Circuit Court for Prince George's County
Case No. CT201026X

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 686

September Term, 2023

MARLES ANTONIO HERNANDEZ

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Zic,

JJ.

Opinion by Zic, J.

Filed: February 28, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

After a jury trial in the Circuit Court for Prince George's County, appellant Marles Antonio Hernandez was found guilty of first-degree rape, three counts of second-degree rape, three counts of third-degree sexual offense, and sexual abuse of a minor. Eleven months before trial, the State filed notices of enhanced penalties. Mr. Hernandez was sentenced to life in prison without the possibility of parole for Count I, first-degree rape; a consecutive sentence of life for Count II, second-degree rape; a consecutive life sentence for Count IV, rape in the second-degree; a consecutive life sentence for Count VI, second-degree rape; a consecutive sentence of ten years for Count VII, third-degree sexual offense; and a consecutive sentence of 25 years of active incarceration for Count VIII, sexual abuse of a minor. All remaining counts were merged for sentencing purposes. Mr. Hernandez was granted permission to file a belated notice of appeal. This appeal followed.

QUESTIONS PRESENTED

Mr. Hernandez presents the following three questions for our consideration, which we have rephrased slightly as follows: [1]

[1] Mr. Hernandez phrased the questions as:

1. Did the trial court err in allowing inadmissible hearsay?
2. Is the evidence insufficient to sustain the conviction for first-degree rape?
3. Did the trial court err in imposing a life sentence without the possibility of parole for first-degree rape?

I. Whether the trial court erred in admitting A.L.'s testimony.

II. Whether the evidence submitted at trial was sufficient to sustain a conviction for first-degree rape.

III. Whether the State failed to provide adequate notice of its intent to seek enhanced penalties.

For the reasons set forth below, we affirm.

BACKGROUND

A.L.[2] lived in a two-bedroom apartment in Hyattsville, Maryland, with her husband B.R., her children C., D., and E., and Mr. Hernandez. A.L., B.R., and their baby, E., slept in the apartment's main bedroom, while C. and D. slept on a bed in the living room. Mr. Hernandez slept in the apartment's second bedroom, which he had rented from A.L. and her family for several years. At some point in either the late evening of Friday, January 11, or early morning Saturday, January 12, 2019, D., A.L.'s then five-year-old son, woke up and told A.L. that Mr. Hernandez had been sexually assaulting him.

A.L.'s sister called the police the following Monday, January 14, 2019. responded, and D. spoke alone with an officer in one of the apartment building's stairwells. Other officers went to Mr. Hernandez's bedroom and found the door locked. The officers announced themselves and knocked on the door for more than 25 minutes.

[2] A.L. testified through a Spanish-language interpreter at trial. Additionally, to protect the children's privacy, we use anonymized initials to refer to A.L. and her family members.

Mr. Hernandez eventually opened the door, entered the hallway, and was detained and later arrested without further incident. A.L., B.R., C., D. and E. were then taken by the police to "some offices." A.L. was also told to take D. to the hospital, which she did.

D.'s Testimony

Mr. Hernandez's trial began in December 2022. Both A.L. and D., who was nine years old at the time of trial, testified, with D. testifying first, and A.L. taking the stand immediately after.

D. testified that when he was five years old, he lived in an apartment with his parents, his brothers, C. and E., and "the man[,]" whom he called "Bad Bunny" and "Tony." D. stated that he slept in his parents' room sometimes, and other times, in the man's room. He was not sure if he and C. sometimes slept in the living room. D. recalled that he would play with the man and with toys that were in the man's room. D. identified photographs of the man's room, and remembered playing with toy airplanes and the man's phone and watching television. D. stated that the man forced D. to watch videos of "people taking their clothes off and showing their penis."

D. also testified that the man kept snacks in his room, sharing them with D. but not C. and E. According to D., the man offered him snacks "[b]ecause [the man] wanted [him] to take off [his] clothes and go in the bed with [the man]." D. said that when he took off his clothes and got into the man's bed, the man would sometimes put "his penis, like, in [D.'s] butt." D. remembered that before the man put his penis in D.'s butt, the man would put "a baggy on his penis" and then put lotion on the baggy. D. said that the

man also put his fingers in D.'s butt. D. further explained that the man "would wash [D.]" in the apartment's bathroom "and do the same thing he did in the bed." D. said that sometimes, the man would close the toilet seat lid, "grab[] [D.] by the armpit[,] and [] carr[y] [D.] onto his -- like, his penis."

D. stated that the man touched D.'s penis with his mouth "[o]nly in the bedroom." While D. testified that the man put his penis in D.'s butt "a lot of times," he could not recall how many times the man put his mouth on D.'s penis or used his fingers. D. stated that the man also sometimes used a red screwdriver instead of his fingers or penis. According to D., this happened "[j]ust a little bit of times." D. remembered that one time, D. "cried in the bed at nighttime" and the man "shushed" him.

