UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 348

September Term, 2016

ALTEE D. RICE

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Nazarian,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: June 7, 2017

After a one-day jury trial in the Circuit Court for Prince George's County, Altee Rice was convicted of illegal possession of a regulated firearm, reckless endangerment, possession of cocaine, and related offenses. Before trial, Mr. Rice filed a Motion for Discovery Sanctions, which the court heard and denied, and during trial, Mr. Rice requested a mistrial after an officer testified that he had "refused to talk" after being arrested, which the court also denied. After trial, Mr. Rice pled guilty to Count 8, possession with intent to distribute phencyclidine ("PCP"), one of three counts that had been severed from the trial counts pursuant to a plea agreement, and he was sentenced for that count as well as the trial counts at a later sentencing hearing. On appeal, Mr. Rice contends that the trial court erred in denying his request for a mistrial, in failing to find a discovery violation, in relieving the State from the promises made to him which induced his guilty plea, and in imposing a sentence on Count 8 that was inconsistent with his plea agreement. We affirm Mr. Rice's convictions, but we agree with Mr. Rice that the State breached the plea agreement when it recommended a higher-than-agreed sentence, and we vacate his sentences and remand for further proceedings.

I. BACKGROUND

In 2016, Mr. Rice was charged with ten criminal counts, including first-degree assault, illegal possession of a firearm, reckless endangerment, possession of cocaine, and other offenses. Before trial, Counts 8 through 10 were severed from Counts 1 through 7 and were scheduled for trial at a later date.

During discovery, Mr. Rice filed a Motion for Discovery Sanctions, in which he argued that the State had willfully withheld the witnesses' personal contact information, and requested that one of the witnesses be excluded because the defense's investigator had been unable to contact that witness in preparation for trial. The State responded that it had complied with the discovery rules by providing the witnesses' names and employment addresses. After a hearing, the court agreed with the State and denied the motion.

A one-day jury trial was held on February 10, 2016. During the trial, Mr. Rice requested a mistrial after one of the arresting officers testified that Mr. Rice had refused to talk when he was taken to the Department of Corrections to be interviewed. The trial court denied the request and instead gave a curative instruction. The court sustained objections to two other questions that asked about whether officers had had "conversations" with Mr. Rice; the defense did not renew its motion for a mistrial after either of these. Mr. Rice was acquitted of all assault charges, but found guilty of illegal possession of a regulated firearm, reckless endangerment, possession of cocaine, and related offenses. Sentencing was scheduled for April 19, 2016.

Before trial on the severed counts, the parties reached a plea agreement that included an aggregate sentence for all of the charges, including the trial counts. The parties agreed that Mr. Rice would plead guilty to Count 8, possession with intent to distribute PCP, in exchange for an aggregate sentence of eight years' incarceration, all but five years suspended, and probation. On February 16, 2016, the court held a plea hearing, and the defense asked the court to bind itself to the plea agreement. The court declined, but said it

would bind itself to the previously agreed sentence on Count 8 and run that sentence concurrently with the sentence the court decided to impose on the trial counts.

At sentencing, the defense argued that the State was still bound by the parties' original agreement to recommend an aggregate eight-year sentence. The court disagreed, and allowed the State to recommend a longer sentence for the trial counts. The court ultimately imposed a sentence exceeding the aggregate eight years on the trial counts, and on Count 8 imposed the agreed sentence, concurrent only to Count 6 rather than all of the trial counts. This timely appeal followed.

II. DISCUSSION

Mr. Rice raises four issues on appeal.[1] *First*, he argues that the trial court erred in denying his request for a mistrial after a police officer testified about his post-arrest silence.

[1] Mr. Rice phrased the Questions Presented as follows:

> 1. Did the lower court err in failing to declare a mistrial after the State elicited from a police officer that Mr. Rice "refused to talk" to police after he was arrested and taken to be interviewed by police?
>
> 2. Did the lower court err in failing to discern a violation of the State's discovery obligations and in failing to afford an appropriate sanction for those violations?
>
> 3. Did the lower court err in permitting the State to deviate, at sentencing, from its prior representations which induced Mr.'s [sic] Rice guilty plea to certain charges?
>
> 4. Is the sentence on Count 8 illegal because it fails to conform to the terms of Mr. Rice's binding guilty plea agreement as to that Count?

