Circuit Court for Baltimore County
Case No. 03-K-18-000970

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2172

September Term, 2019

JERSON DUBON-MEJIA

v.

STATE OF MARYLAND

Fader, C.J.,
Berger,
Arthur,

JJ.

Opinion by Fader, C.J.

Filed: August 6, 2021

A jury sitting in the Circuit Court for Baltimore County found the appellant, Jerson Dubon-Mejia, guilty of second-degree rape, third- and fourth-degree sexual offense, and second-degree assault. The court sentenced Mr. Dubon-Mejia to concurrent terms of seven years' imprisonment for second-degree rape, third-degree sexual offense, and second-degree assault, and a concurrent term of one year's imprisonment for fourth-degree sexual offense. In this appeal, Mr. Dubon-Mejia contends that the circuit court erred when it (1) sustained hearsay objections to testimony he sought to elicit from the victim, and (2) failed to merge his convictions for sentencing purposes.

We hold that the circuit court did not err when it sustained the prosecutor's hearsay objections to the victim's out-of-court statements because Mr. Dubon-Mejia failed to assert any ground for the admissibility of the excluded testimony. We further hold that the court should have merged for sentencing purposes (1) the conviction for fourth-degree sexual offense into that for third-degree sexual offense and (2) the conviction for second-degree assault into the conviction for second-degree rape. However, the court did not err in sentencing Mr. Dubon-Mejia separately for third-degree sexual offense and second-degree rape because those convictions were based on separate acts. Accordingly, we will vacate the sentences for fourth-degree sexual assault and second-degree assault and otherwise affirm the judgments.

BACKGROUND

Factual Background

The victim, S.A., was invited to go out on a Saturday night in December 2017 by a friend and co-worker, Ericka Borjas.[1] That evening, S.A. traveled to Ms. Borjas's residence, where she lived with several distant relatives, including her cousins Luis Angel Rodriguez and Joslyn Kim Gomez.[2] While Ms. Borjas was getting dressed, S.A. and Mr. Rodriguez drank vodka together. S.A. drank five shots of vodka "all at once, as if it were water."

At approximately 11:30 p.m., S.A., Ms. Borjas, Mr. Rodriguez, and Ms. Gomez left in Ms. Gomez's vehicle to go to a night club. During the 20-minute drive to the club, S.A. passed out in the back seat of the car. The others, unable to wake her after arriving at the club, decided to return to Ms. Borjas's residence. On the way back, S.A. began vomiting. Upon arriving at Ms. Borjas's residence, Ms. Borjas, Ms. Gomez, and Mr. Rodriguez carried an unconscious S.A. into the house. Ms. Borjas and Ms. Gomez helped S.A. shower, and Ms. Borjas then dressed S.A. in some of Ms. Borjas's own clothes and, because S.A. was menstruating, inserted a sanitary napkin in her underwear. Ms. Borjas then laid S.A. on a bed in the basement bedroom and left the lights on with the door closed

[1] Ms. Borjas's first name is sometimes spelled "Erica" in the record.

[2] Mr. Rodriguez's first name is sometimes spelled "Louis" in the record. Ms. Gomez's name is written as "Joslyn Kim Gomez" in the transcript. Elsewhere in the record her first and middle names are sometimes transposed, and "Joslyn" is sometimes spelled "Jocelyn."

but unlocked. At approximately 12:30 a.m., Ms. Borjas left with Ms. Gomez to go to a bar.

Ms. Gomez and Ms. Borjas returned home at approximately 3:00 a.m. When Ms. Borjas went to check on S.A., she found the bedroom door locked and heard noises emanating from the room. After forcing the door open with a knife, she found the lights off, the roomy "messy," and Mr. Dubon-Mejia hiding under the bed. He was shirtless, his white pants were unzipped, and there was blood "around the zipper." Cell phones belonging to Mr. Dubon-Mejia and S.A. were on the bed.

When Ms. Borjas asked Mr. Dubon-Mejia why he was in the room, he claimed that Mr. Rodriguez, a friend of his with whom he had spent the evening, had told him that he could sleep there. Mr. Dubon-Mejia then "zipped his pants" and began to leave. On his way out, while S.A. remained unconscious, Ms. Borjas, Ms. Gomez, and Mr. Dubon-Mejia engaged in a heated argument.