D. explained that he did not tell A.L. about what was happening sooner because the man told D. he would do "something bad" if D. ever told anyone. D. said the man told him that if the police ever came, he should tell them that D.'s brother, C., was touching him, although C. never did. D. did not remember what made it okay for him to tell his mother what happened, but that he told "everything to [A.L.], like, what the man did."

D. was then asked to look around the courtroom and say if he saw the man he used to call "Tony" or "Bad Bunny." When asked, "[d]o you see him here," D. responded, "[n]o."

A.L.'s Testimony

According to A.L., out of the three children, Mr. Hernandez only interacted with D. A.L. believed Mr. Hernandez to be "very close" to D. Mr. Hernandez gave D. clothing, toys, candy, food, and hair gel, and had D. sit on his lap to see his tablet. Mr. Hernandez also took D. out of the home, once to a supermarket and once to a party, and would sometimes clean D. in the apartment's bathroom. A.L. explained that she allowed Mr. Hernandez to do these things because she saw Mr. Hernandez as a helping hand and a father-figure to D., and therefore thought D. would be safe. Mr. Hernandez previously told A.L. that he was close to D. because he loved D. "as a son." A.L. also testified that D. referred to Mr. Hernandez as "el muchacho" or "Tony."

On one occasion, A.L. left the apartment and told her oldest child to watch over the other two children. Mr. Hernandez was also in the apartment. When she returned home, A.L. found Mr. Hernandez in the bathroom, dressed "in a towel[,]" and D.[,] naked in the bathtub. Mr. Hernandez explained that D. wanted to bathe with him. A.L. told Mr. Hernandez that she "[didn't] like [him bathing D.,] and that [she is] the one that bathes [D.]" A.L. then instructed Mr. Hernandez to take D. out of the bathtub.

One night, after everyone in the apartment had gone to sleep, A.L. heard a scream coming from Mr. Hernandez's bedroom. As she opened her bedroom door, A.L. saw that Mr. Hernandez had already come out of his bedroom. She also saw D., who normally wore pajamas or underwear and a tank top to bed, standing in Mr. Hernandez's room, naked. A.L. asked D. why he had screamed, but he did not reply. Mr. Hernandez told

A.L. that D. had come into his room wanting to watch a movie. At some point after this incident, A.L. told Mr. Hernandez to move out of the apartment. He refused.

A.L. moved a bed into the main bedroom for D. and began to notice changes in his behavior. A.L. testified that D. would frequently wake up at night crying, and almost always screaming. He started to wet the bed more. D. also liked to hold A.L.'s hand and have her hug him. According to A.L., "[h]e didn't want [her] to let go." A.L. asked D. what was going on, but he would not say.

Other Trial Testimony

The police officer who spoke with D. in the stairwell of the family's apartment building also testified at trial. According to the officer, who communicated with D. in Spanish, D. did not have the vocabulary to explain the situation, and instead used his fingers and hands to show what happened. D. motioned with his index finger, pointing to his butt and making sounds to indicate an object "like a power tool, something like that, or, like, a screwdriver, automatic screwdriver, something like that." The officer also spoke with A.L. after D. on the same Monday evening, testifying that he thought A.L.'s report to police was similar to D.'s report. Based on his conversation with D., the officer believed there could be evidence, such as a computer or other object, in Mr. Hernandez's bedroom.

After the officer interviewed D. in the stairwell, a police detective interviewed D. with a social worker present According to the detective, D. made detailed disclosures of a sexual nature, which were consistent with the statements D. previously made to the

officer in the stairwell. The detective testified that, using hand gestures, D. described "a handheld tool." D. put "his hand against the wall and twist and turn, like twisting his wrist." D. told the detective that he knew the man as "the Muchacho," "the guy" or "Tony[,]" and said the man lived in the same apartment as he did. When asked when the man last did this to him, D. replied, "one day[,]" and then, "[y]esterday morning."

After being interviewed by police, D. was taken to a hospital emergency room and examined by a forensic nurse. At trial, the forensic nurse who examined D. testified as an expert in sexual assault examinations. During the examination, D. told the nurse that he was touched in his rectal area with a screwdriver. The nurse wrote out a narrative statement provided by D. during the examination, which she included in her examination report:

> "Just one time, the man, he took like this," and he was displaying his forefinger, "and he put it in like this," and he was pointing to his rectum and displaying inserting his finger into a closed fist, and it hurt. And when he took it out, there was blood, and the man wiped it off. And then he had the small thing that looks like a hammer that he put in my private part." And he was pointing to the rectum. "And I told my mom that he does this to me and she didn't get mad. I told her something and he's in jail. I told the police, and there's something in the closet and it wasn't there. I was looking for the screwdriver and it wasn't there."