Second, he contends that the trial court erred in failing to impose sanctions for the State's discovery violation. *Third*, he claims that the trial court erred by allowing the State to deviate from its prior agreement to recommend a sentence of no longer than eight years, all but five suspended, because that agreement induced his guilty plea on the severed counts. And *finally*, Mr. Rice argues that the trial court imposed a sentence on Count 8 that is inconsistent with the parties' agreement on that count.

A. The Trial Court Did Not Abuse Its Discretion In Denying Mr. Rice's Request For A Mistrial.

Mr. Rice contends *first* that the trial court erred in denying his motion for mistrial after the State elicited evidence of his post-arrest silence. He complains as well that the curative instruction given by the trial court "exacerbated the harm to [him]" rather than curing the prejudice. The State counters that the trial court correctly denied the request for a mistrial, and that Mr. Rice's complaint about the substance of the jury instruction is not preserved for appellate review because Mr. Rice did not object to the instruction when it was given, nor did he ask the trial court to instruct the jury simply to disregard the arresting officer's remark. We hold that Mr. Rice's objection to the curative instruction is preserved, but that the trial court did not abuse its discretion in denying his request for a mistrial.

We review the denial of a motion for mistrial for abuse of discretion. *Simmons v. State*, 436 Md. 202, 211–12 (2013). "[A] mistrial is generally an extraordinary remedy and . . . under most circumstances, the trial judge has considerable discretion regarding when to invoke it." *Whack v. State*, 433 Md. 728, 751–52 (2013) (quoting *Powell v. State*, 406

Md. 679, 694 (2008)). Only "clear and egregious prejudice" that deprives a defendant of his opportunity for a fair trial warrants the "drastic" remedy of mistrial. *Allen v.* State, 89 Md. App. 25, 42 (1991). As such, "[t]he determining factor as to whether a mistrial is necessary is whether the prejudice to the defendant was so substantial that he was deprived of a fair trial." *Kosh v. State*, 382 Md. 218, 226 (2004) (citation omitted). "In assessing the prejudice to the defendant, the trial judge first determines whether the prejudice can be cured by instruction," and the curative instruction must "ameliorate[] the prejudice to the defendant," otherwise a mistrial is necessary. *Id.* In determining whether to grant a mistrial, courts should consider the frequency and prominence of the error, and measure it against the broader context of the trial:

> whether the reference . . . 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.

Carter v. State, 366 Md. 574, 590 (2001) (internal quotation marks omitted) (alterations in original) (quoting *Rainville v. State*, 328 Md. 398, 408 (1992)).

At trial, the State called arresting Officer Jeffrey Dorsey to testify about the circumstances of the arrest, and during direct examination, the State's questions elicited testimony about Mr. Rice's post-arrest, pre-*Miranda* silence:

> [THE STATE:] What, if anything, did you do after you recovered the CDS and the gun from Mr. Rice?

> [OFFICER DORSEY:] After that, I immediately took custody of Mr. Rice. I made sure I carefully packaged the evidence we had and had someone drop it at the station. From there, went to DOC.
>
> [THE STATE:] You transported Mr. Rice to DOC, Department of Corrections?
>
> [OFFICER DORSEY:] Yes, ma'am. But before that, we took him to District 3 Station to be interviewed.
>
> [THE STATE:] And when you took him to District 3, what, if anything, occurred?
>
> [OFFICER DORSEY:] Nothing occurred. He refused to talk to the detective.

