UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1831

September Term, 2013

ELIAS McCREA

v.

STATE OF MARYLAND

Meredith,
Woodward,
Sharer, J., Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: May 21, 2015

Following a two-day jury trial in the Circuit Court for Prince George's County, Elias McCrea, appellant, was convicted on charges of first- and second-degree rape; first-, third-, and fourth-degree burglary; second-degree assault; false imprisonment; malicious destruction of property; and violating a protective order.[1]

In his timely appeal, appellant raises a number of issues for our consideration, which we have refined:

> I. Did the trial court abuse its discretion by denying appellant's motion for mistrial?
>
> II. Did the trial court abuse its discretion by improperly allowing the admission of hearsay evidence?
>
> III. Did the trial court abuse its discretion by improperly limiting the scope of defense counsel's cross-examination of the victim?
>
> IV. Did the circuit court fail to comply with rules and policies governing rulings on requests for a continuance?
>
> V. Did the circuit court err by failing to merge appellant's convictions for first-degree burglary, false imprisonment, and malicious destruction into his other convictions?

Because we conclude that the trial court failed to properly merge appellant's convictions for first-degree burglary and false imprisonment into his conviction for first-

[1]The court sentenced appellant to life in prison on the rape conviction, a concurrent sentence of 20 years for first-degree burglary, one year for false imprisonment, 90 days for violation of the restraining order, and 60 days for malicious destruction of property. For sentencing purposes, the circuit court merged second-degree rape and second-degree assault into first-degree rape, and merged third-degree and fourth-degree burglary into first-degree burglary.

degree rape, we shall vacate the sentences imposed for those offenses. Discerning no other legal error or abuse of discretion, we shall affirm the judgments of the circuit court.

FACTUAL and PROCEDURAL HISTORY

Appellant and the victim in this case were previously involved in a romantic relationship.[2] In June 2012, the victim ended the relationship and obtained a restraining order against appellant. The victim and her adult son moved into a new apartment and she changed her phone number.

On the evening of August 8, 2012, the victim went to bed a little before midnight. In the following early morning hours, she was awakened by a loud banging from the front of her apartment. She secured a knife from beside her bed, opened her bedroom door to investigate, and saw appellant in her apartment. Appellant took the knife away from her, pushed her back toward her bedroom, put his hands over her mouth, and demanded that she be quiet. She struggled and yelled, hoping to attract attention, but the more she resisted, the more aggressive appellant became. Appellant knocked the victim onto her bed, then onto the bedroom floor, and said he wanted oral sex. The victim refused and continued to resist, but was overpowered by appellant, who forced her to engage in non-consensual sexual intercourse.

[2]In the interest of privacy, we shall not disclose the victim's name.

After the assault, in order to appease appellant, the victim agreed to renew their romantic relationship. She asked appellant to leave because her son would be home soon. When she walked with appellant into the front room, she saw that he had "busted [her] door." As soon as appellant left the apartment, the victim called 911 and reported that appellant had broken into her apartment. Moments after she ended the 911 call, appellant returned to her apartment.

Police officers who responded to the 911 call observed that the front door of the victim's apartment appeared to have been kicked in, the doorknob was missing, and the door was ajar. The officers announced themselves, entered the apartment, and found appellant and the victim in the living room. The victim reported to the officers that she had a restraining order against appellant, and that he had broken into her apartment and raped her. The officers placed appellant in handcuffs and removed him from the apartment.

The victim was taken to the police station to file a complaint and make a statement, and then to a hospital for a forensic examination and treatment. A DNA sample recovered from the sheet on the victim's bed was consistent with appellant's DNA.

ANALYSIS

I. Motion for Mistrial

During direct examination of the victim, the State moved to introduce a recording of her 911 call. Defense counsel objected to the jury hearing certain parts of the recording, stating, "As I recall, at some time during the 911 call, she said he was on PCP. I think that's

inadmissible." The court excused the jury, and the prosecutor played a portion of the 911 call for the court and defense counsel. The call includes the following:

> 911 OPERATOR: Okay. When did this occur?
>
> FEMALE VOICE: It just happened. I had to talk my way out of it because he's on PCP.
>
> 911 OPERATOR: Okay. Were weapons involved or mentioned?
>
> FEMALE VOICE: I didn't see anything.
>
> 911 OPERATOR: Does he have any access to any weapons?
>
> FEMALE VOICE: Yes, he does.
>
> 911 OPERATOR: What type?
>
> FEMALE VOICE: I - I guess a - a gun. I don't know, ma'am. I don't know what it is. Can you please have somebody hurry up and come out here?
>
> 911 OPERATOR: Yes, ma'am. I just need to put in the information, okay?
>
> FEMALE VOICE: All right, thank you.
>
> * * *
>
> 911 OPERATOR: Okay. Anyone involved has been using drugs or alcohol?
>
> FEMALE VOICE: He's on PCP, ma'am.

Transcript of 911 call, at 3-4, 7.[3] Defense counsel expanded his objection to encompass the references to weapons. The court agreed that "the drug use and the weapons need to come out." The prosecutor agreed to stop the recording at 1:22 and restart it at 1:40 to "take[ ] care of" all the drug and weapons discussion.

