Circuit Court for Prince George's County
Case No. CT181161X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1368

September Term, 2020

EDILSAR L. B.

v.

STATE OF MARYLAND

Reed,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: December 21, 2021

*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.

Convicted by a jury in the Circuit Court for Prince George's County of sexual abuse of a minor, second degree rape, second degree sexual offense, third degree sexual offense, and related offenses, Edilsar L. B., appellant, presents for our review two questions: whether the court erred "in allowing the prosecutor to make improper and prejudicial statements at closing argument," and whether the court erred in failing to merge the conviction for third degree sexual offense into the conviction for second degree sexual offense. For the reasons that follow, we shall remand the case with instructions to vacate the sentence for third degree sexual offense and merge the conviction for that offense into the conviction for second degree sexual offense. We shall otherwise affirm the judgments of the circuit court.

At trial, the State called J.P., who at the time was fifteen years old. J.P. testified that when she "was maybe four-ish or five," appellant moved into the apartment where J.P. and her family lived. On "[m]ore than five" occasions thereafter, appellant "touched [J.P.'s] vagina." On one of the occasions, J.P. "was in [appellant's] space area," and he touched J.P. "over [her] clothes." On "the times when [appellant] would touch [J.P.'s] vagina over [her] clothes," he used "[h]is fingers" and moved them in a "[c]ircular motion." When J.P. "was a little bit older," there were "times when [appellant] touched" her vagina "underneath [her] clothes." Appellant again used "[h]is fingers" and moved them in a "[c]ircular" motion "directly on [J.P.'s] vagina." On at least one occasion, appellant "performed oral sex" on J.P., touching "[h]is mouth" to J.P.'s vagina. On an additional occasion, appellant "tried to insert his penis into [J.P.'s] vagina." J.P. "knew [that

appellant] was inserting his penis inside of" her, because "[t]here was a lot of pressure" and "it hurt."

Following conviction, the court sentenced appellant to a term of imprisonment of 25 years, all but ten years suspended, for sexual abuse of a minor. The court also sentenced appellant to concurrent terms of imprisonment of twenty years, all but ten years suspended, for second degree rape, twenty years, all but ten years suspended, for second degree sexual offense, and one year and 61 days for third degree sexual offense. The court merged the remaining convictions into the conviction for sexual abuse of a minor.

Appellant first contends that the court "erred in allowing the prosecutor to make improper and prejudicial statements at closing argument." At trial, the State called Prince George's County Police Detective Krystal Culbreth, who testified that in July 2018, she became "involved in the investigation against" appellant. During her testimony, Detective Culbreth testified as to the reasons why, unlike in other investigations, she did not schedule a "sexual assault forensic examination[]" of J.P.. During cross-examination, the detective confirmed that "sexual assault exams" are conducted not only "to collect DNA," but "also to see whether or not there are injuries to the vagina" and "[w]hether or not the hymen is intact."

Following the close of the evidence, defense counsel presented his closing argument, and the following colloquy occurred:

> [DEFENSE COUNSEL:] Did she order a sexual exam? I think it's important. Now, Madam State asked her about the sexual assault exam. She asked, "What do you do it for?" She says, "Collect DNA." "Well, why didn't you do it?" "Because this is old. There wouldn't be any DNA." The one thing I asked her was, "That's not the only thing that sexual assault

exams are used for?" And she said "No, it's not." I asked her, "You could check to see whether or not there are injuries, whether or not a hymen is attached?" And this is where you can use your common sense. We're alleging that this young girl seven, eight years old; that this is a grown man inserting his penis inside her vagina. I'm sure there would be some kind of damage.

[PROSECUTOR]: Objection.

[DEFENSE COUNSEL]: I'm sure the hymen would not be intact.

THE COURT: Sustained.

[PROSECUTOR]: Move to strike.

THE COURT: You are not to consider that last statement by the –

[DEFENSE COUNSEL]: You can use your common sense.

THE COURT: – [d]efense attorney.

[DEFENSE COUNSEL]: – sorry, Your Honor – as to what could be there. But she didn't do any of that.