The defense objected to the officer's statement about Mr. Rice's silence, and the court sustained the objection. The defense then moved to strike the testimony and requested a mistrial. The court asked the attorneys to approach the bench to discuss the request, but ultimately denied it, opting instead for a curative instruction:

> [DEFENSE COUNSEL]: Your Honor, we knew that Mr. Rice asserted his constitutional right. She just elicited [for] no purpose that he asserted those rights. That is commentary on his right to remain silent. It violates his right to remain silent. There was no valid reason for asking that question. There should be a mistrial because the bell can't be unrung.
>
> [THE STATE]: The State disagrees, Your Honor. He didn't give a statement. There was no statement. The State was simply trying to flush out that he didn't take him right from the crime scene to Department of Corrections; that he first went to District 3. If the State didn't bring that out, there would be an assumption that we were hiding something, that he didn't go to DOC. He first went to District 3 to be interviewed.

[DEFENSE COUNSEL]: Mr. Rice was under no obligation to cross-examine this witness, so he's not required to make an argument. Second of all, he has done nothing to say that it is okay to comment on his assertion of his constitutional right to remain silent. They elicited that he was at the station. They didn't need a follow-up. She asked a follow-up. She concede [sic] me to react. The damage is done, Your Honor.

THE COURT: What's the curative instruction that's appropriate?

[DEFENSE COUNSEL]: Your Honor, we would contend it's not appropriate; because if a curative instruction were enough, it would never be a problem for the State to ask that question because all we would have to do is inevitably [give] the obedient instruction [that] we can't use [the statement] against him then problem solved. The jury has heard it, they have heard the State elicit it and now they've seen an argument at the bench they know is about it. The curative instruction does not unring the bell. We're not talking about an ancillary matter. We're talking about commentary. We think it's too severe to just allow the State to --

[THE STATE]: Your Honor, the State disagrees. He simply said he didn't make a statement. The State didn't ask the question to elicit that testimony. It doesn't in any way prejudice the defendant that he didn't give a statement.

THE COURT: How does a curative instruction prejudice your client anymore [sic] than the standard jury instruction?

[DEFENSE COUNSEL]: Because, Your Honor, the standard jury instruction is given after they have not heard anything, as opposed to hear[ing] what they're being told [that] he didn't give a statement. There is a difference between it not being mentioned and the jury being told you can't consider it . . . that thing that you just heard, don't use it against him.

> THE COURT: Well, I'm not going to grant the motion for mistrial. I think a curative instruction would suffice to say that the defendant has no obligation at all and has a constitutional right not to speak to the police while he's in custody. And so if you believe that he did that, then it should not be considered at all during deliberations. If you don't want me to give an instruction, if you feel giving an instruction puts more attention to it, then the motion for mistrial is denied.
>
> [DEFENSE COUNSEL]: Your Honor, given that -- maintaining our objection, we would ask that the Court give the instruction under the understanding that the Court is going to deny the motion, we would ask the Court to give an instruction.

The State contends that Mr. Rice's objection to the content of the court's curative instruction is not preserved for appellate review. But although the State is correct that Maryland Rule 4-325(e) provides that "[n]o party may assign as error the giving [of] an instruction unless the party objects on the record promptly after the court instructs the jury," we disagree that Mr. Rice failed to meet that burden here. His counsel argued to the court that any curative instruction would prejudice Mr. Rice by calling attention to the fact that he didn't give a statement, that "[t]he curative instruction does not unring the bell." Moreover, when the court denied the motion for mistrial and asked whether the defense wanted an instruction, Mr. Rice requested an instruction, albeit with the understanding that he was "maintaining" the objection. That was enough to preserve his objection to the contents of the curative instruction.

On the merits, though, we agree with the State. The curative instruction that the court gave covered the issue comprehensively, and Mr. Rice didn't object to the particular language the jury heard:

> Before you continue, ladies and gentlemen, you heard a question or a response, what happened allegedly with Mr. Rice once he was taken to the station. You are instructed that every person who is in the custody of a law enforcement officer has a right not to talk to the police, not to make a statement, not to talk to them at all certainly without an attorney being present. So you should not draw any inference regarding guilt in this case with regard to the invocation of Mr. Rice's constitutional right if you believe that's what he did.
>
> Well, if you believe that there was an opportunity for the police to ask a question and he voluntarily chose not to answer the question, you should not draw any inference of guilt at all with regard to that constitutional right. You shouldn't consider it. You shouldn't talk about it during your deliberations at all[,] [it's] as if it had never happened, and it's not relevant to the case.