The jury returned to the courtroom and the State played the 911 recording, including at least one of the PCP references.[4] Following this audio, the court instructed the jury to "please disregard that," and defense counsel asked for a bench discussion.

> [DEFENSE COUNSEL]: We just talked about this. I move for a mistrial.
>
> THE COURT: I'm going to deny the request for mistrial. I'll tell the jury they are to disregard that.
>
> [DEFENSE COUNSEL]: Forcefully.
>
> THE COURT: As forcibly as I can.
>
> [PROSECUTOR]: I didn't realize it was in there. I apologize.

The court then instructed the jury as follows:

> Mr. Foreman and ladies and gentlemen, please totally disregard that last comment made by the witness. I think it's obvious there is no way of

[3]The 18 seconds between 1:22 and 1:40 of the recording include the first reference to PCP, and the discussion about weapons, noted above. Audio of 911 call at 1:22-1:40. The second reference to PCP does not occur until about 3:37 of the recording. Audio of 911 call at 3:37-3:42.

[4]The trial transcript is ambiguous about precisely what portion of the 911 call was played for the jury. Appellant's trial counsel has provided a sworn affidavit attesting to his recollection that the jury heard the victim's assertion that appellant was "on PCP."

> knowing, and I don't want you to consider something that hasn't been proven. So just disregard that comment.

At the conclusion of the trial - just two minutes into deliberations - the jury asked to hear the 911 call again. The jury returned to the courtroom, where the State replayed the recording - including a reference to appellant's use of PCP. The trial court instructed the jury, "Please disregard that last statement, once again, for the reason I said yesterday." The State then replayed the 911 call, without the reference to appellant's drug use. Defense counsel renewed the motion for mistrial:

> [DEFENSE COUNSEL]: That's the second time.
>
> [PROSECUTOR]: I apologize. I didn't react fast enough.
>
> THE COURT: I told them again to disregard it. I told them the reason why yesterday. Basically, that was unavoidable. I'm not going to grant a mistrial.

The jury resumed deliberating for about one hour and 15 minutes, and returned verdicts of guilty as to all counts, as we have noted, *supra*.

Appellant asserts that the trial court abused its discretion by denying his motion for a mistrial. He contends that the jury twice heard the "irrelevant and highly prejudicial" portion of the 911 recording that contained the victim's assertion that appellant was "on PCP" at the time of the crime, which had been excluded by the trial court as inadmissible "other crimes" evidence.

Though the record does not indicate what exact portions of the 911 recording were played in each instance, it is clear that, twice, the jury heard the victim assert that appellant

was "on PCP." Both times, defense counsel properly objected and moved for a mistrial. The second time, the court expressly found that the State's failure to stop the recording in time was "unavoidable." In each instance, the court denied the defense request for a mistrial, but provided a curative instruction.

A mistrial is "'an extreme sanction' that courts generally resort to only when 'no other remedy will suffice'" to cure prejudice that is "'so substantial that [the defendant] was deprived of a fair trial.'" *Rutherford v. State*, 160 Md. App. 311, 323 (2004) (quoting *Webster v. State*, 151 Md. App. 527, 556 (2003)); *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State,* 316 Md. 587, 594-95 (1989)). 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.'" *Parker v. State*, 189 Md. App. 474,493 (2009) (quoting *Hunt v. State*, 321 Md. 387, 422 (1990)). When the trial judge gives a curative instruction, the reviewing court must determine whether "'the damage in the form of prejudice to the defendant transcended the curative effect of the instruction[.]'" *Rainville v. State*, 328 Md. 398,408 (1992) (quoting *Kosmas*, 316 Md. at 594).

This Court considers several factors in weighing whether a motion for mistrial was properly denied, including:

> whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire

> prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists . . . .

Rainville, 328 Md. at 408 (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984) (alterations in *Rainville*)). These factors, however, "'are not exclusive and do not themselves comprise the test.'" *Rainville*, 328 Md. at 408 (quoting *Kosmas*, 316 Md. at 594). Rather, they aid the court in determining whether the inadmissible statement "had a substantial and irreversible impact upon the jurors," and whether the statement "may well have meant the difference between acquittal and conviction." *Rainville*, 328 Md. at 410.

The jury heard the almost four-minute recording of the victim's 911 call three times during appellant's trial, once during the victim's testimony and twice at the very beginning of their deliberations. The brief reference to appellant's PCP use that the jury heard the first two times lasts only seconds. Thus, though the jury heard the irrelevant evidence twice, both times it was only a fleeting reference that was part of a much longer dialogue that was highly relevant to the proceedings.

The trial court expressly found that the State's failure to stop the recording, in the second instance, before the victim asserted that appellant was "on PCP" was "basically unavoidable." "The judge is physically on the scene, able to observe matters not usually reflected in a cold record." *State v. Hawkins*, 326 Md. 270, 278 (1992). The court was able to discern any circumstances that may have prevented the prosecutor from stopping the tape, such as distractions in the courtroom or cumbersome audio machinery. The court was also

able to observe the prosecutor's demeanor when she apologized for not reacting quickly enough to redact the PCP reference, and in the second instance, explained that, "I didn't react fast enough." Consequently, we defer to the trial court's determination that the State's mistake was inadvertent.

