Circuit Court for Carroll County
Case No. C-06-CR-19-000446

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2565

September Term, 2019

MATTHEW A. LITTLE

v.

STATE OF MARYLAND

Graeff,
Beachley,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: April 21, 2021

A jury in the Circuit Court for Carroll County convicted Matthew A. Little, the appellant, of engaging in a continuing course of sexual conduct with a child ("course of conduct") and of sexual abuse of a minor ("sexual abuse"). *See* Md. Code Ann. §§ 3-315(a) and 3-602(b)(2) Criminal Law Art. ("CL"), respectively. The court sentenced Mr. Little to 30 years imprisonment, all but 12 years suspended, for course of conduct and a consecutive 25 years of imprisonment, all but 10 years suspended, for sexual abuse.[1]

Mr. Little raises six questions on appeal, which we have rephrased:

I. Did the trial court err by denying his motions for judgment of acquittal at the close of the State's case?

II. Did the trial court err by admitting the testimony of the State's expert witness on sexual abuse?

III. Did the trial court commit plain error when, in rebuttal closing argument, the prosecutor commented on facts not in evidence?

IV. Did the trial court err by giving a modified *Allen* charge four hours after the jury began deliberating? [2]

V. Did the sentencing court err by not merging the convictions?

VI. Did the sentencing court err by adopting the State's recommended sentencing guidelines, which were based on an incorrect offense score?

For the following reasons, we shall affirm the judgments of the circuit court.

[1] Mr. Little was ordered to serve five years of probation and to register as a sex offender upon release from prison.

[2] An *Allen* charge takes its name from *Allen v. United States*, 164 U.S. 492 (1896), in which the United States Supreme Court sanctioned an instruction a trial court may give to a deadlocked jury.

FACTS AND PROCEEDINGS

The State charged Mr. Little with engaging in a continuing course of sexual abuse of his nephew over a period of five years, beginning when the victim was about eight years old. At trial, the State called the lead detective in the case, the victim, the victim's sister, and an expert in sexual abuse. In the defense case, Mr. Little testified on his own behalf and called two friends as character witnesses. The defense took the position that the victim was not telling the truth and that Mr. Little never touched him sexually.

The victim testified that at the time of trial, he was fourteen years old and in the eighth grade. When he was three or four, his parents separated. Afterward, he lived part-time with his father and part-time with his mother. He explained that Mr. and Mrs. Little are his uncle and aunt; Mrs. Little is his father's sister. At the relevant times, the Littles were living in a house about 800 feet from the victim's father's house.

The victim testified that when he was around eight years old, he started spending the night at the Littles' house once or twice a month. Typically, he would arrive around dinner time; eat dinner with his aunt and uncle and sometimes his cousin, who was an adult; and then he and Mr. Little would play video games for a couple of hours while sitting on a couch in the basement, alone. As the evening progressed, the victim's aunt and cousin often would go upstairs to their bedrooms on the second floor of the house, and he and Mr. Little would continue to play video games.

According to the victim, the abuse started during a visit when he was eight years old. He and Mr. Little were playing video games on a Wii console in the basement. Mr. Little paused the game, pulled his pants and underwear down around his ankles, and

masturbated. He then pulled his underwear and pants back up, un-paused the game, and acted like nothing had happened. The victim testified that he felt confused and awkward about Mr. Little's actions. From then on, whenever he visited the Littles' house, Mr. Little masturbated in front of him in the same manner. Sometimes Mr. Little used a sex toy, which the victim described as a donut-shaped object that Mr. Little would place on his own penis and move up and down.

The visits continued in this way until the victim was about nine years old. The victim testified that beginning then, Mr. Little would pause the video game and direct the victim's hand toward his penis, guiding the victim to masturbate him. This continued until the victim was around ten years old. Starting then, after pausing the video game, Mr. Little would pull the victim's pants and underwear down and masturbate him, after which he would pull his own pants and underwear down and masturbate himself. As on the other occasions, once Mr. Little was finished, he would un-pause the video game and act like nothing had happened.

According to the victim, when he was around ten and a half years old, he and Mr. Little stopped playing the Wii in the basement and started using a Play Station 4 console in the living room on the main floor of the house. The sexual abuse did not stop, however. Mr. Little would pause a game in the middle, wait a few seconds while listening for any noise from the bedrooms upstairs, and, if he did not hear any noise, walk over to the basement door and direct the victim to go downstairs. Once Mr. Little and the victim were in the basement, Mr. Little would masturbate him. Eventually that progressed to Mr. Little's performing fellatio on him.

The victim went on to testify that when he was around 11 years old, Mr. Little directed him to perform fellatio on him, guiding his head to his penis. The sexual abuse occurred almost every time he stayed overnight at the Littles' house. One time he asked Mr. Little if what was happening was wrong or illegal. Mr. Little responded that it was not, and that he was just trying to find out if the victim was gay.

