Circuit Court for St. Mary's County
Case No. C-18-CR-22-000474

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1494

September Term, 2023

JUSTIN TYLER DUNBAR

v.

STATE OF MARYLAND

Zic,
Tang,
Moylan, Charles E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: October 1, 2024

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

Justin Tyler Dunbar, the appellant, was charged with various offenses stemming from allegations that he had sexually abused a minor. A jury in the Circuit Court for St. Mary's County convicted the appellant of three counts of third-degree sexual offense. The court sentenced him to a total of twenty years of incarceration, all but ten years suspended, with credit for 321 days served. On appeal, the appellant raises three issues:

I. Did the trial court err in admitting hearsay testimony?

II. Did the trial court err in sentencing the appellant?

III. Did the commitment record and docket entries incorrectly reflect the sentence imposed by the trial court?

For the following reasons, we shall order a limited remand with instructions to the circuit court to correct the commitment record and docket entries to reflect the correct start date of the appellant's sentence. We shall otherwise affirm the circuit court's judgments.

BACKGROUND

K., who was 13 years old at the time of the trial, testified that the appellant committed acts of sexual abuse against her. The appellant was previously in a relationship with K.'s mother. During that time, the appellant and K. developed a "father-daughter" relationship. The appellant and K.'s mother broke up in 2016, and the appellant eventually moved to Wisconsin. Despite this, the appellant maintained regular contact with K. and her sister.

On Saturday, October 15, 2022, the appellant, his girlfriend, and their two sons visited Maryland for a week to see the appellant's grandparents in St. Mary's County. The

following day (October 16), the appellant picked up K. and her sister and took them to his grandparents' home to stay for a week and celebrate K.'s thirteenth birthday.

K. testified that she and the appellant were watching a movie on the couch that evening. After falling asleep, K. awoke to find the appellant touching her breasts and "down [her] waist." It "started above [her clothing] and then went under." K. tried to "get it to stop" by rolling over, but the appellant then "started going under [her] clothes again." The appellant inserted his penis, and at some point, his fingers, inside her vagina. K. further testified that prior to this, she had not been sexually active.

K. went to the bathroom, locked the door, and cried. She did not immediately call for help because the appellant was bigger and stronger than her and she did not want him to hurt her or any of her family members. Even though K. did not have her cellphone, she later used the iMessage function on her iPad to message her boyfriend about what had happened. She wrote that the appellant rubbed her breasts, "kept going back and forth down [her] body," and "made [her] jerk him off."

Investigation

On October 19, K. visited relatives in Virginia. While there, K. confided in her cousin about the incident and asked her cousin to inform K.'s family about what had happened. Upon learning of the incident, K.'s mother and stepfather arranged for the appellant's girlfriend to take K. and her sister to the police station in Suffolk, Virginia. Later, K. went to the hospital for an examination and testing. The sexual assault nurse did not observe any acute injuries to any part of K.'s body, including her genitalia.

Swab samples were collected from different parts of K.'s body, and buccal swabs[1] were collected from the appellant. A forensic scientist with the Maryland State Police testified that although she detected male DNA on the swabs, she "could not make an identification on the presence of the male DNA on the thigh/external genitalia swab and the forehead swab" because there was not enough male DNA to develop a profile.

Appellant's Statements

On October 20, the appellant's girlfriend confronted him about the incident. In a text exchange, admitted into evidence, the girlfriend sought assurance from the appellant that he had not done what was alleged before she would allow him to return home:

> [APPELLANT'S GIRLFRIEND]: I still can't trust that you didn't do that to [K.]
>
> [APPELLANT]: Don't give up on me I can get better I just need to get help
>
> [APPELLANT'S GIRLFRIEND]: I can't trust that you didn't do that to her
>
> [APPELLANT]: Can we go home and talk about this stuff and figure it out there[?]
>
> [APPELLANT'S GIRLFRIEND]: No we can't
>
> [APPELLANT]: Ok
>
> [APPELLANT'S GIRLFRIEND]: I need the truth and you can't run away from it
>
> [APPELLANT]: Not just thought it be better together there
>
> * * *

[1] "A 'buccal' sample is obtained by swabbing the cheek area inside of a person's mouth." *Derr v. State*, 434 Md. 88, 99 n.6 (2013) (citations omitted).