During the victim's testimony, at the request of defense counsel, the court provided an immediate, forceful, limiting instruction to the jury, directing them to disregard the reference to appellant's alleged use of PCP. The court later restated this instruction when the recording was played at the beginning of their deliberations, again instructing the jurors to disregard that statement. Because it was at defense counsel's request that the trial court "forcibly" instructed the jury not to consider the evidence, we shall not now entertain appellant's contention that the court's curative remarks may only have served to emphasize the evidence and further prejudice appellant.

Finally, although the 911 call was made by the victim, who was the key witness in the State's case, this is not a case where the victim's credibility was so damaged that the jury's determination might have been swayed by the disclosure of evidence regarding appellant's use of PCP. It is clear that, prior to the rape, the victim had ended her relationship with appellant, moved to a new apartment, changed her phone number, and obtained a restraining order against appellant. It is also uncontroverted that on the night of the crime, the victim's apartment door was kicked in, the knob and lock broken. Her testimony regarding the burglary and rape was further corroborated by the testimony of the responding police officers

who found appellant in the victim's apartment and observed her demeanor as she reported the events. Appellant's DNA was also found on the sheets of the victim's bed. Thus, we are persuaded that even in the absence of the evidence regarding his use of PCP, the evidence against appellant was substantial, if not overwhelming.

To the extent appellant asserts that the State should bear the burden of its failure to properly redact the recording, we note that "[a] mistrial is not a sanction designed to punish an attorney for an impropriety. It *is rather 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*." *Williams v. State*, 216 Md. App. 235, 258, *cert. denied*, 438 Md. 741 (2014) (citing *Burks v. State*, 96 Md. App. 173, 187 (1993) (emphasis in *Williams*). We reiterate that the judge was present in the courtroom and able to observe the jury to determine what impact, if any, the reference to appellant's use of PCP had on them, and their reception of the court's instruction that they should disregard the evidence. The court was, therefore, in the best position to determine whether the information was so prejudicial that it could not be cured by the court's instruction. Again, we defer to the court's determination.

Though we agree that the victim's recorded assertions that appellant was "on PCP" were not relevant, and, therefore, not admissible, we are persuaded that this inadvertently admitted material, which the jury was immediately and forcefully instructed to disregard, was not so unfairly prejudicial that denial of defense counsel's motion for a mistrial constituted an abuse of discretion.

II. Admission of Hearsay Evidence

After the victim testified, the State called one of the two officers who responded to her apartment in response to her 911 call. The following exchange occurred:

> [OFFICER]: She said that he kicked --
>
> [DEFENSE COUNSEL]: Objection to what she said.
>
> THE COURT: Overruled. This is [an] exception.
>
> [OFFICER]: The victim explained to me that the suspect kicked in the front door, grabbed her, held her mouth, took her back there to her bedroom at which time she was scared. So she grabbed a knife, attempted to I guess struggle to free herself. He grabbed the knife -- that's what she told me -- and put it to her throat at which time I asked her what else happened. So she said he grabbed her, threw her on the bed and forced her to have sex with her [*sic*], and he supposedly penetrated her.

Appellant contends that the officer's testimony included inadmissible hearsay evidence and prior consistent statements, which were admitted over objection.[5]

[5] Defense counsel did not ask the court which exception the court was relying upon to justify its admission of the testimony. Nor did counsel raise any additional objections suggesting that the State had failed to lay the proper foundation for the admission of the hearsay testimony, nor that the officer's testimony exceeded the permissible limits of the hearsay exception under which it was admitted, nor that the trial court failed to make the appropriate findings to support its ruling. Nor did defense counsel move to strike any of the officer's testimony after it was given, or request any other relief. To the extent that appellant's contentions on appeal require this Court to consider these questions, they were not properly preserved for our review. Md. Rule 8-131(a) (providing that as a general rule, this court "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court").

Hearsay evidence is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801. Hearsay evidence "must be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is permitted by applicable constitutional provisions or statutes." *Gordon v. State*, 431 Md. 527, 535 (2013) (emphasis and internal quotation marks omitted); Md. Rule 5-802. We review a trial court's determinations regarding whether evidence is hearsay and whether it falls within an exception to the general rule excluding such evidence, using the *de novo* standard of review. *Gordon*, 431 Md. at 536-37. We shall, however, defer to any necessary findings of fact made by the trial court, so long as they are not clearly erroneous. *Id*. at 538. *See also Gaerian v. State*, 159 Md. App. 527, 545 (2004) (deferring to the trial court's determination that the victim's complaint was made promptly).

Md. Rule 5-802.1 allows the admission of some out-of-court statements that were made "by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement[.]" Under certain circumstances, the relevant exceptions allow the admission of:

> (b) A statement that is consistent with the declarant's testimony, if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive;
>
> * * *

> (d) A statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony[.]