The victim explained that during a health class in the sixth grade he learned about sexual abuse. The knowledge made him uncomfortable. He testified, "I felt like I had something I couldn't tell anybody" because he did not want to get anyone in trouble. As he got older, around 13 years of age, he realized "that it just wasn't okay." Around this time, he asked his older sister, "[I]f you knew something that could get somebody in trouble, would you do it?" She responded by telling him "to do what's right[.]" He walked away and said nothing further. Later that night, his father asked him what was going on. The victim told his father what Mr. Little was doing to him. The next morning, the victim and his parents went to the police station. The victim explained that he finally told his parents because "[i]t just kind of came to be too much for me."

Sergeant William Burdt, with the Carroll County Sheriff's Office, testified that on March 15, 2019, the victim and his parents came to the police station and spoke with him and with a child protective services investigator. A couple of weeks later, the sergeant met with Mr. Little and his attorney. During that meeting, Mr. Little confirmed that ever since the victim was eight years old, he had spent the night at the Littles' house about once a month. He told the detective that after his wife went to bed, he and the victim would play video games in the basement until 1:00 or 2:00 a.m. After a while, they began playing on

a different gaming system, in the living room. When Sergeant Burdt confronted Mr. Little with the specific allegations of sexually touching and performing fellatio on the victim, he responded, "Yeah, I don't think so. That's gay as shit."

The victim's sister, a freshman in college at the time of trial, testified that her brother was on the small side when he was younger. She confirmed that in March 2019, he approached her with a question. Immediately after that, she telephoned their father and asked him to talk to the victim when he came home. She testified that in the weeks prior to her brother's approaching her, he had been uncharacteristically moody and was "acting very different," flushing items down the toilet and the shower drain, clogging the pipes. When asked if her brother ever lied, she testified that he lied about little, childhood things, like whether he had done his homework or swept the floor, but never about anything that could get someone in trouble.

The State called Crimson Barocca as an expert witness in sexual abuse. During *voir dire*, she testified that she holds bachelor's and master's degrees in social work and since 2009 has worked first as a forensic interviewer and then as a supervisor for the Baltimore Child Abuse Center. The Center sees over 1,000 children a year. Ms. Barocca testified that she has undergone extensive national and local training in child sexual abuse, particularly in the areas of delayed disclosure and grooming. The court accepted Ms. Barocca as an expert "in the field of the dynamics of child sexual abuse including the topics of grooming and delayed reporting."

Ms. Barocca stated that she had not spoken to any witnesses in this case or reviewed any statements. She had been informed about some central facts: the victim was male, the

sexual abuse began when he was about eight years old and continued until he was about 13, and the alleged perpetrator was the victim's uncle. At no time did Ms. Barocca express an opinion about whether the victim in fact was sexually abused.

Ms. Barocca explained that disclosure "is when someone tells something that's secret to another person . . .[a] secret that they have that they decide to tell someone else." She testified that in sexual abuse cases, many victims - - children and adults - - never disclose what happened and, when they do, disclosure often is delayed. She identified several factors that may cause a child not to disclose or to delay disclosing sexual abuse, including: the frequency of the abuse; the closeness of the relationship between the child and the alleged perpetrator; the child's level of family and social support; the child's age and gender and the perpetrator's gender; and the child's level of development and understanding of what he or she was experiencing.

The prosecutor posed several questions based on hypothetical facts. Ms. Barocca testified that if the abuse always took place in the basement while everyone else was upstairs sleeping, or the perpetrator listened to hear any noise before going into the basement, that would lead even a child as young as five to understand to keep the abuse a secret. She also testified that in her experience, if the abuser and the child are the same gender, the child will be less likely to disclose because of the shame attendant to being perceived as a homosexual. She added that when a child is continuously abused over time, the child might not disclose because of the shame and guilt of not having revealed what was happening earlier and the fear of not being believed. When asked how a child might respond to a perpetrator who says he is testing to see whether the child is gay, she testified

that it might increase the child's confusion about the abuse, as the statement implies that the abuser is trying to help the child and it is the child's fault that the abuse is occurring.

The prosecutor asked whether disclosure usually takes place as a one-time event and whether Ms. Barocca would be surprised if in the weeks leading up to disclosure a victim exhibited destructive behavior in the home. She responded that that would not surprise her, explaining that children often disclose small pieces of information over time, that teenagers are more purposeful in how they disclose sexual abuse because they consider the consequences and the impact disclosure could have on the abuser, and that boys are more likely to express their distress over the sexual abuse by destructively acting out. When asked if learning about body safety in school would affect disclosure, she replied it might cause a child not to disclose because the child has become educated that something "bad" has happened to him or her and might feel ashamed.

Ms. Barroca also testified about the concept of "grooming," by which a perpetrator subtly manipulates the child victim into not disclosing the abuse by building a positive relationship with the child and the child's family. When the prosecutor specifically asked whether grooming could include playing video games with a child who really enjoys that activity, Ms. Barocca opined "that anything that the child really loves or enjoys that that's what the abuser would want to do with that child." In response to a question about how grooming affects disclosure, and specifically why a child would continue to spend time with a person who is abusing him or her, Ms. Barocca explained that, with the exception of the abuse, the relationship between the abuser and the victim often is loving and positive. She added that there is no one typical scenario of disclosure or grooming.

