Circuit Court for Wicomico County
Case No. C-22-CR-18-000231

UNREPORTED

IN THE COURT OF SPCIAL APPEALS

OF MARYLAND

No. 28

September Term, 2019

HARRY LEE CHISUM

v.

STATE OF MARYLAND

Friedman,
Wells,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, J.

Filed: July 1, 2020

A jury in the Circuit Court for Wicomico County convicted appellant, Harry Lee Chisum, of third-degree sexual offense, sexual solicitation of a minor, and second-degree assault. The trial court sentenced Chisum to a total of 10 years in prison, suspending all but five years, after which he timely filed a notice of appeal Chisum asks us to consider the following questions:

1. Was the evidence insufficient to sustain a conviction for second-degree assault?
2. Assuming arguendo that the evidence was sufficient to sustain a conviction for second-degree assault, should that conviction have merged into the conviction for third-degree sexual offense?
3. Did the trial court abuse its discretion in allowing the prosecutor to make improper and prejudicial statements during closing argument?

For the following reasons, we conclude that the evidence was sufficient to sustain the conviction of second-degree assault and that the trial court did not abuse its discretion in permitting the prosecutor's statement during rebuttal closing argument. Because the State concedes, and we agree, however, that the second-degree assault conviction should have merged with the third-degree sexual offense conviction for sentencing purposes, we vacate the sentence imposed for the former conviction and remand to the trial court for re-sentencing in accordance with this opinion.

BACKGROUND

For an extended period of time before March 2018, 14-year-old M.B. and her three siblings lived with their maternal aunt, Sheresha Walker, along with Sheresha's three children, Sheresha's father, and Chisum, who was Sheresha's 40-year-old boyfriend and

father of one of her children.[1] At some point, when her mother, Sherita, obtained stable housing, M.B. moved into her mother's house, but she still spent much of her time at her aunt Sheresha's home because her belongings remained there and she caught the school bus nearby each morning. M.B. thought of Chisum, whom she had known since she was seven years old, as a "close friend" with whom she talked a lot about home and family, but also about sexual topics.

M.B. and Chisum were occasionally alone together in Sheresha's house, and on one occasion in March 2018, M.B. did not go to school but went back to the house to see Chisum. According to M.B., on that day they smoked marijuana and watched television, before having consensual vaginal intercourse in Sheresha's bedroom. M.B. said she had also had sex with Chisum on prior occasions, and at least once when the other children were home. M.B. testified that she had last had sex with Chisum on or around March 15, 2018. She professed to having been in love with Chisum and she considered him to be her boyfriend.

[1] In light of the age of the complaining witness and the nature of the charges, we will refer to the child as "M.B." to protect her privacy. In addition, because Sheresha Walker shares a surname with her sisters, Sherita and Sherrell, for the sake of clarity, we will refer to each woman by her given name. We mean no disrespect in doing so.

M.B. said that Chisum had given her an extra Sprint cell phone to use, which she called his "government phone." Her mother did not permit her to have a cell phone, so M.B. hid this phone. Nonetheless, Sherita caught M.B. using the phone and confiscated it.

Sherita and her sister Sherrell obtained the phone's pass code from M.B.'s younger sister, and, once unlocked, they read numerous text messages of a graphic sexual nature. When they called the phone number from which the text messages had been received, Chisum answered. The sisters then called the police.

Later, M.B. was taken to the Child Advocacy Center, but when questioned by a social worker there, M.B. denied that she had had a sexual relationship with Chisum. After that interview, M.B. said she used her grandfather's phone (because her mother had taken the phone Chisum had given her) and told Chisum that she had lied to "the woman from Social Services," assuring him that "they still don't know nothing." Approximately a week later, however, M.B. admitted to a social worker who visited her at school that she had been involved in a sexual relationship with Chisum and that it had gone on for some time.

In a recorded statement he gave to Wicomico County Sheriff's Office Detective Christine Kirkpatrick, Chisum said that he was aware that M.B. had his old "government phone." He claimed that she had texted him messages of a sexual nature but that he had not responded. When Kirkpatrick confronted Chisum with the fact that his personal cell phone showed messages in response to those from the "government phone," he said that

M.B. must have taken his personal phone when she came over in the mornings to catch the school bus and used it to text back to the "government phone" to make it look like he was responding to her. Later, he claimed that Sherrell (rather than M.B.) had sent the explicit texts, but he offered no explanation of how Sherrell could have obtained access to his personal phone.

After waiving his right against self-incrimination, Chisum elected to testify. He stated that he knew M.B. but did not have a personal relationship with her. He said that he kept his "government phone" in a box in his closet at Sheresha's house because he did not use it very often. Despite his earlier statement to Kirkpatrick, he denied having given the phone to M.B. Acknowledging that that the "government phone" was no longer in his possession by February 2018, he said it had been stolen.