Md. Rule 5-802.1(b), (d). On occasion, as in the case before us, these two exceptions to the hearsay rule overlap, and so, are frequently discussed in conjunction with one another.

We discussed the interplay between the two exceptions in *Cole v. State*, 83 Md. App. 279 (1990). As we noted in *Cole*, evidence may be admitted under the "prompt complaint" exception for a variety of purposes, including corroboration, anticipatory rehabilitation, and rebuttal of the negative inference (even if not raised by the defendant) that a failure to report might create. *Id*. at 288 n.3, 289, 292. When the "prompt complaint" evidence is admitted as part of the State's case-in-chief only "to prevent the inference that the woman did in fact maintain a silence inconsistent with her narrative at trial[,]" certain restrictions are placed on the extent to which the complaint may be related. *Id*. at 293 (quoting *Green v. State*, 161 Md. 75, 82 (1931)). Although the State may freely elicit testimony regarding the circumstances under which the complaint was made, testimony regarding the substance of the victim's complaint is limited to "the essential nature of the crime complained of and the identity of the assailant." *Id*. "[T]he more narrative details of the complaint are not admissible." *Id*. at 294. Where, however, "the victim's credibility has been impeached, either on cross-examination or through defense witnesses, then the prior complaint, if otherwise qualified, may come in *in full detail* as a prior consistent statement." *Id*. (emphasis added).

It is clear that, at least portions of the victim's statement, as related by the officer, were admissible as a prompt complaint of a sexual assault under Md. Rule 5-802.1(d). *See Parker v. State*, 156 Md. App. 252, 261 (2004) ("a complaint by a rape victim may be admitted as original evidence primarily to support the testimony of the victim as to the time, place, crime, and name of the wrongdoer") (quoting *Guardino v. State*, 50 Md. App. 695, 706 (1982)). *See also Hyman v. State*, 158 Md. App. 618,632-33 (2004) (upholding admission of "prompt complaint" that included identity of assailant (her estranged husband), that he had used handgun, and that sexual attack took place in her apartment); *Cantrell v. State*, 50 Md. App. 331, 337 (1981) (upholding admission of "prompt complaint" that included related statement that "appellant and another young man had been waiting for her outside her house, that they had grabbed her, put handcuffs on her wrist and had taken her down to the Severn River where they had abused her sexually in the mouth, vagina and rectum"). Because defense counsel subsequently raised no objection, or moved to strike those portions of the officer's testimony that constituted narrative details, we conclude that the issue was not properly preserved. Md. Rule 8-131(a).

Notwithstanding the preservation question, defense counsel actively challenged the victim's credibility throughout appellant's trial. During his opening statement, defense counsel emphasized the fact that the victim, during the 911 call, failed to expressly report that she had been raped. While cross-examining the victim, defense counsel asked several questions undermining the accuracy of her trial testimony, and exposing the details of her

long-term relationship with appellant that ended a few weeks before the alleged rape occurred, suggesting that the break-up caused the victim to feel biased towards appellant. In cross-examination of other State's witnesses, defense counsel highlighted the lack of physical evidence of the rape. Finally, we note that defense counsel, albeit unsuccessfully, sought the court's permission to explore evidence of another private sexual encounter between the victim and appellant which, he argued, demonstrated the victim's motive to fabricate the charges against appellant. Thus, counsel's tactics, although proper in light of the serious offenses with which appellant was charged, opened the door for the State to elicit testimony from the police officer about the details of the victim's prior consistent statement. *See Cole*, 83 Md. App. at 294 (permitting the admission of all the details of a prompt complaint of sexual assault where the victim's credibility has been impeached).

We conclude, therefore, that the trial court neither erred nor abused its discretion by allowing the officer to testify about the prior consistent statements made to him by the victim only minutes after she had called 911, regarding the details of her rape and assault. Because we conclude that the evidence was admissible under Md. Rule 5-802.1(b) and (d), we decline to consider whether the statement might also have been admissible as an excited utterance under Md. Rule 5-803(b)(2), or to rehabilitate the victim under Md. Rule 5-616(c).

III. Limiting Cross Examination

Prior to trial, appellant sought the trial court's permission to introduce evidence that he had earlier engaged in a sexual encounter with the victim and one of her female friends,

during which he did not wear a condom. Appellant suggested that the victim became upset with him as a result of this encounter, and that her anger motivated her to fabricate the charges against him. The court reserved ruling on the motion until after he heard the victim's direct testimony, and advised defense counsel to "just approach the bench before . . . get[ting] into any of those matters."

During the State's redirect examination of the victim, defense counsel requested a recess. While the jury was out of the courtroom, counsel requested the court's permission to ask the victim "[w]hether or not she had set up a situation whereby [appellant] had sex with a friend of hers named Tracy." The court allowed counsel to question the victim about the incident outside the presence of the jury. The victim admitted that the encounter had occurred. The court denied defense counsel's request to question the victim about the consensual acts in front of the jury, however, stating, "I think there is absolutely no probative value. It does not go to a motive to fabricate a breaking and entering, a rape and a violation of protective order. So I'm not going to permit that."