As noted, Mr. Little testified on his own behalf. He gave his age as 49 years old and testified that he lives with his wife and their 23-year-old son in a 2,600 square foot house. The house has bedrooms on the second floor, a common living space on the first floor, and a basement in which there is a pool table, a television, two slot machines, and gym equipment. He has known the victim ever since the victim was born. After the victim's parents divorced, the victim started coming over to the Littles' house to visit. When the victim was around eight years old, he started spending the night at their house. According to Mr. Little, until the victim was 10 years old, he did not stay over at their house more than three times a year, and when he was 11 or 12 years old, he stayed over maybe five times a year.

Mr. Little testified that typically when the victim came over, they had dinner together and afterward they played video games, board games, or watched television for several hours. Then everyone went to bed. He acknowledged that he is "a big gamer" and has enjoyed playing video games most of his childhood and adult life. He testified that during the victim's visits, he and the victim rarely were alone, and they only played video games in the first-floor family room, never in the basement. He explained that he and the victim would stop playing video games when his wife went upstairs to bed or came downstairs and told them to come to bed.

Mr. Little denied engaging in any sexual acts or having any sexual contact with the victim. He testified that his wife and daughter had given the victim's father a "gag" gift a couple of years earlier that resembled the sex toy the victim testified about. He stated that that toy had never been in his house. He acknowledged that he keeps sex toys in a keyed

safe in his bedroom closet. He testified that he had misspoken when he told the detective that he and the victim had played video games on the Wii in the basement. After being interviewed by the detective, he found pictures showing the Wii in the living room of the house, where it had been moved after he underwent knee surgery. That surgery took place before the victim started spending nights at the Littles' house.

Brenda Willey and her husband Brian, friends of Mr. Little and his wife for over 20 years, each testified that Mr. Little is a truthful person.

DISCUSSION

I.

Mr. Little was convicted of course of conduct and sexual abuse of a minor. With respect to course of conduct, CL § 3-315(a) prohibits a person from "engag[ing] in a continuing course of conduct which includes three or more acts that would constitute violations of[,]" among other things, certain sexual offenses, including sexual offense in the third degree, "over a period of 90 days or more[.]" With respect to sexual abuse of a minor, CL § 3-602(b)(2) provides that "[a] household member or family member may not cause sexual abuse to a minor." "Sexual abuse" includes a sexual offense in any degree. CL § 3-602(a)(4)(ii).

The parties agree that the only sexual offense that could apply here is third-degree sexual offense committed against a victim under the age of 14 by a person at least four years older than the victim. *See* CL § 3-307(a)(3). Accordingly, proof of the age disparity between the defendant and the victim was a necessary element of both offenses. In the

State's case, through the victim's testimony, the State established that the victim was under the age of 14 when all the acts of sexual abuse happened.

Mr. Little contends the trial court erred by denying his motions for judgment of acquittal at the close of the State's case because the State failed to prove that when the sexual abuse happened, he was at least four years older than the victim. The State responds that Mr. Little's sufficiency contention is "barely appropriate for adjudication" because he did not raise it below; but in any event, there was sufficient circumstantial evidence of his age relative to the age of the victim to support the trial court's decision to deny the motions for judgment of acquittal.

The standard for appellate review of evidentiary sufficiency is "whether, 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." *State v. Thomas*, 464 Md. 133, 152 (2019) (quotation marks and citations omitted). *See also Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010) (citation omitted). Thus, "the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Allen v. State*, 158 Md. App. 194, 249 (2004) (quotation marks and citation omitted).

In pertinent part, Rule 4-324(a) provides that "[a] defendant may move for judgment of acquittal . . . at the close of the evidence offered by the State and, in a jury trial, at the

close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted." Rule 4-324(c) provides that if a motion for judgment of acquittal is made at the close of the State's case and is denied, and the defense then introduces evidence, the motion is withdrawn. In that circumstance, the defendant may move for judgment of acquittal at the close of all the evidence, and if desired may do so on the same ground raised in the motion made at the close of the State's case. However, the motion for judgment of acquittal made at the close of the State's case, having been withdrawn, is not subject to appellate review. *Warfield v. State*, 315 Md. 474, 487 (1989). *See also Williams v. State*, 131 Md. App. 1, 5-6, *cert. denied*, 359 Md. 335 (2000).

Here, at the close of the State's case, the trial court raised the question whether the State had introduced evidence from which a reasonable jury could find that when Mr. Little perpetrated the sexual acts against the victim, he was at least four years older than the victim. The parties proceeded to present argument on the issue. Defense counsel asserted that the State had failed to introduce any evidence of Mr. Little's age and therefore could not prove the age disparity. The prosecutor responded that it had introduced circumstantial evidence from which a finding of the necessary age disparity could be made. The trial court ruled that there was sufficient circumstantial evidence introduced of Mr. Little's age and denied the motions for judgment of acquittal on both counts on that basis.

