State v. Baby: One Step Forward for Maryland—Protecting a Woman’s Right to Withdraw Consent, but Sending a Conflicting Message to Appellate Courts Reviewing Multiple-conviction Cases

Michelle D. Albert

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STATE v. BABY: ONE STEP FORWARD FOR MARYLAND—
PROTECTING A WOMAN’S RIGHT TO WITHDRAW
CONSENT, BUT SENDING A CONFLICTING
MESSAGE TO APPELLATE COURTS
REVIEWING MULTIPLE-CONVICTION CASES

MICHELLE D. ALBERT*

In State v. Baby,1 the Court of Appeals of Maryland held that the
continuation of intercourse through force or threat of force after
withdrawal of consent may constitute rape, even if the intercourse be-
gan consensually.2 Finding that the trial court erred by failing to re-
spond clearly to the jury on the effect of post-penetration withdrawal
of consent,3 the Court of Appeals reversed Maouloud Baby’s first de-
gree rape conviction, first degree sexual offense conviction, and two
third degree sexual offense convictions, and remanded the case for
trial.4 By extensively analyzing whether to reverse Baby’s rape convic-
tion, the Court of Appeals settled the confusion as to the significance
of its previous statement in Battle v. State5 on the subject of post-pene-
tration withdrawal of consent.6 With its analysis of Baby’s rape convic-
tion, the Court of Appeals seized the opportunity to declare that
Maryland law, in accordance with the weight of authority on this issue,
recognizes that forcibly continued intercourse after withdrawal of con-
sent subsequent to penetration constitutes rape.7 However, because
the court did not conduct a comparable examination when deciding
whether to reverse Baby’s other convictions, ignoring several compel-
lng arguments, the Court of Appeals improperly reversed Baby’s two
third degree sexual offense convictions and thus provided a con-
foundng example for appellate courts.8

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* Michelle D. Albert is a second-year student at the University of Maryland School of
Law, where she is a staff member for the Maryland Law Review. The author wishes to thank
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additions.

2. Id. at 260, 946 A.2d at 486.
3. Id. at 265–66, 946 A.2d at 489–90.
4. Id. at 223–24, 272, 946 A.2d at 465–66, 494.
5. 287 Md. 675, 414 A.2d 1266 (1980).
6. See infra Part IV.A.
7. See infra Part IV.B.
8. See infra Part IV.C.

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I. THE CASE

On December 13, 2003, J.L. and her best friend, Lacey, encountered a friend of Lacey’s younger brother, Maouloud Baby, at the McDonald’s restaurant in Montgomery Village. J.L. agreed to give Baby and his friend, Mike, a ride. During the drive, at Baby’s request, J.L. stopped at a residential development. Lacey left the group after they returned to the McDonald’s, but gave J.L. her cell phone. J.L. agreed to drive Baby and Mike to another residential development, and once there, she complied with the boys’ request for her to move to the back seat of the car so they could talk.

J.L.’s and Baby’s versions of the events that evening diverged at this point. According to J.L, after she moved to the back seat, Baby “put his hand between her legs and Mike tried to put J.L.’s hand down his pants.” When J.L. refused, Baby began fondling her breast. J.L. insisted that they return to the McDonald’s, but then agreed to stay ten more minutes. J.L. “somehow ended up on [her] back” with Baby trying to remove her jeans, while Mike attempted to put his penis in her mouth. J.L. asked them to stop, but Baby held her arms, as Mike attempted to insert his penis into her vagina, “briefly inserting his penis mistakenly into her rectum.” After Mike again unsuccessfully attempted intercourse with J.L., Baby put his fingers into her va-

9. Baby, 404 Md. at 225, 946 A.2d at 466. J.L. testified at trial that she was eighteen years old and a student at Montgomery College at the time of the incident on December 13, 2003. Baby v. State, 172 Md. App. 588, 593, 916 A.2d 410, 413 (2007). Baby was sixteen years old at the time of the incident, id. at 594, 916 A.2d at 413, and although J.L. recognized Baby from high school, she did not otherwise know him, Baby, 404 Md. at 225, 946 A.2d at 466.

10. Baby, 404 Md. at 225, 946 A.2d at 466. Specifically, J.L. agreed to drive Baby, Mike, and an unidentified “Hispanic boy” to a party. Id. On the way to the party, Baby instructed J.L. to stop at a gas station, where Baby and the Hispanic boy got out of the vehicle, but only Baby returned. Id. Upon arriving at their destination, the group discovered that there was no party, so J.L. drove back to the McDonald’s. Baby, 172 Md. App. at 594, 916 A.2d at 413; see also Baby, 404 Md. at 225, 946 A.2d at 466 (explaining that “Baby and Mike decided not to attend the party”).

11. Baby, 404 Md. at 225, 946 A.2d at 466.

12. Id. at 226, 946 A.2d at 466.

13. Id.

14. Id. at 229, 946 A.2d at 468.

15. Id. at 226, 946 A.2d at 466–67.

16. Id., 946 A.2d at 467. Baby asked J.L. to “flash him” and Mike instructed her to “just lick it.” Id.


18. Baby, 404 Md. at 226, 946 A.2d at 467 (alteration in original); Baby, 172 Md. App. at 594, 916 A.2d at 413.

Baby then exited the car, and Mike inserted his penis into J.L.’s vagina. After Mike left the vehicle, Baby reentered the car, informing J.L. that it was his turn. After sitting together for a few seconds, Baby asked J.L. if he could have sex with her, and said that he did not want to rape her. J.L. consented “as long as he stop[ped] when [she] t[old] him.” Baby climbed on top of J.L. and attempted to put his penis into her vagina; however, this hurt J.L., so she yelled for Baby to stop, but “he kept pushing it in.” Although J.L. pushed Baby’s knees in an attempt to stop him, Baby did not stop for “[a]bout five or so seconds.” J.L. called Lacey shortly thereafter.

Baby’s account of the events that night was nearly identical to J.L.’s version; however, Baby asserted that, prior to leaving Mike and J.L. alone in the car, Baby did not touch, hold, grab, or have any contact with J.L. Baby’s account also differed with respect to what took place once Mike departed and left Baby and J.L. alone in the car.

20. Id.
21. Id.
22. Id.
23. Id. According to J.L.’s testimony, Baby asked J.L. if she would “let [him] hit it.” Id. Baby testified that this expression means to “[h]ave sex.” Id. at 230, 946 A.2d at 469. When asked by the Assistant State’s Attorney at trial what she said in response to Baby’s inquiry, J.L. testified that the boys had told her that she could leave as soon as they were finished, which she took to mean that “[she] wouldn’t be able to leave until [she] was done.” Id. at 226, 946 A.2d at 467.
24. Id. at 227, 946 A.2d at 467. J.L. testified that, at this moment, she “just wanted to go home.” Id.
25. Id.
26. Id.
27. Id. at 227–28, 946 A.2d at 467. During the drive back to the McDonald’s, J.L. gave Baby her phone number upon his request. Id. at 228, 946 A.2d at 468. Without J.L.’s permission, Mike then drove them to a location across the street from the McDonald’s. Id.
28. Id. at 228, 946 A.2d at 468. As soon as Baby returned Lacey’s cell phone to J.L., which one of the boys had previously taken from J.L., J.L. called Lacey. Id. After Baby and Mike left, J.L. picked Lacey up at the McDonald’s, and the girls went shopping with J.L.’s mother and then to Lacey’s home, where J.L. told Lacey’s mother what had happened. Id.; Baby v. State, 172 Md. App. 588, 596, 916 A.2d 410, 414 (2007). Before telling Lacey’s mother what had happened, however, J.L. “responded in the negative to inquiries about what was wrong from Lacey’s brother” at Lacey’s house. Baby, 172 Md. App. at 596, 916 A.2d at 414. The police were called after J.L. told Lacey’s mother. Baby, 404 Md. at 228, 946 A.2d at 468.
29. Baby, 404 Md. at 229, 946 A.2d at 468; see Baby, 172 Md. App. at 597, 916 A.2d at 415 (noting that Baby’s testimony was “surprisingly consistent” with J.L.’s explanation of the events). Baby explained that, just as J.L. contended, after J.L. moved to the back seat, Mike put her hand down his pants. Baby, 172 Md. App. at 598, 916 A.2d at 415.
30. Baby, 404 Md. at 229, 946 A.2d at 468. At trial, Baby testified that, after Mike left the car, he told Baby that he had “just hit that.” Id. Baby also testified that when he got back in the car, J.L. was only wearing her shirt, but that she otherwise appeared normal and was not crying. Id. at 229–30, 946 A.2d at 468–69. Baby’s description of the brief conversation that he had with J.L. after he entered the car was identical to J.L.’s account.
Baby claimed that, after Baby and J.L. briefly conversed, “J.L. laid down on the back seat.” Baby then tried to place his penis into J.L.’s vagina, but “it wouldn’t go in.” Baby contended that J.L. did not ask him to stop, but rather sat up and said “[i]t’s not going to go in,” after which he stopped immediately.

In December 2003, Baby was indicted for two counts of first degree rape, one count of first degree sexual offense, one count of attempted first degree sexual offense, one count of conspiracy to commit first degree rape, and two counts of third degree sexual offense. Baby was initially tried on these charges in the Circuit Court for Montgomery County, Maryland, but the court declared a mistrial due to a hung jury. Baby was retried before a new jury four months later.

During the first day of deliberations, the new jury submitted three notes to the court, the final one reading: “If a female consents to sex initially and, during the course of the sex act to which she consented, for whatever reason, she changes her mind and the man continues until climax, does the result constitute rape?” Uncertain as to the meaning of this question, the trial court informed the jury that the court could not answer the question as posed, and directed the jury to reread its instructions as to the elements. The next morning, the jury submitted a fourth note: “If at any time the woman says stop is that rape?” To this note, the court provided a similar answer, again referring the jury to its original instructions.

