

Circuit Court for Baltimore City
Case No. 117138025

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2053

September Term, 2018

OLIVER MILLER

v.

STATE OF MARYLAND

Leahy,
Wells,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, J.

Filed: October 12, 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.

A jury in the Circuit Court for Baltimore City convicted appellant Oliver Miller of first-degree rape, attempted first-degree rape, two counts of first-degree sex offense, three counts of third-degree sex offense, and false imprisonment. Miller was sentenced to a cumulative 109 years' imprisonment. Miller filed a timely appeal and asked us to consider the following issues:

1. Was DNA evidence admitted in violation of Appellant's right to confrontation?
2. Did the trial court improperly impose separate sentences for rape and attempted rape, and for multiple counts of third-degree sex offense?

On direct appeal, we reversed Miller's convictions, holding that the trial court erred in permitting an analyst to testify as to the contents of a DNA report that she did not author, and that was not in evidence, in violation of the Confrontation Clause of the Sixth Amendment. *Miller v. State*, No. 2053, 2020 WL 737638, at *7–8 (Md. Ct. Spec. App. Feb. 12, 2020). Because we reversed his convictions, we did not reach the merger issue. *Id.* at *1.

On appeal from our decision, the Court of Appeals reinstated Miller's convictions, holding that the analyst's testimony did not violate Miller's rights under the Sixth Amendment. *State v. Miller*, --- Md. ---, No. 24, slip op. at 21 (Sept. Term 2021). The Court then remanded to us to rule on the merger issue. *Id.* For the following reasons, we hold that the verdict was not ambiguous and thus the trial court did not err in declining to merge the convictions for first-degree rape and attempted first-degree rape, and for two of the three sexual offenses in the third degree.

FACTUAL BACKGROUND

A complete recitation of the facts can be found in the Court of Appeals’ opinion. *State v. Miller*, --- Md. ---, No. 24, slip op. at 5–18 (Sept. Term 2021). We will constrain our recitation of the facts to those which are relevant for the purposes of this opinion.

On January 19, 2008, an unidentified assailant followed a woman, L.J.¹, to her Baltimore City apartment and forced his way inside at knifepoint. Once inside the apartment, the assailant instructed L.J. to remove her clothes and demanded that she perform various sexual acts throughout a lengthy encounter. Fearing for her life, L.J. complied. The assailant attempted to have vaginal sex with L.J. but was unable to “completely” penetrate her vagina with his penis. L.J. testified that she believed her assailant ejaculated onto a pillowcase, and then forced her to shower with him.

After the shower, the assailant forced L.J. back onto the bed where he sucked one of her breasts. He next used cords to tie her to a chair and again sucked her breasts. After untying her from the chair, the assailant attempted to have vaginal sex with L.J. for a second time, but he could only partially penetrate her with his penis. Before leaving the apartment, the man again tied L.J. to a chair using electric cords and took her phone, debit card, and cash.

Initially, unidentified tests of DNA found on L.J.’s left breast and on the pillowcase, electric cords, and whiskey bottle matched with that of Miller. A jury subsequently

¹ Given the nature of the offenses and to protect the victim’s privacy, we shall refer to the adult victim by her initials.

convicted Miller of first-degree rape attempted first-degree rape, two counts of first-degree sex offenses, three counts of third-degree sex offenses, and false imprisonment. The trial court sentenced Miller to 35 years for first-degree rape; 30 years for attempted first-degree rape, to be served consecutively; 20 years for each count of first-degree sex offense, one to be served concurrently and the other to be served consecutively; and eight years for each count of third-degree sex offense, each to be served consecutively. Miller's conviction for false imprisonment merged with the other counts for a total sentence of 109 years' imprisonment.

DISCUSSION

THE TRIAL COURT DID NOT ERR IN DECLINING TO MERGE MILLER'S CONVICTIONS FOR FIRST-DEGREE RAPE AND ATTEMPTED FIRST-DEGREE RAPE, AND FOR THREE THIRD-DEGREE SEXUAL OFFENSES

A. Parties' Contentions

Miller argues that his sentences should merge because it was ambiguous whether the jury convicted him of separate acts. Miller asserts that there was conflicting evidence at trial as to which act constituted attempted first-degree rape and which act constituted first-degree rape. Miller analogizes this case to *Snowden v. State*, 321 Md. 612, 618–619 (1991), where the Court of Appeals held that the appellant's convictions for assault and battery should have merged into his conviction for armed robbery because it was unclear whether the trier-of-fact convicted him of separate acts. The key inquiry, Miller asserts, is not whether there was sufficient evidence to substantiate a conviction on separate offenses, but whether the jury's verdict was ambiguous as to whether the jury convicted based on

separate acts. Similarly, Miller argues that his separate convictions for two of the three third-degree sexual offenses should have also merged for the same reason that it was ambiguous whether the jury convicted him based on separate acts.