By offering argument in support of the trial court's expression of doubt about the sufficiency of the evidence of age disparity, the defense in fact moved for judgment of acquittal, on both offenses, at the conclusion of the State's case, on the ground that necessary evidence of Mr. Little's age was lacking. When the motions were denied, he

proceeded to introduce evidence, thereby withdrawing the motions. Therefore, his challenge on appeal to the court's ruling on his motions at the close of the State's case is unavailable. [3]

In the defense case, Mr. Little testified that his current age was 49 years old. At the close of all the evidence, at the prompting of the court, defense counsel renewed his motions for judgment of acquittal and, in response to the question whether he wanted to be heard further, said: "I will submit on what I argued previously." The court denied the motions.

Mr. Little's motions for judgment of acquittal at the close of all the evidence were adequate. *See Warfield v. State*, 315 Md. at 487-90. Nevertheless, the court properly denied them. The evidence at that point was that the victim was 14 years old and Mr. Little was 49 years old, that is, 35 years his senior. Accordingly, the evidence was legally

[3] Even if the denial of the motions for judgment of acquittal at the close of the State's case were not waived as a ground for appeal, we would conclude that there was sufficient circumstantial evidence to permit a reasonable juror to find that Mr. Little was at least four years older than the victim when the sex acts were committed. The State's evidence showed that Mr. Little was the victim's uncle through marriage to the victim's father's sister and that Mr. Little had known the victim since the victim was born. It also showed that when the sex acts were committed, Mr. Little was married and living with his wife and an adult child, and that sometimes when the victim was spending the night, Mr. Little would drive him to the Littles' house. Reasonable jurors could deduce from those facts that Mr. Little, having an adult child and being old enough to drive, was at least four years older than the victim. Additionally, the jurors could see Mr. Little in the courtroom and determine from his appearance that he was at least four years older than the victim. *See Commonwealth v. Miller*, 657 A.2d 946, 947 (Pa. Super. Ct. 1995) (in a prosecution for corruption of a minor the age of the defendant need not be proven by direct evidence where the jury has the opportunity to observe the defendant).

sufficient to satisfy the "at least four years older" element of the mode of third-degree sexual abuse the State needed to prove for both charged crimes.

II.

Prior to Ms. Barocca's testimony, defense counsel moved *in limine* to preclude the State from calling her as an expert witness. He argued that there was not a sufficient factual basis for her testimony because she had not interviewed the victim or any person involved in the case; had not reviewed any records associated with the case; did not have "intimate knowledge" about the facts in the case; and her testimony would be so "general" as to be prejudicial to the defense. He also argued that her testimony would not be helpful to the jury.

The prosecutor responded that Ms. Barocca had been given basic information about the case - - the gender of the victim, his age when the abuse started and ended, and the victim's relationship with the defendant. The prosecutor explained that Ms. Barocca was not being called to give an opinion about whether the abuse in fact happened. Rather, the State was offering her as an expert in the field of the dynamics of child sexual abuse, specifically, grooming and delayed disclosures, and her knowledge in this area would be of assistance to the jurors in deciding the factual disputes before them. The trial court denied the motion *in limine*.

After Ms. Barocca was *voir dired* by both attorneys, the prosecutor asked the court to accept her as an expert in the field described above. The court asked defense counsel whether he was objecting, and he responded, "Just for the record, Your Honor." The court accepted Ms. Barocca as an expert witness.

Mr. Little contends the trial court erred by accepting Ms. Barocca as an expert witness. He repeats the arguments he made below and adds that Ms. Barocca provided "no methodology to follow" and was not going to offer (and did not offer) an opinion about the "veracity of the alleged victim's story[.]" The State responds that the trial court properly exercised its discretion to admit Ms. Barocca's opinion testimony.

Rule 5-702 states:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

The trial court's decision to admit or deny expert opinion testimony is reviewed for abuse of discretion and will "'seldom constitute a ground for reversal.'" *Sissoko v. State*, 236 Md. App. 676, 712 (quoting *Bryant v. State*, 393 Md. 196, 203 (2006)), *cert. denied*, 460 Md. 1 (2018).[4]

[4] In *Rochkind v. Stevenson*, 471 Md. 1 (2020), the Court of Appeals overruled *Reed v. State*, 283 Md. 374 (1978), which had adopted the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) "general acceptance in the [relevant] scientific community" test for admission of scientific expert testimony. In its place, the Court adopted the test set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), which uses a flexible set of "factors to help courts determine the reliability of expert testimony[.]" 471 Md. at 4-5 (quotation marks and citations omitted). The *Rochkind* holding applies to all appeals pending at the time the opinion was filed, "where the relevant question has been preserved for appellate review." *Id*. at 38-39 (quotation marks and citations omitted). In this case, there was no *Frye-Reed* hearing and that standard was not applied in any of the court's rulings. The parties agree that although this case was pending on appeal when *Rochkind* was filed, an assessment of the admissibility of Ms. Barocca's opinion testimony under *Daubert* would not affect the facts and arguments before us.