D. did not report to the nurse any contact with a penis or oral contact between him and another person. The nurse asked D. if the man touched him anywhere else on his body, and D. responded that the man wanted to touch his testicles but D. did not want to do that. D. told the nurse that "Tony" had touched him, and that D. knew "Tony"

because D. lived with him. When the nurse asked D. where, specifically, he was touched, D. "put his finger like this . . . and he pointed to his rectal area." According to the nurse, when asked what he was touched with, D. said, "'[w]ith this,' and he showed his forefinger, and like this. 'That tool thing that you turn into the wall.' When asked if it was a screwdriver, he said, 'Yes, that thing.'" When the nurse asked how often this happened, D. said, "Every day, I don't remember, I told my mom and she told the police."

During the rectal examination, the nurse did not see any indication of bodily fluids. She observed that D.'s rectum had four healed tears. While the nurse did not see any active bleeding, she observed redness and irritation in the rectal area. When she touched D.'s anus, it relaxed and opened up into the rectal cavity. The nurse testified that the anus should be closed, but might be dilated by "something being inserted into the area." The nurse also explained that while certain illnesses can also cause lack of sphincter control, these illnesses are not often seen in young children. Constipation, the nurse testified, could cause anal dilation, but would need to be chronic and occurring "all day, every day" to do so.

On January 23, 2019, a search warrant was obtained for and executed on Mr. Hernandez's bedroom. Police officers obtained a description of a black and red screwdriver and the search revealed screwdriver sets under the bed and on top of a desk. Officers also found "lots of toys," diapers, and a tablet in the room.

The Prince George's County Police Department's Forensic Science Division's DNA laboratory later performed testing on anal and peri-anal swabs and inner anus swabs obtained from D. No DNA other than D.'s was found. The swabs were likewise negative for the presence of sperm. DNA testing was also performed on the black and red screwdriver located in Mr. Hernandez's bedroom, but no DNA profile was obtained. The DNA laboratory's manager explained at trial that "just the act of wiping a surface can substantially remove DNA from the item[.]"

We supplement our analysis with additional facts as appropriate.

DISCUSSION

I. MR. HERNANDEZ WAIVED THE ISSUE OF A.L.'S ALLEGEDLY INADMISSIBLE TESTIMONY.

Mr. Hernandez first contends that the trial court erred in admitting A.L.'s testimony about what D. told her because it was inadmissible hearsay. Specifically, Mr. Hernandez argues that "under the guise of a prompt complaint, [A.L.] was allowed to recount in great detail [D.'s] allegations." According to Mr. Hernandez, A.L.'s testimony "far exceeded the bounds of a prompt complaint of sexual assault, and violated the purpose of the prompt complaint exception." Mr. Hernandez further maintains that the court and counsel understood that the court's initial ruling on defense counsel's motion *in limine* was final and that any contemporaneous objection would be merely *pro forma*.

The State responsively maintains that A.L.'s testimony was admissible under Maryland Rule 5-802.1(d) as a prompt complaint of a sexual assault, because the testimony was not "too narratively detailed[.]"

A. Standard of Review

We ordinarily review admissibility of evidence under an abuse of discretion standard. *Colkley v. State*, 251 Md. App. 243, 263, *cert. denied*, 476 Md. 268 (2021). Whether evidence qualifies as an exception to the rule against hearsay presents a question of law, which we review *de novo*. *Wise v. State*, 471 Md. 431, 442 (2020). We scrutinize the circuit court's factual findings for clear error. *Gordon v. State*, 431 Md. 527, 538 (2013). Even when evidence was improperly admitted, the admission must be prejudicial to warrant reversal. Md. Rule 5-103(a) ("Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling[.]"). Paramount here, however, this Court will not decide any issue unless it "plainly appears to have been raised in or decided by the trial court." Md. Rule 8-131(a).

B. Discussion

Pursuant to Maryland Rule 4-323(a), "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise the objection is waived." The Supreme Court of Maryland has explained the applicability of the contemporaneous objection rule and its applicability to circumstances involving motions *in limine*:

> When the evidence, the admissibility of which has been contested previously in a motion *in limine*, is offered at trial, a contemporaneous objection generally must be made pursuant to Maryland Rule 4-323(a) in order for that issue of admissibility to be preserved for the purpose of appeal.

Reed v. State, 353 Md. 628, 638 (1999). *See also Klauenberg v. State*, 355 Md. 528, 539 (1999) ("[W]hen a motion *in limine* to exclude evidence is denied, the issue of the admissibility of the evidence that was the subject of the motion is not preserved for appellate review unless a contemporaneous objection is made at the time the evidence is later introduced at trial."). Thus, "to preserve an objection, a party must either object each time a question concerning the matter is posed or . . . request a continuing objection to the entire line of questioning[.]" *Wimbish v. State*, 201 Md. App. 239, 261 (2011) (internal quotation omitted), *abrogated on other grounds*, *State v. Davis*, 249 Md. App. 217 (2021).