Chisum explained that the sexually explicit text messages from his cell phone between March 15 and 16, 2018 were sent by whoever had stolen his phone. Later, he contradicted that statement when he said he "probably thought" he was responding to Sheresha, since she was the only person he had had sex with that week. Chisum denied ever having had sexual intercourse, or any sexual contact, with M.B.

A jury convicted Chisum of third-degree sexual offense, sexual solicitation of a minor, and second-degree assault. The trial court sentenced Chisum to a total of 10 years in prison, suspending all but five years. He filed this timely appeal.

DISCUSSION

I. Sufficiency of the Evidence

Chisum contends that the evidence adduced by the State was insufficient to sustain his conviction of second-degree assault. In his view, because the State acknowledged that the only assault upon M.B. was one specific instance of sexual intercourse in March 2018, the evidence failed to prove the required element of an offensive touching because M.B. had testified that she had consented to the intercourse. The State counters, as it did at trial, that M.B. was legally unable to consent to the sexual intercourse due to her age and was therefore also unable to consent to the assault that arose from the intercourse.

Chisum was charged with sexual abuse of a minor, sexual offenses, and second-degree assault, among other charges, occurring between March 14 and March 16, 2018. At trial, M.B. testified that any sexual activity she engaged in with Chisum was consensual. At the close of the State's case, Chisum moved for judgment of acquittal on the charge of second-degree assault, on the ground that the State had not proven an offensive touching because M.B. had consented to the sexual activity that comprised the touching. The prosecutor responded that M.B. was not legally able to consent because she was 14 years old at the time of the sexual activity.

At the close of all the evidence, Chisum renewed his motion, making the same argument. The prosecutor acknowledged that the incident comprising the assault was the sexual activity itself, to which M.B. was legally unable to consent because of her age. The trial court denied Chisum's motion, ruling that M.B. had no legal capacity to consent to the touching.

The trial court later instructed the jury on second-degree assault:

> THE COURT: The defendant is charged with the crime of assault. Assault is causing offensive physical contact to another person. In order to convict the defendant of assault, the State must prove: one, that the defendant caused offensive physical contact with [M.B.]; that the contact was the result of an intentional or reckless act of the defendant and was not accidental; that the contact was not consented to by [M.B.] and was not legally justified.

And later, in closing argument, the prosecutor told the jury:

> [PROSECUTOR]: And third, we have second degree assault, which is offensive physical contact. That can be anything, but in this case, it is the sex offense with the offense of physical contact.
>
> Now, [the assault instruction] says she didn't consent to it, and we know that she probably did, except she can't legally consent to it. It's not legally justified. So, essentially, this would be the same as if she said, hey, beat me to death. He still can't expect not to be held responsible because she can't say, beat me to death. That's not permitted. She cannot consent to that act.

So the fact that this is an assault is because she cannot legally consent for Harry Chisum to have physically touched her.

We review the sufficiency of evidence to support a conviction "in the light most favorable to the prosecution and determine whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Perry v. State*, 229 Md. App. 687, 696 (2016) (quoting *State v. Smith*, 374 Md. 527, 533 (2003)). We do not second-guess the judgment when there are "'competing rational inferences available.'" *State v. Manion*, 442 Md. 419, 431 (2015) (quoting *Smith v. State*, 415 Md. 174, 183 (2010)).

Second-degree assault is a "statutory crime that encompasses the common law crimes of assault, battery, and assault and battery." *Quansah v. State*, 207 Md. App. 636, 646 (2012); Maryland Code, § 3-201(b) of the Criminal Law Article ("CL"). Second-degree assault encompasses three modalities: "(1) [a] consummated battery or the combination of a consummated battery and its antecedent assault; (2) [a]n attempted battery; and (3) [a] placing of a victim in reasonable apprehension of an imminent battery." *Lamb v. State*, 93 Md. App. 422, 428 (1992). The battery modality, of which Chisum was convicted, is an unconsented-to "touching that is either harmful, unlawful, or offensive." *Quansah*, 207 Md. App. at 647.

Chisum bases his argument of evidentiary insufficiency on M.B.'s trial testimony that the sexual activity underlying the third-degree sex offense, the same activity that, according to the State, comprised the second-degree assault, was consensual.[2] It is true that our courts have held that absence of consent is an essential element of the crime of assault when it is treated as a crime against only the person. *Taylor v. State*, 214 Md. 156, 159 (1957). In some instances, however, a criminal assault "tends to bring about a breach of the public peace" and is then treated as "a crime against the public generally, and therefore the consent of the victim is no defense." *Id.*

In *Taylor*, the defendant asked a 15-year-old boy to take a ride with him to a restaurant. On the way, Taylor drove onto a private road, unzipped the boy's pants and proposed "an act of oral perversion," offering the boy money if permitted to proceed. *Id.* The boy had previously submitted to similar acts with Taylor for money and "clearly offered no resistance to the improper advances." *Id.* Taylor's main contention at trial was that the victim's consent provided a defense to the charged crime of sodomy. *Id.*

[2] Chisum does not argue that the evidence was insufficient to sustain the conviction of third-degree sex offense.