Compare id. at 226, 946 A.2d at 467 (quoting J.L.’s testimony in which she detailed her conversation with Baby after he entered the car), with id. at 230, 946 A.2d at 469 (quoting Baby’s testimony in which he described his conversation with J.L. after he entered the car). Baby explained that he said “I’m not going to rape you” to confirm that he had permission. Id. at 232, 946 A.2d at 470. Id. at 223–24 & nn.1–4, 946 A.2d at 465–66 & nn.1–4. Baby, 172 Md. App. at 593, 916 A.2d at 412. 36. Id.

37. Baby, 404 Md. at 233–34, 946 A.2d at 471. The jury’s first two notes read: “We’re not close but would like to stay” and “Can we have until 10:30?” Baby, 172 Md. App. at 600, 916 A.2d at 416.

38. Baby, 404 Md. at 234, 946 A.2d at 471. Baby’s attorney argued at trial that the court should have responded in the negative to this inquiry because the question indicated that “the female in the note consented to penetration.” Id. at 235, 946 A.2d at 471.

39. Id. at 235, 946 A.2d at 472.

40. Id. In response to the fourth note, the trial court instructed the jury: “This is a question that you as a jury must decide. I have given the legal definition of rape which includes the definition of consent.” Id.
The jury found Baby guilty of one count of first degree rape, one count of first degree sexual assault, and two counts of third degree sexual offense.\textsuperscript{41} Baby was sentenced to fifteen years of imprisonment, with all but five years suspended, and five years of probation.\textsuperscript{42}

Baby noted an appeal to the Court of Special Appeals of Maryland,\textsuperscript{43} presenting three issues: (1) did the trial court err by not providing Baby’s suggested supplemental instruction in response to the jury’s inquiry on the issue of post-penetration withdrawal of consent; (2) did the trial court err by denying Baby’s “request to remove a juror who indicated that he had read a newspaper article about the case;” and (3) did the trial court err in denying Baby’s motion \textit{in limine} to exclude expert testimony on the subject of rape trauma syndrome.\textsuperscript{44} On the first issue, the Court of Special Appeals held that the trial court erred by not answering the jury’s inquiries in the negative, and thus reversed Baby’s convictions and remanded the case for further proceedings.\textsuperscript{45} Finding that the jury made explicit its difficulties, the appellate court identified the “fair interpretation” of the jury’s notes as an inquiry about the “legal effect of a withdrawal of consent \textit{subsequent} to penetration, and prior to climax.”\textsuperscript{46} The appellate court explained that a trial judge is obliged to address a jury’s clearly demonstrated difficulties with “‘concrete accuracy.’”\textsuperscript{47} It concluded that the trial court should have provided the jury with a relevant statement of the law from \textit{Battle}, as this statement represented a current statement of Maryland law.\textsuperscript{48} The appellate court explained that Maryland must adhere to English common law principles, having

\textsuperscript{41} Id.
\textsuperscript{42} Baby, 172 Md. App. at 593, 916 A.2d at 413.
\textsuperscript{43} Baby, 404 Md. at 236, 946 A.2d at 472.
\textsuperscript{44} Baby, 172 Md. App. at 593, 916 A.2d at 413.
\textsuperscript{45} Id. at 593, 621, 916 A.2d at 413, 429.
\textsuperscript{46} Id. at 606, 916 A.2d at 420. The Court of Special Appeals rejected the State’s argument that the plain meaning of the jury’s question was ambiguous, and found that, even if the third note’s wording was unclear, the fourth note, submitted the next morning, should have clarified any such confusion. \textit{Id.} at 605–06, 916 A.2d at 420.
\textsuperscript{47} Id. at 608, 916 A.2d at 421 (quoting Bollenbach v. United States, 326 U.S. 607, 612–13 (1946)).
\textsuperscript{48} Id. at 617–18, 620–21, 916 A.2d at 427, 429. The Court of Special Appeals determined that the relevant language in \textit{Battle v. State} was holding, not dicta, due to the extensive analysis that the Court of Appeals engaged in this case. \textit{Id.} at 615, 916 A.2d at 425. The Court of Special Appeals identified the relevant language from \textit{Battle v. State}.

Given the fact that consent must precede penetration, it follows in our view that although a woman may have consented to a sexual encounter, even to intercourse, if that consent is withdrawn prior to the act of penetration, then it cannot be said that she has consented to sexual intercourse. On the other hand, ordinarily if she consents prior to penetration and withdraws the consent following penetration, there is no rape.
adopted the common law, and that, under English common law, the essence of the crime of rape was the act of penetration.

The Court of Appeals of Maryland granted certiorari to decide three issues: (1) if a woman withdraws consent after penetration, even though she initially consented to vaginal intercourse, is she a victim of rape if the intercourse continues against her will; (2) did the Court of Special Appeals improperly reverse Baby’s first degree sexual offense and third degree sexual offense convictions when these offenses were unrelated to the subject matter of the jury’s inquiries; and (3) did the trial court err in denying Baby’s motion in limine to exclude the expert testimony on the subject of rape trauma syndrome.

Id. at 614–15, 916 A.2d at 425 (internal quotation marks omitted) (quoting Battle v. State, 287 Md. 675, 684, 414 A.2d 1266, 1270 (1980)). However, the appellate court noted that the relevant question was not whether this statement from Battle was dicta or holding, but rather whether this statement accurately represented Maryland law. Id. at 616, 916 A.2d at 425–26. The appellate court explained that whether this statement from Battle “should be revisited in light of the weight of authority to the contrary is a matter for the Maryland legislature or the Court of Appeals.” Id. at 621, 916 A.2d at 429 (footnote omitted). Until then, the appellate court explained that the answer should be “no” to the question posed in the jury’s third note: “If a female consents to sex initially and, during the course of the sex act to which she consented, for whatever reason, she changes her mind and the . . . man continues until climax, does the result constitute rape?” Id.

49. Id. at 617, 916 A.2d at 427 (explaining that common law “remains the law of the Land until and unless changed by the State’s highest court or by statute”).

50. Id. Because rape was a common law crime in Maryland prior to its codification in the Acts of 1976, the “present statutory requirement of ‘vaginal intercourse with another person by force against the will and without the consent of the other person’ is an outgrowth of the definitions of rape at common law,” which the Court of Appeals set forth in Hazel v. State. Id. at 611–12, 916 A.2d at 423 (quoting Battle, 287 Md. at 681, 414 A.2d at 1269). The appellate court explained that the English common law viewed the real harm of rape as the injury of the man’s interest in the woman’s sexual and reproductive functions because, after the initial penetration, the man’s interest was damaged, as the woman could not be “re-flowered.” Id. at 617, 916 A.2d at 427. The appellate court found that this principle also undergirded the Battle holding. Id. at 616–17, 916 A.2d at 426–27. On the second issue presented, the Court of Special Appeals held that the trial court properly exercised its discretion in waiting to excuse the juror until the jury began its deliberations. Id. at 627–28, 916 A.2d at 433. On the third issue, the court held that the trial court did not err by denying Baby’s motion in limine and allowing Dr. Burgess’s testimony on the subject of rape trauma syndrome. Id. at 632, 916 A.2d at 436.

51. State v. Baby, 404 Md. 220, 237–38 & n.10, 946 A.2d 463, 473 & n.10 (2008). The State raised the first two issues in its Petition for Writ of Certiorari, while Baby presented the third issue in a Conditional Cross-Petition for Writ of Certiorari. Id. at 237, 946 A.2d at 473. Baby raised an additional issue in his Conditional Cross-Petition, but the Court of Appeals declined to address this issue because the court was remanding for a new trial on other grounds. Id. at 237 n.10, 946 A.2d at 473 n.10.
II. LEGAL BACKGROUND

Because rape was not codified in Maryland until 1976, Maryland courts still use the common law to interpret the statutory definition of rape, including the elements of rape, such as the element of consent.\(^{52}\) Courts typically consult and rely upon cases from other jurisdictions that have directly addressed this issue because few courts have examined post-penetration withdrawal of consent.\(^{53}\) Courts most frequently address post-penetration withdrawal of consent in the context of supplemental jury instructions; thus, any relevant inquiry into this topic must include a discussion of the Maryland standards for determining whether an error in a criminal case warrants a reversal and for evaluating whether a supplemental jury instruction is erroneous.\(^{54}\)

A. Maryland Law on the Crime of Rape and the Withdrawal of Consent

Prior to its codification in 1976, rape remained a common law crime in Maryland.\(^{55}\) The Court of Appeals of Maryland defined the common law crime of rape in *Hazel v. State*\(^{56}\) as the act of having “unlawful carnal knowledge” of a female older than ten years old through force, without consent, and against the will of that female.\(^{57}\) The Court of Appeals has explained that Maryland’s statutory crime of rape\(^{58}\) was an outgrowth of the common law definition of rape recog-
nized by Hazel. Consequently, Maryland courts use common law to interpret terms from the definition of rape that the statute fails to define, including the terms “force,” “threat of force,” and “without consent.” The Court of Appeals has explained that these terms retain their “judicially determined meaning” as applied in common law rape cases.

In Hazel, the Court of Appeals described the element of consent, explaining that “consent to the act at any time prior to penetration deprives the subsequent intercourse of its criminal character.” However, the Court of Appeals did not address withdrawal of consent until Battle v. State. In Battle, a 44-year-old woman agreed to drive John Battle to his home and to examine a radio that Battle had hoped to sell. The woman accepted Battle’s invitation to go upstairs to see the radio because “he looked like a nice old man.” According to the woman, Battle struck her, placed a screwdriver against her head, and ordered her to disrobe. The woman complied out of fear, and Battle proceeded to effect penetration. Battle claimed that the woman invited him to have intercourse with her, and that he found her naked in his bedroom. Battle denied that any sexual contact occurred.

During its deliberations, the jury submitted a written note to the trial judge with the question: “When a possible consensual sexual relationship becomes non-consensual for some reason, during the course of the action—can the act then be considered rape?” The trial judge eventually affirmed that a situation that began consensually could become non-consensual in the course of the event. In her response, the trial judge also quoted the text from Hazel that described the element of consent and the differences between consent and submission. Thereafter, the jury convicted Battle of assault with intent to rape.