> [APPELLANT'S GIRLFRIEND]: You can't come home until I know you didn't do it
>
> [APPELLANT]: Ok
>
> [APPELLANT'S GIRLFRIEND]: You're not even telling me that you didn't
>
> [APPELLANT]: I told you I didn't already[.] It's just alot easier to talk then [sic] text[.] We can talk on the way even and if you want me to leave I can

The next day (October 21), Corporal James Bare of the St. Mary's County Sheriff's Office interviewed the appellant's grandmother. At trial, the prosecutor asked the grandmother if Corporal Bare had asked her if the appellant made statements about the incident, which the grandmother denied. However, later at trial, Corporal Bare testified, without objection, that the grandmother indeed told him that the appellant had made a statement to her about the allegation. According to Corporal Bare, "[The grandmother] stated that [the appellant] informed her of what happened. I asked her what that was. She stated that [K.] attempted to touch him in a sexual manner, which he rejected, and at that time she became angry and locked herself in the bathroom."

On November 7, Detective Patrick Carlson from a law enforcement agency in Burnett County, Wisconsin questioned the appellant's girlfriend about statements made by the appellant regarding the allegation. Over objection, the girlfriend testified that she told the detective that the appellant had told her that K. had attempted to touch him sexually, that the appellant had rejected K.'s advance, and that K. then became embarrassed:

> [PROSECUTOR]: [D]id [Detective Carlson] ask you whether or not the [appellant] had told you anything regarding [K.]'s disclosure?
>
> [APPELLANT'S GIRLFRIEND]: Yes.

[PROSECUTOR]: Okay. And what did you tell Detective Carlson?

[APPELLANT'S GIRLFRIEND]: *I told him that [the appellant] told me [K.] grabbed him and he told her to stop and she had got embarrassed.*

[DEFENSE COUNSEL]: Objection. Hearsay.

THE COURT: Overruled.

(emphasis added).

Verdict & Sentencing

The jury found the appellant guilty of three counts of third-degree sexual offense: Count 4 (touching the breasts of someone under 14 years of age); Count 5 (touching the genitalia of someone under 14 years of age); and Count 6 (engaging in masturbation with someone under 14 years of age).[2]

The court sentenced the appellant to ten years of executed incarceration on Count 4 with 321 days of credit for time served; ten years suspended on Count 5, to run consecutive to Count 4; and ten years on Count 6, concurrent with Count 5 and consecutive to Count 4. The total sentence, therefore, was twenty years, all but ten years suspended, with credit for 321 days.

The appellant noted a timely appeal. We supply additional facts below as necessary.

[2] The State *nol prossed* Count 1 (child sex abuse) before trial, and the jury acquitted the appellant on Counts 2 and 3 (second-degree rape).

DISCUSSION

I.

Girlfriend's Statement

The appellant argues that the circuit court erroneously admitted the following testimony by the appellant's girlfriend: "I told [Detective Carlson] that [the appellant] told me [K.] grabbed him and he told her to stop and she had got embarrassed." Specifically, the appellant contends that his girlfriend's out-of-court statement relaying his own statement constituted multiple hearsay. He claims that the error was not harmless beyond a reasonable doubt and thus a new trial is required.

The State responds that the appellant's statement to his girlfriend was admissible as a statement by a party opponent. The State argues that the girlfriend's statement to the detective was not hearsay because it did not contain any assertions other than those already contained within the appellant's statement, which was itself admissible under the exception for a party-opponent statement. Alternatively, the State asserts that the girlfriend's statement was not hearsay because it was not offered for its truth. Finally, even if the court erred in admitting the girlfriend's statement, the State asserts that the error was harmless beyond a reasonable doubt.

A.