Part (3) of Rule 5-702, that the expert's opinion has a sufficient factual basis, requires "an adequate supply of data and a reliable methodology." *Sugarman v. Liles*, 460 Md. 396, 415 (2018) (quotation marks and citations omitted). "A factual basis for expert testimony may arise from a number of sources, such as facts obtained from the expert's first-hand knowledge, facts obtained from the testimony of others, and facts related to an expert through the use of hypothetical questions." *Sippio v. State*, 350 Md. 633, 653 (1998) (citing 6 Lynn McLain, MARYLAND EVIDENCE, § 703.1, at 236-37 (1987)).

Mr. Little seems to think that in a case like this an expert witness only can obtain a factual basis for an opinion by meeting with the victim, reading any statement by the victim, or reviewing any documents relevant to the case. He does not cite any support for that position, and there is none.

Ms. Barocca was provided key facts about the case that either were undisputed or were based on the victim's testimony. She explained the concepts of grooming in sexual abuse of children and delayed disclosure that she had learned and become familiar with from her education and from hands on experience working in the field of child sexual abuse. She then was asked questions based on hypothetical facts that were grounded in the State's evidence. She was qualified to answer these questions based on her education, training, and experience, and her answers were not the product of speculation or guesswork.

Mr. Little also argues that there was not an adequate basis for Ms. Barocca's expert testimony because there was "no indication as to any methodology used." This argument is not preserved for review and in any event is meritless.

Rule 8-131(a) provides that "[o]rdinarily, the appellate 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[.]" Rule 4-323(a), governing objections to evidence provides, in relevant part: "An 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." In addition, Rule 5-103(a)(1) states: "Error may not be predicated upon a ruling that admits . . . evidence unless the party is prejudiced by the ruling, and . . . a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was requested by the court or required by rule[.]"

As discussed above, before the State called Ms. Barocca to the stand, defense counsel moved *in limine* to exclude her testimony. He made the argument above, that her "testimony will not be based upon any factual basis in the case" because she had no "intimate knowledge about this case whatsoever" and after a lengthy discussion, the court declined to exclude her testimony on that basis. Both parties then engaged in a robust *voir dire* of Ms. Barocca. When the court asked defense counsel whether he had any objection to the court's acceptance of the witness as an expert in the dynamics of child sexual abuse, specifically delayed disclosure and grooming, defense counsel stated, "Just for the record, Your Honor." The court questioned defense counsel further, asking him, "Do you wish to be heard?" Defense counsel responded, "No, I do not."

During Ms. Barocca's testimony, which covered almost 50-pages of transcript, defense counsel objected a total of four times. Each time he gave a reason for his objection, and at no time did he raise the issue of Ms. Barocca's "methodology."[5] The first criticism of Ms. Barocca's "methodology" is in Mr. Little's opening brief in this Court, and the first challenge to the "reliability" of her methodology is in his reply brief. Accordingly, this methodology argument is not preserved for review.

The argument lacks merit in any event. The type of foundation required for the admission of expert testimony necessarily turns upon the nature of the evidence offered and no set criteria will apply in all cases. There is a vast difference between the foundation needed to show how an expert witness arrived at a complex scientific opinion about the statistical reliability of a DNA match, and the foundation needed for a witness to report common characteristics of sexual abuse in children based on education, training, and experience. The factual basis for Ms. Barocca's opinion was a combination of her expertise in that area together with the hypotheticals she was asked to consider that were grounded in facts elicited by the State in its case-in-chief.

[5] When the prosecutor asked generally what steps are taken to confirm or rule out a child's disclosure of an allegation of sexual abuse, defense counsel objected, arguing that this was outside the witness's area of knowledge. The court sustained the objection. When defense counsel objected to the prosecutor's phrasing of a question, she rephrased it. The court overruled defense counsel's objection to the witness testifying that during an investigation of a child sexual abuse allegation it is "the investigator's job to consider all the facts, statements that the child has made." The court sustained defense counsel's objection to the witness's testimony that children do lie but those situations are, in her experience, "weeded out" and not prosecuted.

Ms. Barocca did not express an opinion that the victim had been sexually abused but explained certain general characteristics and behaviors of children who have been sexually abused. Reliability may be based on education, training, and experience. Ms. Barocca's opinion testimony about the characteristics of child sexual abuse victims was based on the principles that she had learned in her training and experience in the field of child sexual abuse, as a child protective service investigator, and as a forensic interviewer and supervisor. Her "methodology" was essentially observational--that is what she saw over the course of the many cases she was involved with, and those related to her by others who trained on these topics. Therefore, we reject the argument that Ms. Barocca's testimony should have been excluded because she provided "no methodology" to follow, and, on the record before us, we find no abuse of discretion in the court's ruling admitting her expert testimony.