Although evidence of post-arrest silence generally is inadmissible, *see Kosh*, 382 Md. at 227 ("In general, silence is evidence of dubious value that is usually inadmissible under Maryland Rule 5-402 [relevance] or 5-403 [prejudice]."), and should not have been admitted here, any prejudice to Mr. Rice was ameliorated by the court's curative instruction and its subsequent rulings sustaining defense objections to questions that sought further commentary on his silence. Even though the court's instruction alluded to the fact that Mr. Rice *may* have invoked his right to remain silent, it did not highlight it in a way that would cause prejudice, as Mr. Rice asserts, because the court also instructed the jury not to draw any inference of guilt from it and emphasized that it may or may not have happened in the

first place.[2] The jury is presumed to follow curative instructions, *Carter*, 366 Md. at 592, and in this case the record reveals no reason to fear they didn't.

Finally, and after applying the factors listed in *Carter*, we see no abuse of discretion in the court's decision to deny Mr. Rice's request for a mistrial. Officer Dorsey's comment that Mr. Rice "refused to talk to the detective" was an isolated statement and was immediately followed by a curative instruction from the court. Even if we were to assume that the prosecutor actively solicited the statement, which is possible but not obvious, that alone wouldn't compel a mistrial because the court caught it and addressed it. Although, as Mr. Rice points out, the State subsequently asked two more questions regarding Mr. Rice's silence, the court sustained the defense's objections before the witness answered, and the defense did not renew its motion for a mistrial after either question. And the remaining factors—whether Officer Dorsey was a principal witness upon whom the entire prosecution depended, whether credibility was a crucial issue, and whether there was significant other evidence—also do not weigh in favor of a mistrial. Officer Dorsey was not a key State witness—the key witnesses were the two security guards who saw the incident, ordered Mr. Rice to drop the gun, detained him, and then called the officers,

[2] The curative instruction in this case is distinguishable from the curative instructions given in cases where the Court of Appeals found a mistrial was necessary because the curative instruction exacerbated the prejudice to the defendant. *See Kosh*, 382 Md. at 227 (mistrial was necessary when the judge told the jury during his curative instruction that the defendant had invoked his right to silence); *Carter*, 366 Md. at, 592 (holding that the curative instruction was inadequate to cure the prejudice to the defendant when the instruction mentioned the inadmissible evidence four times).

including Officer Dorsey, to the scene. There was nothing to suggest that credibility was a crucial issue in the case, and a great deal of other evidence supported the convictions, such as the testimony of the two security guards who were eyewitnesses as well as the gun and drugs found on the ground near Mr. Rice.

B. The Trial Court Did Not Abuse Its Discretion In Failing To Find A Discovery Violation.

Second, Mr. Rice contends that the trial court erred in failing to find a discovery violation from the State's refusal to provide the personal addresses and phone numbers of two State witnesses, an omission that, he claims, prevented the defense from contacting the witnesses in preparation for trial. He concedes that counsel was able to contact one of the witnesses, and that he suffered no prejudice in that regard. This leaves only the second witness, and the State counters that the circuit court complied with the discovery rules by providing his employment address. We agree with the State.

Before trial, the court held a hearing on Mr. Rice's Motion for Discovery Sanctions. The defense argued that the State violated Maryland Rule 4-263(d)(3)(B) by failing to provide personal addresses and phone numbers for two State witnesses, security guards Jackie Herndon and Gregory Stewart, and asked the court to exclude their testimony as a sanction. The defense's investigator, Thomas Lancaster, testified at the hearing that he had been provided with the two witnesses' names and the name of the security company for which they worked, as well as the company's address. When Mr. Lancaster went to the location, though, he discovered that the company had moved. He eventually went to the

new location and ultimately to the rental office of Shadyside Apartments, where the witnesses were working when the incident occurred, and was able to contact Mr. Herndon. Mr. Herndon explained that Mr. Stewart no longer worked at that property, but still worked for the security company. When cross-examined by the State, Mr. Lancaster admitted that he did not go the rental office to find out where Mr. Stewart was currently working. Instead, he made several phone calls to numbers "listed on a report" that he had for Mr. Stewart, but no one answered to that name. The State asked how he identified himself during the phone calls, to which he replied "[a]s [a] private investigator employed by the Office of the Public Defender for the state of Maryland."