After Mr. Dubon-Mejia left, S.A. awoke and stated that she was "hurting all over" and "needed to go to the bathroom." S.A. did not know what had happened, and Ms. Borjas did not tell her.

The following morning, which was a Monday, S.A. noticed that she had a "hickey" on her neck and asked Ms. Borjas if she knew who had done that to her. Ms. Borjas avoided answering.

On Tuesday, two days after the incident and the next time Ms. Borjas and S.A. met at work, Ms. Borjas finally revealed her suspicion that S.A. had been sexually assaulted. Shortly thereafter, S.A. notified the police.

The following day, Wednesday, Mr. Dubon-Mejia, who by then had become aware that the police had been contacted, traveled on his own accord to a police station and gave a voluntary statement to Baltimore County Police Detective Jill D. Gilmore, in the hope that he could avoid any "problem with the law."[3] In his recorded statement to the police, Mr. Dubon-Mejia, speaking through a translator, admitted to having had sex with S.A. and to touching her vagina with his hand, but claimed that the contact was consensual. According to Mr. Dubon-Mejia, he had been drinking at a restaurant with Mr. Rodriguez, who then invited Mr. Dubon-Mejia to his residence to avoid a much longer ride home. Mr. Rodriguez directed Mr. Dubon-Mejia to what the latter thought was Mr. Rodriguez's basement bedroom, and when Mr. Dubon-Mejia entered, "there was a girl in that room."

According to Mr. Dubon-Mejia, the woman "grabbed his arm," pulled him toward her, "started kissing him on the lips," and "grabbed his hand" and "forced it on her leg . . . like she wants it." Mr. Dubon-Mejia did not resist. He kissed the woman on the neck and manually stimulated her vagina with his hand, at which point he noticed that she was "on her period." He then transferred blood to his pants when he touched the pants with his hand. Mr. Dubon-Mejia acknowledged that he vaginally penetrated the woman with his penis for "20, 25 seconds," wearing a condom as he did so. The two were then interrupted by knocking on the door, and Mr. Dubon-Mejia, "scared," hid underneath the bed. When he was discovered, "all the females started making a big scandal[.]" Without taking the

[3] Mr. Dubon-Mejia is a citizen of Honduras who was illegally in the United States.

condom off, Mr. Dubon-Mejia got dressed and left. When he arrived home, he discarded both the condom and his bloody pants.

Two months after making his statement to the police, a Statement of Charges was filed in the District Court of Maryland for Baltimore County, followed the next month by a superseding four-count indictment filed in the Circuit Court for Baltimore County. The indictment charged Mr. Dubon-Mejia with second-degree rape, third- and fourth-degree sexual offense, and second-degree assault.

During a three-day jury trial, the State presented testimony from S.A., Ms. Borjas, Det. Gilmore, and a Sexual Assault Forensic Examination nurse who had examined S.A. the day after she contacted the police. The State also played for the jury and admitted into evidence Mr. Dubon-Mejia's statement to the police. Mr. Dubon-Mejia testified on his own behalf consistently with his prior statement. At the conclusion of the trial, the jury found Mr. Dubon-Mejia guilty on all counts. He noted this timely appeal.

DISCUSSION

I. THE CIRCUIT COURT DID NOT ERR IN SUSTAINING THE PROSECUTOR'S OBJECTIONS TO PORTIONS OF MR. DUBON-MEJIA'S TESTIMONY.

Mr. Dubon-Mejia contends that the trial court erred in sustaining the State's objections to portions of his testimony in which he sought to introduce out-of-court statements purportedly made by S.A. Although Mr. Dubon-Mejia did not offer any basis for the admission of the statements at the time, he now contends that they were admissible under the hearsay exception for statements reflecting the declarant's state of mind and as non-hearsay for the purpose of proving that S.A. was conscious and able to consent. He

argues that the court's evidentiary rulings interfered with his right to present his defense because S.A.'s state of mind and ability to consent were central to his defense.

The State counters that Mr. Dubon-Mejia, as the proponent of the excluded evidence, had the obligation to assert grounds for its admissibility during the trial and that his failure to do so renders his appellate claim unpreserved. The State further contends that the trial court did not err in sustaining the State's objections, and even if it had, any error would be harmless.