The trial court did not abuse its discretion in permitting Ms. Barocca's expert testimony at trial.

III.

Mr. Little next contends he was prejudiced because, during the State's rebuttal closing, the prosecutor commented on facts not in evidence. Acknowledging that he did not object, move for a mistrial, or take any action to bring the improper comments to the court's attention, he argues that we should recognize plain error, as the remarks were "so inflammatory and so without justification that the only possible remedy is reversal[.]" In support, he relies on *Lawson v. State*, 389 Md. 570 (2005). The State concedes that the

prosecutor referred to facts not in evidence in rebuttal closing but argues that we should not engage in plain error review.

After the jury was empaneled, the court gave instructions about the various facets of a trial, specifically advising them: "Following my [jury] instructions [at the close of all the evidence], the lawyers are permitted to give closing arguments. These arguments are not evidence. They are an opportunity for the lawyer to summarize and to comment on the evidence that you have heard and to argue to you how to decide the charges in this case." In its instructions at the close of all the evidence, the trial court again told the jury about closing argument, advising them, among other things:

> Opening statements and closing arguments of the lawyers are not evidence. They are intended only to help you understand the evidence and to apply the law. Therefore, if your memory of the evidence differs from anything the lawyers or I may say, you must rely on your own memory of the evidence.

During the State's initial closing argument, the prosecutor told the jury: "[I]f my recollection of what was heard in this trial and what we heard from witnesses differs from yours, yours controls. Okay."

In rebuttal closing, the prosecutor made the following remarks about the sex toy the victim had testified about:

> This sex toy, [the victim] told you that this man started using something on his penis and he moved it up and down. Some sort of sex toy. When the Defendant – when he was on the stand, gosh I don't know what that is, what is that? What is that picture? Let's look at that picture.
>
> Excuse me, that drawing. I am sorry, Madam Clerk. I am showing you what has been marked as State's 4 and oh my gosh, what is this? I have no idea what this is. No idea what this is. Then a few minutes later, oh you know what? My wife gave that to her brother – [the victim's] father, as a

gag gift. Well then how come you didn't – because you know that is a gag gift because remember he told you that he has the best memory, his memory is really good. So why? Why wouldn't he know what this is?

Do you know how easy it would have been for his wife to get up here and tell you that story? I mean, the Defense made a big deal about me not calling additional witnesses. Did I need to? You got the full story. Do I need to call 20 more people to tell you a fraction of something? Because [the victim] told you what happened, the police officer corroborated what [the victim] told you.

Defendant even corroborated some of what [the victim] told you. The expert corroborated what [the victim] told you and so did his sister, Kate. Who stood up to corroborate any of his story? Any of it? No one. How about something so simple as hey my wife gave this masturbating sex toy to her brother, she was on the witness list. You might have heard her name called when we were sitting here in voir dire. All of those questions asked of you, she was on – even somebody in the back had said is that a nurse? There is clarification on who she was.

Why wouldn't he put her up here to corroborate that? Why? Simple enough to do it. And ladies and gentlemen, again very few things surprise me during trials. Like this one was the biggest surprise[s] that I think I have ever had in trial. Because we asked about other sex toys. *[The victim] told you about other sex toys in the home. He told you that this Defendant showed him other sex toys and where were they were located? [The victim] told you. In his closets, in some locked plastic box that needed a key. That is what [the victim] told you.*

That is what he said. And then lo and behold this Defendant gets on the stand and he talks about this one sex toy that oh that was a gift to somebody else and it has never been in my house. So I asked about other sex toys in the house. Yes, they are there. But I keep them under lock and key. They are in a safe. Really? Where is that safe kept? In my closet. Wow. Is that a plastic box? Well it is a safe. Okay it is a safe. Is it plastic? Well, yeah maybe. Does it take a key? Yep. Sure does.

And then for reasons that are still unclear to me, Counsel even on redirect stands up and asks about that safe, that box again. It is not mine, it's my wife's. Does that matter? Of course not. How easy would it have been for his wife to stand up and confirm that for you? Not that it matters. Because here is why it matters. And this is what you can hang your hat on here.

> Answer this for me. If nothing ever went on, [the victim] wasn't ever touched by this man, anything, *how on earth would [the victim] know those details? How would he know there is extra sex toys in the house? How would he know where they are kept? How would he know they are in a safe in the closet and it takes a lock and key? How would [the victim] know that information?* And folks, when you answer that question, you will have your verdict.

(Emphasis added.) The prosecutor moved on to other topics and then brought her rebuttal closing to an end. Defense counsel did not object to the prosecutor's remarks during or after rebuttal closing and did not move for a mistrial after closing arguments.

Counsel are generally afforded wide latitude to engage in oratorical flourishes during closing argument and to invite the jury to draw inferences. *Degren v. State*, 352 Md. 400, 430 (1999). Nevertheless, counsel may not refer to facts not in evidence. The parties agree that there was no evidence in this case to support the prosecutor's statement that Mr. Little showed the victim the sex toys he kept in a locked safe in his house.