The defense contended that the State must have possessed the witnesses' personal contact information because the State was able to secure their appearance at two different hearings. Under the circumstances, then, the State was required to provide that contact information to the defense, and failure to do so was a discovery violation. The trial court ruled that no discovery violation had occurred because the State had provided the defense with the witnesses' employment address. The court noted that it sounded like the witnesses "[didn't] want to have contact with [the investigator]," and explained that "[t]hey do have that opportunity and that choice." Moreover, the court found no indication that the State in fact possessed the witnesses' personal contact information, or had willfully withheld them.

On appeal, "[d]iscovery questions generally involve a very broad discretion that is to be exercised by the trial courts[, and t]heir determinations will be disturbed on appellate

review only if there is an abuse of discretion." *Cole v. State*, 378 Md. 42, 55 (2003) (citation omitted). And we see no abuse of discretion here. Mr. Rice argues that the plain language of the Maryland Rule 4-263(d)(3)(B) requires the State's Attorney to provide the personal addresses and phone numbers of its witnesses, but that's not what it says. The Rule provides that the State shall turn over the address and, if known, the telephone number of a witness it intends to call,[3] but neither the Rule nor any case specifies *personal* contact information. Moreover, even if the rule required disclosure of personal contact information, the trial court was not convinced that the State possessed such information in the first place; Mr. Rice asks us to assume that the State had the witnesses' personal contact information because it secured their attendance at two prior hearings, but the record doesn't support that conclusion. As the finder of fact, it was up to the trial court to determine whether the State possessed and willfully withheld the contact information of its witnesses. The trial court found no indication of a willful discovery violation, and we see no error in its conclusion.

C. The State Breached The Plea Agreement, And Mr. Rice Is Entitled To Be Resentenced.

[3] Md. Rule 4-263(d)(3)(A) and (B) provide in pertinent part:

> As to each State's witness the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony: (A) the name of the witness; (B) except as provided under Code, Criminal Procedure Article § 11-205 or Rule 16-910 (b), the address and, if known to the State's Attorney, the telephone number of the witness.

Mr. Rice's *third* contention is that the trial court erred by failing to require the State to abide by its previous plea agreement, which induced his guilty plea. The State counters that although there may have been a plea agreement initially, any such agreement was void after the trial court refused to bind itself to the agreed sentence. We agree with Mr. Rice that there was a valid plea agreement that required the State to recommend a particular sentence, that that agreement survived the court's decision not to be bound to a specific sentence recommendation, and that the State breached the agreement.

Mr. Rice was scheduled for trial on the severed counts (Counts 8 through 10) on February 16, 2016. Instead of going to trial on the remaining counts, however, the defense and the State reached a plea agreement that encompassed the entire case. Mr. Rice agreed to plead guilty to Count 8, possession with intent to distribute PCP, in exchange for a global sentence of eight years' incarceration, with all but five years suspended, followed by probation. The defense presented the agreement to the court and asked the court to bind itself. The court declined to bind itself for the trial counts, but agreed to impose the agreed sentence on Count 8 concurrently with the sentence on the trial counts:

> [DEFENSE COUNSEL:] Your Honor, the parties have reached an agreement that we are asking the Court to bind to. Mr. Rice, as the Court will recall, was convicted last week of Counts 4 through 7. In this case we would have gone to trial today in Counts 8 through 10. He is pleading guilty to Count 8, by agreement of the parties -- which is possession with intent to distribute PCP. The agreement of the parties is that he serve concurrent sentences of eight years suspending all buy five years. And that would be --

> THE COURT: I'm not doing that. You are asking me to bind on a case that went to trial, on the other case. I'm not doing that. I'm not binding myself to a case you went to trial on.
>
> * * *
>
> [DEFENSE COUNSEL]: Would the Court bind as far as concurrent on Count 8?
>
> THE COURT: I don't have a problem with that.