59. Battle, 287 Md. at 681, 414 A.2d at 1269.
61. Id.
63. See 287 Md. at 676, 678, 414 A.2d at 1267–68 (analyzing a trial court’s response to a jury’s inquiry on the issue of withdrawn consent in the context of rape).
64. Id. at 676–77, 414 A.2d at 1267.
65. Id. at 677, 414 A.2d at 1267.
66. Id.
67. Id.
68. Id. at 678, 414 A.2d at 1267.
69. Id.
70. Id., 414 A.2d at 1268.
71. Id. at 678–79, 414 A.2d at 1268.
72. Id. at 679, 414 A.2d at 1268.
73. Id. at 676, 414 A.2d at 1267.
In analyzing whether the trial judge provided a proper response to the jury’s inquiry, the Court of Appeals first examined the English common law treatment of consent withdrawn after the act of intercourse, explaining that authorities unanimously held that consent after intercourse does not prevent the intercourse from qualifying as rape. \(^{74}\) After observing that there was little case law on the effect of a withdrawal of consent before penetration, the court quoted three foreign cases on this issue without explaining the significance of the quoted text. \(^{75}\) The first case, decided in 1843, appeared to indicate that the reason why a person consents is irrelevant. \(^{76}\) In the second case, *State v. Auld*, \(^{77}\) the Supreme Court of New Jersey provided that generally “[c]onsent must precede the penetration.” \(^{78}\) The Supreme Court of Kansas in the third case, *State v. Allen*, \(^{79}\) explained that, even though the “petting party” between the victim and the defendant began consensually, the fact that the victim withdrew consent, advised the defendant, and then resisted his efforts was controlling. \(^{80}\) After directly quoting these three cases, the *Battle* court held that, because “consent must precede penetration,” a court cannot find that a woman consented to intercourse if she withdrew consent prior to penetration, even if she initially consented to a “sexual encounter, even to intercourse.” \(^{81}\) The court subsequently commented: “[o]n the other hand, ordinarily if she consents prior to penetration and withdraws the consent following penetration, there is no rape.” \(^{82}\) Because the jury’s ambiguous question in combination with the trial judge’s ambiguous clarification of and answers to that question created sufficient confu-

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74. *Id.* at 681, 414 A.2d at 1269. In its brief discussion of the English common law crime of rape, the Court of Appeals quoted commentary explaining the view that the crime of rape was complete upon penetration. See *id.* (providing short excerpts from several legal treatises covering the issue of consent subsequent to penetration).

75. See *id.* at 683–84, 414 A.2d at 1270 (incorporating, without additional analysis, block quotations from decisions of the highest courts in Tennessee, New Jersey, and Kansas).

76. See *id.* at 683, 414 A.2d at 1270 (“It is no difference if the person abused consented through fear, or that she was a common prostitute, or that she assented after the fact, or that she was taken first with her own consent, if she were afterwards forced against her will.” This charge is correct in every particular, and fully sustained by authority.” (quoting Wright v. State, 23 Tenn. 194, 198 (1843))).

77. 67 A.2d 175 (N.J. 1949).

78. *Battle*, 287 Md. at 683, 414 A.2d at 1270 (quoting *Auld*, 67 A.2d at 180).


80. *Id.* at 684, 414 A.2d at 1270 (quoting *Allen*, 183 P.2d at 460).

81. *Id.*

82. *Id.* (emphasis added).
sion, the court reversed Battle’s conviction and remanded the case for a new trial. 83

Prior to 2008, the Court of Appeals had not published any other opinion addressing the issue of revoked consent in the context of rape.

B. Status of the Law on Post-Penetration Withdrawal of Consent in Other Jurisdictions

Although foreign cases are not binding, due to the novel nature of the issue of post-penetration withdrawal of consent, courts addressing this topic frequently consult and rely on the analyses of courts in other jurisdictions. 84 Since 1979, eight states have judicially addressed this issue, 85 but only North Carolina has held that post-penetration withdrawal of consent cannot result in a rape conviction. 86 The other seven states have held that forcibly continued intercourse subsequent to revoked consent constitutes rape. 87 Illinois has legislatively recognized that a person can withdraw consent at any time during intercourse, regardless of whether that person consented to the initial penetration. 88

In 1979, the Supreme Court of North Carolina became the first court to address the issue of consent revoked subsequent to penetra-

83. Id. at 685, 414 A.2d at 1271. After its explanation of the law, the court expressly concluded that “[t]he question and the answer here were confusing,” id. at 684, 414 A.2d at 1270, but did not explain its reasoning for this conclusion. Instead, the court incorporated several direct quotations from Midgett v. State, 216 Md. 26, 139 A.2d 209 (1958), before holding that this confusion warranted a reversal of Battle’s conviction. Id. at 684–85, 414 A.2d at 1270–71 (quoting Midgett, 216 Md. at 38, 41, 139 A.2d at 215, 217).


85. E.g., McGill, 18 P.3d at 84; In re John Z., 60 P.3d 183, 184 (Cal. 2003); Siering, 644 A.2d at 963; Bunyard, 133 P.3d at 28; Robinson, 496 A.2d at 1070; Crims, 540 N.W.2d at 865; State v. Way, 254 S.E.2d 760, 761 (N.C. 1979); Jones, 521 N.W.2d at 672.

86. See Way, 254 S.E.2d at 761–62 (holding that there cannot be a finding of rape if the victim consented to the initial penetration).

87. E.g., McGill, 18 P.3d at 84; In re John Z., 60 P.3d at 184; Siering, 644 A.2d at 963; Bunyard, 133 P.3d at 28; Robinson, 496 A.2d at 1069–70; Crims, 540 N.W.2d at 865; Jones, 521 N.W.2d at 672.

88. See 720 ILL. COMP. STAT. 5/12–17(c) (West 2002 & Supp. 2008) (“A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct.”).
tion in *State v. Way.*\(^{89}\) In *Way*, in response to the jury’s inquiry, the trial court instructed the jury that a victim could withdraw “consent initially given” and that the continuation of intercourse through force or threat of force after the withdrawal of consent would constitute rape.\(^{90}\) The Supreme Court of North Carolina found the trial court’s instruction to be erroneous, and concluded that North Carolina law precluded a finding of rape if the initial penetration occurred with the victim’s consent.\(^{91}\)

In 1985, Maine became the first state to hold that the continuation of intercourse after post-penetration withdrawal of consent constitutes rape.\(^{92}\) In *State v. Robinson*,\(^{93}\) the Supreme Judicial Court of Maine evaluated whether the trial court properly responded to the jury’s inquiry as to whether rape occurred when “two people began consenting to an act, [but] then one person says no and the other continues.”\(^{94}\) The trial court responded that there could be rape after a withdrawal of consent subsequent to penetration, but emphasized that the intercourse must continue under compulsion.\(^{95}\) The Supreme Judicial Court of Maine held that the trial court properly instructed the jury that the continuation of intercourse after withdrawal of consent does not become rape merely as a result of the revoked consent, but due to the compulsion that forces the continued intercourse.\(^{96}\) The court explained that “[p]ractical, common sense considerations” supported holding that continued penetration after withdrawal of consent qualifies as “sexual intercourse” under Maine’s rape statutory definition.\(^{97}\) The court expressly rejected the holding

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90. 254 S.E.2d at 761.

91. *Id.* at 761–62.

92. *See Robinson*, 496 A.2d at 1069–70 (holding that the “continued penetration of the female sex organ by the male sex organ” after a withdrawal of consent subsequent to penetration constitutes rape); *see also* Matthew R. Lyon, Comment, *No Means No?: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape*, 95 J. CRIM. L. & CRIMINOLOGY 277, 296 (2004) (“Maine was the first state to classify intercourse that continues after consent is withdrawn as rape.”).

93. 496 A.2d 1067.

94. *Id.* at 1069.

95. *Id.*

96. *Id.* at 1070.

97. *Id.* at 1069–70. At the time of *Robinson*, Maine’s rape statute defined “sexual intercourse” as “any penetration of the female sex organ by the male sex organ.” *Id.* at 1069–70 n.2 (quoting ME. REV. STAT. ANN. tit. 17-A, § 251(1)(B) (1983), repealed by 1989 ME. Legis. Serv. 401 (West)). The court also justified its decision, explaining that “[i]n
in Way because the Way court failed to cite any authority on point and, more importantly, disregarded the crucial element of compulsion.\textsuperscript{98} The court rejected the position that there must be a withdrawal of the male sex organ, however brief, for a rape conviction if intercourse began consensually because this would shield from prosecution persons who used overwhelming force or “threat of serious bodily harm” to prevent such a withdrawal.\textsuperscript{99} Therefore, the Supreme Judicial Court of Maine affirmed that the trial court’s instruction stated the law correctly.\textsuperscript{100}

Since Robinson, six other state courts have upheld a woman’s right to withdraw consent subsequent to penetration by holding that any forced continuation of intercourse after a woman withdraws consent constitutes rape: Connecticut, South Dakota, Minnesota, Alaska, California, and Kansas.\textsuperscript{101} In 1994, the Appellate Court of Connecticut held in State v. Siering\textsuperscript{102} that the trial court properly instructed the jury that a defendant is guilty of first degree sexual assault if he continues intercourse through use of force after the victim revokes her consent, even if the intercourse began consensually.\textsuperscript{103} The Connecticut court concluded that the definition of “sexual intercourse” in Connecticut’s rape statute established that “‘[p]enetration, however slight, is sufficient to complete vaginal intercourse’”\textsuperscript{104} and thus is not limited to the initial penetration. Consequently, like the Supreme Judicial Court of Maine, the Connecticut court held that penetration continued through forcible compulsion after withdrawal of consent constitutes rape.\textsuperscript{105}

anybody’s everyday lexicon, the continued penetration of the female sex organ by the male sex organ, after the time either party has withdrawn consent, is factually ‘sexual intercourse.’” Id. at 1069.

