Circuit Court for Harford County
Case No. 12-K-16-001751

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 344

September Term, 2018

KALEEM MICHAEL FRAZIER

v.

STATE OF MARYLAND

Fader, C.J.,
Wright,
Leahy,

JJ.

Opinion by Wright, J.
Concurring Opinion by Fader, C.J.,
which Leahy, J. joins

Filed: June 20, 2019

A jury sitting in the Circuit Court for Harford County convicted Kaleem Frazier, appellant, of fourth-degree sexual offense and second-degree assault. On March 26, 2018, the court sentenced Frazier to ten years' incarceration, with all but five years suspended for the second-degree assault charge, and one-year consecutive for the fourth-degree sexual offense charge. Frazier challenges his convictions and presents the following questions for our review:

1. Was the evidence sufficient to sustain the conviction for fourth-degree sexual offense?

2. Did the trial court order an illegal sentence when they failed to merge the conviction and sentence for second-degree assault and fourth-degree sexual offense?

We decline to answer the first question and answer the second in the affirmative. We shall remand for re-sentencing as to merger.

BACKGROUND

On October 2, 2016, Frazier came to the victim's[1] home to watch her two sons, L and C. That evening, the two had consensual sex, including fellatio. The morning of October 3, 2016, the two again had consensual sex. Frazier and the victim had been in a ten-year "off-and-on" relationship but had become "exclusive" in February 2016.

On the evening of October 3, 2016, the victim's mother, M, picked up Frazier and the victim's two sons, L and C, and drove them to the football field for practice. When

[1] In the interest of privacy, we will not disclose the victim's name.

the victim arrived at the football field, Frazier was "agitated" and "upset" because she left his sunflower seeds in her car. After an argument about the sunflower seeds, Frazier bought beer from a nearby liquor store. He consumed some of the beer and discarded the rest.

After practice, the victim, Frazier, L and C went home for dinner. After dinner, the victim went upstairs to put her sons to bed while Frazier retired to her bedroom. While she put the boys to bed, Frazier texted the victim to "come here." When she came into the bedroom, Frazier confronted the victim about a text message on her cellphone, which read, "when will I see you again?" When Frazier asked the victim if she was cheating on him, she said that the text was from a "friend" who was a football coach from an opposing team. In response, Frazier called the victim a "liar, a slut, [and] a bitch."

The victim testified that Frazier became so angry he grabbed her shirt, pulled her hair, and continued calling her a liar. The victim further testified that Frazier slapped her across the face with an open hand, and he closed and locked her bedroom door. The victim went on to explain that after Frazier locked the door, he pushed down her head, held onto her hair, and forced her to perform fellatio on him. While this occurred, the victim asked Frazier to "please stop now."

The victim next testified that Frazier raped her. He ripped her shirt off, placed her on the bed stomach-down, and "put his penis inside of [her]." The victim testified that she did not kick or scream because she was afraid of waking her sons. She continually

asked Frazier to "please stop." She testified that she felt pressure on her neck and was "scared he would hurt her a lot more."

Sometime after midnight, the victim asked Frazier if she could go to the kitchen to get water. Frazier consented and followed her to the kitchen. In the kitchen, Frazier yelled at the victim and called her a "slut" and a "liar." After he grabbed her hair and slapped her in the face, Frazier said, "do you know what you and Nicole Brown Simpson have in common[.] . . . [B]oth of your father's names are Lou, and that is how long I have been thinking about killing you." The victim thought she "wasn't going to make it through the night" and was frightened.

A short time after, the victim heard movement in C's room and returned upstairs with Frazier. The victim asked Frazier if she could check on her sons, and he said "yes, but I'm not done with you." The victim went into C's bedroom and found L awake and concerned about her. As the victim assured L she was okay, Frazier texted her "what are you doing, are you playing games?"

The victim returned to her bedroom and Frazier locked the door. Frazier told the victim, "you are going to fuck me again." He removed her clothes, pushed her onto the bed, and raped her. After the rape was over, the victim put on pajamas and got in bed. She attempted to leave the room when she thought Frazier was asleep, but "he popped back up." She did not attempt to leave the room again.

Later that morning, the victim drove Frazier to a bus stop. After Frazier left, the victim called her mother, M, and told her that "[Frazier] hurt me." M encouraged the

victim to drive to her sister G's house. When the victim arrived at G's house, she was "very upset" and "a little frantic." G testified that on the morning of October 4, 2016, E.T., a family friend, called her and said the victim might be in trouble. L sent E.T. an email the night before that Frazier was hurting his mother.