Because there is not a specific rule governing preservation of trial court error regarding closing arguments, we look to Rule 8-131(a). It provides: "Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" As we have explained:

> The purpose of Maryland Rule 8-131 is to allow the court to correct trial errors, obviating the necessity to retry cases had a potential error been brought to the attention of the trial judge. The Rule is also designed to prevent lawyers from "sandbagging" the judge and, in essence, obtaining a second "bite of the apple" after appellate review.

Sydnor v. State, 133 Md. App. 173, 183 (2000), *aff'd*, 365 Md. 205 (2001), *cert. denied*, 534 U.S. 1090 (2002). Nonetheless, an appellate court should address an error that has not been objected to when the error is "compelling, extraordinary, exceptional or fundamental

to assure the defendant of fair trial." *Rubin v. State*, 325 Md. 552, 588 (1992) (quotation marks and citations omitted). The standard is high: "Every error that, if preserved, might have led to a reversal does not thereby become extraordinary." *Perry v. State*, 150 Md. App. 403, 436 (2002), *cert. denied*, 376 Md. 545 (2003). We have said: "[T]he notion of 'plain error' requires, as a rock-bottom minimum, a legal error by the judge, not a tactical miscalculation by defense counsel; the judge does not sit as co-counsel for the defense. Neither does the appellate court." *Nelson v. State*, 137 Md. App. 402, 423 n.5 (2001). "[A]ppellate review under the plain error doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Hammersla v. State*, 184 Md. App. 295, 306 (quotation marks and citation omitted), *cert. denied*, 409 Md. 49 (2009).

In *Lawson*, 389 Md. at 596-605, the defendant was convicted of various sex offenses against a child. On appeal, invoking plain error, he argued that the convictions should be reversed because the prosecutor made numerous improper arguments and comments in closing argument. The prosecutor twice made an improper "golden rule" argument, asking the jurors to place themselves in the shoes of the victim's mother; accused the defense of not introducing evidence of a motive for the victim to lie, thereby suggesting to the jurors that the burden of proof rested on the defendant; called the defendant a "monster"; and insinuated that, if the jury were to acquit the defendant, he would be free to molest more children. *Id.* at 580. The Court of Appeals noted that, standing alone, each argument might not have warranted reversal, but "*when taken as a whole*, could have prejudiced the jury in such a way as to deny the defendant a fair and impartial trial." *Id.* at 604-05 (emphasis

added). Exercising its discretion to engage in plain error review, the Court considered the propriety of the prosecutor's remarks, in total, and reversed.

This case is a far cry from *Lawson*. The disparaging remark in *Lawson* profoundly impugned the character of the defendant and was facially inflammatory, and of course was one of several improper remarks. That was not the case here. Moreover, here the court advised (and the prosecutor reminded) the jury that closing arguments are not evidence and that it is the jurors' memories of the evidence, not the lawyers' memories, that control. Additionally, the prosecutor's remarks could have been easily and promptly corrected by the trial court had defense counsel timely objected either when they were made or at the end of closing argument. Neither was done.

Notwithstanding that the prosecutor's reference to facts not in evidence was improper, we are not persuaded that they rose to a level so prejudicial as to affect Mr. Little's fundamental right to a fair trial. Plain error review is reserved for those circumstances of "'truly outraged innocence[,]'" *Gross v. State*, 229 Md. App. 24, 37 (2016) (quoting *Jeffries v. State*, 113 Md. App. 322, 325-26 (1997)), which does not exist here. To permit Mr. Little to raise the issue for the first time on appeal, when an objection easily could have been lodged and dealt with below, would run counter to considerations of fairness and judicial efficiency. *See Chaney v. State*, 397 Md. 460, 468 (2007). Accordingly, we decline to exercise our discretion to engage in plain error review.

IV.

Mr. Little contends the trial court erred by giving the modified *Allen* instruction when it did, after the jury had been deliberating for four hours. He cites no case law in support.

The record shows that the jury retired to deliberate at 11:13 a.m. It deliberated until 3:27 p.m., at which time the foreman told the bailiff that the "jury was at an impasse." When the parties reassembled before the court, the prosecutor asked the court to instruct the jurors to deliberate for a bit longer. Defense counsel moved for a mistrial. The court denied that motion and instead decided to give the jury a modified *Allen* charge, noting that the amount of time that the jury had been deliberating was not "excessive."

The jurors entered the courtroom at 3:33 p.m. After confirming that they remained at an impasse, the court instructed them as follows:

> Members of the jury, the verdict must be the considered judgment of each of you. In order to reach a verdict, all of you must agree. In other words, your verdict must be unanimous. You must consult with one another and deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors. During deliberations, do not hesitate to re-examine your own views. You should change your opinion if convinced you are wrong. But do not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.[6]

The jury exited the courtroom at 3:36 p.m. At 6:14 p.m., the jury announced that it had reached a verdict.