A party's right to cross-examine witnesses is not boundless. *Martinez v. State*, 416 Md. 418, 428 (2010); *Pantazes v. State*, 376 Md. 661, 680 (2003). To be sure, a defendant has a right to cross-examine a witness to show bias, *Pantazes,* 376 Md. at 692, and to determine the reasons for acts referred to on direct examination. *Smallwood v. State*, 320 Md. 300, 307 (1990). Judges are, however, afforded "wide latitude to establish reasonable limits on cross-examination based on concerns about . . . harassment, prejudice, confusion

of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Pantazes*, 376 Md. at 680. A trial court does not abuse its discretion by denying a party the opportunity to question a witness if "there is no factual foundation for such an inquiry in the presence of the jury," or if "the probative value of such an inquiry is substantially outweighed by the danger of undue prejudice or confusion." *Calloway v. State*, 414 Md. 616, 623-624 (2010) (citation omitted).

By allowing defense counsel the opportunity to question the victim regarding these events outside the presence of the jury, the court was able to observe the effect of the questions on the victim. The court was likewise able to balance the probative value of the salacious details of this menage a trois against the potential embarrassment to victim as a result of the questioning, and the possibility that the jury would be confused or distracted by her testimony about an unrelated event that had occurred at least several weeks before the events underlying the charges in this case.

Under all the circumstances, we discern no abuse of discretion in the trial court's decision not to allow defense counsel to question the victim regarding these issues.

IV. Request for Continuance Based on *Hicks*

A criminal defendant is entitled to a trial date "not . . . later than 180 days after" the earlier of the appearance of counsel, or the first appearance of the defendant in circuit court. Md. Code (2001, 2008 Repl. Vol.) §6-103(a) of the Criminal Procedure Article (Crim. Pro.); Md. Rule 4-271(a)(1). "The date by which the State must bring a criminal defendant to trial

is known as the *Hicks* date, referring to *State v. Hicks*, 285 Md. 310 (1979)." *Ashton v. State*, 185 Md. App. 607, 613 n.2 (2009). Only "[f]or good cause shown," may "the county administrative judge or a designee of the judge . . . grant a change of the trial date . . ." Crim. Pro.§6-103(b); Md. Rule 4-271(a).

Appellant's *Hicks* date was March 5, 2013. Appellant's trial was initially scheduled to begin on January 28, 2013. On January 24, 2013, the parties appeared before the court for a hearing on the State's request to delay appellant's trial until after the *Hicks* date, because, due to a backlog, the DNA laboratory reported that it would need at least six weeks, and probably two months, until the necessary testing was complete. Finding good cause for the continuance, over defense counsel's objection, the circuit court granted the State's motion and rescheduled appellant's trial.[6]

On April 4, 2013, appellant filed a *pro se* motion to dismiss, asserting that in granting the State's request for a continuance, the circuit court had failed to comply with the requirements of Crim. Pro. §6-103 and Md. Rule 4-271(a), which mandate the procedures for setting and subsequently changing a criminal defendant's trial date. Following a hearing on May 3, 2013, the court denied appellant's motion to dismiss.

In his appeal, appellant again challenges the circuit court's decision to grant the State's continuance and its subsequent denial of his motion to dismiss, challenging the

[6]The circuit court subsequently granted an additional continuance to allow the defense to analyze the DNA results on April 23, 2013.

legality of the court's decision to reschedule his trial. Appellant contends that the circuit court's denial of his motion to dismiss was erroneous for two reasons – first, that the judge who granted the continuance was not the County Administrative Judge or the properly authorized designee, and second, that the State failed to show good cause to justify the continuance. We address each of appellant's contentions in turn.

A. Does the circuit court's procedure for designating which judge is authorized to grant continuances adhere to the requirements of Maryland law?

Pursuant to Maryland Law, the Chief Judge of the Court of Appeals is authorized to appoint a county administrative judge in each circuit court:

> who has an overall view of the court's business, who is responsible "for the administration of the court," who assigns trial judges, who "supervises the assignment of actions for trial," who supervises the court personnel involved in the assignment of cases, and who receives reports from such personnel."

State v. Frazier, 298 Md. 422, 453-54 (1984) (footnotes omitted); Md. Rule 16-101(d).

When a party requests the continuance of a criminal trial that would result in a trial date later than the *Hicks* date, the county administrative judge, or his or her designee, "has sole authority" to grant the continuance. *State v. Taylor*, 431 Md. 615, 623 (2013); Crim. Pro. §6-103(b); Md. Rule 4-271(a); Md. Rule 16-101(d)(3)(B). The administrative judge, who "ordinarily is in a much better position than any other trial judge on the court to make the judgment as to the existence of good cause for, as well as the length of, a postponement[,]" is the individual designated to grant requests for continuances. *Goldring v. State*, 358 Md. 490, 501, 504 (2000).