The victim called the police, and Deputy Kristin Novak ("Deputy Novak") arrived at the home to interview M and the victim. Deputy Novak testified that "[the victim] appeared to be very upset" and "had a large red mark [on] her chest and neck area." Deputy First Class Kimberly Giveden ("Deputy Giveden") interviewed the victim as part of a "follow-up investigation."

At trial, Dr. Susan Rotolo ("Dr. Rotolo"), an expert in sexual assault nurse examination, testified about the victim's Sexual Assault Forensic Examination ("SAFE") report. Dr. Rotolo testified that she could not say to a medical degree of certainty whether Frazier raped the victim or whether the sexual intercourse was consensual or nonconsensual. Notably, Dr. Rotolo testified that a rape victim could present with no physical injuries.

Frazier testified in his own defense and described his relationship with the victim as "up and down," but said the two considered marriage. Frazier acknowledged having sexual intercourse and fellatio with the victim the evening of October 2, 2016, and sexual intercourse the morning of October 3, 2016. When asked about the evening of October 3, 2016, Frazier acknowledged that he read the text message on the victim's phone and confronted her about it, but he denied raping and assaulting her.

At the close of the State's case, Frazier moved for judgment of acquittal and argued that the State had failed to make a *prima facie* showing of the central elements of each charge against him. The court denied his motion. Later, at the close of all the evidence, Frazier renewed his motion, which the court denied. The circuit court instructed the jury on second-degree assault, fourth-degree sexual offense, and the other charges brought against Frazier. The jury convicted Frazier of second-degree assault and fourth-degree sexual offense. This timely appeal followed.

DISCUSSION

I. Sufficiency

As a preliminary matter, we address the State's contention that Frazier's fourth-degree sexual offense sufficiency claim is unpreserved.

At the end of the State's case-in-chief, defense counsel moved for judgment of acquittal stating:

> Your Honor, at this time I would like to make a motion for judgment of acquittal. Your Honor, even in a light most favorable to the State, [. . .] we would argue that the State has failed [to] make a *prima facie* case of rape, second[-]degree, fourth[-]degree sexual offense, second[-]degree assault, and false imprisonment. Your Honor, we would argue that the State has failed to provide any—enough evidence that will allow rational jurors to find Mr. Frazier guilty of those offenses. On that we will submit.

After resting his case, defense counsel renewed his motion for judgment of acquittal stating:

> [E]ven in viewing the evidence in a light most favorable to the State, no rational trier of fact could find that the central elements of the crimes that

> Mr. Frazier has been charged with can be proven beyond a reasonable doubt. Your Honor, Mr. Frazier has been charged with second[-]degree rape, second[-]degree sexual offense, fourth[-]degree sexual offense and second[-]degree assault and false imprisonment. Your Honor, even in viewing the light—in viewing the evidence in a light most favorable to the State, the State has failed to make a *prima facie* case. We don't believe that—no rational trier of fact could find that this rape was conducted by force or threat of force, that these acts were committed without the consent of [the victim]. I believe that no rational trier of fact could find that the acts of second[-]degree sexual offense were also committed by force or threat of force or without the consent of [the victim]. We don't believe that any rational jury could find that second[-]degree assault occurred or that Mr. Frazier intentionally falsely imprisoned her and for that we would ask that Your Honor grant that motion and grant a motion for judgment of acquittal on all charges.

Md. Rule 4-324(a), which governs motions for judgment of acquittal, states:

> A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the State's case.

"A criminal defendant who moves for judgment of acquittal is required by Md. Rule 4-324(a) to state with particularity all reasons why the motion should be granted[,] and is not entitled to appellate review of reasons stated for the first time on appeal." *Starr v. State*, 405 Md. 293, 302 (2008) (citations and quotations omitted). "[A] motion which merely asserts that the evidence is insufficient to support a conviction, without specifying the deficiency, does not comply with [Md.] Rule [4-324(a),] and thus does not

preserve the issue of sufficiency for appellate review." *Montgomery v. State*, 206 Md. App. 357, 385-86 (2012) (quoting *Brooks v. State*, 68 Md. App. 604, 611 (1986)). Rather, "a defendant must argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient." *Poole v. State*, 207 Md. App. 614, 632 (2012) (quotations and citations omitted).

