's interpretation, we would have to conclude that subsection (c) incorrectly refers to subsection (b) as an "enhanced penalty," rather than subsection (e). Furthermore, appellant's interpretation would render the text of the statute internally inconsistent, in that subsection (c) vests the court with discretion to impose an enhanced penalty, while subsection (e) makes a consecutive sentence mandatory.

To illustrate, the interpretation urged by appellant would essentially require us to read the statute as if it were written as follows:

> (c) A court ~~may~~ **shall** impose an enhanced penalty under subsection ~~(b)~~**(e)** of this section if:
>
> (1) at least 30 days before trial in the circuit court, and 15 days before trial in the District Court, the State's Attorney notifies the defendant in writing of the State's intention to seek the enhanced penalty; and
>
> (2) ~~the elements of subsection (a)(1) of this section have been proven beyond a reasonable doubt.~~ **the defendant is convicted of a violation of subsection (a) of this section.**

We reject such a forced interpretation as contrary to the established principles of statutory construction to which this Court is bound. *See Moore v. State*, 424 Md. 118, 129 (2011)

(quoting *Henriquez v. Henriquez*, 413 Md. 287, 299 (2010) ("[w]e will not . . . judicially insert language [into a statute] to impose exceptions, limitations, or restrictions not set forth by the legislature")); *McGlone v. State*, 406 Md. 545, 559 (2008) ("We interpret the words enacted by the Maryland General Assembly; we do not rewrite the language of a statute to add a new meaning.").

We disagree with appellant's contention that his sentence violates his right to due process. The requirements of the statute are consistent with *Apprendi v. New Jersey*, in which the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000); *see also Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (imposition of enhanced penalty based on facts not admitted by defendant or found by jury violated defendant's right to trial by jury). Here, the State provided the requisite notice of its intention to seek the enhanced penalty and, in accordance with *Apprendi* and *Blakely*, the enhanced penalty imposed by the court was based on facts found by the jury.

We express no opinion as to whether the statute also establishes a chargeable offense. The narrow issue before this Court is whether appellant's sentence violates due process because the State did not charge him with that offense. We hold that, under § 3-601.1, the court's authorization to impose an additional penalty for a crime of violence, when that crime is committed in the presence of a minor, is not dependent upon the defendant being charged with and convicted of a violation of § 3-601.1. Pursuant to the plain and unambiguous language of the statute, the court may impose the penalty in

§ 3-601.1 if the State timely files the requisite notice and proves to the finder of fact that a crime of violence was committed in the presence of a minor in a residence. Here, the State met both requirements. Therefore, the court did not impose an illegal sentence.

II.

Appellant asserts that the court committed reversible error by impermissibly relying on bald accusations of uncharged conduct when fashioning his sentence. The State maintains that, to the extent that appellant preserved his challenge, the court did not err.

A.

At the outset of the sentencing hearing, the prosecutor reminded the court of the facts of the prior assault in December 2019, to which appellant pleaded guilty, stating that it was a "strangulation." Defense counsel objected, arguing that appellant had not been convicted of "strangling" Ms. M. in that case, and that the prior assault did not relate to the underlying case. Defense counsel asked the court to instruct the prosecutor to "focus on this case which is what the sentencing is about." The court overruled the objection, explaining that it had "wide latitude to consider all sorts of matters as to sentencing" and that it could "disregard" information and "weed through" the distinction between the conviction for assault and the factual predicate of strangulation. In addition, defense counsel asserted that the prosecutor's use of the term "strangulation" to describe the instant event on August 9, 2020, was inappropriate because the jury had "concluded that there was no strangulation" when they found him not guilty of first-degree assault by strangulation.

Ms. M. addressed the court during the hearing and read her victim impact statement. Before she began, defense counsel requested to review the statement before she read it to

the court, objecting to it (or parts of it) because it purportedly contained allegations that had "never been brought forward" or "proven in a court of law." The court granted a recess so that defense counsel could review Ms. M.'s statement before it was presented to the court.

Defense counsel requested no action from the court when the hearing resumed. Ms. M. then presented her victim impact statement. She told the court, without objection, that, in addition to the instant event on August 9, 2020, appellant had abused her "several" other times and had "strangled" her "dozens of times." She said that, "[a]fter several of the beatings" appellant "force[d]" her to have sex while "chok[ing]" her into submission. She described an incident in which appellant broke her ribs by repeatedly "stomp[ing]" on her. She said appellant had "busted" her lips, "left [her] with black and blue eyes," pushed her "countless" times, "dragged" her by her hair, and "caused innumerable bruises" on her body. She described appellant as "manipulative and controlling" and said that he dictated where she could go and whom she could see.