Overview of Hearsay and Multiple Hearsay

"'Hearsay' is 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(c). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Md. Rule 5-801(a). "A 'declarant' is a person who makes a statement." Md. Rule 5-801(b).

To determine whether the proffered evidence is hearsay, we first determine if it contains an out-of-court statement and, if so, identify the declarant. *See* 6A Lynn McLain, *Maryland Evidence: State and Federal* § 801:1 at 176 (3d ed. 2013) ("McLain"). Second, we identify the assertions, if any, contained in the out-of-court statement by determining what the declarant was asserting *at the time* the declarant made the statement. *Id.*

Third, we examine the purpose for which the statement is being offered. *Id.* at 176–77. If the proponent seeks to introduce the statement to prove the truth of the matter asserted in it, the statement constitutes hearsay. *See* Md. Rule 5-801(c). But "a statement that is offered for a purpose other than to prove its truth is not hearsay at all." *Hardison v. State*, 118 Md. App. 225, 234 (1997).

An out-of-court statement is considered to have been offered to prove the truth of the matter asserted if it would "only have any probative value . . . if the out-of-court declarant was both sincere and factually accurate as to the fact(s) he was asserting at the time he made the statement[.]" McLain § 801:7 at 236. The relevant inquiry is, "[D]oes a fact asserted in the out-of-court statement have to [have] been sincerely and accurately stated, in order for the out-of-court statement to help to prove what it is offered to prove?" *Id.* at 235. If the answer is yes, the statement is hearsay; otherwise, it is nonhearsay and consequently not subject to the hearsay rule. *Id.*

Hearsay is inadmissible except as otherwise provided by the Rules[3] or an applicable constitutional provision or statute. Md. Rule 5-802; *see Bernadyn v. State*, 390 Md. 1, 8 (2005) ("Hearsay . . . *must* be excluded as evidence at trial, unless it falls within an exception to the hearsay rule . . . or is 'permitted by applicable constitutional provisions or statutes.'") (citing Md. Rule 5-802). Whether evidence constitutes hearsay and, if so, whether the statement falls within a relevant exception are questions reviewed *de novo*. *Dulyx v. State*, 425 Md. 273, 285 (2012).

Multiple hearsay exists when "one or more hearsay statements are contained within another hearsay statement[.]" Md. Rule 5-805. In that case, "each [statement] must fall within an exception to the hearsay rule in order not to be excluded by that rule." *Id.* As Professor McLain provides:

> When evidence contains [out-of-court statements] by more than one declarant, each [out-of-court statement] must be evaluated. If there is more than one "level" of evidence, i.e., we are asked to rely on one [out-of-court statement] to prove another [out-of-court statement] made earlier, then we can't get to the earlier [out-of-court statement] unless the more recent one is admissible (either as nonhearsay or hearsay falling within a hearsay exception).

McLain § 800:0 at 31. In other words, "[t]he fact that one of the statements falls within either a hearsay exception or a nonhearsay category does not mean it can carry inadmissible hearsay in with it." *Id.* § 805:1 at 830. Thus, "[i]f the most recent declarant's

[3] Maryland Rules 5-802.1 through 5-804 provide various exceptions to the general hearsay rule.

statement is excluded by the hearsay rule, so [is] the evidence reported within it." *Id.* at 831.

As with any hearsay problem, when analyzing a multiple-hearsay problem, we first identify each out-of-court statement and its declarant. *Id.*; *see also id.* § 801:1 at 176. Like an "archaeological dig from the newest layer of earth to the oldest[,]" we examine one layer at a time. *Id.* § 805:1 at 831. The most recent statement is the "first layer," and the earlier included statement is the second layer (and so on if there are additional layers). *See id.* From there, we apply the second and third steps (outlined above) to each level and determine whether there is a route for admissibility.

B.

Analysis

Applying these steps, we start by identifying the statement at issue. The appellant's girlfriend testified to the following on the stand at trial:

> I told [Detective Carlson] that [the appellant] told me [K.] grabbed him and he told her to stop and she had got embarrassed.