Here, Frazier failed to state with particularity why his motion for judgment of acquittal should be granted. Arguing a generality is not enough. *See Correll v. State*, 215 Md. App. 483, 498 (2013) ("[w]hen a defendant only argues a generality, he does not preserve for review more particularized insufficiency arguments that could have been made but were not."). Therefore, Frazier's argument on the issue of insufficiency of the evidence is not preserved for our review.

As this Court pointed out in *Williams v. State*, 131 Md. App. 1, 7 (2000), "there is no instance of a Maryland appellate court's ever applying the 'plain error' exception [to] entertain a non-preserved challenge to the legal sufficiency of the State's evidence[.]" We have not done so in the past and will not use our discretion to apply plain error on the issue of sufficiency of the evidence at this time.

II. Merger

Frazier avers that the circuit court failed to merge his convictions for second-degree assault and a fourth-degree sexual offense. The State responds that the circuit court correctly sentenced Frazier. Specifically, the State argues that Frazier's convictions

for second-degree assault and fourth-degree sexual offense were based on separate and distinct acts.

A.

The Fifth Amendment to the United States Constitution bars double jeopardy. That protection is extended to the individual states through the Fourteenth Amendment. *See Snyder v. State*, 210 Md. App. 370, 396 (2013), *cert. denied*, 432 Md. 470 (2013). This protection against double jeopardy prevents the imposition of multiple trials or punishments for the same offense. *See Snyder*, 210 Md. App. at 396 (citation omitted).

In *Brooks v. State*, 439 Md. 698, 737 (2014), the Court of Appeals explained that:

> The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law. Merger protects a convicted defendant from multiple punishments for the same offense. Sentences for two 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.

(Citations omitted).

Only after the required evidence test has not been satisfied, may the court seek other alternative courses for merger.[2]

The only exception to the required evidence test's rule that a lesser included offense merges into a greater offense exists when the Legislature has authorized

[2] The other tests for merger are the rule of lenity and "the principle of fundamental fairness." *Johnson v. State*, 228 Md. App. 27, 46 (2016) (quoting *Carroll v. State*, 428 Md. 679, 693-94 (2012)), *cert. denied*, 450 Md. 120 (2016).

cumulative punishments. *Lancaster*, 332 Md. at 394. In *Lancaster*, the Court of Appeals held that the elements of the offense of committing an oral sex act were fully contained in fourth-degree sexual offense, even though the latter carried a greater penalty.

Here, we must determine whether Frazier's convictions were based on the same act, or on separate and distinct acts. "[W]hen the factual basis for a jury's verdict is not readily apparent, the court resolves factual ambiguities in the defendant's favor and merges the convictions if those convictions also satisfy the required evidence test." *Brooks*, 439 at 739; *Snowden v. State*, 321 Md. 612, 618-619 (1991); *Nightingale v. State*, 312 Md. 699, 708-709 (1988)). However, we can "look to the record for other indications that might resolve the ambiguity in favor of non-merger." *Brooks*, 439 at 741.

At the sentencing hearing, the circuit court addressed the issue of merger, stating: "there were separate events of physical assault which [were] separate from or in addition to the sexual penetration of the victim." The court identified the "slapping or smacking" and "putting the hands around the neck" as separate assaults. However, the record looking at the trial in its entirety is not so clear. It appears that the same act or acts could have formed the basis for Frazier's convictions. We explain below.

The jury instructions comported with the Maryland Pattern Jury Instructions ("MPIJ") but did not specify that the jury must find that the assault occurred separately

from the fourth-degree sexual offense to convict Frazier both offenses.[3] *See Brooks*, 439 Md. at 741-42 (explaining that false imprisonment must merge into first-degree rape because neither the jury instructions nor any other portion of the record clearly established that the jury viewed the "encounter" as two distinct acts).

During closing argument, the prosecutor failed to direct the jury's attention to which act or acts, separate from the sexual offense, could support a conviction for second-degree assault. Specifically, she stated:

> Now, that force is important because we will talk about the elements. But physically forces her. This is not -- this particular crime is not a crime of -- he physically takes her hair and shoves her head down and forces his penis into her mouth. Without her consent. And then he is grabbing her and sort of man-handling her around the room as she put it. He is not throwing her into anything based on the victim's testimony. He is just sort of pushing her around the room and he throws her on the bed on her stomach and

[3] The court instructed the jury as follows:

> In order to convict the Defendant of fourth[-]degree sexual offense, the State must prove that the Defendant had sexual contact with [the victim] and that the sexual contact was made against the will and without the consent of [the victim]. Sexual contact means the intentional touching of [the victim's] genital or anal area or other intimate parts for the purposes of sexual arousal or gratification or for the abuse of either party.
>
> The Defendant is charged with second degree assault. Assault is causing offensive physical contact to another person. In order to convict the Defendant of assault, the State must prove that the Defendant caused offensive physical contact with [the victim]; that the contact was the result of an intentional or reckless act of the Defendant and was not accidental; and that the contact was not consented to by [the victim]. Reckless act means conduct that under all circumstances shows a conscious disregard of the consequences to other people and is a gross departure from the standard of conduct that a law abiding person would observe.

forces his penis into her vagina. Forces vaginal intercourse on her. And you heard she is saying no and stop over and over and over again. She is crying. She is sobbing.

* * *

[The victim] tells you all the while this is happening, he is threatening her. So all of this is done by force. He is pushing her down. He is grabbing her hair. But it is also by threat of force. You only have to actually find as you saw in the elements, one of the two, that it is by force or threat of force. In this case, we actually have both because he is actually physically forcing her but he is also threatening her throughout, he is going to kill her over and over and over again. One time she leaves the room because he will allow it. Okay. I won't harm you when you walk out of the room this time. That is threat of force, ladies and gentlemen of the jury. I will allow it. Because had she walked out prior to that, you can bet the assault would have *continued*. And he slammed the door. His own words. He slammed the door and locked her in there. He didn't say he locked it.

* * *

There is no mistake as to whether she consented that night. There is no question that she didn't consent. And then you heard some testimony that she went downstairs and he *continues* to threaten her. And still -- in that bedroom prior to letting her out, while he is physically assaulting her, slapping her, choking her, strangling her, and that when they go downstairs, he slaps her again.

* * *

And so she tells you she goes back in there and the assault *continues*, including the sexual assault. He forces her back down on the bed and again penetrates her vagina with his penis. And she tells you, I thought this out and her first thought, if you remember, was I'm going to wait for him to fall asleep, I'm going to try to get out. She tried that. Remember she waited for him. She thought he was asleep and she got up and tried to sneak out to get her and the boys out. And he wakes up. What are you doing? Again, clear, one missed step, this is going to be bad. And so that is when she decides I'm just going to wait until the morning, this is all we can do, because of his force and his threat of force, I'm going to kill you over and over again.

(Emphasis added).

The State points to the prosecutor's statements during opening statements[4] and closing arguments as evidence of two distinct acts. Specifically, the State argues that the prosecutor characterized the offenses as "rape and assault."

We are unable to ascertain to specifically determine, which act or acts were the basis for Frazier's convictions. Based on our review of the record, the prosecutor muddled the second-degree assault elements and the fourth-degree sexual offense elements in her last and final words to the jury. The record reflects two separate acts of assaultive behavior. One where Frazier choked and slapped the victim. The second where Frazier raped the victim and forced the victim to perform fellatio on him. The jury could have disbelieved the occurrence of the neck grabbing and slapping *or* could have believed that both the rape and forced fellatio were the assaultive conduct. The factual

[4] In her opening statements, the Prosecutor stated:

> And as the situation unfolds, he assaults her. And he assaults her in *numerous* ways. He slaps her. He puts his hand around her neck and chokes her. He forces her physically and tells her you are going to suck my dick. And he grabs her by the hair and physically forces her to put his penis in her mouth. Once he has done that, he shoves her on to the bed, face down initially, and inserts his penis into her vagina, raping her[.]
>
> * * *
>
> [H]e follows her to the kitchen . . . . He *continues* to threaten to kill her down in the kitchen and you will hear about the things he said to her in that kitchen . . . . [Y]ou will hear that he got her back up in that bedroom and *continues* to sexually assault her, yet another time.
>
> (Emphasis added).

basis for the jury's verdict is not readily apparent from the record before us and therefore creates an unreasonable ambiguity. Accordingly, we must resolve these ambiguities in Frazier's favor, and the convictions must be merged if the required evidence test is satisfied. *Brooks*, 439 Md. at 739.

B.