Defense counsel consulted with Mr. Rice, and the court clarified its position:

> THE COURT: I'm willing to bind as to [Count 8]. So today, so we are clear, I'm only binding myself to what is in front of the Court today, that's Counts 8, 9 and 10. You are telling me, in lieu of a trial on 8, 9, and 10, your client is willing to plead guilty to possession with intent. And as the parties' agreement as to Count 8, possession with intent, to do a suspended sentence all but five years. And that five years will be concurrent with whatever I do on the Counts 1 through 7, the ones he was convicted of.
>
> [DEFENSE COUNSEL]: Yes, Your Honor, that's what we are asking and if the Court is willing to do that --
>
> THE COURT: Correct.
>
> [DEFENSE COUNSEL]: -- then we are ready to go forward.
>
> [THE STATE]: I have no problem.

Mr. Rice pled guilty to Count 8, and sentencing on all counts was continued to April 19, 2016.

At the sentencing hearing, the defense explained to the court that because the parties had reached a plea agreement at the previous hearing, neither the defense nor the State was allowed to ask the court to impose a different sentence on the trial counts than the sentence to which the parties had agreed, *i.e.*, eight years' incarceration with all but five years suspended, concurrent with the trial counts, even though the court had refused to bind itself to the plea agreement. Initially, the State denied ever having such a plea agreement, but that assertion was disabused both by the court's recollection of the previous hearing and emails the defense admitted into evidence that documented the terms of the plea agreement. The court acknowledged that the parties had presented a plea agreement for the entire case at the previous hearing, but reasoned that once the court refused to bind itself there was no longer an agreement between the parties:

> [M]y recollection is that [eight years' incarceration with all but five years suspended] is what was proposed on the trail [sic] case, the last remaining count, and I had rejected the plea offer suggestion that -- well, *I rejected being bound by it* initially and I believe after some discussion with your client then you asked would I, at least, do it to that remaining count and make it concurrent with whatever I did in the trial counts.
>
> And so when I did that, then I believe that the, again, the plea agreement that you two had, if I didn't accept it, then I'm not going to say "off the hook" because, I guess, there was an amended understanding with regard to the PWID count. So I believe the State is . . . "off the hook" with regard to the trial counts.

(Emphasis added.) The court also allowed the State to argue for a longer sentence, which it did, asking the court "for a sentence of no less than nine years." Before imposing the

sentence, the trial court stated that it wasn't being influenced by the State, explaining, "whatever sentence I give, it's going to be my own decision." The court imposed a sentence that exceeded the agreed (if non-binding) sentence recommendation.

Plea agreements are governed by Maryland Rule 4-243, which provides that the defendant may enter into an agreement with the State's Attorney for a plea of guilty on any proper condition including that "the State's Attorney will recommend, not oppose, or make no comment to the court with respect to a particular sentence." Md. Rule 4-243(a)(1)(E). We review the terms of a plea agreement, and whether a party breached the agreement, *de novo*. *See Ray v. State*, 230 Md. App. 157, 189 (2016) ("[T]he appellate court makes the *de novo* determination, as a question of law, as to what the terms of a plea agreement actually were."), *cert. granted*, 451 Md. 249 (2017). "We construe the terms of the plea agreement according to the reasonable understanding of the defendant when he pled guilty." *Solorzano v. State*, 397 Md. 661, 668 (2007) (citations omitted). Although the court is not required to bind itself to the terms of the plea agreement, Md. Rule 4-243(c)(2), "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled," *Solorzano*, 397 Md. at 667. As such, when the prosecution violates a plea agreement, the defendant may elect to either withdraw his plea or leave the plea standing and be resentenced. *Miller v. State*, 272 Md. 249, 255 (1974).