We first set forth the relevant parts of the transcript for context. During the defense's direct examination of Mr. Dubon-Mejia, counsel sought to elicit testimony in support of Mr. Dubon-Mejia's consent defense:

> [DEFENSE COUNSEL]: You describe to the ladies and gentlemen of the jury what -- specifically what her movements, her physical movements?
>
> [MR. DUBON-MEJIA]: She is putting her hand under my shirt. I --
>
> * * *
>
> [MR. DUBON-MEJIA]: I took off my shirt and she was touching my back.
>
> [DEFENSE COUNSEL]: Touching my?
>
> [MR. DUBON-MEJIA]: Back.
>
> [DEFENSE COUNSEL]: Oh, back. Okay.
> You -- she put her hands under your shirt, is that what you're saying?
>
> [MR. DUBON-MEJIA]: Yes, uh-huh. . . .
>
> * * *
>
> [DEFENSE COUNSEL]: All right. Um, did she verbalize, did she say any words to you while you had contact [with] her?

[STATE]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: In response to what you were doing --

[MR. DUBON-MEJIA]: Yes, I asked her before that, I forgot to say, when I was touching her I asked her did you like it and she said, yes. She said yes, with a seductive voice. Do you understand?

[STATE]: Objection, Your Honor.

THE COURT: Sustained.

* * *

[DEFENSE COUNSEL]: Okay. Um, did she remove any of her clothing?

[MR. DUBON-MEJIA]: Yeah. Yes, when I asked her if she liked it, and then she say [sic] yes, with her hand, uh, she pulled, uh -- because she had my hand in her hand, I pulled down her pants. Then I went to turn off the light.

[DEFENSE COUNSEL]: Did, as you were pulling down her pants did she say no?

[MR. DUBON-MEJIA]: No.

[DEFENSE COUNSEL]: Did she ever say no?

[MR. DUBON-MEJIA]: She say yes, but she didn't say anything. She didn't say anything. Uh, when I asked her do you like --

[STATE]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Okay.

THE COURT: Just please advise him that he cannot testify as to anything she said, only what he said to her.

[MR. DUBON-MEJIA]: Okay.

* * *

> [DEFENSE COUNSEL]: Okay. Let me, if I may back up just a little bit. You testified that when you came in the room the lights were on; is that correct?
>
> [MR. DUBON-MEJIA]: Yes.
>
> [DEFENSE COUNSEL]: Okay. And when you -- and then the lights were off; is that correct?
>
> [MR. DUBON-MEJIA]: Yes.
>
> [DEFENSE COUNSEL]: And who turned the lights off?
>
> [MR. DUBON-MEJIA]: I did.
>
> [DEFENSE COUNSEL]: And why did you turn the lights off?
>
> [MR. DUBON-MEJIA]: For privacy. And because she told me -- because of her consent.
>
> [STATE]: Objection.
>
> THE COURT: Sustained.

At no point during this testimony or through the remainder of trial did Mr. Dubon-Mejia assert grounds for the admission of S.A.'s out-of-court statements.

Absent an applicable exception or a basis for admitting an out-of-court statement for a reason other than its truth, "hearsay is not admissible." Md. Rule 5-802. "When evidence is excluded that on its face is inadmissible but that properly could be admitted under some theory, there is no error, unless the proponent of the evidence has explained to the trial judge how the evidence is admissible and offered it for that purpose." Lynn McLain, *Necessary explanation as to why evidence is admissible*, 5 Maryland Evidence

State & Federal, § 103:20, at 112 (3d ed. 2013). In *Braxton v. State*, this Court stated that a trial court's "refusal to permit an answer to a question which on its face called for hearsay . . . is not error where trial counsel fails to show that the purpose of the question is to elicit non-hearsay or evidence which would be considered as an exception to the hearsay rule." 57 Md. App. 539, 549-50 (1984) (emphasis removed).

Here, the evidence Mr. Dubon-Mejia sought to admit was S.A.'s out-of-court statements to him during the early-morning encounter. It is clear from the trial court's instruction to defense counsel to advise Mr. Dubon-Mejia that "he cannot testify as to anything she said, only what he said to her," that the court's basis for sustaining the objections was hearsay. Under the circumstances, it was incumbent upon Mr. Dubon-Mejia to assert at trial any ground for the admissibility of the out-of-court statements. Because he did not do so, the trial court did not err in sustaining the objections.