Under the required evidence test, we must ascertain "whether all the elements of one crime are necessarily in evidence to support a finding of the other, such that the first is subsumed as a lesser included offense of the second." *Monoker v. State*, 321 Md. 214, 220 (1990). The Court of Appeals summarized the required evidence test as follows:

> The required evidence test is that which is minimally necessary to secure a conviction for each . . . offense. If each offense requires proof of a fact which the other does not, or in other words, if each offense contains an element which the other does not, the offenses are not the same for double jeopardy purposes, even though arising from the same conduct or episode. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, the offenses are deemed to be the same for double jeopardy purposes. And of course if both [offenses] have exactly the same elements, the offenses are also the same within the meaning of the prohibition against double jeopardy.

Monoker, 321 Md. at 220 (quoting *State v. Holmes*, 310 Md. 260, 267-68 (1987).

In *Biggus v. State*, 323 Md. 339, 352 (1990), the Court of Appeals explained that "Maryland cases have consistently taken the position that, where a defendant is convicted of a sexual offense and a common law assault or battery, and the threat of force of sexual contact involved in the sexual offense is also the

basis for the assault or battery convictions, the assault or battery merges into the sexual offense under the required evidence test."

Second-degree assault consists of: "(1) intent to frighten; (2) attempted battery, and (3) battery." *Snyder*, 210 Md. App at 382. Battery consists of a harmful "offensive or unlawful touching." *Marlin v. State*, 192 Md. App. 134, 166 (2010). A fourth-degree sexual offense is "sexual contact with another without the consent of the other." Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL") § 3-308(b)(1). A fourth-degree sexual offense is also "multi-purpose" crime, in that it is an offense with multiple alternatives. *State v. Lancaster*, 332 Md. 385, 392 (1993). Therefore, in applying the required evidence test, we must "examine the alternative elements relevant to the case at hand." *Id.* at 401 (quotations and citations omitted).

"Sexual contact" is "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." CL § 3-301(e)(1). Judge Moylan, writing for this Court in *Travis v. State*, 218 Md. App. 410, 465 (2014), further defined sexual contact as:

> [P]urposeful tactile contact and tactile sensation, not incidental touching. It is the sexually oriented act of groping, caressing, feeling or touching of the genital area or the anus or the breasts of the female victim. It is something other than the necessarily involved contact that is merely incidental to the vaginal intercourse or the sexual act itself.

A fourth-degree sexual offense requires a specific type of touching - sexual contact. The offensive, unlawful touching on which Frazier's second-degree assault conviction was based could have been the sexual contact required to convict Frazier of

fourth-degree sexual offense. In other words, it is abstractly impossible to commit a fourth-degree sexual offense without also committing an assault. While the jury may have found that Frazier's second-degree assault conviction arose from separate and distinct acts, "we are constrained by precedent from assuming that the two convictions were not based on the same act or acts." *Brooks*, 439 Md. at 739.

III.

It is not lost on us that a second-degree assault conviction carries a larger penalty than a fourth-degree sexual offense. Maryland precedent mandates that "where two offenses are deemed the same under the required evidence test, the included offense merges into the offense having a distinct element regardless of the maximum authorized sentence for each offense." *Lancaster*, 332 Md. at 405; *see also Nightingale*, 312 Md. at 708-09 (where defendant's convictions for sexual offenses were vacated because the sexual offenses were included in the sexual abuse offense, even though the punishment for the sexual offenses was more severe). As fourth-degree sexual offense has a distinct element, that of sexual contact, Frazier's second-degree assault conviction must merge.

The State argues that the logic that justified a merger of a lesser offense with a greater punishment in *Lancaster* is not present here.[5] The State also avers that Frazier

[5] The *Lancaster* Court explained that "[t]he required evidence test merger situation . . . typically arises when the included offense is a relatively broad offense covering a wide range of conduct and the greater offense (because of the additional elements) is a narrower offense covering the specific type of conduct engaged in by the defendant." *Lancaster*, 332 Md. at 420. Thus, the penalty for the "narrower" but greater offense "represents a legislative judgment concerning the punishment for the precise type of

seeks a relatively minor punishment for what the State contends was a major offense. The State also contends that there was no proscription of sexual contact within the applicable statute, *see* CL § 3-308(b)(1), and suggests that merger would punish Frazier's conduct in a lesser way. The State also argues that whatever "touching" the jury found, it had to credit some part of the victim's testimony to convict Frazier of sexual contact and assault, and that any version of the facts, would warrant the higher sentence that the judge enforced. As a final point, the State argues that to obliterate the five-year sentence enforced by the circuit court would give Frazier a windfall that "neither the Double Jeopardy Clause nor any other constitutional provision exists to provide."