\textsuperscript{98} Id. at 1070; see State v. Way, 254 S.E.2d 760, 761–62 (N.C. 1979) (explaining that, even though there can be no rape if the initial penetration was consensual, there is rape if a particular act of intercourse was done without consent, so the concept of withdrawn consent usually applies when there are multiple acts of intercourse).

\textsuperscript{99} Robinson, 496 A.2d at 1071.

\textsuperscript{100} Id. at 1071, 1073.

\textsuperscript{101} See infra notes 102–122 and accompanying text.

\textsuperscript{102} 644 A.2d 958 (Conn. App. Ct. 1994).

\textsuperscript{103} Id. at 961, 964.

\textsuperscript{104} Id. at 961–62 n.5 (quoting CONN. GEN. STAT. § 53a-65(2) (1994)). The Connecticut court concluded that the legislature intended the statute to establish the minimum amount of evidence necessary to prove intercourse. Id. at 962.

\textsuperscript{105} Id. at 963 (citing Robinson, 496 A.2d at 1069). However, the Connecticut court explained that, because the Robinson court’s reasoning at least partly reflected the Maine statute, which was not identical to the Connecticut rape statute, the Connecticut court had to decide this issue of first impression based on its “own best judgment” of the state statute “interpreted in the light of the common sense of the situation.” Id. The court rejected as “archaic and unrealistic” the notion, upheld in State v. Way and People v. Vela, 218 Cal. Rptr.
In *State v. Jones*, the Supreme Court of South Dakota held that initial consent does not foreclose a rape prosecution under South Dakota law. The South Dakota Supreme Court held that the trial court did not err by refusing to provide the defendant’s requested jury instruction: “An act of sexual intercourse does not constitute rape, where the female initially consents to the act, but after penetration, withdraws her consent, and the male, without interruption of penetration, continues the act against the will of the female and by means of force.”

In 1995, in *State v. Crims*, the Court of Appeals of Minnesota similarly held that rape includes forcible continuation of initially consensual intercourse because, unlike *Way*, Minnesota law defined “penetration both as the initial intrusion into the body of another and as the act of sexual intercourse.” The Minnesota court thus held that the trial court did not err by refusing to instruct the jury that initially consensual intercourse cannot become rape.

In 2001, in *McGill v. State*, the Court of Appeals of Alaska held that Alaska statutes do not limit the scope of “sexual penetration” to only the moment of initial penetration. The Alaska court thus held that the trial court did not commit plain error by responding to the jury’s note with the supplemental instruction that a woman may withdraw her initial consent to penetration, but that all of the elements of first degree sexual assault must be proven beyond a reasonable doubt to sustain a conviction for this crime. Agreeing with the Maine

161, 164 (Cal. Ct. App. 1985), *overruled by In re John Z.*, 60 P.3d 183 (Cal. 2003), that a man cannot be guilty of rape if a woman initially consents to intercourse. *Id.* at 963; see also infra note 117 (discussing *Vela*).

106. 521 N.W.2d 662 (S.D. 1994).
107. *Id.* at 672.
108. *Id.*
110. *Id.* at 845.
111. *Id.*
113. See *id.* at 84 (explaining that sexual penetration encompasses "a broader range of conduct than [just] genital sexual intercourse" under Alaska law because the Alaska sexual assault statute defines "sexual penetration" as including "genital intercourse, cunnilingus, fellatio, and anal intercourse or an intrusion ‘however slight’ of an object or any part of a person’s body into the genital or anal opening of another person’s body" (quoting ALASKA STAT. § 11.81.900(b)(56) (2001) (current version at ALASKA STAT. § 11.81.900(b)(59) (2006))). Furthermore, the court found that nothing in the legislative history of the Alaska statutes supported the proposition that a person cannot withdraw consent after penetration. *Id.*
114. *Id.* at 82, 84. Because the court found that the defendant did not preserve an objection to the trial court’s instruction, the court explained that the defendant must prove plain error to justify reversing his conviction. *Id.* at 82.
court’s reasoning in *Robinson*, the court criticized the illogical result of the contrary approach: allowing rape prosecution when a victim was able to momentarily displace the male organ, but not when any withdrawal, however brief, was impossible because the victim was under overwhelming “compulsion by physical force or threat of serious bodily harm.”

In 2003, in *In re John Z.*, addressing a conflict between lower appellate decisions, the Supreme Court of California held that “a withdrawal of consent effectively nullifies any earlier consent” and subjects a person to forcible rape charges if that person forces continued intercourse.

In the same year, in *State v. Bunyard*, the Court of Appeals of Kansas also held that a person may withdraw consent after penetration during intercourse. Although the Kansas court consulted case law from other jurisdictions, the court ultimately relied on statutory interpretation to determine whether there was sufficient evidence to support the defendant’s rape conviction. The Kansas court found that the statutory definition of “sexual intercourse” established a minimum amount of contact necessary to prove intercourse, as the Kansas statute did not state that “the act of sexual intercourse ends with penetration.” Consequently, the court held that the continuation of

115. *Id.* at 84 (citing *State v. Robinson*, 496 A.2d 1067, 1071 (Me. 1985)). The court expressly dismissed the reasoning in *State v. Way*, *Battle v. State*, and *People v. Vela* as “not persuasive,” and also criticized these decisions as representing “archaic and outmoded social conventions.” *Id.* at 82–84.

116. 60 P.3d 183 (Cal. 2003).

117. *Id.* at 184. With this holding, the Supreme Court of California expressly overruled *People v. Vela*, instead agreeing with the reasoning of *People v. Roundtree*, 91 Cal. Rptr. 2d 921 (Cal. Ct. App. 2000). *See In re John Z.*, 60 P.3d at 184 (comparing *Vela* and *Roundtree*). Relying on reasoning from *Way* and *Battle*, the Court of Appeal for the Fifth District of California held in *Vela* that “the presence or absence of consent at the moment of initial penetration” determines whether the intercourse constitutes rape. *People v. Vela*, 218 Cal. Rptr. 161, 164 (Cal. Ct. App. 1985), overruled by *In re John Z.*, 60 P.3d 183. In *Vela*, the court defined the “essence of the crime of rape [as] . . . the outrage to the person and feelings of the female resulting from the nonconsensual violation of her womanhood.” *Id.* at 165. The *Vela* court justified its holding by finding that, when a man forcibly continues intercourse after a woman withdraws consent, a woman could hardly have the same magnitude of outrage “as that resulting from an initial nonconsensual violation of her womanhood.” *Id.* In *Roundtree*, the Court of Appeal for the First District of California declined to follow *Vela* and instead adopted the *Robinson* view, holding that the forced continuation of intercourse against the victim’s will constitutes rape. *Roundtree*, 91 Cal. Rptr. 2d at 924–25.


119. *Id.* at 756.

120. *See id.* at 755–56 (discussing *Battle*, *Siering*, *Robinson*, and *In re John Z.*, but then making its decision based on statutory analysis).

121. *Id.* at 756.
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intercourse through “force or fear” after a participant withdraws consent constitutes rape.122

That same year, in 2003, Illinois became the first state to address this issue legislatively, passing a statute that explicitly protects a person’s right to withdraw consent at any time during sexual intercourse.123 The Illinois statute provides that a “person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct.”124

Aside from these states and two other state courts that have expressly declined to rule on the merits of the issue of post-penetration withdrawal of consent,125 no other state has addressed this issue.

C. Maryland Standard for Determining if an Erroneous Jury Instruction Warrants Reversal in a Criminal Case

Notably, seven of the eight states that have judicially addressed post-penetration withdrawal of consent did so in the context of challenged supplemental jury instructions.126 Thus, any inquiry into this topic must include a discussion of the Maryland standards for decid-

122. Id. Although the Supreme Court of Kansas ultimately reversed this decision because the trial court did not properly instruct the jury, the Supreme Court of Kansas maintained the position that, under Kansas law, “rape may occur after the initial penetration.” State v. Bunyard, 133 P.3d 14, 28, 30–31 (Kan. 2006).
124. 720 ILL. COMP. STAT. 5/12-17(c).
125. See State v. Brodniak, 718 P.2d 322, 330 (Mont. 1986) (holding that the trial court did not err by refusing to provide the instruction requested by the defendant, which was based on State v. Way, but declining to address whether Way was the law in Montana); State v. Crain, 946 P.2d 1095, 1102 (N.M. Ct. App. 1997) (“Although we do not rule on the merits of the issue of withdrawal of consent under New Mexico law, we note that other jurisdictions have questioned the legal validity of the proposition that there can be no rape or CSP crime if the victim’s consent is withdrawn after penetration has begun.”).
126. See McGill v. State, 18 P.3d 77, 79 (Alaska Ct. App. 2001) (evaluating whether a trial court’s instruction was erroneous); State v. Siering, 644 A.2d 958, 964 (Conn. App. Ct. 1994) (evaluating whether a trial court’s supplemental instruction was erroneous); Bunyard, 133 P.3d at 27 (same); State v. Robinson, 496 A.2d 1067, 1070 (Me. 1985) (same); State v. Crims, 540 N.W.2d 860, 865 (Minn. Ct. App. 1995) (evaluating whether a trial court’s refusal to provide a supplemental instruction was erroneous); State v. Way, 254 S.E.2d 760, 761 (N.C. 1979) (evaluating whether a trial court’s supplemental instruction was erroneous); State v. Jones, 521 N.W.2d 662, 672 (S.D. 1994) (evaluating whether a trial court’s refusal to provide a supplemental instruction was erroneous). The Supreme Court of California heard a case on this issue not to examine an erroneous jury instruction, but to settle a conflict between the intermediate California appellate courts. See In re John Z., 60 P.3d 183, 184 (Cal. 2003) (explaining that the court had “granted this case to settle a conflict in Court of Appeal decisions”).
ing whether an error in a criminal case warrants a reversal and for determining whether a supplemental jury instruction constitutes such error.