This statement comprises two out-of-court statements made by two declarants. The first-layer statement is the more recent out-of-court statement, from the girlfriend to the detective:

> [The appellant] told me [K.] grabbed him and he told her to stop and she had got embarrassed.[4]

[4] Contrary to the State's claim, the assertion contained in the out-of-court statement was not that the girlfriend actually told the detective that (*i.e.*, "did [the girlfriend] actually say that to the detective?"). As explained, when identifying what assertion is contained in

The second-layer statement is the earlier out-of-court statement, made by the appellant to his girlfriend:

[K.] grabbed [me] and [I] told her to stop and she had got embarrassed.

We examine each layer, beginning with the second.[5]

i. The Second-Layer Statement by the Appellant Is Admissible.

We have no difficulty concluding that the second-layer statement made by the appellant to the girlfriend ("[K.] grabbed [me] and [I] told her to stop and she had got embarrassed.") is admissible. This is because this statement is not hearsay. As the proponent of the statement, the State did not seek to introduce the statement to prove the truth of the matter it asserted, that is, that K. actually grabbed the appellant, the appellant told her to stop, and K. got embarrassed. Instead, the State offered the appellant's statement to show that he both possessed a guilty conscience and needed to concoct a cover story for the incident. The prosecutor's closing statement confirms this intent: "I'm not saying his statement of that part is true at all. It's his consciousness of guilt that's talking, because he knows that he raped [K.] And he has to tell them something at this point, as she's on her way to the police station."

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the out-of-court statement, we examine what the girlfriend was asserting *at the time she made the out-of-court statement* to the detective on November 7, 2022. *See* McLain § 801:1 at 176. The State incorrectly focuses instead on what the girlfriend was asserting *on the stand at the time of trial* ("I told [Detective Carlson] that . . . .").

[5] Although Professor McLain suggests that "the analysis must proceed from most recent to oldest, as would an archaeological dig," McLain § 805:1 at 831, we begin with the oldest (second layer) for purposes of this analysis.

The facts asserted in the appellant's statement need not have been sincerely and accurately stated for the statement to help prove what the State offered it to prove. *See* McLain § 801:7 at 235. In other words, the probative value of the appellant's statement did not depend on whether he was "both sincere and factually accurate as to the fact(s) he was asserting." *Id.* at 236. As Professor McLain explains, an out-of-court statement is not hearsay if it serves "any other purpose where relevance is obtained short of having to rely on the out-of-court declarant's factual accuracy, such as when a statement is offered *as a false cover story* or alibi." *Id.* at 237 (emphasis added) (footnote omitted).

Even if the appellant's out-of-court statement were hearsay, it would have been admissible under an exception to the general hearsay rule as a statement by a party opponent. *See* Md. Rule 5-803(a)(1) (providing that a "statement that is offered against a party and is . . . [t]he party's own statement" is "not excluded by the hearsay rule"). The appellant does not seriously dispute that the exception would have applied. Accordingly, the appellant's out-of-court statement is admissible either as nonhearsay or under an exception to the general hearsay rule.

However, our determination that the second-layer statement by the appellant to his girlfriend is admissible does not end the inquiry. We must examine the first-layer statement made by the girlfriend to Detective Carlson in which she relayed what the appellant had told her.[6]

[6] The State suggests that the inquiry should end here because the girlfriend merely relayed to the detective what the appellant said and "did not relay any *other* assertions to

ii. The First-Layer Statement by the Girlfriend Is Inadmissible.

The statement made by the girlfriend to Detective Carlson ("[The appellant] told me [K.] grabbed him and he told her to stop and she had got embarrassed.") is inadmissible hearsay. The out-of-court statement was offered to prove that what the girlfriend asserted was true, that is, that the appellant actually told her that. The State acknowledges this by stating that the purpose of offering the girlfriend's statement was to present the appellant's statement to the jury. The problem is that, for the *appellant's* out-of-court statement to reach the jury, the proponent (the State) implicitly had to ask the factfinder to rely on the truth of the *girlfriend's* out-of-court statement recounting what the appellant had told her. Unlike the appellant's out-of-court statement, the probative value of which did not depend on whether the appellant was both sincere and factually accurate as to the facts he was asserting, the girlfriend's out-of-court statement would not have any probative value unless the factfinder (the jury) believed that what she told the detective was sincere and factually accurate, *i.e.*, that the appellant had really told her that. Thus, the first-layer statement by the girlfriend to the detective was hearsay.[7]