This said, "objections need not be reasserted if [they] would only spotlight for the jury the remarks of the State.'" *State v. Robertson*, 463 Md. 342, 366-67 (2019) (internal citation and marks omitted). As we explained in *Hall v. State*, "an objection normally is expected each time the excluded evidence would be offered[,]" but "that principle is meant to guard against contextual sandbagging, to allow the trial court an opportunity to consider whether the evidence offered and testimony elicited since an earlier ruling supports its decision or compels a change." 233 Md. App. 118, 129 (2017).

The rare "exception to the general rule for a contemporaneous objection is when it is apparent that any further ruling would be unfavorable, *i.e.*, an objection would be futile." *Wright v. State*, 247 Md. App. 216, 228 (2020), *aff'd*, 474 Md. 467 (2021). To determine whether an objection is futile, we consider the "temporal proximity" to when the motion *in limine* was made. *See Clemons v. State*, 392 Md. 339, 363 (2006)

(requiring a party to restate objection "minutes after he originally" objected is unnecessary); *Watson v. State*, 311 Md. 370, 376 n.1 (1988) ("requiring [the defendant] to make yet another objection only a short time after the court's ruling to admit the evidence would be to exalt form over substance."); *Dyce v, State*, 85 Md. App. 193, 198 (1990) (objection did not need to be renewed when the court's ruling on defendant's motion *in limine* was separated by only 14 pages of trial transcript, and "[n]othing elicited during the [intermittent] examination provided any information bearing upon the exercise of the court's discretion to admit evidence" objected to in the motion *in limine*); *see also Jamsa v. State*, 248 Md. App. 285, 310 (2020) (the exception "is a narrow one and applies only when the prior ruling by the court . . . is in close proximity to the point where the offending evidence was introduced.").

Here, during D.'s testimony at trial, defense counsel moved *in limine* to request that A.L., who had not yet testified, be precluded from testifying "to anything [D.] told her." Defense counsel specifically stated, "[a]nd we'd make, of course, the appropriate objections at that time." The State opposed the request on the ground that there was an exception to the rule against hearsay "for a prompt report of a sex offense, which this was" and so "everything comes in." Mr. Hernandez argued that A.L.'s statement was not prompt because the police were not called until after A.L. called her sister, "who ended up calling the police." The court agreed with the State, stating:

> So I believe the State is correct, and it is appropriate. So I'm going to overrule the objection.

> Obviously, I will note your objection. And make your objection at the time, and I will note it. But I think it's appropriate pursuant to the exception, along with the case law.

The court asked counsel if there was "anything else that we need to deal with before that[,]" and the following exchange occurred:

> [DEFENSE]: No, Your Honor. Nothing else that we'd need to deal with. I would just request that if I have to make the objections for the record with the mother writing that thing, that I might just be allowed to approach and then make the objection so that it's not an objection overruled immediately in front of the jury.
>
> THE COURT: Sure. Sure.
>
> [DEFENSE]: Thank you.
>
> THE COURT: Yeah, that's fine. You can just go -- or you could even say, "For the basis stated on the record earlier," or -- either one.
>
> [DEFENSE]: Uh-huh.
>
> THE COURT: I mean, it doesn't really matter much to me. So --
>
> [DEFENSE]: Thank you very much, Your Honor.
>
> THE COURT: -- if you want to approach, that's fine. All right. Anything else?
>
> (No response.)

D.'s cross-examination resumed, and the State questioned him on re-direct. A.L. was then called as a witness for the State. When asked what D. told her the night he woke up and said he wanted to talk to her, A.L. testified in detail about what D. told her.

At no point during A.L.'s testimony about what D. said did defense counsel object. The State asked questions about A.L.'s call to a family member after her conversation with D., and about another situation when Mr. Hernandez brough D. food. State then asked additional questions about D.'s disclosure:

> [STATE]: I want to take you back a second. You said that when [D.] woke you up to tell you that night what was happening, he was telling you what "el muchacho" did.
>
> [A.L.]: Yes.
>
> [STATE]: Who's "el muchacho?"
>
> [A.L.]: Marlen. [sic]
>
> [STATE]: Why did [D.] call him "el muchacho"?
>
> [A.L.]: I don't know. He would call him "muchacho" or Tony. He said that he liked him to call him that, not to call him anything else.

After this testimony, defense counsel requested a sidebar:

> [DEFENSE]: We previously (inaudible) objection for timeliness reporting. She did not testify to (inaudible). There was actually several incidents that she talked about where she (inaudible). And there was no -- at no point did she say I needed this information to (inaudible), which (inaudible).
>
> THE COURT: Okay. So what do you mean it's very narrow?
>
> [DEFENSE]: All of these things that she's been saying has been considered hearsay, and it does not fall under the sexual assault exception (inaudible).
>
> THE COURT: So which parts are --
>
> [DEFENSE]: So she (inaudible).