The county administrative judge may, at his or her discretion, designate another judge of the circuit court to hear and decide continuance requests. Md. Rule 16-101(d)(3)(B). The administrative judge is prohibited, however, "from authorizing more than one judge at a time to postpone the trial date of cases originating in the Circuit Court." Md. Rule 16-101(d)(3)(B); *Goldring*, 358 Md. at 494. Nor may a designee of the administrative judge designate yet another judge to perform the administrative duties assigned to him or her. *Ingram v. State*, 80 Md. App. 547, 555 (1989).

> [I]f a case is not tried within the 180-day deadline, and if there was no order by or approved by the administrative judge [or that judge's designee] having the effect of postponing the trial past the deadline, a motion to dismiss . . . must ordinarily be granted even if there may have been good cause for such a postponement.

Goldring, 358 Md. at 503 (citations and quotations omitted).

At all times relevant to this appeal, the administrative judge for Prince George's County was Hon. Sheila R. Tillerson-Adams, who had designated Hon. Michael P. Whalen, the coordinating judge for criminal operations, as her designee to hear and decide continuance requests. In the event that Judge Whalen was not available, Judge Tillerson-Adams authorized the following "back-up" judges to serve as "continuance judges": Hon. Melanie Shaw-Geter, Hon. Maureen Lamasney, Hon. Michael Pearson, and Hon. Dwight Jackson. The back-up judges "are not authorized individually, or as a group, to continue cases at the same time, but only in the absence or unavailability of [Judge Whalen], or listed

back-up Judge, each in turn." The designated continuance judge for each day is determined by 3:00 p.m. on the preceding day, and is clearly posted in the circuit court.

On January 24, 2013, Judge Whalen was unavailable to hear continuances because he was presiding over a multi-day murder trial. Thus, Judge Whalen's first back-up judge, Judge Shaw-Geter, served as Judge Tillerson-Adams' designee on January 24th, her name having been posted the previous afternoon. Judge Shaw-Geter heard and approved the State's request to continue appellant's trial on that day.

Appellant asserts that the procedure by which Judge Shaw-Geter was granted authority to continue his trial on January 24, 2013, "is contrary to the spirit of the law" inasmuch as the circuit court's plan "designates several 'backup' judges at once - rather than one, and only one, designee[,]" and therefore, "fails 'to ensure that the judge in the best position to do so changes the trial date.'" (quoting *Ingram v. State*, 80 Md. App. 547, 558 (1989)). Appellant complains that "[o]n any given day, the judge 'authorized' to continue a case beyond its *Hicks* date may be determined solely by the unavailability of one or several other judges, rather than the reasoned judgment of the administrative judge that the judge before whom the parties appear is the best qualified to decide whether a continuance is appropriate." Appellant concludes, therefore, that the circuit court erred by denying his motion to dismiss based on the circuit court's alleged violation of the Md. Rules and existing case law.

We are persuaded that the procedure utilized by the Circuit Court for Prince George's County to designate which judge is authorized to grant continuances in criminal cases at any given time, comports with both the letter and the spirit of the applicable rules. The procedure utilized by the circuit court ensures that at any one time, only one judge is authorized to grant continuances in criminal cases. *See Goldring*, 358 Md. at 494-95 (disapproving procedure whereby, at any one time, three Charles County Circuit Court judges could postpone trial dates). Moreover, the procedure ensures that the designations were made only by the county administrative judge, Judge Tillerson-Adams, as it was she who assigned the duty first to Judge Whalen, and then to each back-up judge in the specified order. *See Ingram*, 80 Md. App. at 555 (finding violation of Rule 4-271 where administrative judge's designee designated another judge as acting administrative judge, and administrative judge did not approve, and was not aware of, that designation).

Essentially, Judge Tillerson-Adams ordered that Judge Shaw-Geter was the first option to replace Judge Whalen in the event of his unavailability, and so on down the list of assigned judges. By memorializing her designations in advance, Judge Tillerson-Adams avoids leaving the court without a judge empowered to grant continuances in criminal cases. Judges are occasionally, for various legitimate reasons, unavailable for specific duties. The procedure implemented by the circuit court, as applied in this case, constitutes a thoughtful and practical alternative to requiring the county administrative judge to officially designate

a judge to hear requests for continuances each day, or whenever substitution is otherwise necessary.

In our view, Judge Shaw-Geter was properly authorized to grant the State's request for a continuance on January 24, 2013. The circuit court did not err in denying appellant's motion to dismiss the charges against him based on the alleged procedural deficiencies attendant to the postponement of his trial date beyond the *Hicks* date.

B. Did the circuit court abuse its discretion by finding good cause to postpone appellant's trial beyond the *Hicks* date?

Appellant contends that the circuit court abused its discretion by granting the State's request to continue his trial beyond the *Hicks* date. He asserts that the unavailability of the DNA evidence did not constitute good cause.

In order to justify a continuance of a criminal trial beyond the *Hicks* date, "there must be good cause for not commencing the trial on the assigned trial date" and "there must be good cause for the extent of the delay." *Frazier*, 298 Md. at 448. On appeal, we examine the circuit court's good cause determinations for abuse of discretion. *State v. Fisher*, 353 Md. 297, 306 (1999).