Although we decline Mr. Dubon-Mejia's invitation to address the merits of his claim, we observe that, contrary to his claims on appeal, he did not suffer any meaningful interference with his right to present a defense as a result of the court's rulings sustaining objections to his testimony about S.A.'s out-of-court statements expressing consent to his actions. Notably, such statements nonetheless came before the jury in several ways. First, the State did not object every time Mr. Dubon-Mejia testified that S.A. had expressed consent to his actions. Second, on several occasions when the State did object after the testimony had already been given, the prosecutor did not ask for the testimony to be struck and the court did not instruct the jury to disregard the testimony. And third, Mr. Dubon-Mejia's recorded statement to Det. Gilmore, which was played for the jury and admitted

into evidence, was replete with assertions that S.A. had initiated their encounter and consented to his actions, both verbally and demonstratively. The court's rulings sustaining objections to some of Mr. Dubon-Mejia's testimony about S.A.'s out-of-court statements therefore did not prevent him from presenting his consent-based defense.

In sum, under the circumstances of this case, the court did not err in sustaining the State's objections to Mr. Dubon-Mejia's testimony about S.A.'s out-of-court statements.

II. MERGER

Mr. Dubon-Mejia contends that the circuit court should have imposed only one sentence—for second-degree rape—and that it erred in not merging the other offenses for sentencing purposes. According to Mr. Dubon-Mejia, the other offenses should have been merged because the record is ambiguous as to whether they were based upon the same conduct as that underlying the conviction for second-degree rape. Mr. Dubon-Mejia acknowledges that although this Court held in *Paige v. State* that third-degree sexual offense and first-degree rape do not merge, *see* 222 Md. App. 190, 208-09 (2015), that ruling predated 2016 statutory changes that redefined the scope of rape and sexual offense crimes. Mr. Dubon-Mejia contends that based on the current statutory definitions and as the offenses were described for the jury, "it is impossible to determine if the jurors based all of the convictions on the same assaultive conduct[.]"

The State concedes that there is ambiguity concerning the basis for the third- and fourth-degree sexual offense convictions and agrees that the latter should have been merged into the former. As for the other offenses, the State contends that "the trial court's instructions coupled with the prosecutor's closing argument on the evidence demonstrates

that the jury relied on different acts to convict Dubon-Mejia of second-degree rape (penile penetration into the vagina), third-degree sexual offense (intentional touching of the genital area), and second-degree assault (kissing the neck)." With respect to *Paige*, the State acknowledges that this Court's decision was based on a prior version of the relevant statutory provisions. However, the State posits that the 2016 revisions to the rape and sexual offense statutes reflected "a legislative choice to punish more severely *all* penetrations" by redefining rape to encompass all of them and, in doing so, effectively excluding such penetrations from the definitions of third- and fourth-degree sexual offenses. Thus, according to the State, notwithstanding the statutory changes, third-degree sexual offense and second-degree rape still do not merge.

"The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides that no individual shall be tried or punished more than once for the same offense." *State v. Frazier*, 469 Md. 627, 640 (2020). Moreover, when offenses are based upon the same act, Maryland law "will often require that one offense be merged into the other for sentencing purposes, so that separate sentences are not imposed for the same act or acts." *Biggus v. State*, 323 Md. 339, 350 (1991).[4]

The critical question here is whether the offenses of which Mr. Dubon-Mejia was convicted were based on the same act or different acts. If based on the same act, because

[4] The failure of a trial court to merge sentences when required by law results in an illegal sentence, *Pair v. State*, 202 Md. App. 617, 624-25 (2011), and therefore may be raised on appeal without the requirement of an objection below, *Chaney v. State*, 397 Md. 460, 465-66 (2007).

there is no suggestion of a legislative intent to permit multiple punishments for the crimes at issue, the convictions should have been merged for sentencing purposes under the required evidence test. *See Frazier*, 469 Md. at 641 (identifying the two conditions that must be satisfied for merger under the required evidence test as: (1) the convictions being "based on the same act or acts" and (2) the two offenses are "the same" or one is "the lesser included offense of the other" (quoting *Brooks v. State*, 439 Md. 698, 737 (2014))). To resolve whether offenses were based on the same act or different acts, we look to the charging document, the evidence adduced at trial, the jury instructions, the closing arguments, and the verdict sheet. *See*, *e.g.*, *Brooks*, 439 Md. at 741-42 & n.23 (resolving merger issue by reviewing the trial transcript, the jury instructions, the prosecutor's closing argument, any jury questions posed during deliberations, and the verdict sheet); *Nicolas v. State*, 426 Md. 385, 412 (2012) (resolving merger issue by reviewing the trial transcript, the jury instructions, and the verdict sheet); *Thomas v. State*, 119 Md. App. 606, 609, 621-22 (1998) (resolving merger issue by considering the structure of the indictment). Any ambiguity as to whether two offenses are based upon the same act or acts is construed in favor of the defendant. *See Frazier*, 469 Md. at 642.