The only objections by defense counsel, during Ms. M.'s statement, were to allegations that appellant had assaulted her with a gun:

> [MS. M.]: . . . [Appellant] pulled a gun on me and he held it to my head and he's threatened to kill me.
>
> [DEFENSE COUNSEL]: Objection.
>
> [MS. M.]: He's hit me –
>
> THE COURT: Overruled. Go ahead.
>
> [MS. M.]: He's hit me upside the head with a gun causing a concussion.

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

In opposing the sentence recommended by the State, defense counsel argued that there was no evidence to corroborate Ms. M.'s claims of abuse, and he suggested that "if these things were all as horrendous and heinous as they were, it doesn't seem logical or even believable that she took no other steps." He challenged the allegation that appellant held a gun to Ms. M.'s head, stating there was no evidence that appellant owned or used a gun. Defense counsel argued: "[j]ust because [Ms. M.] said it and just because the State endorses her statement doesn't make every element of it true, and that's an important factor that this [c]ourt needs to take into account."

In announcing the sentence, the court summarized the chronology of events that led appellant to sentencing and its reasons for imposing a sentence above the guidelines:

> [T]his case is disturbing on many levels, but going back to the history of it and the [c]ourt has to look at the history of this, or it doesn't have to but it's going to because you want to know how we got here.
>
> * * *
>
> And the history of the case is you had been in [c]ourt previously and you had pled guilty to assaulting your wife. She indicated today that she was afraid to go further. The [S]tate had put a great deal of effort into prosecuting that case. They had evidence that was helped [sic] brought forward by a thorough investigation by the State, but her decision at that time was her decision and she said she did it because she was fearful. You and your counsel have characterized her as lying about that. That's fine, you have the right to do that. But we had that, that happened, and then it went beyond that and there were two restraining orders, protective orders against you in place at the time this offense occurred.
>
> * * *

And for whatever reason you decided to have a couple drinks very close to her house and then drop by in violation of the protective order, all of which is extremely concerning to the [c]ourt. I'm trying to figure out, you know, is this a dangerous person? Do I have to worry about these people? And the truth is every ounce of my being says, yes, that I do, that you are dangerous to them. That's how I feel with what I know about this case.

* * *

Your incredible story of falling on [Ms. M.] by accident or something of that nature defies logic. There's been a lot of accusations thrown here at the State for being disingenuous[,] and [at] your wife [for] flat out lying, and yet no acceptance of your own untruths, and that's being kind. I have other words I would use for it, but this is a [c]ourt of law and I will keep the decorum that is necessary here.

This [c]ourt believes that you are – that these victims are in danger if you are free, and there's many reasons for it that came out during the trial that I believe that, and certainly the history of it as well. Domestic violence is unfortunately one of the crimes that leads to homicide more than just about any other thing that happens in society I guess, certainly in Maryland. If there's a murder in Maryland a lot of times, it's domestically related.

The trauma that you put the young [S.] through is – I'm not even going to comment on that. We heard from him.[6] We know the suffering that he's doing now. So, there is a sentence in this case that is appropriate, and that is what the [c]ourt is going to impose. It is above the guidelines. The [c]ourt has the right to go above the guidelines. The guidelines are just guidelines.

And I do find it interesting that often the [c]ourt is asked to go below the guidelines, often the [c]ourt goes below the guidelines. In fact, if you looked at my sentences, I would suggest to you that 95 percent of the time if there's a deviation from the guidelines I've gone below, and that seems to be okay, but boy if you go above then you've done something horrible and wrong to somebody.

I disagree with that. The guidelines are there for guidelines and there are circumstances like this case that warrant a sentence above the guidelines, and that's why I'm going above the guidelines in this case because of the

[6] At sentencing, S. gave his victim impact statement, stating that the event changed him and put him in a "dark place"; he became "angry" and "disgusted" with himself for his perceived inability to protect his mother.

> facts of this case and the heinousness of the treatment of the victim in this case.

The court proceeded to sentence appellant, inviting defense counsel to "jump in . . . if you think I'm doing it wrong." Defense counsel did not object during or after the announcement of its sentence.

B.