As this Court and the Court of Appeals have previously opined, if there is no indication that the State failed to act diligently to obtain DNA evidence in a timely manner, a circuit court may properly conclude that the unavailability of DNA results constitutes good cause for a continuance. *See State v. Kanneh*, 403 Md. 678, 690 (2008) (continuance

resulting from unavailability of State's DNA evidence "largely neutral" in constitutional speedy trial analysis); *Glover v. State*, 368 Md. 211, 226 (2002) (concluding that a continuance to allow the State to obtain the results of DNA testing was "both neutral and justified" when there was "no evidence that the State failed to act in a diligent manner"); *Henry v. State*, 204 Md. App. 509, 552 (2012) (weighing the State's request to continue trial due to backlog at DNA laboratory "less heavily").

Appellant relies on *State v. Price*, 385 Md. 261 (2005), and *Wheeler v. State*, 165 Md. App. 210 (2005) in support of his argument. The issues in *Price* and *Wheeler* were whether, when the State re-indicts a defendant on the same charges previously *nol prossed*, the State is bound by the original *Hicks* date, or whether the 180-day period begins anew? Both cases held that the *Hicks* rule had been violated where the purpose of the *nol pros* was to circumvent a circuit court's ruling that the unavailability of DNA evidence did not constitute good cause for a continuance. *Price*, 385 Md. at 263-64, 278-79; *Wheeler*, 165 Md. App. at 233. In neither case was the Court asked to review the circuit court's discretionary finding that, under the specific facts of the case before it, the unavailability of the DNA evidence was not good cause for a continuance. Those holdings are inapposite to our present considerations.

In *Price*, the lab would not analyze DNA until the prosecutor or police notified it of a trial date, which the State failed to do. 385 Md. at 265-66. In *Wheeler*, the prosecutor had delayed requesting DNA analysis because she expected that the case would be resolved by

a plea agreement. 165 Md. App. at 218-19. In both cases, the circuit court determined that the State should bear the blame for the delay caused by the unavailability of the DNA results because it was, at least in part, the State's inaction that caused the delay. These cases do not stand for a general proposition that a delay to obtain the results of DNA testing never constitutes good cause. Rather, they emphasize the fact-intensive nature of a court's discretionary determination regarding whether a given circumstance constitutes good cause.

Finally, appellant makes issue of the fact that the State did not notify the defense of its intent to use DNA evidence until January 16, 2013 - less than two weeks before the then-scheduled trial dates of January 28-29, 2013. Section 10-915(c) of the Courts and Judicial Proceedings Article ("Cts. & Jud. Pro.") requires a party to provide notice of the intent to introduce DNA evidence at least 45 days prior to a criminal proceeding, Cts. & Jud. Pro. §10-915(c)(1), and to provide copies of the results and reports at least 30 days before a criminal proceeding. Cts. & Jud. Pro. §10-915(c)(2). By our calculations, complying with all applicable statutory requirements, and assuming the availability of all parties and courts, had DNA results been available and provided to the defense by February 1, 2013, appellant's trial could have commenced before the March 5, 2013, *Hicks* date. Thus, it was not the State's failure to diligently provide notification of its intent to use DNA evidence that necessitated the continuance of appellant's trial beyond the *Hicks* date; rather, it was the six- to eight-week queue at the DNA laboratory.

Under these circumstances, we discern no abuse of discretion in the circuit court's determination of good cause justifying the State's request to postpone appellant's trial beyond the *Hicks* date.

V. Merger of Convictions for Sentencing Purposes

At appellant's sentencing hearing, the circuit court merged his convictions for second-degree rape and second-degree assault into his conviction for first-degree rape. The court also merged appellant's convictions for third-degree burglary and fourth-degree burglary into his conviction for first-degree burglary. Having done so, the court sentenced appellant to serve life in prison for first-degree rape, a concurrent 20 years for first-degree burglary, a concurrent one year for false imprisonment, a concurrent 90 days for violation of a restraining order, and a concurrent 60 days for malicious destruction of property.

Appellant's final contention on appeal is that the sentences imposed by the circuit court "for first degree burglary, false imprisonment, and malicious destruction are illegal, because these offenses merge into other offenses[,]" and therefore they must be vacated. Though appellant concedes that defense counsel did not object to the separate sentences at the time they were imposed, Md. Rule 4-345(a) provides that this Court "may correct an illegal sentence at any time." We "address the legal issue of the sentencing . . . under a *de novo* standard of review." *Blickenstaff v. State*, 393 Md. 680, 683 (2006).