During rebuttal, the prosecutor argued, in pertinent part:

[Detective Culbreth] did not order a [SAFE] exam or a SAK exam or a forensic examination – however you want to phrase it – because these events happened about four years or more, at the latest, from when Detective Culbreth learned about this case. There would not be any DNA. We know that. We all know about DNA. It's in our lexicon as a culture. We know DNA doesn't last four years, even inside a child's vagina. And injuries, ladies and gentlemen, they heal.

Defense counsel objected and, at the bench, argued: "[The prosecutor is] not an expert as to whether or not injuries would heal. I'm specifically talking about if the hymen is not intact, it's not healing." The following colloquy then occurred:

[PROSECUTOR]: Your Honor, Defense Counsel did get into his argument the fact that there was no evidence about the hymen, no evidence about any injuries, so I think that I can comment about whether or not there

would be injuries. What I objected to was him getting into the technicalities of a hymen being torn during sex, and then I have to get into whether it can be torn riding a bike or riding a horse and so on. I just think –

THE COURT: Well, no one can get into that because there is no testimony –

[PROSECUTOR]: Which is why I objected, but I think it's within my bounds to say that injuries could heal. And I'll move on after that.

* * *

THE COURT: There can be other injuries that are caused by force, not necessarily breaking of the hymen. If I'm hearing you, you're arguing that her statement only applies to the hymen.

[DEFENSE COUNSEL]: I'm now saying that it was to whole injuries because she's not an expert, and she can't testify to that. And there's common sense, what we're talking about, and I went in there, she objected, you sustained it. Now, she can't back door it –

[PROSECUTOR]: Can I just say it's unlikely they would have found any evidence at that point and move on?

THE COURT: I don't know that – are you conceding his point?

[PROSECUTOR]: No. I'm just tired of arguing this point.

THE COURT: Based upon what she said, I'm going to overrule the objection.

[PROSECUTOR]: Thank you.

([The parties] returned to the trial tables and the proceedings resumed in open court.)

THE COURT: Overruled.

[PROSECUTOR]: Ladies and gentlemen, any injuries would heal in four years.

Appellant contends that the court erred in allowing the argument, because it "had no basis in any facts admitted into evidence at trial," and "[s]uch a claim could only be made if an expert witness had been called to testify specifically about whether or not such injuries would heal over time." Assuming, without deciding, that the argument was improper, the Court of Appeals has stated that "the mere occurrence of improper remarks does not by itself constitute reversible error." *Wilhelm v. State*, 272 Md. 404, 431 (1974). A "prosecutor's improper comments . . . require reversal" only "if it appears that the . . . remarks actually misled the jury or were likely to have misled or influenced the jury to the defendant's prejudice," and "[t]o determine whether improper comments influenced the verdict," a reviewing court "consider[s] the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Donaldson v. State*, 416 Md. 467, 496-97 (2010) (internal citations and quotations omitted). Here, the challenged argument was a single, isolated comment within a rebuttal comprising over seven pages of transcript. Also, the court explicitly instructed the jury that "closing arguments of lawyers are not evidence," and J.P. gave extensive and detailed testimony regarding the offenses committed by appellant. We conclude that under these circumstances, the argument did not actually mislead, and was not likely to have misled or influenced the jury to appellant's prejudice, and hence, any error by the court in allowing the argument was harmless.

Appellant next contends that because "the charging document did not specify the particular assaultive conduct underlying the charges," and "the judge failed to instruct the jury that their verdict for each crime should be based on separate and distinct actions," the

"court erred in failing to merge the conviction for third degree sexual offense into the conviction for second degree sexual offense." The State concurs, noting that "the jury was never instructed to base its separate verdicts on distinct conduct," and "in closing argument, the prosecutor made an argument that specifically allowed for cunnilingus to underlie the convictions for both third-degree and second-degree sexual offense." We agree with the parties that under these circumstances, merger is appropriate. *See Morris v. State*, 192 Md. App. 1, 39 (2010) ("when the indictment or jury's verdict reflects ambiguity as to whether the jury based its convictions on distinct acts, the ambiguity must be resolved in favor of the defendant" (citations omitted)). Accordingly, we remand the case with instructions to vacate the sentence for third degree sexual offense and merge the conviction for that offense.

CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY WITH INSTRUCTIONS TO VACATE THE SENTENCE FOR THIRD DEGREE SEXUAL OFFENSE AND MERGE THE CONVICTION FOR THAT OFFENSE. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY PRINCE GEORGE'S COUNTY.