"Under Maryland Rule 8-131(a), a defendant must object to preserve for appellate review an issue as to a trial court's impermissible considerations during a sentencing proceeding." *Sharp v. State*, 446 Md. 669, 683 (2016). "A timely objection serves an important purpose" in that "it gives the court opportunity to reconsider the sentence in light of the defendant's complaint that it is premised upon improper factors, or otherwise to clarify the reasons for the sentence in order to alleviate such concerns." *Reiger v. State*, 170 Md. App. 693, 701 (2006). Where a defendant fails to object "during or after" the court's announcement of its sentence, any claim that the court relied on impermissible considerations is not preserved for appellate review. *See Ellis v. State*, 185 Md. App. 522, 550 (2009). Appellant did not object or assert at any time during or after the court's announcement that the court had relied on impermissible considerations. Accordingly, appellant's claim that the court was motivated by impermissible considerations is not preserved for our review.

Even if preserved, appellant's claims are without merit. He claims that the court improperly relied on Ms. M.'s statements that (1) appellant had "strangled" her in the instant case and on a prior occasion in December 2019, (2) appellant had, in the past, held

a gun to her head, and (3) "a slew of additional uncharged and serious allegations" of physical and emotional abuse contained in her victim impact statement.

In reviewing the considerations of a sentencing judge, we examine the record to determine whether the sentencing court was motivated by impermissible considerations or whether its comments might lead a reasonable person to infer that it might have been motivated by such considerations. *See Ellis*, 185 Md. App. at 551. In fashioning a sentence, our Court has explained,

> In Maryland, a sentencing judge is vested with almost boundless discretion. A defendant's sentence *should be individualized to fit the offender and not merely the crime*. Consequently, the defendant's sentence should be premised upon *both the facts and circumstances of the crime itself and the background of the individual* convicted of committing the crime.
>
> The trial court is not limited to a consideration of prior convictions. To aid the sentencing judge in fairly and intelligently exercising the discretion vested in him, the procedural policy of the State encourages him to consider information concerning the convicted person's reputation, past offenses, health, habits, mental and moral propensities, social background and any other matters that a judge ought to have before him in determining the sentence that should be imposed. A trial court may consider *uncharged or untried offenses, or even circumstances surrounding an acquittal*.

Anthony v. State, 117 Md. App. 119, 130-31 (1997) (cleaned up) (emphasis added).

We are not persuaded, based on our review of the entire sentencing transcript, that the court was motivated by impermissible considerations when sentencing appellant. In announcing the sentence, the court did not comment on the allegation that appellant had previously assaulted Ms. M. with a gun. It also did not describe the December 2019 assault

as a "strangulation," as Ms. M. and the prosecutor characterized.[7] Moreover, it made no reference to other allegations of emotional and physical abuse described by Ms. M. during her victim impact statement. Instead, the court's comments were circumscribed to the facts of the underlying case and the history that led to the event on August 9, 2020. It also articulated its consideration for the impact of the event on Ms. M. and S. and appellant's veracity regarding his account of the event. The court expressly stated that the sentence exceeded the guidelines "because of the facts *of this case* and the heinousness of the treatment of the victim *in this case*."[8] (Emphasis added). Accordingly, we are not persuaded that a reasonable person would infer that the court was motivated by impermissible considerations.

[7] To the extent that the court considered the factual predicate for the December 2019 assault, it did not err in considering the details and circumstances surrounding that incident. A sentencing judge "is not limited to reviewing past conduct whose occurrence has been judicially established, but may view 'reliable evidence of . . . [the] details and circumstances of criminal conduct for which the person has not been tried.'" *Logan v. State*, 289 Md. 460, 481 (1981) (quoting *Henry v. State*, 273 Md. 131, 147-48 (1974)). The assertion that appellant "strangled" Ms. M. in December 2019 was based on reliable evidence. At trial, Ms. M. testified under oath that appellant had "choked her" until she was unable to speak or breathe. *See Robson v. State*, – Md. App. –, No. 764, Sept. Term 2022, slip op. at 21 (filed Mar. 8, 2023) ("To be reliable. . . is not necessarily to be credited – by anyone in particular. To be reliable is simply to be believable. Not necessarily believed, just believable. Reliability requires that the evidence be legally competent to be credited.").

[8] To the extent that the court considered Ms. M.'s testimony that appellant "strangled" her on August 9, 2020, even though he was acquitted of first-degree assault, the court was within its discretion to do so based on her trial testimony. *See Jackson v. State*, 230 Md. App. 450, 470 (2016) ("since an acquittal does not necessarily establish the untruth of all evidence introduced at the trial of the defendant, the sentencing judge may also properly consider reliable evidence concerning the details and circumstances surrounding a criminal charge of which a person has been acquitted.") (citation and internal quotation marks omitted); *see also Robson*, n.7, *supra*.

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