[6] This instruction is identical to Maryland Pattern Jury Instruction – Cr. 2:01 on "Jury's Duty to Deliberate."

When jurors indicate they are unable to reach a unanimous decision, it is appropriate in some circumstances for the trial court to give an "*Allen*-type" instruction to aid them in reaching a unanimous verdict. *Kelly v. State*, 270 Md. 139, 142 (1973). Although there are no "hard and fast rules limiting trial judges' discretion in allowing juries to deliberate[,]" when presented with a possibly deadlocked jury, the judge ordinarily should consider: "the length of the trial, the nature or complexity of the case, the volume and nature of the evidence, the presence of multiple counts or multiple defendants, and the jurors' statements to the court concerning the probability of agreement." *Thomas v. State*, 113 Md. App. 1, 9, 11 (1996) (quotation marks and citations omitted). "It is within the trial judge's discretion to require an apparently deadlocked jury to continue deliberating or to declare a mistrial." *Browne v. State*, 215 Md. App. 51, 57 (2013) (citing *Mayfield v. State*, 302 Md. 624, 632 (1985)). A trial court abuses its discretion when it is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Gray v. State*, 388 Md. 366, 383 (2005) (quotation marks and citations omitted).

On the record before us, we see no reason why the trial court should have declared a mistrial after the jury deliberated for only four hours. Accordingly, under the circumstances presented, we perceive no abuse of discretion by the trial court in giving a modified *Allen* charge when it did.

V.

Mr. Little contends the court erred by not merging his convictions for engaging in a continuing course of conduct and sexual abuse of a minor, for sentencing. *See* CL §§ 3-

315(a) and 3-602(b)(2), respectively. Specifically, he argues that because "there is no clear legislative prohibition on the merger of these offenses," his sentences should have merged under either the required evidence test, the rule of lenity, or the principle of fundamental fairness. The State disagrees, as do we.

CL § 3-315(b)(2) sets forth the penalty for a continuing course of conduct conviction, stating that a "sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence under § 3-602 of this title." This antimerger provision allows for the imposition of separate sentences and overrides any merger arguments like the required evidence test, the rule of lenity, or fundamental fairness. *See Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983) (explaining that double jeopardy does not attach when the legislature specifically authorizes cumulative punishment under two statutes, regardless of whether they proscribe the same conduct), and *Quansah v. State*, 207 Md. App. 636, 645 (2012) (explaining that when the "legislature clearly intended" that two crimes arising from the same act(s) be punished separately, we shall "defer to that legislated choice.") (quotation marks and citations omitted). Accordingly, any merger arguments are of no avail to Mr. Little. The sentencing court did not err by imposing separate sentences for Mr. Little's convictions.

VI.

Finally, Mr. Little contends the sentencing court improperly adopted the offense score recommended by the State, which was based on evidence that the victim had suffered permanent injury and/or was a vulnerable victim, and had the effect of raising his sentence under the guidelines. He argues that there was no evidence that the victim was permanently

injured or was a vulnerable victim and maintains that under the circumstances his sentence was illegal.

The State responds that the offense score it recommended and the court used was correct because, given his age when the sexual abuse started, the victim was a vulnerable victim. Alternatively, the State asserts that even if there was error, it did not result in an illegal sentence.

Under Rule 4-345(a), "[t]he court may correct an illegal sentence at any time." However, no relief is afforded under the Rule when "the sentences imposed were not inherently illegal, despite some form of error or alleged injustice." *Matthews v. State*, 424 Md. 503, 513 (2012) (citations omitted). Only three limited grounds exist in Maryland for appellate review of a sentence: " (1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations; and (3) whether the sentence is within statutory limits." *Abdul-Maleek v. State*, 426 Md. 59, 67 n.3 (2012) (quotation marks, citations, and italics omitted).

The Maryland sentencing guidelines were created by the Maryland Judiciary "for voluntary use by circuit court judges to assure that like criminal offenders would receive like sentences for like offenses." *Teasley v. State*, 298 Md. 364, 366 (1984). The Guidelines assign numbers based on various factors, from which an offense score and an offender score are computed. *Id.* at 366-67. A sentencing matrix sets out the range of sentences based on those scores. *Id*. at 367. The preface to the revised Guidelines makes clear that "the Guidelines are not mandatory; instead they complement rather than replace

the judicial decision-making process or the proper exercise of judicial discretion." *Id.* (quotation marks and citation omitted). "[A] mistaken application of, or failure to apply, the Guideline provisions by the sentencing judge . . . does not require vacation of the sentence and a new sentencing hearing." *Id*. at 370.

There was no error in the Guideline worksheet here. The victim was eight years old when the abuse began, clearly under the age of 11, which the Guidelines set out as one of several criteria to meet the definition for being a vulnerable victim. Even if the Guideline worksheet submitted by the State and adopted by the court was inaccurate, however, Mr. Little is not entitled to a new sentence for the reasons stated above. Accordingly, we shall not disturb the sentences imposed.

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