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the detective." But, as stated, "[t]he fact that one of the statements falls within either a hearsay exception or a nonhearsay category does not mean that it can carry inadmissible hearsay in with it." McLain § 805:1 at 830. Rather, "each must fall within an exception to the hearsay rule in order not to be excluded by that rule." Md. Rule 5-805.

[7] Courts in other jurisdictions have similarly concluded that the most recent out-of-court statement relaying an earlier out-of-court statement is hearsay. *See, e.g.*, *Biegas v. Quickways Carriers, Inc.*, 573 F.3d. 365, 379 (6th Cir. 2009) ("Cohen's statement to Dailey recounting [Cohen's] earlier statement [to Biegas] is hearsay. This statement was offered for its truth content—to prove that Cohen had in fact told Biegas earlier to 'get out of the

The State relies on *Ashford v. State*, 147 Md. App. 1 (2002), to support the admissibility of the girlfriend's out-of-court statement. In that case, an investigating officer testified: "I told [the defendant during his interrogation] his wife had already told us that he was involved with [the murder]." *Id.* at 68. The defendant objected on hearsay grounds to the introduction of the wife's out-of-court statement asserting that he was involved in the murder.

This Court concluded that the wife's statement was not hearsay because it was not offered for the truth of the matter asserted but instead to explain why the investigation had suddenly altered course:

> With respect to the single brief allusion to the [defendant's] wife, [the investigating officer] was clearly not testifying, at that point in the trial, *about the ultimate merits of guilt or innocence*. *He was attempting to get the [defendant's] statement introduced into evidence.* For several hours, the [defendant] had been denying his involvement in the [victims'] murder. At approximately nine p.m., he suddenly admitted his involvement. It was necessary for the State to show a plausible reason for that sudden change of heart.
>
> The fact that his wife had implicated him in the crime was the catalyst. [The investigating officer's] words to the effect, "Your wife has told me you

road.'"); *Larez v. City of L.A.*, 946 F.2d 630, 642 (9th Cir. 1991) ("First, the reporters' transcriptions [of Gates's statements] were out-of-court statements. By attributing quotations to Gates, the reporters necessarily made the implicit statement, 'Gates said this!' . . . Second, the statements—'Gates said this!'—were offered for the truth of the matter asserted: that Gates did in fact make the quoted statement."); *Warren v. Fed. Nat'l Mortg. Ass'n*, 932 F.3d 378, 387 (5th Cir. 2019) ("Jefferson's statement about what Bynum-Wilson allegedly said other people allegedly said is, in fact, being offered for the truth of the matter asserted. . . . To advance [the plaintiff's] claim against [the defendant], it matters whether Bynum-Wilson was truthful as to what she heard the unnamed employees say."); *Beeler v. Norton Healthcare, Inc.*, No. 3:17-cv-573, 2020 WL 1265419, at *10 (W.D. Ky., Mar. 16, 2020) ("[The plaintiff] offers Facktor and Tinal's hearsay statement 'as evidence that [Knapper] actually told [them]' that he was worried about [the plaintiff's] complaint to HR—'i.e., for the truth of the matter asserted.'") (citation omitted).

> were involved," were offered not to show the [defendant's] involvement but to show why the [defendant's] resistance suddenly cracked. The assertion by the wife was offered to show not the truth of the thing asserted, but simply to show that the [defendant] heard that assertion and reacted to it. The assertion in question was not hearsay . . . .

Id. at 77 (emphasis added).