Couching its decision in terms of prevention of juvenile crime, the Court of Appeals held that "[i]n the light of the public policy embodied in these statutes dealing with juvenile delinquency and those who contribute thereto, we conclude that this assault is of a type which constitutes a crime against the public generally, for which the consent of the fifteen year old prosecuting witness affords no defense." *Id*. at 160.

In *Owens v. State*, 352 Md. 663, 681-83 (1999), the Court of Appeals, in upholding the constitutionality of the strict liability imposed for statutory rape, explained that the State's compelling interest in promoting the physical and mental health of children—and limiting the related "societal consequences"—supports statutes that criminalize sex with minors, due to the great potential of lasting harm to minors who are victims of adult sexual predators. Noting that "[l]egislators generally have broader discretion in enacting laws to promote the health and welfare of children than they have for adults," the *Owens* Court added that "'[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.'" *Id*. (quoting *New York v. Ferber*, 458 U.S. 747, 757 (1982)).

The societal interest in deterring individuals—particularly minors—from knowingly participating in activities harmful to themselves justifies overriding their right to consent to the activity. *See* 1 Wayne R. LaFave, Substantive Criminal Law § 6.5(a) (3d

ed.2018, Oct. 2019 update). *See also State v. Fransua*, 510 P.2d 106, 107 (N.M.Ct.App. 1973) ("Whether or not the victims of crimes have so little regard for their own safety as to request injury, the public has a stronger and overriding interest in preventing and prohibiting acts such as these. We hold that consent is not a defense to the crime of aggravated battery . . . irrespective of whether the victim invites the act and consents to the battery.").

Because of the public policy embodied in the prevention of sexual exploitation and abuse of children, we conclude that the assault, based on Chisum's sexual intercourse with a 14-year-old girl, constitutes a crime against M.B. for which the child's consent provides no defense. We conclude that the evidence was sufficient to sustain Chisum's conviction for the crime of second-degree assault.

II. Merger

Chisum also argues that, even if we deem the evidence sufficient to sustain the conviction for second-degree assault, the trial court erred in failing to merge the assault conviction into the third-degree sexual offense conviction for sentencing purposes because the only assault charged was the sexual intercourse underlying the sexual offense conviction. Therefore, he concludes, the assault and the sex act were one and the same, and he cannot be punished twice for the same act. The State concedes that the trial court

was required to merge the offenses for sentencing purposes and agrees that we should vacate the second-degree assault sentence and remand for a resentencing hearing.

The merger of multiple convictions for sentencing purposes is required by the protection against double jeopardy afforded by the Fifth and Fourteenth Amendments to the United States Constitution and by Maryland common law, and it protects criminal defendants from incurring multiple punishments for the same offense. *Brooks v. State*, 439 Md. 698, 737 (2014). Sentences for two or more convictions must be merged when "(1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other." *Id*. Failure to merge a sentence when it is required is an illegal sentence as a matter of law. *Latray v. State*, 221 Md. App. 544, 555 (2015). We review *de novo* a trial court's failure to merge offenses for sentencing purposes. *Blickenstaff v. State*, 393 Md. 680, 683 (2006).

As discussed in Section I, above, second-degree assault consists of: "(1) intent to frighten; (2) attempted battery, and (3) battery." *Snyder v. State*, 210 Md. App. 370, 382 (2013). Battery consists of a harmful "offensive or unlawful touching." *Marlin v. State*, 192 Md. App. 134, 166 (2010).

To sustain a conviction for third-degree sexual offense requires proof of sexual contact with another person without that person's consent, along with the additional element that the person performing the sexual act or vaginal intercourse must be at least 21 years old, while the victim is 14 or 15 years old. *See* CL§ 3-307(a)(4)-(5). A battery conviction merges into a third-degree sexual offense conviction under the required evidence test when the sexual conduct involved in the sexual offense is also the basis for the assault conviction. *Biggus v. State*, 323 Md. 339, 351-52 (1991).

Here, there is no dispute that the assault and the sex offense for which Chisum was convicted were both based on the same act. The sexual conduct required to convict him of third-degree sexual offense (the vaginal intercourse) was the same offensive or unlawful touching upon which his second-degree assault was predicated. Accordingly, the conviction of second degree-assault was required to merge with the conviction of third-degree sexual offense for sentencing purposes, as a lesser-included offense based on the same act.