Since 1976, Maryland courts have applied the Dorsey standard when evaluating whether an erroneous jury instruction warrants a reversal in a criminal case.\(^\text{127}\) In Dorsey v. State,\(^\text{128}\) the Court of Appeals articulated the Maryland standard for determining in criminal cases whether an error of "constitutional significance or otherwise" is harmless or whether that error warrants a reversal.\(^\text{129}\) In Dorsey, the Court of Appeals adopted the criteria enunciated by the Supreme Court of the United States in Chapman v. California,\(^\text{130}\) as well as its application by the Court of Appeals of Maryland in Younie v. State,\(^\text{131}\) requiring that Maryland courts reverse if the beneficiary of an error cannot demonstrate beyond a reasonable doubt that "the error in no way influenced the verdict."\(^\text{132}\) Consequently, to deem an error harmless, a reviewing court in Maryland must be satisfied, upon its own independent review of the record, that "there is no reasonable possibility that the evidence complained of . . . may have contributed to the rendition of the guilty verdict."\(^\text{133}\) The Dorsey court justified this standard by explaining that it would be illogical for appellate courts to apply a


\(^{128}\) 276 Md. 638, 350 A.2d 665 (1976).

\(^{129}\) Id. at 658–59, 350 A.2d at 678. The Court of Appeals adopted one uniform standard of review for all errors in criminal cases because there was "no sound reason for drawing a distinction between the treatment of those errors which are of constitutional dimension and those other evidentiary, or procedural, errors which may have been committed during a trial." Id. at 657, 350 A.2d at 677.

\(^{130}\) 386 U.S. 18 (1967).


\(^{132}\) Dorsey, 276 Md. at 648, 655, 659, 350 A.2d at 671, 675, 678 (citing Chapman, 386 U.S. at 24; Younie, 272 Md. at 246, 322 A.2d at 218). In Chapman, the Supreme Court held that a court cannot find that a federal constitutional error is harmless unless the court can declare that the error was harmless beyond a reasonable doubt. 386 U.S. at 24. In reaching this holding, the Court explained that there was "little, if any, difference between . . . [inquiring] whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. (internal quotation marks omitted). In Younie, the Court of Appeals of Maryland adopted the Chapman standard to evaluate whether an error resulting in a violation of a petitioner’s fundamental constitutional rights was harmless. 272 Md. at 246–47, 322 A.2d at 218.

\(^{133}\) Dorsey, 276 Md. at 659, 350 A.2d at 678.
lesser evidentiary standard in criminal cases than trial courts, which can sustain a criminal conviction only if it is supported by proof beyond a reasonable doubt.\footnote{134. Id. at 658, 359 A.2d at 677–78 (citing In re Winship, 397 U.S. 358 (1970)).}

Under Maryland Rule 4-325(a), the decision to provide a supplemental jury instruction in a criminal case is within the discretion of the trial court.\footnote{135. Lovell v. State, 347 Md. 623, 657, 702 A.2d 261, 278 (1997) (citing Md. R. 4-325(a)).} In Lovell v. State,\footnote{136. 347 Md. 623, 702 A.2d 261 (1997).} the Court of Appeals of Maryland evaluated whether a trial court abused its discretion by refusing to provide a supplemental instruction regarding the mitigating circumstance of "youthful age," as set forth in Maryland’s death penalty statute, after the jury submitted a note inquiring about this issue.\footnote{137. Id. at 653, 702 A.2d at 276.} In determining whether this refusal constituted error, the Court of Appeals relied extensively on the Supreme Court decision Bollenbach v. United States,\footnote{138. 326 U.S. 607 (1946).} which held that when a jury clearly demonstrates its difficulties, the trial judge should address the jury’s confusion with "concrete accuracy."\footnote{139. See Lovell, 347 Md. at 658, 702 A.2d at 278 (quoting Bollenbach, 326 U.S. at 613) (extensively reviewing and placing significant weight on Bollenbach).} The Lovell court, relying on a United States Court of Appeals for the Fourth Circuit opinion, then explained that when a jury explicitly expresses a specific difficulty relating to a central question of the case, a helpful response from the trial court is mandatory.\footnote{140. Id. at 659, 702 A.2d at 279 (quoting Price v. Glosson Motor Lines, Inc., 509 F.2d 1033, 1037 (4th Cir. 1975)).} Thus, Maryland courts are obligated to respond helpfully to resolve the jury’s expressed confusion.\footnote{141. See id. at 658–59, 702 A.2d at 278–79 (explaining the importance of resolving the jury’s confusion).} Because the jury’s note indicated that at least one juror was sufficiently concerned about the “youthful age” mitigating circumstance and sought clarification, the Court of Appeals held that in this case the trial court erred by not providing a supplemental instruction.\footnote{142. Id. at 659–60, 702 A.2d at 279.} Furthermore, the Lovell court held that the trial court’s decision did not constitute harmless error because it took only one unconvinced juror to prevent a death sentence.\footnote{143. Id. at 660, 702 A.2d at 279.}
III. THE COURT’S REASONING

In *State v. Baby*, the Court of Appeals of Maryland held that the crime of first degree rape includes the continuation of vaginal intercourse “through force or threat of force and without the consent of the victim, even if the victim consented to the initial penetration.” The Court of Appeals vacated the judgments of the Court of Special Appeals and the Circuit Court for Montgomery County and remanded the case for a new trial, but issued multiple opinions to address the three issues on which the court granted certiorari. On the first issue presented, Judge Battaglia, writing for the majority, held that the trial court erred by not providing a more specific response to the jury’s inquiry regarding the effect of post-penetration withdrawal of consent. The majority extensively reviewed *Battle v. State* in order to discern whether the following statement from *Battle*, upon which the Court of Special Appeals relied, was dicta or holding: “ordinarily if she consents prior to penetration and withdraws the consent following penetration, there is no rape.” The majority held that this statement was *obiter dictum* not entitled to precedential weight because the statement was a collateral statement, “not made on a point that was argued by counsel and deliberately addressed by this Court,” and because the decision in *Battle* did not depend on the statement. Moreover, the majority found this statement to be dicta because it merely articulated the converse of the holding in *Battle*, as the *Battle* court did not subject this statement to any additional analysis.

The majority then concluded that, even if the English common law crime of rape was derived from the concept of “de-flowering” virgins, before Maryland adopted the English common law, “the English law of rape had evolved beyond the [ancient] understanding of rape

145. *Id.* at 272, 946 A.2d at 494. Judge Battaglia wrote the majority opinion: Part I, joined by Judges Harrell, Greene, and Cathell, addressed the first issue; Part II, joined by Chief Judge Bell and Judges Greene and Cathell, decided the second issue; and the Court of Appeals issued a unanimous opinion on the third issue. *Id.* at 222–23, 946 A.2d at 464–45.
146. *Id.* at 223, 946 A.2d at 465.
147. *See id.* at 241–45, 946 A.2d at 475–77 (explaining the court’s conclusions and reasoning in *Baby*).
148. *Id.* at 244, 946 A.2d at 477 (emphasis omitted) (quoting *Battle v. State*, 287 Md. 675, 684, 414 A.2d 1266, 1270 (1980)).
149. *Id.* at 246, 946 A.2d at 478. The Court of Appeals concluded that the decision in *Battle* did not depend on this statement because, if the statement were removed, the decision would remain unaffected. *Id.*
150. *Id.*
as merely a trespass upon a man’s property. As support for its conclusion that the English law of rape at the time of its adoption by Maryland in the seventeenth century no longer viewed “the harm done through rape [as] fully accomplished upon penetration,” the court examined the writings of various early English commentators. The court then examined early post-Revolution American cases that addressed withdrawal of consent, and found that only two of these cases contained any support for Baby’s position, and that the language in both cases was arguably dicta. The court reviewed modern cases in which other state courts had considered whether post-penetration withdrawal of consent could result in rape and dismissed the single case that had held that the withdrawal of consent after initially consensual penetration could not result in rape, on the basis of its lack of analysis. Persuaded instead by the analyses conducted by the Maine, Kansas, and Connecticut appellate courts, the court concluded that Maryland’s rape statute also “punishes the act of penetration, which persists after the withdrawal of consent.” The court thus concluded that the weight of authority supported a finding that any continuation of penetration by force or threat of force after a woman withdraws consent could constitute rape.

Nonetheless, the Court of Appeals affirmed the lower appellate court’s reversal of Baby’s rape conviction because the trial court should have directly responded to the jury’s confusion as to the effect of a post-penetration withdrawal of consent. The court explained that when a deliberating jury submits a question involving a central issue of the case, the trial court must provide a response that resolves

151. Id. at 248–49, 946 A.2d at 479–80.
152. Id. at 252, 946 A.2d at 482.
153. See id. at 249–52, 946 A.2d at 480–82 (drawing upon Bracton’s thirteenth-century treatise, On the Laws and Customs of England; the writings of Sir Matthew Hale, including This History of the Pleas of the Crown; and Sir William Backstone’s Commentaries on the Laws of England). The court explained that “Hale and Blackstone wrote before the time of American independence, and Bracton’s writings and Lord Audley’s Case occurred before the founding of Maryland.” Id. at 252, 946 A.2d at 482.
154. See id. at 253–55, 946 A.2d at 482–83 (examining Wright v. State and citing many other early American cases on this issue).
155. See id. at 255, 946 A.2d at 483–84 (discussing Way and finding this decision to be unpersuasive).
156. See id. at 255–59, 946 A.2d at 484–86 (discussing decisions by those courts in Robinson, Bunyard, and Siering, respectively).
157. Id. at 259, 946 A.2d at 486.
158. Id. at 260, 946 A.2d at 486. The Court of Appeals did, however, emphasize that force or threat of force remains an essential element of the crime of rape. Id. (citing Hazel v. State, 221 Md. 464, 469, 157 A.2d 922, 925 (1960)).
159. Id. at 263–64, 946 A.2d at 488–89.
the jury’s confusion. The court concluded that the jury’s inquiries about the effect of a post-penetration withdrawal of consent certainly related to a central issue. Because the court could not conclude that the trial court’s error in not providing a more specific response was harmless beyond a reasonable doubt, the court reversed Baby’s rape conviction.