THE COURT: Okay.

[DEFENSE]: (Inaudible).

THE COURT: All right. So here's the issue. If you thought it was beyond the exception, you should have objected when she said it, not now.

* * *

[DEFENSE]: So I have made (inaudible) an objection to hearsay (inaudible) for the purposes of (inaudible).

THE COURT: Correct.

[DEFENSE]: However, the testimony (inaudible) indicating that it's going toward (inaudible). So I would object (inaudible) hearsay, and I have previously made an objection and testified that all of this would come out and would be considered hearsay. And I have found that the (inaudible) only thing we heard so far, nothing regarding (inaudible).

[STATE]: May I respond?

THE COURT: Go ahead.

[STATE]: So we're now to the question of what the name was. I believe the Court's ruling was that, as a prompt report, a disclosure of sexual assault comes in. The Court also said, if you have an objection, make it. And counsel even asked, "Can we object and come up before you make a ruling?"

And Your Honor said, "Of course, you can object when you find appropriate, and you guys can come up." We're now, like, three questions past anything about a prompt report. So we're now objecting to questions -- answers three questions ago.

THE COURT: So if you're objecting to this last answer --

[DEFENSE]: (Inaudible.)

[STATE]: She did.

> THE COURT: So the whole -- the whole exception is not her reporting it.
>
> [STATE]: It's timely reporting --
>
> THE COURT: Excuse me. Thank you. I'm going to speak. Then you can speak. Thanks.
>
> So the whole point of the statute is that it's a complaint of sexually assaultive behavior. It's not reporting to the police. It is a statement of prompt complaint of sexually assaultive behavior, not going to the police, not any of that.
> So what she has testified to is that her son woke up in the middle of the night -- or woke her up in the middle of the night and explained what, allegedly, the Defendant was doing to him for a period of time. At this point, the question is what [D.] called him.
>
> I'm going to sustain it as to [D.] saying he liked to be called "muchacho" or Tony, because that is beyond the statute. And that you can ask what her testimony of him -- of -- excuse me -- her testimony of what [D.] called the Defendant is admitted.
>
> But the part about the Defendant saying that's what he wanted to be called because he liked it and nothing else, that part will be sustained.

We highlight that defense counsel told the circuit court that the appropriate objections to A.L.'s testimony about what D. told her would be made when the evidence was offered. Defense counsel did not object, however, when the evidence was offered, but instead waited to object until questions were asked about D.'s references to "el muchacho." Therefore, because the objection came after A.L.'s testimony, the circuit court noted that if the defense thought A.L.'s testimony was beyond the hearsay exception, counsel "should have objected when she said it, not now."

We conclude that Mr. Hernandez's objection is distinguishable from cases this Court and the Supreme Court of Maryland have held Rule 4-323(a) does not apply. To start, the circuit court stated in response to defense counsel's motion *in limine* that Mr. Hernandez's objections could be made at the bench, so the worry that continued objections would "only spotlight for the jury the remarks of the State" is irrelevant. *Robertson*, 463 Md. at 366-67. And, unlike in *Clemons*, mere "minutes" did not separate defense counsel's initial request to exclude testimony and the testimony's proffer. 392 Md. at 362-63 (holding that renewal unnecessary when initial objection and disputed testimony separated by only "minutes). Defense counsel also confirmed that she would make the appropriate objections when A.L.'s testimony was offered, but she did not do so until after the State moved to a different line of questioning.

Furthermore, the court's consideration of defense counsel's motion *in limine* here is distinguishable from *Watson*, in which the Supreme Court declined to require a renewal when doing so would "exalt form over substance[,]" because the motion was followed by the remainder of D.'s cross-examination and his redirect examination and most of A.L.'s testimony on direct examination. 311 Md. at 272 n.1. Mr. Hernandez's motion *in limine* and A.L.'s first reference to D.'s disclosure to her are separated by about 30 pages of transcript—approximately double the length at issue in *Dyce*, in which this Court held that the defense's motion *in limine* was sufficiently close to the disputed testimony and did not to require defense counsel to renew the objection. 85 Md. App. at 198. Mr. Hernandez's motion *in limine* did not result in a continuing objection, nor did it

address specifically the issue of whether A.L.'s testimony included more than the basics of D.'s report of sexual assault. For these reasons, noting contemporaneous objections during A.L.'s testimony would be more than *pro forma* here. We, therefore, conclude that Mr. Hernandez's objection was waived, and do not reach the issue of whether the circuit court erred in admitting A.L.'s testimony.

II. THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO MAINTAIN A CONVICTION FOR FIRST-DEGREE RAPE.

Mr. Hernandez contends that the evidence is insufficient to sustain the conviction for first-degree rape because the State failed to prove the use of force or threat of force. At the close of the State's case, and at the close of the evidence, the defense requested judgment of acquittal arguing specifically that the State had failed to prove the "use of force or threat of force" required to prove first-degree rape.[3] The trial court denied those motions. On appeal, Mr. Hernandez argues that the State "failed to present evidence of acts of forcible compulsion by Mr. Hernandez which a jury could conclude compelled [D.] to submit when the act occurred."

In support of his argument, Mr. Hernandez points to the following testimony from D.:

> [STATE]: And when the man was doing these things to you, did he ever -- did he ever say why?

[3] Mr. Hernandez's argument here, as below, is limited to whether the evidence was sufficient to establish the force or threat of force required to prove first-degree rape. He does not challenge the sufficiency of the evidence to sustain his convictions for second-degree rape.

[D.]: No.

[STATE]: No? Did he ever say anything at all?

[D.]: No.

Mr. Hernandez also points to the following portion of D.'s testimony on direct examination:

[STATE]: Did you tell your mom after it had happened?

[D.]: Yeah.

[STATE]: Yes? And why didn't you tell your mom sooner?

[D.]: Because I thought he would, like, kill me.

[STATE]: You thought he would kill you?

[D.]: Or hurt my mom.

[STATE]: Or hurt your mom? Why did you think those things?

[D.]: I just thought it, because I was a little kid.

[STATE]: You were a little kid? Did he ever say or do anything to make you think that?

[D.]: No. He just said he was going to do something bad.

[STATE]: Say that -- what did you say?

[D.]: He said -- he just said he was going to do something bad.

[STATE]: Okay. So he said he was going to do something bad if what? I don't under -- what was he talking about when he said that?

> [D.]: He didn't tell me what he meant. He just said he'll do something bad to me.
>
> [STATE]: He'll do something bad to you if what? If you told your mom?
>
> [D.]: Yes.
>
> [STATE]: Okay. But he never said he was going to kill you; right?
>
> [D.]: Yeah. He never said --
>
> [STATE]: He never said that. He just said he was going to do something bad?
>
> [D.]: Yes.
>
> [STATE]: But you thought maybe he would kill you or hurt your mom?
>
> [D.]: Yes.

Mr. Hernandez argues that there was no other evidence of conduct by Mr. Hernandez at the time of the rape that would constitute either physical force or a threat. Moreover, the purported threats were aimed at keeping D. from disclosing, rather than compelling him to submit to, the conduct. As a result, Mr. Hernandez contends, the evidence was insufficient to sustain the conviction for first-degree rape.

Citing to *Hazel v. State*, 221 Md. 464, 469 (1960), the State maintains that based on the evidence, namely, that Mr. Hernandez lived with D. and his family, Mr. Hernandez was in his thirties while D. was five-years of age when the abused ended, Mr. Hernandez's warning that he would "do something bad" to D., and use of a screwdriver

to carry out the rapes sufficiently satisfies the force element required for a conviction for first-degree rape. As explained further below, we agree with the State.

A. Standard of Review

"When reviewing a criminal conviction for sufficiency of the evidence, we will consider the evidence adduced at trial sufficient if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime[] beyond a reasonable doubt." *Beckwitt v. State*, 249 Md. App. 333, 351 (2021) (internal citation and brackets omitted). Our concern is "only with whether the [verdict was] supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994). "Although circumstantial evidence alone is sufficient to sustain a conviction, the inferences made from circumstantial evidence must rest upon more than mere speculation or conjecture." *Hall*, 233 Md. at 137 (internal citation omitted).

B. Discussion

Maryland Code Ann., Crim. Law ("CR") § 3-303(a)(ii) (2002, 2012 Repl. Vol., 2017 Supp.) defines first-degree rape, in pertinent part, as "engag[ing] in a sexual act with another by force, or the threat of force, without the consent of the other[.]" The force or threat of force element of first-degree rape may exist without violence. *State v.*

Mayers, 417 Md. 449, 469-70 (2010). "[R]esistance is relative and should be measured by the fact-finder." *Id.* at 468. In *Hazel*, the Supreme Court of Maryland explained:

> Force is an essential element of the crime and to justify a conviction, the evidence must warrant a conclusion either that the victim resisted and her resistance was overcome by force or that she was prevented from resisting by threats to her safety. But no particular amount of force, either actual or constructive, is required to constitute rape. Necessarily that fact must depend upon the prevailing circumstances. As in this case force may exist without violence. If the acts and threats of the defendant were reasonably calculated to create in the mind of the victim—having regard to the circumstances in which she was placed—a real apprehension, due to fear, of imminent bodily harm, serious enough to impair or overcome her will to resist, then such acts and threats are the equivalent of force.