III. Closing Argument

Finally, Chisum avers that the trial court abused its discretion in permitting the prosecutor to make improper and prejudicial statements during rebuttal closing argument.

By inviting the jury to imagine their own children in M.B.'s place, he argues, the prosecutor impermissibly invoked a "golden rule" argument.

During her rebuttal closing argument, the prosecutor addressed defense counsel's focus on M.B.'s family situation in relation to the alleged crimes:

> [PROSECUTOR]: So [defense counsel] is going to use her family situation against her, her uprooted life-style, her poverty, her mom's lack of supervision is incredibly disfunctional [sic], and I really hope abnormal family dynamic.
>
> But being poor isn't a crime. Having a crappy parent isn't a crime. Being a couch surfer isn't a crime. Having a mother who will never compete for mother of the year isn't a crime, and it doesn't mean we look the other way when that kid gets molested.
>
> That kid, she is a kid whatever her life experiences may have been, however hard and tough she is when she sits up there, however you may look at her and think, wow, she's disrespectful or sullen, even more than the average teenager, whatever all that has made up [M.B.] has turned her into and how she responded on the stand, that kid is entitled—as entitled to protection as my kid and your kid and your kid.

Defense counsel then objected, and when called to the bench to explain the objection, argued that "[t]his thing is very close if not over the line with respect to a Golden Rule argument comparing [M.B.] to the children of jurors and the State's Attorney." The prosecutor disagreed, stating, "I don't think I'm over the line at all. I'm just saying because

she's poor doesn't mean we don't care . . . . And I'm not asking them to put themselves in the position." The court overruled the defense objection.

A "golden rule" argument is one "in which an arguing attorney asks the jury to place themselves in the shoes of the victim," is generally impermissible during closing argument. *Lawson v. State*, 389 Md. 570, 593 n.11 (2005) (citing *Lawson v. State*, 160 Md. App. 602, 627 (2005) (finding it improper for the prosecutor to ask that in weighing the child victim's testimony, the jurors should imagine if their own child was a victim of sexual assault)). Such arguments are prohibited because they "'encourage the jurors to abdicate their position of neutrality and decide cases on the basis of personal interest rather than the evidence'." *Lawson*, 389 Md. at 594 (quoting *Lawson*, 160 Md. App. at 627).

As we explained in *Anderson v. State*, 227 Md. App. 584, 589-90 (2016),

> [a]ttorneys are afforded great leeway in presenting closing arguments to the jury. Closing argument typically does not warrant appellate relief unless it exceeded the limits of permissible comment. Generally, counsel has the right to many any comment or argument that is warranted by the evidence proved or inferences therefrom and, in doing so, to indulge in oratorical conceit or flourish. As long as counsel does not make any statement of fact not fairly deducible from the evidence his argument is not improper. What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case. Thus, the propriety of prosecutorial argument must be decided contextually, on a case-by-case basis. Because a trial court is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case, the exercise of its broad discretion to regulate closing argument will not be overturned unless there is a clear abuse of discretion that likely injured a party.

(internal quotation marks, citations, and alterations omitted).

Here, the prosecutor told the jurors that, despite M.B.'s upbringing and her disrespectful attitude while on the witness stand, she was as entitled to protection from sexual abuse as was any other child. Although the prosecutor asked the jury to remember that M.B. was as entitled to protection as was "my kid and your kid and your kid and your kid," she did not ask the jurors to put themselves in M.B.'s place as a sexual assault victim. Instead, she reminded the jurors that M.B., despite her demeanor and circumstances, was a child and a victim. Accordingly, we cannot say that the State's argument was impermissible or that the trial court abused its discretion in allowing it.

Even if we had concluded that the prosecutor's comments amounted to an impermissible "golden rule" argument, reversal would not be required. The comments, which came during rebuttal closing argument, were isolated. Further, the court instructed the jury that counsels' closing arguments were not evidence. More importantly, the State's case against Chisum was strong, given M.B.'s testimony and the numerous sexually graphic text messages between his personal phone and the phone that he had given her. Therefore, we would not have been persuaded that "the jury were actually misled or were likely to have been misled or influenced to the prejudice of the accused by the remarks for the State's Attorney." *See Wilhem v. State*, 272 Md. 404, 415-16 (1974) (setting forth the standard for reversal when the prosecutor makes an improper closing argument).

SENTENCE IMPOSED ON THE CHARGE OF SECOND-DEGREE ASSAULT VACATED AND CASE REMANDED TO THE CIRCUIT COURT FOR WICOMICO COUNTY FOR RE-SENTENCING CONSISTENT WITH THIS OPINION; JUDGMENTS OTHERWISE AFFIRMED; COSTS ASSESSED 1/3 TO WICOMICO COUNTY AND 2/3 TO APPELLANT.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0028s19cn.pdf