On the second issue, the Court of Appeals held that Baby’s convictions for first degree sexual offense and third degree sexual offense should also be reversed. The majority concluded that a further instruction on the effect of post-penetration withdrawal of consent may have altered the jury’s verdict on Baby’s first degree and third degree sexual offense charges, as “[l]ack of consent” is an element of rape as well as of first and third degree sexual offense charges.

Judge Raker concurred in part and dissented in part. Judge Raker concurred in the judgment of the majority’s opinion on the first issue presented, reversing Baby’s rape conviction; however, unlike the majority, she believed that the statement from Battle was holding, not dicta. Judge Raker noted that whether the Battle statement was dicta or holding “becomes highly significant at any retrial” for several reasons. If the Battle statement was dicta and did not “stat[e] new law or chang[e] the law of rape in Maryland,” she explained, “at any retrial, the court should instruct the jury that post-penetration with-

161. Id., 946 A.2d at 488–89.
162. Id. at 265, 946 A.2d at 489 (citing Dorsey v. State, 276 Md. 638, 659, 350 A.2d 665, 678 (1976)).
163. Id. at 241, 946 A.2d at 475.
164. Id. at 266, 946 A.2d at 490. On the third issue, the Court of Appeals issued a unanimous opinion, suggesting that courts should subject evidence regarding “rape trauma syndrome” to Frye-Reed analysis. Id. at 241, 946 A.2d at 475. Although the court did not need to address whether Baby interposed an appropriate objection, the court provided guidance to the circuit court, explaining that the court has “reaffirmed the importance of Frye-Reed analysis in determining the validity and reliability of a wide variety of scientific methodologies and conclusions, including various syndromes.” Id. at 266, 270, 946 A.2d at 490, 492–93. In Reed v. State, the Court of Appeals adopted the Frye standard as the threshold standard governing the admissibility of scientific evidence. 283 Md. 374, 389, 391 A.2d 364, 372 (1978). The Frye standard evaluates the validity and the reliability of a scientific principle or methodology by examining the “‘general acceptance’” of the principle or methodology in the relevant scientific community. Id. at 381, 391 A.2d at 368 (emphasis omitted) (quoting Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).
165. Baby, 404 Md. at 272, 946 A.2d at 494 (Raker, J., concurring in part and dissenting in part). Chief Judge Bell and Judge Wilner joined Part I of Judge Raker’s opinion, while Judges Harrell and Wilner joined Part II of Judge Raker’s opinion. Id.
166. Id. at 272–73, 946 A.2d at 494.
167. Id. at 274, 946 A.2d at 495.
drawal of consent may constitute rape.”168 However, if the Battle statement was a holding that announced a new rule of law, at any retrial, the court should instruct the jury that there can be no rape if a woman consents to intercourse before penetration, as any new rule of law may be applied only prospectively.169 Judge Raker ultimately concluded that the statement from Battle was a holding because it was “hardly a ‘by the way’ statement,” as it “was directly involved in the issues raised in the case.”170 Therefore, Judge Raker ended Part I of her opinion by explaining that the “trial court should have instructed the jury in the language of Battle.”171

Judge Raker dissented from the majority’s “bald conclusion” on the second issue, instead concluding that the court should have affirmed Baby’s convictions of first and third degree sexual offense.172 Decisively, Judge Raker noted that Baby’s sexual offense charges were unrelated to the jury’s questions and arose from “separate and discrete acts, that of aiding and abetting Mike in an act of anal penetration and the touching of J.L.’s breasts and vagina without her consent, which are entirely unrelated to the issue of post-penetration withdrawal of consent during the separate act of sexual intercourse.”173

IV. ANALYSIS

By thoroughly analyzing the issue of whether to reverse Baby’s rape conviction, examining both English and Maryland common law, the Court of Appeals eliminated any confusion that had developed in the legal community as to the significance of the statement from Battle on the subject of post-penetration withdrawal of consent.174 Consulting jurisprudence from other states, the court firmly declared that Maryland law, in accordance with the weight of authority on the issue, recognizes that the continuation of intercourse through force or threat of force after a withdrawal of consent subsequent to penetration can constitute rape.175 However, because the court failed to con-

168. Id. at 275, 946 A.2d at 495.
170. Id. at 280, 946 A.2d at 498. In addition, Judge Raker found it compelling that this issue was raised and argued in the Appellant’s brief in the Battle case. See id., 946 A.2d at 499 (citing Brief of Appellant at 6, Battle v. State, 287 Md. 675, 414 A.2d 1266 (1980) (No. 159)).
171. Id., 946 A.2d at 499.
172. Id. at 281, 946 A.2d at 499.
173. Id. Judge Raker also found that “the absence of any evidence of the victim consenting to Mike’s acts makes the Court’s ipse dixit conclusion . . . too great a leap.” Id. at 281–82, 946 A.2d at 499.
174. See infra Part IV.A.
175. See infra Part IV.B.
duct a comparable examination when deciding whether to reverse Baby’s other convictions, ignoring several compelling arguments and conducting a hasty analysis of the issues, the Court of Appeals improperly reversed Baby’s two third degree sexual offense convictions and thus established a confounding example for appellate courts.176

A. Through a Thorough Analysis of Whether to Reverse Baby’s Rape Conviction, the Court of Appeals Thwarted Any Confusion that Had Developed as to the Significance of the Statement from Battle on the Subject of Post-Penetration Withdrawal of Consent

In the years following the 1980 Battle opinion, substantial confusion arose as to the significance of this opinion, as evidenced by law journal articles and court opinions from other jurisdictions.177 Although Battle left little ambiguity with regard to Maryland’s position on the effect of pre-penetration withdrawal of consent,178 the subsequent statement in Battle did not clearly define the effect of post-penetration withdrawal of consent, and instead generally observed that “ordinarily if [a woman] consents prior to penetration and withdraws the consent following penetration, there is no rape.”179 This statement in Battle regarding the ordinary implication of post-penetration withdrawal of consent created substantial confusion as to its significance. Tending to ignore the word “ordinarily” in this statement, many law journals cited Battle as holding that Maryland law precludes a finding of rape when a woman withdraws consent after penetration, even if intercourse is forcibly continued thereafter.180

176. See infra Part IV.C.
177. See infra text accompanying notes 180–184.
178. See Battle v. State, 287 Md. 675, 684, 414 A.2d 1266, 1270 (1980) (“Given the fact that consent must precede penetration, it follows in our view that although a woman may have consented to a sexual encounter, even to intercourse, if that consent is withdrawn prior to the act of penetration, then it cannot be said that she has consented to sexual intercourse.”).
179. Id.; see also supra notes 81–82 and accompanying text (explaining that, after the Battle court’s holding, the court commented that ordinarily no rape occurs when consent is withdrawn after penetration).
180. See, e.g., Amanda O. Davis, Comment, Clarifying the Issue of Consent: The Evolution of Post-Penetration Rape Law, 34 Stetson L. Rev. 729, 734–35 (2005) (“According to Battle, if the victim gives consent at the moment of penetration, it follows in our view that although a woman may have consented to a sexual encounter, even to intercourse, if that consent is withdrawn prior to the act of penetration, then it cannot be said that she has consented to sexual intercourse.”); Lyon, supra note 92, at 294 (“Thus, the court [in Battle] concluded that if a woman consents to intercourse prior to penetration, and then withdraws her consent, no rape has occurred.”); Erin G. Palmer, Recent Development, Antiquated Notions of Womanhood and the Myth of the Unstoppable Male: Why Post-Penetration Rape Should be a Crime in North Carolina, 82 N.C. L. Rev. 1258, 1260 n.19 (2004) (citing to Battle as “holding that if a woman withdraws consent following penetration, a man’s failure to
Divergent interpretations by state courts further demonstrate the confusion caused by this second statement in *Battle* on the subject of post-penetration withdrawal of consent. The Appellate Court of Connecticut in *State v. Siering* interpreted the statement as being “arguably dicta.” However, other courts concluded that the *Battle* court reached the same conclusion as the Supreme Court of North Carolina did in *State v. Way*, that post-penetration withdrawal of consent cannot result in rape if intercourse began consensually. Courts in other jurisdictions have also accorded the *Battle* statement varying degrees of authority. Some courts granted the *Battle* language little to no weight because the court did not provide any analysis or cite any authority, while one court relied on this language to justify holding that rape cannot occur in withdrawn consent scenarios. Through an in-depth examination of its decision in *Battle*, the Court of Appeals in *Baby* quieted all of this confusion by concluding that the language in *Battle* pertaining to post-penetration withdrawal of consent was only *obiter dictum* because it ap
peared after the *Battle* court’s holding and was independent of the holding.185

The *Baby* court provided several justifications for its finding that this language from *Battle* was only dictum. First, the *Baby* court identified the statement as a collateral statement and thus dictum because the court did not make the statement on a point “argued by counsel and deliberately addressed by [the c]ourt.”186 Second, the *Baby* court noted that the statement was not essential to the holding, as the holding would remain unaffected even if this language was removed.187 Finally, the *Baby* court concluded that this statement was dictum because it appeared to be an “articulation of the converse” of the previous statement in *Battle* and was not subjected to any additional analysis.188

The *Baby* court also clarified the scope of its *Battle* decision by explaining that the “sole issue” before the court in *Battle* was “whether withdrawal of consent before penetration, followed by vaginal intercourse accomplished through force or threat of force, constituted rape.”189 By addressing both the significance of the *Battle* statement and clearly defining the scope of the *Battle* decision, the *Baby* court put an end to inconsistent interpretations of *Battle*.190

B. In *Baby*, the Court of Appeals Also Seized the Opportunity to Declare that Maryland Law, in Accordance with the Weight of Authority, Recognizes that Forcibly Continued Intercourse After Withdrawal of Consent Subsequent to Penetration Can Constitute Rape

In addition to clarifying the significance of *Battle*, the Court of Appeals in *Baby* established that Maryland law, in accordance with the weight of authority, punishes penetration that continues after a with-

185. *See* State v. Baby, 404 Md. 220, 244–47, 946 A.2d 463, 477–78 (2008) (citing *Battle* v. State, 287 Md. 675, 684, 414 A.2d 1266, 1270 (1980)) (extensively reviewing the court’s decision in *Battle* and providing multiple reasons for its conclusion that the relevant language was only *obiter dictum*).