The State argues that merger is not required because there was no ambiguity in the verdict as the prosecutor’s closing argument and the verdict sheet demonstrate that the jury’s verdicts for first-degree rape and attempted first-degree rape, as well as the three convictions for third-degree sex offenses, were all based on separate acts. In her testimony, the victim described two separate incidents, one where Miller attempted to penetrate her and another where Miller actually did penetrate her. Accordingly, in closing, the prosecutor described the two separate incidents to the jury. Further, the verdict sheet instructed the jury that if it “found Miller guilty on . . . first-degree rape, it should skip . . . second-degree rape, and proceed to . . . attempted first-degree rape.” Finally, upon Miller’s request for merger, the trial court stated that the verdict sheet and the prosecutor’s closing argument establish that the jury’s convictions were based on separate acts.

Next, the State argues that the three convictions for third-degree sexual offenses are similarly based on separate acts and do not require merger. In her testimony, the victim described being forced to masturbate Miller, and two separate times when Miller “sucked on her breasts.” In closing, the prosecutor identified all three of these incidents as separate third-degree sexual offenses. Again, the State says, the fact that the verdict sheet similarly described all three incidents as different questions demonstrates that they were separate acts. Finally, in sentencing, the trial court highlighted the prosecutor’s closing argument

and the verdict sheet in finding that they were discrete acts. Thus, the State asks us to affirm the sentences.

B. Analysis

Maryland common law and the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution prohibit a criminal defendant from being punished twice for the same criminal conduct. *Nicolas v. State*, 426 Md. 385, 400 (2012). Yet, “separate acts resulting in separate insults to the person of the victim may be separately charged and punished even though they occur in very close proximity to each other and even though they are part of a single criminal episode or transaction.” *State v. Boozer*, 304 Md. 98, 105 (1985). Merger will only be required when: “(1) 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.” *Brooks v. State*, 439 Md. 698, 737 (2014) (citing *Nicolas*, 426 Md. at 400–02). Further, “when 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.” *Id.* at 739.

To determine whether a jury convicted a defendant on separate acts, courts will look at the charging document, evidence introduced at trial, jury instructions, closing arguments, and the verdict sheet. *See Johnson v. State*, 228 Md. App. 27, 47 (2016) (citing *Morris v. State*, 192 Md. App. 1, 39–44 (2010)). In *Johnson*, we held the trial court did not err in declining to merge dozens of counts of violation of a protective order stemming from

harassing emails that the appellant sent to the victim. *Id.* at 49–50. We found that the jury’s verdicts were not ambiguous because the verdict sheet, “coupled with the trial court’s instructions regarding the verdict sheet and the prosecutor’s closing argument, made clear that each violation of the protective order corresponded to each email” sent by the appellant to the victim. *Id.* at 49. The verdict sheet listed 81 questions even though the case only involved five types of crimes because there were “charges that certain crimes were repeated multiple times over the course of certain days.” *Id.* at 47.

When instructing the jury, the trial court stated that the jury “must consider each charge separately and return a separate verdict as to each charge.” *Id.* And finally, in closing argument, the prosecutor told the jury that they should go through each email as each email constituted a separate charge. *Id.* at 47–48. Thus, taking all of these factors together, we concluded that the jury’s verdicts were not ambiguous and held that the trial court did not err in declining to merge the convictions for sentencing purposes. *Id.* at 50.

Like *Johnson*, in this case, we can look to the prosecutor’s closing argument, the verdict sheet, and the jury instruction to determine whether there was ambiguity in the jury’s verdict. First, the trial court’s instruction mirrored that of the trial court in *Johnson* by instructing the jury to “consider each charge separately and return a separate verdict as to each charge.” Next, in closing, the prosecutor laid out for the jury which precise acts constituted each separate charge. For first-degree rape, the prosecutor told the jury:

[H]e got her on the bed again, and told her to straddle him, and told her to ride him, and she was crying and said “I don’t know how.” And he said there was only one hole, and got her to get

on him, and she said, on the stand in front of us, that she thinks that it went in even a little bit. It actually went in.

So that—at that point, we proved for that act, we’ve proved that there’s not even an attempt. There was intercourse. There was penetration of the vagina by the penis. There was no consent. She didn’t consent to anything that happened that day, and there was force used. He got her— put him on, and forced her to straddle him and ride him.