In *Cortez v. State*, 104 Md. App. 358, 369 (1995), this Court stated:

> This merger problem continues to arise despite *Nightingale*, *Biggus*, *Snowden*, and *Lancaster*. We believe it can be avoided in a case in which separate convictions and sentences might be sustainable on the evidence. In a bench trial, the solution is simple: the trial judge need only articulate for the record the basis for the dual verdicts, stating the separate acts justifying both convictions. In a jury trial, the solution, as suggested in *Snowden*, is the giving of an appropriate instruction. For example, the trial judge might instruct the jury that, if it found the defendant guilty of robbery (or kidnapping, or other compound crimes in which force or the threat of force is an element), it could find the defendant guilty of battery (or assault, or both) only if it found that there was a use of force (or threat of force) separate from and independent of the force (or threat of force) employed to effect the greater offense. If such an instruction were given, a conviction of

conduct prohibited by the statute" and it is therefore "reasonable to sentence the defendant in accordance with the offense more specifically tailored to his or her conduct." *Id.* Because the purpose of the statute delineating the greater offense at issue in *Lancaster* was to proscribe specific conduct, the Court believed that it had been "the General Assembly's judgment that a person who performs [the specific sexual act] should be subject to a maximum of only one-year imprisonment. Nevertheless, that is a matter for the General Assembly and not for this Court." *Id.* at 422.

> battery or assault in addition to the conviction of the greater offense would not merge, and the only debatable issue would be the sufficiency of the evidence of a separate battery or assault to sustain the conviction.

In light of the facts and circumstances of this case, we add an addition to the above: the prosecutor could have articulated the separate acts of assaultive behavior for the jury in no uncertain terms and thus could have left no room for ambiguity. We remand this case to the circuit court to address merger and resentencing as consistent with this opinion.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED IN PART. REMANDED TO THE CIRCUIT COURT FOR RE-SENTENCING CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.

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Concurring Opinion by Fader, C.J., which
Leahy, J. joins

Filed: June 20, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

I join the majority opinion in full because I agree that the result is compelled by governing law. The evidence at trial *could have* supported separate convictions for second-degree assault and fourth-degree sexual offense because the jury *could have* determined that the alleged physical assault in the kitchen served as the basis for the second-degree assault conviction and that the alleged sexual assault in the bedroom served as the basis for the fourth-degree sexual offense conviction. But it is also true that the jury *could have* determined that the alleged sexual assault in the bedroom served as the basis for both of those convictions. That determination would have been compatible with the court's instructions to the jury, which did not convey that those two convictions had to be based on separate acts. And that determination would also have been compatible with the prosecutor's closing argument to the jury, in which she expressly told the jurors that the sexual assault could serve as the basis for the second-degree assault charge.

A more explicit jury instruction, or perhaps even a more explicit argument from the State defining for the jury what was required to convict Mr. Frazier of both crimes, could potentially have saved both convictions. *See Cortez v. State*, 104 Md. App. 358, 369 (1995) ("In a jury trial, the solution . . . is the giving of an appropriate instruction."). In the absence of either, we cannot say with the requisite confidence that the jury based these two

convictions on different acts.[6] As a result, we are left with no choice but to conclude that merger is required to avoid a double jeopardy problem. *See Nightingale v. State*, 312 Md. 699, 708 (1988) (concluding that when a court cannot tell whether two guilty verdicts were based on the same act, "we resolve the ambiguity in favor of the defendants and set aside the judgments" for one of the offenses), *superseded by statute on other grounds as stated in Twigg v. State*, 447 Md. 1, 11 n.6 (2016); *Snowden v. State*, 321 Md. 612, 619 (1991) (stating that where a court's rationale in entering multiple convictions is not readily apparent such that it is possible that the convictions were based on the same underlying acts, "we are constrained to give the Petitioner the benefit of the doubt and merge" the sentences and convictions).

I also agree with the majority opinion's determination that binding precedent requires that we merge the lesser included offense into the greater, even though the lesser included offense bears the greater potential penalty. *Lancaster v. State*, 332 Md. 385, 392 (1993). I write separately to express my opinion that this rule should be revisited. In my view, courts in other jurisdictions facing the same issue have reached a result that is both consistent with double jeopardy jurisprudence and, at least in circumstances like Mr.

[6] We cannot assume that the jury based its two convictions on separate acts by Mr. Frazier solely because the victim's testimony, if believed in its entirety, would have supported separate convictions. That is true in any case in which the trial record does not include sufficient insight into the bases for a jury's multiple convictions to conclude that they must have been based on separate acts. But it is especially true here, where we know, based on the jury's acquittal of Mr. Frazier on some counts, that the jury did not believe all of the victim's testimony.