221 Md. at 469 (citations omitted). This was the standard of proof that the State faced and, in our view, met.

The evidence presented at trial was sufficient to allow the jury to find the required force or threat of force for first-degree rape. D. told A.L. that he did not want to engage in sexual acts. He also told the forensic nurse that he did not want the man who lived in his family's apartment to touch his testicles. D. stated that, sometimes, the man who lived in his family's apartment would wash him and do in the bathroom "the same thing he did in the bed." According to D., sometimes when he and the man were in the bathroom, the man would close the toilet lid and sit on it. The man would grab D. by the armpits, carry him, and place him on the man's penis.

In addition to the physical force exerted by Mr. Hernandez against D., D. testified that the man who lived in his family's apartment threatened "to do something bad." D.

testified that he thought the man would kill him or hurt his mom because he "was a little kid." Indeed, at the time of the incidents at issue, D. was a five-year-old child and Mr. Hernandez was a 39-year-old man. According to A.L., D. told her that Mr. Hernandez had threatened to kill him and her and to abuse his younger brother. Because Mr. Hernandez was an adult who lived with D. and his family, it was reasonable for D. to believe that Mr. Hernandez had access to him and his family and could act on his threats at any time.

Additionally, Mr. Hernandez's use of an "automatic" screwdriver to effectuate at least some of the rapes provided evidence of the use or threat of use of force[.]" CR § 3-303(a)(ii). The forensic nurse's testimony established that D. suffered injury to his rectal area and that he had anal dilation. When asked to explain what might cause anal dilation, the nurse said, "something being inserted into the area." The nurse further explained that anal dilation is uncommon in young children absent insertion, and that dilation would cause D. significant discomfort and constipation.

Based on Mr. Hernandez's use of physical force against D., his statement to D. that he would "do something bad" to D., his proximity and access to D. and his family, the difference in age between him and D., and his use of a screwdriver to carry out at least some of the rapes, we conclude that a rational trier of fact could reasonably infer that Mr. Hernandez's conduct was calculated to instill fear in D., thus contributing to the use or threat of use of force. *See Hazel*, 221 Md. at 469. Therefore, we hold that there was sufficient evidence to prove first-degree rape.

III. MR. HERNANDEZ'S SENTENCING CHALLENGE IS NOT PRESERVED.

Last, Mr. Hernandez contends that the circuit court erred in imposing a sentence of life without the possibility of parole for first-degree rape because the State failed to comply with the mandatory notice requirement under CR §§ 3-303(d) and (e). As a result, Mr. Hernandez argues that his sentence was illegal and, pursuant to Maryland Rule 4-345(a), may be corrected at any time. The State argues that Mr. Hernandez failed to preserve the alleged notice issue because he did not bring it to the attention of the circuit court. Nonetheless, the State claims Mr. Hernandez received adequate notice of the State's intention to seek enhanced penalties, and that any error was harmless.

A. Standard of Review

"We 'address the legal issue of [] sentencing . . . under a de novo standard of review.'" *Bishop v. State*, 218 Md. App. 472, 504 (2014) (quoting *Blickenstaff v. State*, 393 Md. 460, 683 (2006)). Ordinarily, this Court will not a decide non-jurisdictional issue "unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). And, while "[a] defendant may attack the sentence by way of direct appeal, or 'collaterally and belatedly' through the trial court, and then on appeal from that denial[,]" *Bishop*, 218 Md. App. at 504 (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)), we review only an allegedly illegal sentence for the first time on appeal. Md. Rule 9-345(a); *Chaney*, 397 Md. at 466.

B. Discussion

Maryland law is clear that the State's imperfect compliance in a notice of an enhanced sentence creates "a procedural deficiency in the sentence but not a sentence in which the circuit court did not have statutory power to impose." *Bailey v. State*, 464 Md. 685, 697 (2019). Inadequate notice—or no notice at all—"is a procedural flaw in the sentencing process[]" that is "no more an inherent illegality in the sentence itself than would be the insufficiency of the evidence to support the conviction or an erroneous jury instruction or the deprivation of a constitutional trial protection." *Mack v. State*, 244 Md. App. 549, 584 (2020). Thus, when there exists a flaw in notice, Maryland Rule 4-345(a) does not apply and "[t]he traditional preservation requirement still abides." *Id.* at 584.

Here, on January 18, 2021, the State filed a "Notice of Intent to Seek Enhanced Penalties." The notice was served on Mr. Hernandez's then-attorney, who was later replaced and did not serve as defense counsel at trial. The notice stated:

> You are hereby given notice pursuant to Criminal Code Section 3-303(d)(4) of the Annotated Code of Maryland, that upon conviction in the above-referenced case for the crime of first[-]degree rape, the State of Maryland intends to seek the sentence of twenty-five (25) years without the possibility of parole. Additionally, pursuant to Criminal Code Section 3-304(4)(i) of the Annotated Code of Maryland, the Defendant is subject to maximum sentence of life imprisonment without the possibility of parole.
>
> This notice applies to Count One (1), First Degree Rape.