186. *Id.* at 246, 946 A.2d at 478.

187. *See id.* (“[The] decision in *Battle* was not dependent upon this statement; the holding would indeed be unaffected were that language to be removed.”).

188. *Id.*

189. *Id.* at 247, 946 A.2d at 478.

190. *See supra* note 180 (identifying the law journals that interpreted *Battle* as holding that a post-penetration withdrawal of consent could not result in rape, which the *Baby* court explained was not the case); *supra* note 182 (identifying the court opinions that interpreted *Battle* as reaching the same holding as *Way*, which the Court of Appeals explained was not the case).
Prior to the *Baby* ruling, most states had not explicitly addressed the issue of post-penetration withdrawal of consent. Of the eight states that had judicially addressed this issue prior to 2008, only North Carolina failed to recognize that rape can occur after a post-penetration withdrawal of consent when the act of intercourse began consensually. One state legislatively addressed post-penetration withdrawal of consent by passing a statute that expressly protects a person’s right to withdraw consent at any time during sexual intercourse. Therefore, prior to *Baby*, eight states had adopted the position that a person can withdraw consent after penetration and that any forcible continuation of intercourse thereafter constitutes rape.

By using *Baby* to address directly post-penetration withdrawal of consent, the Court of Appeals seized the opportunity to declare the status of Maryland law on this issue, engaging in a thorough examination of the authority of other states that had directly considered this issue. In accordance with the many state courts that had rejected the *Way* approach, the *Baby* court expressly found that the *Way* decision was not persuasive due to its lack of analysis and support.

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191. *Baby*, 404 Md. at 250, 946 A.2d at 486.
192. See Davis, *supra* note 180, at 744 (explaining that the majority of states have not addressed the issue of post-penetration rape); Lyon, *supra* note 92, at 296 (same).
195. Illinois, Alaska, California, Connecticut, Kansas, Maine, Minnesota, and South Dakota adopted this position prior to *Baby*. To review the context in which these states adopted this rule, respectively, see *id.*; McGill, 18 P.3d at 84; *In re John Z.*, 60 P.3d at 184; Siering, 644 A.2d at 963; Bunyard, 133 P.3d at 28; Robinson, 496 A.2d at 1070; Crims, 540 N.W.2d at 865; Jones, 521 N.W.2d at 672. In 2006, the Supreme Court of Kansas acknowledged that the majority of states that had addressed this issue had recognized that the crime of rape included the continuation of intercourse through force or threat of force after a withdrawal of consent subsequent to penetration. *Bunyard*, 133 P.3d at 28.
196. See *Baby*, 404 Md. at 255, 946 A.2d at 483 (beginning its review of the decisions from states that have directly considered the issue of post-penetration withdrawal of consent in "more recent years").
197. *Id.*, 946 A.2d at 484; see also McGill, 18 P.3d at 83–84 (declining to follow the decision in *Way* and noting that the *Way* court made its decision "without explanation or citation to authority"); Siering, 644 A.2d at 963 ("Th[e] decision [in *Way*] is not persuasive because it contains no analysis or explanation but is merely a bald statement that the trial court was wrong."); *Bunyard*, 133 P.3d at 28 (declining to follow the decision in *Way* and
stead, the Baby court found the decisions of the Supreme Judicial Court of Maine in Robinson, the Court of Appeals of Kansas in Bunyard, and the Appellate Court of Connecticut in Siering to be persuasive. The Baby court adopted the modern position, concluding that allowing “the act of penetration [to effectively] end[ ] the act of sexual intercourse would lead to absurd results not contemplated by the drafters of [the Maryland] rape statute.” Through its analysis, the Court of Appeals firmly declared that, under Maryland law, the crime of rape includes forcibly continued vaginal intercourse after a withdrawal of consent subsequent to penetration. Thus, the Court of Appeals effectively took a step forward for Maryland by formally declining to follow the outdated and archaic position represented by Way, and by clarifying Maryland law on this issue.

C. The Court of Appeals Conducted a Hasty Examination in Deciding Whether to Reverse Baby’s Other Convictions, Which Resulted in an Improper Reversal of Baby’s Third Degree Sexual Offense Convictions and Established an Inconsistent Example for Appellate Courts

Despite the court’s comprehensive twenty-four-page analysis of whether to reverse Baby’s rape conviction, the Court of Appeals failed to engage in a comparable examination of Baby’s other convictions.

noting that the Way court made its decision without providing “any analysis or citation to authority to support [its] conclusions”; Robinson, 496 A.2d at 1070 (rejecting the Way decision because the “court did not cite any authority on point” and misstated the jury instruction at issue).

198. Baby, 404 Md. at 259, 946 A.2d at 486.

199. Id. As further evidence of its concurrence with this modern view, the Baby court cited to other state courts that have recognized that there can be rape when a defendant forcibly continues intercourse after a withdrawal of consent subsequent to penetration. Id. at 259 n.22, 946 A.2d at 486 n.22 (citing McGill, 18 P.3d at 84; In re John Z., 60 P.3d at 185; Maddox v. State, 317 S.E.2d 658, 659 (Ga. Ct. App. 1984); Crims, 540 N.W.2d at 865; Jones, 521 N.W.2d at 672). Moreover, by finding that English common law at the time of Maryland’s adoption no longer maintained that initial penetration completes the act of intercourse, the Baby court may have provided contrary evidence to Matthew Lyon’s conclusion that the majority of states adhere to the “common law principle that once consensual intercourse begins, a man cannot be prosecuted for rape even if the woman withdraws her consent during the act.” See Lyon, supra note 92, at 291.

200. See Baby, 404 Md. at 260, 946 A.2d at 486 (holding that “a woman may withdraw consent for vaginal intercourse after penetration has occurred and that, after consent has been withdrawn, the continuation of vaginal intercourse by force or the threat of force may constitute rape”).

201. See, e.g., McGill, 18 P.3d at 84 (dismissing the reasoning in Way as representing “arista, and outdated social conventions”); Siering, 644 A.2d at 963 (rejecting the position in Way as “archaic and unrealistic”; Palmer, supra note 180, at 1259–60 (describing the legal trend dismissing Way as “rejecting the outdated notions of ‘womanhood’”).

202. See supra Part IV.A–B.
Instead, the court devoted only a single page of its opinion to this topic, disregarding several compelling arguments and thus improperly reversing Baby’s two third degree sexual offense convictions. The Court of Appeals first overlooked the fact that Baby’s two third degree sexual offense convictions arose from facts entirely separate from those that substantiated Baby’s first degree rape conviction. At his second trial in December 2004, Baby was convicted on four counts: (1) first degree rape for being “aided and abetted by [Mike] in the act of vaginal penetration;” (2) first degree sexual assault for aiding and abetting “[Mike] in the act of anal penetration;” (3) third degree sexual offense for “touched vagina;” and (4) third degree sexual offense for “touched breast.”203 The trial court instructed the jury that, to find Baby guilty of the two third degree sexual offense charges, it must “find that Baby intentionally touched the victim’s vagina and her breast against her will and without her consent, while aided and abetted by [Mike] Wilson.”204 The trial instruction thus explained that the two counts of third degree sexual offense arose from J.L.’s allegations that Baby touched her breast and her vagina after she moved to the backseat of the vehicle and before Baby left Mike and J.L. alone in the car.205 Baby completely denied these allegations, claiming that he had no contact with J.L. prior to leaving Mike and J.L. alone in the car.206 There was thus no allegation of consent to Baby’s touching.207 The facts serving as the basis for Baby’s first degree rape charge did not occur until later in the evening, after Mike had exited and Baby had reentered the car, when Baby and J.L. then engaged in intercourse.208 These events were separated not only in time, but also by the series of events that transpired between Mike and J.L. after Baby left the two alone in the automobile.209

203. Baby, 404 Md. at 235, 946 A.2d at 472 (alterations in original).
204. Brief of Petitioner and Appendix at 47, Baby, 404 Md. 220, 946 A.2d 463 (No. 14) [hereinafter Brief of Petitioner].
205. See Baby, 404 Md. at 226, 946 A.2d at 466–67 (describing J.L.’s version of the events after she moved to sit between Baby and Mike in the backset of the car).
206. Id. at 229, 946 A.2d at 468.
207. See id. at 226, 946 A.2d at 466–67 (describing J.L.’s account of the events without any allegation of consent to the touching and explaining that J.L. “told them to stop”); id. at 229, 946 A.2d at 468 (describing Baby’s complete denial of the events and no allegation of consent to the touching).
208. See id. at 227–32, 946 A.2d at 467–70 (quoting J.L.’s and Baby’s testimony on the events that transpired after Baby reentered the car and asked J.L. if he could have sex with her).
209. See id. at 226, 946 A.2d at 467 (describing the events that occurred after Baby left Mike and J.L. alone in the car).
The Court of Appeals also seemingly ignored the fact that, not only were Baby’s third degree sexual offense convictions based on a separate set of facts, but also the third degree sexual offense charges involved distinct elements. To sustain a first degree rape conviction, a jury must find that the defendant engaged in “vaginal intercourse with another” through force or threat of force and without the person’s consent. However, a third degree sexual offense conviction does not require vaginal penetration, but only that the defendant partake in “sexual contact with another” without that person’s consent.

Despite acknowledging that the jury’s notes explicitly referred to rape and did not make any reference, direct or tangential, to the facts or the elements relating to the third degree sexual offense charges, the Court of Appeals relied exclusively on one argument to justify reversing Baby’s two third degree sexual offense convictions. Because “[l]ack of consent is an element common to both rape and . . . third degree sexual offense[,]” the court reasoned that any clarification on the element of consent could have conceivably affected the jury’s verdict on Baby’s third degree sexual offense charges. However, this argument ignored a crucial fact, which the court acknowledged earlier in the Baby opinion: the jury did not inquire merely about the element of consent, but about the element of consent in the context of a post-penetration withdrawal of consent during intercourse.