Frazier's, more faithful to legislative intent and the amount of deference properly afforded to jury verdicts.

In *Lancaster*, the Court of Appeals held that when two offenses have merged under the required evidence test, "a sentence may be imposed only for the offense having the additional element or elements." *Id*. The Court explained its view that the penalty prescribed for the greater, more specific offense "represents a legislative judgment concerning the punishment for the precise type of conduct" and that "it is reasonable to sentence the defendant in accordance with the offense more specifically tailored to his or her conduct." *Id.* at 420. That view is uncontroversial when employed in most instances of merger under the required evidence test because the greater offense—i.e., the offense with the additional element(s)—will generally also carry the more severe penalty. But when the lesser included offense carries a greater maximum penalty—here, ten times greater—it is more questionable that this outcome is a true reflection of legislative intent. Indeed, here, application of the *Lancaster* rule means that by *adding* a sexual component to his assault of the victim, Mr. Frazier *reduced* 10-fold the maximum penalty for that assault. I am not persuaded that this result accurately reflects the intent of the General Assembly.

I also question whether the *Lancaster* rule shows the proper amount of deference to jury verdicts. When a jury convicts a defendant of two separate crimes sharing common elements, the jury has determined that the defendant's conduct meets all of the elements of both of those crimes, not just the one that includes an additional element. Here, the jury

determined beyond a reasonable doubt that Mr. Frazier is guilty of second-degree assault, an offense that the General Assembly determined should be subject to a maximum penalty of ten years' imprisonment. That the jury also concluded that there was a sexual component to Mr. Frazier's assault does not erase the jury's conclusion that his conduct constituted a second-degree assault or minimize the seriousness of that offense. The *Lancaster* rule, however, does exactly that.

Furthermore, although it is undoubtedly true that the State could have avoided this result by deciding not to charge Mr. Frazier with fourth-degree sexual assault, I fail to see why we should treat the State's charging decision as dispositive of a question that is supposed to turn on legislative intent. The General Assembly determined that conduct meeting the elements of fourth-degree sexual offense should constitute a crime. It did not decide that engaging in conduct meeting the elements of that offense should mitigate conduct that would otherwise constitute a second-degree assault, and I see no reason why the State should be precluded from charging a defendant with a fourth-degree sexual offense at the risk of reducing the penalties available for a second-degree assault conviction. *But see State v. Dragoo*, 277 Neb. 858, 866 (2009) ("[The defendant] has not 'escaped' the enhanced penalty he should have received; he was relieved of it by the State's charging decision, which we cannot undo."). Making the maximum penalty available for a defendant convicted of second-degree assault vary based on a prosecutor's strategic charging decision seems to be an odd way of discerning legislative intent.

Some other courts have taken the same view as the decision in *Lancaster*. *See Dragoo*, 277 Neb. at 865-66 (holding that the conviction and sentence of the lesser-included offense must be vacated even though it provided the potential for a greater sentence); *People v. Halstead*, 881 P.2d 401, 405-08 (Colo. App. 1994) (holding that merger under the required evidence test "requires vacating a conviction for an offense carrying a more severe penalty," but noting that it did so "reluctantly" because "contrary to common sense, an included offense . . . is not necessarily a less serious crime").

Other jurisdictions have taken a different approach. The Pennsylvania Supreme Court, for example, has reasoned that "the merger doctrine requires that only one sentence may be imposed, but it has nothing to say about which sentence that should be." *Commonwealth v. Everett*, 550 Pa. 312, 315-16 (1993). There, the defendant pleaded guilty to charges of aggravated assault and attempted murder and was sentenced to serve between eight and 20 years in prison. *Id.* at 314. The defendant sought reconsideration of the sentence, arguing that the lesser-included offense of aggravated assault—which carried a 20-year maximum sentence—should have merged with the attempted murder conviction, which carried a maximum sentence of ten years. *Id.* The Pennsylvania high court disagreed, explaining that the legislature clearly intended that a person convicted of aggravated assault could be sentenced to 20 years' imprisonment and that "[i]t would be absurd to use the merger doctrine to find, contrary to this explicit expression of intent, . . . that a lesser maximum sentence of ten years imprisonment should control" because the defendant was additionally convicted of attempted murder. *Id.* at 316. The Pennsylvania

Supreme Court further noted that "[a]lthough in most cases the 'greater' offense for merger analysis will also be the offense carrying the greater penalty, this is not universally true." *Id.* In such cases, "the court ha[s] discretion to impose sentence on any of the charges so long as it d[oes] not impose separate sentences for aggravated assault and attempted murder." *Id.* at 315.