When a court imposes a sentence that is not authorized by law, the sentence is illegal. *Waker v. State*, 431 Md. 1, 7 (2013). "[W]hen the trial court is required to merge convictions

for sentencing purposes but, instead, imposes a separate sentence for each unmerged conviction," "the result is the imposition of a sentence 'not permitted by law.'" *Britton v. State*, 201 Md. App. 589, 598–99 (2011) (quoting *Campbell v. State*, 65 Md. App. 498, 510 (1985)). Thus, in cases where merger is required under the required evidence test or the rule of lenity, we may consider the issue of merger on appeal even though it was not properly preserved in the circuit court. *See Pair v. State*, 202 Md. App. 617, 625, 649 (2011), *cert. denied*, 425 Md. 397 (2012) (Although the failure to merge multiple convictions pursuant to the required evidence test or the rule of lenity renders a sentence illegal, the failure to merge convictions pursuant to fundamental fairness is not inherently an "illegal sentence.")." *See also Carroll v. State*, 428 Md. 679, 695 n.5 (2012) (recognizing this Court's holding in *Pair*); *Kyler v. State*, 218 Md. App. 196, 222-230, *cert. denied*, 441 Md. 62 (2014) (same).

An individual is guilty of first-degree rape if he "engage[s] in vaginal intercourse with another person by force or threat of force against the will and without the consent of the other person" and "at least one enumerated aggravating factor [is] present." *Middleton v. State*, 318 Md. 749, 758 (1990). In previous cases, we have acknowledged that where first-degree burglary is the "aggravating factor" that elevates a second-degree rape to a first-degree offense, then the burglary conviction merges into the rape conviction under the required evidence test. *See e.g. Utter v. State*, 139 Md. App. 43, 53-54 (2001).

At appellant's trial, the State acknowledged that the only "aggravating factor" being asserted was that appellant "commit[ted] the crime in connection with a burglary in the first,

second, or third degree." Md. Code (2002, 2012 Repl. Vol.) §3-303(a)(2)(v) of the Criminal Law Article. We are persuaded that the circuit court erred as a matter of law by failing to merge appellant's conviction for first-degree burglary into his conviction for first-degree rape. We conclude, therefore, that the 20-year concurrent sentence for first-degree burglary must be vacated.

An individual is guilty of false imprisonment if he or she confines or detains another person against his or her will by force, threat of force, or deception. *Garcia-Perlera v. State*, 197 Md. App. 534, 558 (2011). In cases where an individual is convicted of both false imprisonment and first-degree rape, and the evidence indicates that "the victim was detained only a sufficient time to accomplish the rape," the false imprisonment conviction must be merged into the first-degree rape conviction under the required evidence test. *Hawkins v. State*, 34 Md. App. 82, 92 (1976).

In the instant case, there is evidence indicating that appellant may have detained the victim for some period before the rape when he knocked her to the floor and demanded that she perform oral sex. There is also evidence suggesting that the false imprisonment continued for some time after the rape as the victim was trying to escape from appellant.

It is notable, however, that neither the jury instructions nor the State's closing argument instructed the jury to consider the periods before, during, and after the rape separately for the purposes of the offense of false imprisonment. Because we are unable to discern the precise factual basis for the jury's conviction for false imprisonment, and because

any factual ambiguities must be resolved in favor of appellant, we must assume that the false imprisonment conviction was based on the same facts as the rape conviction — that is, the detention of the victim during the rape. *See Brooks v. State*, 439 Md. 698, 742 (2014) (merging the offenses of false imprisonment and first-degree rape under similar circumstances). We are persuaded that the circuit court erred as a matter of law by failing to merge appellant's conviction for false imprisonment into his conviction for first-degree rape. Therefore, the one-year concurrent sentence for false imprisonment must be vacated.

Finally, appellant contends that the merger of his conviction for malicious destruction of property into his conviction for first-degree burglary, (and thereafter into his conviction for first-degree rape), was required by principles of fundamental fairness. *See Marquardt v. State*, 164 Md. App. 95, 152-53 (2005) (where a conviction of malicious destruction is predicated upon conduct that is merely incidental to the accomplishment of a break-in, fundamental fairness requires that the sentencing court impose no separate punishment for malicious destruction). As we noted, however, in *Pair v. State*, 202 Md. App. 617 (2011), this Court determined that a trial court's failure to merge an individual's convictions pursuant to principles of fundamental fairness does not render the resulting sentence illegal. *Id*. at 649. In *Pair*, we distinguished the "heavily and intensely fact-driven" fundamental fairness test from the required evidence test and the rule of lenity, which could "both be decided as a matter of law, virtually on the basis of examination confined within the 'four corners' of the charges." *Id*. at 645. We opined that because the fundamental fairness test is "such a

fluid test dependant upon a subjective evaluation of the particular evidence in a particular case" a non-merged sentence under the fundamental fairness test is not an inherently "illegal sentence" as that term is considered for the purposes of Md. Rule 4-345(a)). *Id*. at 649.

Because appellant did not raise an objection to the trial court's failure to merge his conviction for malicious destruction of property at sentencing, much less an argument based on principles of fundamental fairness, that issue is not now properly before us for appellate review. Appellant suggests that we revisit, and distinguish or overturn, our holding in *Pair*, contending that *Pair* is "both procedurally distinguishable and wrongly decided." We decline his invitation.

SENTENCES IMPOSED FOR FIRST-DEGREE BURGLARY AND FALSE IMPRISONMENT ARE VACATED. ALL OTHER JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED.
COSTS TO BE PAID, 80% BY APPELLANT, 20% BY PRINCE GEORGE'S COUNTY.