In its analysis of whether to reverse Baby’s third degree sexual offense conviction, the court failed to recall its earlier language describing the jury’s notes as inquiring “about the effect of a woman withdrawing consent during vaginal intercourse.” Instead, in its examination of this issue, the court made the bald conclusion, without

211. Id. § 3-307(a)(1)(i).
212. See Baby, 404 Md. at 265–66, 946 A.2d at 490 (“It is true that the jury’s instructions specifically mentioned consent ‘to sex’ and ‘rape,’ and did not specifically mention the actions for which Baby was convicted on the sexual offense charges, specifically . . . touching J.L.’s breast and vagina without her consent.”).
213. Id. at 266, 946 A.2d at 490.
214. See id. at 263, 946 A.2d at 488 (“In both questions, the jurors inquired about the effect of a woman withdrawing consent during vaginal intercourse.”). In Baby, the jury submitted two substantive questions, as the first two of the four notes submitted by the jury related only to the duration of the jury’s deliberations. See id. at 235, 946 A.2d at 470–71. The jury’s third note read as the following: “If a female consents to sex initially and, during the course of the sex act to which she consented, for whatever reason, she changes her mind and the man continues until climax, does the result constitute rape?” Id. at 233–34, 946 A.2d at 471. The next morning, the jury submitted a fourth note, reading as the following: “If at any time the woman says stop is that rape?” Id. at 235, 946 A.2d at 472.
215. See id. at 263, 946 A.2d at 488 (noting the jury’s inquiry about withdrawal of consent during intercourse).
any analysis or citation, that the jury’s question did not represent “doubt [only] as to the effect of withdrawal of consent in relation to intercourse.” The Court of Appeals claimed that the Court of Special Appeals concluded that the jury’s questions were not limited only to the context of sexual intercourse. However, the Court of Special Appeals repeatedly explained in its opinion that the “jury in this case simply wanted to know if consent could be withdrawn after commencement of the ‘sex act,’ i.e., penetration.” Therefore, without adequate justification, the Court of Appeals ignored the compelling argument that the jury’s inquiries did not relate to the two third degree sexual offense charges because the facts from which the two third degree sexual offense charges arose did not involve penetration, let alone post-penetration withdrawal of consent.

Moreover, by citing only to Dorsey and not to any other case law, the Court of Appeals ignored the body of cases in which Maryland courts have chosen not to reverse all of a petitioner’s convictions due to an erroneous supplemental instruction, but to reverse only those convictions affected by the error. The Court of Appeals over-

216. See id. at 265, 946 A.2d at 490.

217. See id. (“Like the Court of Special Appeals, we do not find the State’s argument persuasive that the jury’s questions only represented doubt as to the effect of withdrawal of consent in relation to intercourse.”).

218. Baby v. State, 172 Md. App. 588, 607, 916 A.2d 410, 421 (2007) (emphasis added); see also id. at 605, 916 A.2d at 420 (“The plain meaning of the jury’s words, ‘during the sex act,’ leads one ineluctably to conclude that the reference was to the act of intercourse.”); id. at 606, 916 A.2d at 420 (“A fair interpretation of the jury’s question is that it was an inquiry as to the legal effect of a withdrawal of consent subsequent to penetration, and prior to climax.”). Without any citation to the lower court’s opinion, the Court of Appeals asserted that the Court of Special Appeals rejected the State’s argument that the jury’s inquiry was limited to the context of sexual intercourse. See Baby, 404 Md. at 265, 946 A.2d at 490. However, the opinion of the Court of Special Appeals did not appear to support this assertion, that it rejected such an argument by the State; instead, the opinion of the Court of Special Appeals demonstrated that the court rejected the State’s arguments that the jury’s notes were ambiguous and that the jury’s questions were “not related to either party’s theory of the case.” Baby, 172 Md. App. at 606, 916 A.2d at 420; see id. at 605–06, 916 A.2d at 420 (rejecting the State’s argument that the wording of the jury’s notes rendered them ambiguous).

219. See Baby, 404 Md. at 255, 946 A.2d at 472 (identifying the facts that substantiated the third degree sexual offense convictions); Brief of Petitioner, supra note 204, at 47 (asserting that the jury was “not asking about the law as to [the] third degree sexual offense[s]”).

220. See Baby, 404 Md. at 266, 946 A.2d at 490 (relying upon the Dorsey standard exclusively to make its decision with respect to the supplemental jury instructions).

221. See, e.g., Brogden v. State, 384 Md. 631, 651 & n.8, 652, 866 A.2d 129, 141 & n.8 (2005) (reversing the petitioner’s handgun conviction, but not the petitioner’s burglary conviction, because the erroneous supplemental instruction “did not address any of the elements of the separate burglary charge or the applicable burden of proof as to that charge”); Malik v. State, 152 Md. App. 305, 396–397, 831 A.2d 1101, 1118–19 (2005) (vacat-
looked the strong analogy between this case and *Brogden v. State*\(^\text{222}\) on this issue, as, in both *Baby* and *Brogden*, the supplemental instructions and the jury’s inquiries did not address any of the elements of the separate charges—a separate third degree sexual offense charge in *Baby* and a separate burglary charge in *Brogden*\(^\text{223}\). In *Brogden*, the petitioner, who was convicted of first degree burglary and carrying a handgun, contended that the trial court erred in giving the jury a supplemental instruction regarding the burden of proof for existence of a handgun license\(^\text{224}\). The *Brogden* court found that this supplemental jury instruction was erroneous, as no evidence had been admitted on the issue of whether the petitioner possessed a handgun license and the petitioner did not elect to raise this defense\(^\text{225}\). The *Brogden* court held that this error was not harmless with regard to the handgun conviction and thus reversed this conviction\(^\text{226}\). However, the *Brogden* court affirmed the petitioner’s burglary conviction because the trial court’s supplemental instruction “only addressed the separate charge of a handgun violation” and did not address the elements of the separate burglary charge\(^\text{227}\). Just as the jury’s inquiries in *Brogden* regarding handgun licenses did not relate to the elements of the petitioner’s separate burglary charge, the jury’s inquiries in *Baby* addressed only the separate charge of first degree rape\(^\text{228}\). Thus, as the *Brogden* court found that a further instruction could not have conceivably affected the petitioner’s separate burglary charge\(^\text{229}\), the
Court of Appeals should have found that a further instruction on the issue of post-penetration withdrawal of consent could not have conceivably affected Baby’s separate third degree sexual offense charges. Under the Dorsey standard, the error in Baby was harmless with regard to the unrelated third degree sexual offense charges, as there was no reasonable possibility that the erroneous supplemental jury instruction could have altered the jury’s verdict on Baby’s third degree sexual offense charges. Therefore, the Court of Appeals should have concluded beyond a reasonable doubt that this error “in no way influenced the verdict” on the two third degree sexual offense convictions because these convictions were based on a separate set of facts that did not involve any intercourse, consent, or post-penetration withdrawal of consent.

Through its abrupt decision to reverse Baby’s third degree sexual offense convictions without addressing the relevant body of Maryland law, the Court of Appeals in Baby provided a perplexing example for appellate courts. Despite precedent suggesting that Maryland courts should analyze the effect of an error on each conviction individually, the Court of Appeals conducted only a cursory examination of the impact of the trial court’s erroneous instruction on Baby’s sexual offense convictions. Thus, by reversing all of Baby’s convictions without acknowledging that his two third degree sexual offense convictions arose from separate facts and involved distinct elements, the Court of Appeals effectively undermined Maryland case law that traditionally required courts to carefully analyze the effect of an error on each conviction individually, recognizing that an error may not “infect” unrelated convictions.

V. Conclusion

By conducting a thorough analysis of whether to reverse Baby’s rape conviction, the Court of Appeals thwarted any confusion that had developed as to the significance of its previous statement in Battle on post-penetration withdrawal of consent. The Court of Appeals

230. See Dorsey v. State, 276 Md. 638, 659, 350 A.2d 665, 678 (1976) (explaining that, to find an error was harmless, a reviewing court must “be satisfied that there is no reasonable possibility that the evidence complained of . . . may have contributed to the rendition of the guilty verdict”).

231. See id. (explaining the Dorsey standard).

232. See supra notes 203–209 and accompanying text.

233. See supra note 221 and accompanying text.

234. See supra notes 203–229 and accompanying text.

235. See supra notes 221–229 and accompanying text.

236. See supra Part IV.A.
also firmly declared that Maryland law, in accordance with the weight of authority, recognizes that forcibly continuing intercourse after a withdrawal of consent subsequent to penetration constitutes rape.\textsuperscript{237} With regard to its decision to reverse Baby’s sexual offense convictions, however, the Court of Appeals did not engage in a comparable analysis, disregarding several compelling arguments, and thus improperly reversed Baby’s two third degree sexual offense convictions.\textsuperscript{238} The Court of Appeals may have reversed all of Baby’s convictions in order to emphasize to trial courts the importance of providing a clear supplemental jury instruction when the jury expresses confusion.\textsuperscript{239} However, by reversing all of Baby’s convictions, without addressing the fact that the two third degree sexual offense convictions arose from separate facts that involved no allegations of penetration and from distinct elements,\textsuperscript{240} the court provided a confounding example to Maryland courts by undermining the previously well-guarded importance of carefully analyzing the effect of an error on each conviction individually, recognizing that the error may not infect unrelated convictions.\textsuperscript{241}

\textsuperscript{237} See supra Part IV.B.
\textsuperscript{238} See supra Part IV.C.
\textsuperscript{239} See State v. Baby, 404 Md. 220, 260–64, 946 A.2d 463, 487–89 (2008) (explaining the importance of clarifying the jury’s confusion and evaluating whether the trial court successfully did so in this case).
\textsuperscript{240} See supra notes 203–211 and accompanying text.
\textsuperscript{241} See supra notes 221–229, 233–255 and accompanying text.