There is no question that the defense and the State had reached a plea agreement—the issue is what happened to it, and to the parties' respective obligations, once they

presented the agreement to the court. Maryland Rule 4-243(c)(1)–(2) requires the parties to present a plea agreement to the court to accept or reject. Viewed as a contract, this agreement had two components: Mr. Rice would plead guilty to Count 8, and the parties (collectively) would recommend a sentence that would encompass the trial counts as well. When the court declined to bind itself to the agreed sentence recommendation, it did not, as the State contends, reject the agreement—a sentence recommendation isn't binding on the court unless the court itself agrees to it, which this court didn't. *Compare* Md. Rule 4-243(c)(2) ("The agreement of the State's Attorney relating to a particular sentence, disposition, or other judicial action is not binding on the court unless the judge to whom the agreement is presented approves it.") *with* (c)(4) ("If the plea agreement is rejected, the judge shall inform the parties of this fact and advise the defendant (A) that the court is not bound by the plea agreement; (B) that the defendant may withdraw the plea; and (C) that if the defendant persists in the plea of guilty, condition plea of guilty, or a plea of nolo contendere, the sentence or other disposition of the action may be less favorable than the plea agreement."). Nor did the court advise Mr. Rice that the plea agreement was rejected, as the Rule required. At the point the court declined to bind itself, the agreement remained in place and, unless Mr. Rice walked away before pleading guilty, bound both sides.

The events that followed were somewhat unusual procedurally, but didn't vitiate the core agreement. Mr. Rice and the court continued the colloquy, and the court agreed to bind itself to a different sentence—it would run the (same) agreed sentence for Count 8 concurrent to whatever it imposed for the trial counts. Mr. Rice could have walked away,

but he didn't. Importantly, the State could have called the agreement off, but it didn't either.[4] The result, then, was: (a) the agreement remained in force; (b) the court declined to bind itself to the original sentence recommendation, but indicated a sentence consistent with the agreement to which it would bind itself; and (c) Mr. Rice pled guilty. At that point, the State retained the obligation under the agreement to recommend the agreed global sentence. That recommendation was part of the deal that induced Mr. Rice to plead guilty, and the court erred when it concluded that the State no longer was bound, and the State breached the agreement when it asked for "a sentence of no less than nine years."

This leaves the remedy. "Ordinarily where a plea bargain has been breached, the sentence is vacated and the defendant has the option to either have the guilty plea vacated and begin anew or to leave the plea standing and be resentenced." *Clark v. State*, 57 Md. App. 558, 562 (1984). Although Mr. Rice pled guilty only to Count 8, the plea agreement encompassed (and the State's breach relates to) the State's sentence recommendation as to the trial counts as well. As a result, we vacate the sentences as to all counts and remand for resentencing, at which Mr. Rice can decide whether to withdraw his guilty plea or be resentenced in a manner consistent with the agreement. This decision also eliminates any

[4] We recognize that the defense negotiated the court's agreement to bind itself to the Count 8 sentence on its own, and that the State didn't say anything during that part of the colloquy. Then again, the sentence the court agreed to impose represented a better deal from the State's perspective than it had negotiated on its own, so perhaps there wasn't any incentive for the State to interject at that point. Regardless, nothing stopped the State from speaking up if it had concerns that bore on its willingness or ability to proceed with the terms of the plea agreement.

need for us to address Mr. Rice's contention that the sentence that the court imposed on Count 8 exceeds the plea agreement.[5]

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED AS TO ALL CONVICTIONS, VACATED AS TO ALL SENTENCES, AND REMANDED FOR RESENTENCING CONSISTENT WITH THIS OPINION. COSTS DIVIDED EQUALLY BETWEEN APPELLANT AND PRINCE GEORGE'S COUNTY.

[5] The issue in this last point is whether the sentence imposed on Count 8 was meant to run concurrently with the sentences of all of the trial counts or just Count 6, as the commitment record reads. Everybody agrees that the commitment record is wrong; it is unclear whether the trial court meant it that way or whether it was merely a clerical error, but it's an error in any event. If Mr. Rice opts not to withdraw his guilty plea on remand, the plea agreement requires that the agreed sentence on Count 8 run concurrently with the sentence imposed on the trial counts, and he should be resentenced accordingly.