We’ve also shown that there was still that dangerous weapon. She said that dangerous weapon, that knife, was either in his hand or on the floor by the bed this whole time, within his reach. He could have reached down and got that knife at any time. She was also in fear for her life this whole time. *So for that act, the State has shown that he’s guilty of rape in the first degree.*

(Emphasis added). For attempted first-degree rape, the prosecutor told the jury:

[The victim] told us that he told her to take off her clothes and get on the bed, and then he took off[f] her -- his clothes and got on the bed. I’m not going chronologically right now, but [the victim] said to us that when they were on the bed, that he tried to penetrate her vagina with his penis, but it didn’t work . . .

So he tried, but he couldn’t do it. *That’s attempt.*

(Emphasis added). For the third-degree sex offenses involving the victim’s breasts, the prosecutor told the jury:

[The victim] told us that he sucked on her breasts at least two times, and that when he did it, it was painful. All right? So that’s sexual contact. That is no consent. It’s also using force because it was painful, but also, he’s still all the time, had that weapon nearby, and she was in fear for her life. So that’s sex offense in the third degree.

There’s two times that he committed sex offense in the third degree when he sucked on her breasts.

The prosecutor deliberately described to the jury each discrete act and to which charge the act applied. The jury instruction and the closing arguments are similar to those in *Johnson* and we are thus able to infer that based on these instructions and the prosecutor's closing argument, the jury convicted based on separate acts.

The verdict sheet also demonstrates that the jury convicted Miller based on separate acts. The verdict sheet listed question #1 as first-degree rape, question #2 as second-degree rape, and question #3 as attempted first-degree rape. Under question #1, first-degree rape, was the following note: "If you find the Defendant guilty on question #1, do not go to question #2, but proceed to question #3." Through the note, we can infer that questions one and two were based on the same acts, but question three was based on a separate act. If the jury found Miller guilty of first-degree rape (question #1), there was no need to decide his guilt on second-degree rape (question #2), because the jury would have already found him guilty of the more serious offense for that particular act. If question #3, attempted first-degree rape, was based on the same act as questions #1 and #2, the jury need not have decided Miller's guilt on attempted first-degree rape because it had already found Miller guilty of completed first-degree rape or alternatively, completed second-degree rape. The instruction in the verdict sheet to proceed to question #3, attempted first-degree rape, therefore implies that the attempted first-degree rape charge was based on a different act altogether.

The same analysis applies to the convictions for the third-degree sexual offenses involving the victim's breasts. The relevant part of the verdict sheet is reproduced below:

Question #9: DID COMMIT THIRD DEGREE SEXUAL OFFENSE – BREAST

Not Guilty _____ Guilty _____

If you find the Defendant guilty on question #9, do not go to question #10, but proceed to question #11. If you find the Defendant not guilty on question #9, go on to consider question #10.

Question #10: DID COMMIT FOURTH DEGREE SEXUAL OFFENSE – BREAST

Not Guilty _____ Guilty _____

Question #11: DID COMMIT THIRD DEGREE SEXUAL OFFENSE – BREAST

Not Guilty _____ Guilty _____

If you find the Defendant guilty on question #11, do not go to question #12, but proceed to question #13. If you find the Defendant not guilty on question #11, go on to consider question #12.

Question #12: DID COMMIT FOURTH DEGREE SEXUAL OFFENSE – BREAST

Not Guilty _____ Guilty _____

Like the verdict sheet in *Johnson*, the verdict sheet here lists the same crime twice, indicating two separate acts. And like the first- and second-degree rape charges mentioned above, the instructions on the sheet direct the jury to skip questions of a lesser included offense if the jury finds the defendant guilty of the greater offenses. Thus, we can say that the verdict sheet makes clear that the jury, by indicating “Guilty” under questions 9 and 11, convicted Miller of separate acts.

Courts have also looked at the charging document to determine whether convictions were based on separate acts. *See Johnson*, 228 Md. App. at 51–52 (“First, we look at the charging document to determine whether there was any ambiguity regarding the factual basis for the . . . charges.”); *Morris v. State*, 192 Md. App. 1, 39 (2010) (“[W]hen 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.”); *Gerald v. State*, 137 Md. App. 295, 312 (2001) (“With an ambiguity in the indictment, and non-curative instructions, the first degree assault conviction must indeed merge into the robbery conviction.”). In *Johnson*, when ruling on the issue of merger with respect to two different convictions for reckless endangerment, we affirmed the trial court’s declination to merge the convictions for sentencing purposes in part because “[t]he language in the charging document ma[de] clear that appellant was charged with two counts of reckless endangerment based on conduct related to two different Craigslist ads.” *Johnson*, 228 Md. App. at 521; *cf. Lamb v. State*, 93 Md. App. 422, 461 (1992) (treating three separate batteries as one, in part, because the indictment made no distinction between the three discrete applications of physical force). Similarly, the indictment in this case lists three separate charges of sexual offense in the third degree (Counts 3, 8, and 11), implying three separate acts that constitute a sex offense in the third degree,² and lists separate charges for