CR § 3-303(d), referred to in the first sentence of the notice, addresses first-degree rape. It provides, in relevant part:

> (d)(1) Except as provided in paragraphs (2), (3), and (4) of this subsection, a person who violates subsection (a) of this section is guilty of the felony of rape in the first degree and on conviction is subject to imprisonment not exceeding life.
>
> * * *
>
> (d)(4)(i) Subject to subparagraph (iv) of this paragraph, a person 18 years of age or older who violates subsection (c) of this section is guilty of the felony of rape in the first degree and on conviction is subject to imprisonment for not less than 25 years and not exceeding life without the possibility of parole.
> (ii) A court may not suspend any part of the mandatory minimum sentence of 25 years.
> (iii) The person is not eligible for parole during the mandatory minimum sentence.
> (iv) If the State fails to comply with subsection (e) of this section, the mandatory minimum sentence shall not apply.
>
> (e) If the State intends to seek a sentence of imprisonment for life without the possibility of parole under subsection (d)(2), (3), or (4) of this section, or imprisonment for not less than 25 years under subsection (d)(4) of this section, the State shall notify the person in writing of the State's intention at least 30 days before trial.

CR § 3-304, referenced in the last sentence of the notice, is a statute pertaining to second-degree rape, although neither the version of the statute in effect at the time, nor the current version of the statute, includes a paragraph or subsection (4)(i). That statutory reference conflicted with the last sentence of the notice, which indicated it applied to the charge set forth in count one which alleged first-degree rape.

On December 12, 2022, prior to the start of trial, the prosecutor asked to put on the record the terms of a plea offer that Mr. Hernandez rejected. The following colloquy occurred:

[STATE]: [. . .] The State would also [. . .] like to put the plea on the record prior to starting, Your Honor.

THE COURT: Go ahead.

[STATE]: Your Honor, in this case before the prior trial date in June, [. . .] the State conveyed a plea where the Defendant could choose to plead guilty to either sex abuse of a minor, or rape in the second-degree. [. . .] [T]he State agreed to cap itself at the bottom of the guidelines, being five years. Defense was free to allocate for anything they wanted, including terms of probation.

To be, [. . .] for a full record, Your Honor, that plea was not conveyed to the Defendant. So when the State discovered that, in like October, the State offered the plea again, again, to avoid any post-conviction issues, for two weeks. Those two weeks came and went. The plea, again, was not conveyed to the Client. The State left that plea open for one more week. On November 1st, 2022, the State received a formal rejection in writing from Defense Counsel.

And, Your Honor, I just want to place on the record that the Defendant is looking at life without the possibility of parole, as to Count 1, because the State filed enhanced penalties. The State additionally filed enhanced penalties as to Count 2, Count 4 and Count 6. All of those counts he would face now a maximum of life in prison. And each of those counts would carry the first 15 years without any parole eligibility.

THE COURT: All right. [. . .] Mr. Hernandez, are you -- you've been -- you were extended that plea offer, is that correct?

[MR. HERNANDEZ]: Uh, yes. Yes.

THE COURT: And you have rejected it, is that correct?

[MR. HERNANDEZ]: That is correct.

THE COURT: Okay. And you're aware of the enhanced penalties that the State has filed?

> [MR. HERNANDEZ]: No.
>
> THE COURT: Okay. So, the State has filed, with respect to Count 1, an enhanced penalty that [. . .] you could possibly be facing life without parole. With respect to Counts 2, 4 and 6, the State has filed a notice of enhanced penalty, which I believe each of those counts would carry life. And the first 15 years would be without the eligibility of parole. Would you like to discuss that with your Attorney?
>
> [MR. HERNANDEZ]: All right.
>
> THE COURT: All right. Go ahead and put the husher on please.
>
> (Mr. Hernandez conferring with [defense counsel].) (Long pause).
>
> [DEFENSE]: I have spoke with my Client. He is indicating he has no questions, and would like to proceed today with trial.
>
> THE COURT: Okay. All right, let's go ahead and bring our jurors in.

The record makes clear that Mr. Hernandez failed to raise this claim in the circuit court. Because Mr. Hernandez argues a procedural error, *i.e.*, lack of adequate notice, the sentence itself was not illegal, and the "[t]he traditional preservation requirement still abides." *Mack*, 244 Md. App. at 584. As a result, the issue of inadequate notice was not timely preserved for our consideration, and we do not reach it. Md. Rule 8-131(a).

CONCLUSION

We hold that Mr. Hernandez waived his objection to the admission of A.L.'s testimony regarding D.'s report to A.L. of the sexual assault. We also hold that that there was sufficient evidence in the record to support a conviction for first-degree rape, and conclude that Mr. Hernandez failed to preserve his procedural challenge to the sentence imposed by the circuit court. Accordingly, we affirm.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

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

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0686s23cn.pdf