The State relies on the emphasized passage to argue that the girlfriend's statement was admissible if it did not go to the "ultimate merits" of the case but instead was used only to introduce the appellant's statement. The State appears to interpret the emphasized passage in isolation. When considering the entire passage and the context of that case, it becomes clear that this Court was explaining that the purpose of offering the wife's assertion was not to prove the truth of it (that the defendant committed the crime) but rather to show that the investigating officer was attempting to obtain a confession from the defendant to use as evidence. *See id. Ashford*, therefore, is unhelpful to the State's argument that the girlfriend's statement was not hearsay.

In the instant case, there was no purpose, investigatory or otherwise,[8] for the State to offer the girlfriend's statement other than to prove the truth of it, namely, that the appellant actually said that "[K.] grabbed him and he told her to stop and she had got embarrassed." The girlfriend's statement was hearsay. We are unaware of any exception to

[8] The State claims that the purpose of introducing the girlfriend's statement was to demonstrate "what information was available to police as part of their investigation." However, the record does not show how this explained the course of the investigation or why law enforcement took certain investigatory steps. By the time the girlfriend made the statement to Detective Carlson on November 7, 2022, law enforcement had already collected most of the evidence and arrested the appellant.

the general hearsay rule for which this statement might qualify, nor was any suggested by the State. For the reasons stated, the statement by the girlfriend was inadmissible, and the trial court erred in admitting it.

iii. The Error in Admitting the Inadmissible Hearsay Was Harmless.

The appellant contends that the erroneous admission of the girlfriend's hearsay statement was not harmless and thus requires a reversal of his convictions. In determining whether error at trial was harmless, the Supreme Court of Maryland has "long approved the proposition that [it] will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury *without objection* through the prior testimony of other witnesses." *Yates v. State*, 429 Md. 112, 120 (2012) (citation omitted); *Robeson v. State*, 285 Md. 498, 507 (1979) ("The law in this state is settled that where a witness later gives testimony, without objection, which is to the same effect as earlier testimony to which an objection was overruled, any error in the earlier ruling is harmless."); *see also McClurkin v. State*, 222 Md. App. 461, 485 (2015) (erroneously admitted phone call deemed harmless where the hearsay within was cumulative of properly admitted evidence).

Although admitting the girlfriend's statement was in error, we conclude the error was harmless because testimony recounting a substantially similar statement by the appellant's grandmother was later admitted without objection. Corporal Bare testified without objection to the grandmother's hearsay statement that the appellant had told her "[K.] attempted to touch him in a sexual manner, which he rejected, and at that time [K.]

became angry and locked herself in the bathroom." This testimony established the "essential contents" of the objected-to hearsay statement made by the girlfriend. *Yates*, 429 Md. at 120.

Although the prosecutor referred to the girlfriend's objected-to statement in closing arguments, the prosecutor also relied on the grandmother's hearsay statement, which, like the girlfriend's statement, was intended to illustrate the appellant's "consciousness of guilt" concerning his actions toward K. Indeed, the prosecutor explained: "[Y]ou have the testimony of [the girlfriend], *plus you have the testimony of [Corporal] Bare [who] had to testify to what [the grandmother] first told him*." (emphasis added). The prosecutor proceeded to recount to the jury that the appellant told "not only [the girlfriend], *but also told [the grandmother]*" after "being confronted by [the] family" about the incident. Given the cumulative nature of a similar statement offered at trial, the admission of the girlfriend's hearsay testimony did not ultimately affect the jury's verdict. Therefore, we hold that the erroneous admission of the girlfriend's hearsay statement does not entitle the appellant to a new trial.

II.

Sentencing

The appellant was convicted of three counts of third-degree sexual offense under the Maryland Code, Criminal Law § 3-307(a)(3), which prohibits an individual from "engag[ing] in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim[.]" Each

count represented a separate act by the appellant: Count 4 (touching the breasts), Count 5 (touching the genitalia), and Count 6 (engaging in masturbation).