The Appeals Court of Massachusetts has also determined that in a situation where the lesser-included offense has the higher penalty, "the more appropriate action would be to allow the trial judge to decide which charge to dismiss." *Commonwealth v. Johnson*, 75 Mass. App. Ct. 903, 905 (2009) (citing *Commonwealth v. Shuman*, 17 Mass. App. Ct. 441, 451-52 (1984)). The court observed that rigidly applying the rule generally requiring vacating the lesser included offense "might well violate the apparent principle behind that rule: ensuring that the convicted defendant receive the appropriate punishment for the crime that underlies the duplicative convictions." *Johnson,* 75 Mass. App. Ct. at 905. Similarly, in *United States v. Peel*, the Seventh Circuit explained that "to punish a person for a lesser-included offense as well as the 'including' offense is double jeopardy," but that "[t]he remedy is to eliminate the doubleness." 595 F.3d 763, 767-68 (7th Cir. 2010). Determining "which conviction must be vacated is not dictated by the Constitution. It is a matter committed to the trial judge's discretion because functionally it is a decision concerning the length of the defendant's sentence." *Id.* at 768. The court noted that "it would be paradoxical to give the defendant a shorter sentence than he would have received

had the government not also charged him with the less serious offense." *Id.* (citing *Lanier v. United States*, 220 F.3d 833, 842 (7th Cir. 2000)).

I find persuasive the rationale of these courts in leaving to the trial court the decision as to which count should survive for sentencing.[7] Doing so eliminates the double jeopardy problem entirely and appropriately leaves sentencing discretion in the hands of the court that has heard all of the evidence and is best placed to determine which offense is most appropriate to the defendant's conduct. *See generally Sharp v. State*, 446 Md. 669, 685 (2016) ("A trial court 'may exercise wide discretion in fashioning a defendant's sentence.'") (quoting *McGlone v. State*, 406 Md. 545, 557 (2008)).[8] I also believe that

[7] Judge McAuliffe, writing in dissent in *Lancaster*, articulated this same general approach. 332 Md. at 422-25 (McAuliffe, J., dissenting). He asserted that where merger is required, the Fifth Amendment "does not require that the conviction left standing be of the offense having the greatest number of elements" and that double jeopardy is avoided where "one of the convictions is vacated and the defendant is given a sentence no greater than was intended by the legislature." *Id.* at 422-23, 425. He also noted that "neither the Double Jeopardy Clause nor any other constitutional provision exists to provide unjustified windfalls." *Id.* at 425 (quoting *Jones v. Thomas*, 491 U.S. 376, 387 (1989)).

[8] In at least one case, the Court of Appeals decided to vacate the "greater" offense, although only when it had no other option. In *Middleton v. State*, 318 Md. 749 (1990), a jury had convicted the defendant of first and second-degree rape and attempted first and second-degree sexual offense. 318 Md. at 751. Before imposing sentence, the trial judge vacated the first-degree rape verdict and sentenced the defendant for second-degree rape. *Id.* While that conviction was pending on appeal, the trial court reconsidered its prior order and reinstated the conviction for first-degree rape. *Id.* By the time the Court of Appeals considered the defendant's appeal from the first-degree rape conviction, the conviction for second-degree rape was "entirely final including all appeals." *Id.* at 761. Thus, the Court explained, while it would "usually . . . vacate the sentence for the lesser included offense," that sentence was then "beyond our reach." *Id.* As a result, the Court overturned the conviction for the greater offense of first-degree rape. *Id.*

this result is more consistent with legislative intent. Here, the General Assembly determined that a second-degree assault can be punished by up to ten years' imprisonment. The jury convicted Mr. Frazier of second-degree assault. In the absence of the separate conviction for fourth-degree sexual assault, Mr. Frazier could have been sentenced to up to ten years' imprisonment. Nothing about the General Assembly's creation of a separate offense of fourth-degree sexual assault suggests to me that the General Assembly intended to reduce by nine-tenths the possible sentence Mr. Frazier could receive for his conduct.

Judge Leahy has authorized me to say that she joins in this concurrence.