² There were three counts of sexual offense in the third degree, but Miller only asks us to merge two of those counts which involved the victim’s breasts.

first-degree rape and attempted first-degree rape (Counts 1 and 4), implying separate acts for those charges.

Miller argues that the verdict in this case is similarly ambiguous to the verdicts in *Snowden v. State*, 321 Md. 612 (1991) and *Nightingale v. State*, 312 Md. 699 (1988).³ In *Snowden*, the Court of Appeals directed the trial court to merge the convictions of assault and battery with armed robbery. The Court noted that it did not know whether the robbery charge was “based on battery as a lesser included offense or on assault as a lesser included offense with the battery considered separate.” *Snowden*, 321 Md. at 619. The Court continued:

Snowden’s was a court trial; had it been a jury trial we could have looked to the judge's instructions in hope of illuminating the rationale behind the verdicts. Because the case was tried by the court, we must look to the judge's rationale for the convictions. That rationale is not readily apparent to us, so, as in *Nightingale*, we are constrained to give the Petitioner the benefit of the doubt and merge his sentence for and conviction of assault and battery into those for the robbery charge.

Id. In *Snowden*, the Court did not have the benefit of jury instructions or a verdict sheet, and the Court did not address either the charging document or the prosecution’s closing argument. The Court found ambiguity because it was unable to identify the trial court’s rationale for convicting the defendant. However, here, the indictment, the verdict sheet,

³ *Nightingale* has been superseded by statute. Laws of Maryland, ch. 604 (1990) as stated in *Twigg v. State*, 447 Md. 1, 11 n.6 (2016) (“The General Assembly effectively overruled our decision in *Nightingale* by amending the child abuse statute in 1990 to permit separate sentences for child abuse and any underlying crime(s) that establish the gravamen of the child abuse conviction.”).

the jury instruction, and the prosecution’s closing arguments all indicate the rationale for convictions of separate acts.

Nightingale is also distinguishable. In *Nightingale*, a consolidated case, the Court of Appeals held that separate convictions for child abuse and sexual offense were improper because the Court could not discern whether the general verdicts “were based on the use of sexual offenses as lesser included offenses (or elements) of child abuse, or whether the child abuse verdicts were based on other reasons” 312 Md. at 708. As a result, the Court resolved the ambiguity in favor of the defendants and vacated the judgments on the sexual offense counts. *Id.* *Nightingale* differs in that the prosecutor, in closing arguments of one of the petitioners’ trial, did not identify separate acts which would have constituted separate charges. The prosecutor told the jury that “[c]hild abuse, in this instance, consists of sexual abuse. You will have to decide today whether or not the State has proven that there was sexual abuse committed by [the defendant] on his own daughter.” *Id.* at 707–08.

The Court continued:

The evidence of that abuse, as recounted by the prosecutor, consisted of the evidence of the various sexual offenses with which [the defendant] was charged. And in his final remarks, the prosecutor addressed by name *only the crime of child abuse*.

Under these circumstances, we believe that each jury could have found the defendant before it guilty of child abuse based solely on evidence of a sexual offense in some degree. If that were done, then the sexual offense became, in effect, a lesser included offense of sexual child abuse, and under the authorities we have cited, the offenses are the same for double jeopardy purposes.

Id. at 708 (emphasis added). Whereas the prosecutor’s closing argument here specifically outlined each act constituting each charge, the prosecutor in *Nightingale* discussed the acts of “various sexual offenses,” but then lumped them together into “the crime of child abuse,” thereby creating ambiguity as to which acts constituted which convictions. *Id.* Consequently, *Nightingale* is clearly distinguishable from this case.

Taking together the indictment, the jury instructions, the prosecutor’s closing argument, and the verdict sheet, we find that the record reveals no ambiguity as to the factual bases of the jury’s verdict. Therefore, we hold that the trial court did not err in declining to merge, for sentencing purposes, the convictions of first-degree rape and attempted first-degree rape, and the two third-degree sex offenses.

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED.
APPELLANT TO PAY COSTS.**