Before imposing its sentence, the court explained:

> So the Court, in balancing all of that and in listening to your attorney and listening to the State and listening to the victims, has to determine what is an appropriate sentence in this case.
>
> [Defense counsel has] asked me to consider concurrent sentences in this case because of the fact that these three separate acts are part of one incident. *And the law does provide for them to be—in fact, the law requires that they be charged as individual acts and treated separately.* And in this case there were other counts that the jury found [the appellant] not guilty of that probably were the more serious, in terms of the allegations, and the—and carried a heavier penalty than these charges.

(emphasis added).

The court proceeded to sentence the appellant to ten years of incarceration on Count 4; ten years of consecutive incarceration, all suspended, on Count 5; and ten years of incarceration on Count 6, all suspended, to run concurrently with Count 5 and consecutive to Count 4. The court also imposed five years of probation upon the appellant's release.

Whether to run counts consecutively or concurrently is a matter entirely within the discretion of the trial court. *See Abdul-Maleek v. State*, 426 Md. 59, 71 (2012) (emphasizing a trial judge's "very broad discretion" in sentencing). "When a court must exercise discretion, failure to do so is error, and ordinarily requires reversal." *Maus v. State*, 311 Md. 85, 108 (1987) (citation omitted).

The appellant, relying on the emphasized portion of the passage above, argues that the circuit court erroneously believed that the law "requires" that the three counts of third-

degree sexual offenses be treated separately. He asserts that "[b]ecause the court had discretion to merge the convictions and/or impose wholly concurrent sentences on all three counts, and it is evident from the record that the court erroneously believed that it did not have that discretion, the sentences must be vacated and the case remanded for resentencing."[9] The appellant claims that by acknowledging that the three counts must be "treated separately," the court simultaneously declared that it lacked the discretion to sentence them concurrently. We disagree.

The court's remark about treating each count *separately* did not mean it thought it must run the sentences *consecutively*. When viewed in the context of the entire sentencing proceeding, it is apparent that the court understood that it had discretion to impose either consecutive or concurrent sentences. Indeed, it ran the sentence imposed for Count 6 concurrently with that imposed for Count 5. Accordingly, the court did not abuse its discretion in sentencing the appellant.

III.

Commitment Record and Docket Entries

The circuit court sentenced the appellant to a total of twenty years, with ten years suspended and with credit for 321 days. The commitment record issued, however, states

[9] The appellant does not articulate his basis for merger, *i.e.*, the required evidence test, the rule of lenity, or fundamental fairness. He suggests only that the court had the "discretion" to merge the convictions. To the extent the appellant relies on one of these bases, his argument is not adequately briefed. *See Webster v. State*, 221 Md. App. 100, 133 (2015) (citing *Bert v. Comptroller of the Treasury*, 215 Md. App. 244, 269 n.15 (2013) ("Appellant's 'argument' could also be rejected out of hand because it is inadequately briefed.")).

that the start date of the appellant's sentence is September 6, 2023, the date of the sentencing hearing, rather than October 20, 2022, the date of the appellant's initial imprisonment on the charges.

The appellant contends that at the time of his September 6, 2023 sentencing, he had been incarcerated due to the charges in this case for 321 days since his arrest on October 20, 2022. When the court rendered its sentence, it gave him credit for 321 days; thus, the correct start date of his sentence is October 20, 2022, the date of his arrest. The State agrees, as do we. *See Bratt v. State*, 468 Md. 481, 495–96 (2020) (noting that because the appellant was entitled to credit for time served and had been in custody since July 16, 1982, the correct start date for his sentence was July 16, 1982); *Douglas v. State*, 130 Md. App. 666, 673 (2000) (holding that if the transcript of a court's rendition of a sentence conflicts with the commitment record, the transcript prevails). Consequently, we shall remand the case to the circuit court for the sole purpose of correcting the commitment record and docket entries to reflect the correct start date of the appellant's sentence.

CASE REMANDED TO THE CIRCUIT COURT FOR ST. MARY'S COUNTY SOLELY TO CORRECT THE COMMITMENT RECORD AND DOCKET ENTRIES CONSISTENT WITH THIS OPINION. JUDGMENTS OTHERWISE AFFIRMED. APPELLANT AND ST. MARY'S COUNTY TO SPLIT COSTS.