We turn first to the conviction for fourth-degree sexual offense, which Mr. Dubon-Mejia and the State agree should have merged into his conviction for third-degree sexual offense.[5] We agree as well because we can find nothing in the record that

[5] Fourth-degree sexual offense is a lesser-included offense of third-degree sexual offense. As a result, whether merger was required depends on whether the convictions were premised on the same act. *See Nicolas*, 426 Md. at 408.

suggests that the two convictions were based on different acts. Accordingly, we will vacate the sentence for fourth-degree sexual offense.

We turn next to the conviction for third-degree sexual offense, which Mr. Dubon-Mejia argues should have merged into the conviction for second-degree rape.[6] The indictment charged each of the offenses using the statutory short form,[7] without describing any particular acts. Each count alleged merely that Mr. Dubon-Mejia, "on or about 12/3/2017, in Baltimore County, did unlawfully commit" the particular crime against the victim, S.A. Similarly, neither the verdict sheet nor the jury instructions provided any indication of the specific act or acts on which each of the offenses was based. The court instructed the jury that to find Mr. Dubon-Mejia guilty of second-degree rape, it had to find that he "had vaginal intercourse with" S.A., meaning "the penetration of the penis into the vagina." For third- (and fourth-)degree sexual offense, the court instructed the jury that a conviction required a finding that Mr. Dubon-Mejia "had sexual contact with" S.A., meaning "the intentional touching of" her "genital or anal area or other intimate parts for the purpose of sexual arousal or gratification, or for abuse of either party." The court's instruction did not inform the jury that penile penetration of the vagina was *not* "sexual contact" for purposes of third-degree sexual offense, nor did the court instruct the jury that

[6] Because we determine that Mr. Dubon-Mejia's convictions for second-degree rape and third-degree sexual offense were based on different acts, and that merger was not appropriate on that basis, we need not resolve the parties' disagreement concerning whether those offenses can merge.

[7] *See* Md. Code Ann., Crim. Law § 3-317 (2021 Repl.) (short form indictment for rape and sexual offenses).

it could convict Mr. Dubon-Mejia of both offenses only if each was based on a different act.

On the other hand, the evidence adduced at trial provided independent factual bases for separate convictions for third-degree sexual offense and second-degree rape. Specifically, Mr. Dubon-Mejia admitted that he had both (1) touched S.A.'s vagina with his hand, an act that could serve as the basis for the third-degree sexual offense conviction, and (2) penetrated S.A.'s vagina with his penis for 20 to 25 seconds, an act that could serve as the basis for the second-degree rape conviction. Even more important to our ultimate conclusion is the State's closing argument, in which the prosecutor drew a sharp distinction between the two offenses and the conduct claimed to support each, telling the jury, "I'd like to simplify this case . . . to Count 1 and Count 2. And if you look at your verdict sheet, and I'm going to hold mine up. Count 1, second degree rape. Count 2, third degree sex offenses -- sex offense." The prosecutor then explained how the two charges were "different." He first stated that second-degree rape requires "vaginal intercourse" with the victim and noted that Mr. Dubon-Mejia had admitted to that act. On the other hand, he stated, third-degree sexual offense requires "sexual contact" with the victim, which occurred when Mr. Dubon-Mejia touched the victim's vaginal area. The prosecutor elaborated:

> Now, she was menstruating. It's a fact that she had blood on her vaginal area. He touched that vaginal area and got the blood on him. He says he touched his pants[,] that's how he transitioned the blood from the hand to his pants, but admits that he touched her vagina. *That's your third degree sex offense.*

(Emphasis added).

In light of the evidence presented at trial and the extreme clarity with which the prosecutor distinguished the offenses and the specific acts on which each was predicated, we are confident that the jury's verdicts for second-degree rape and third-degree sexual offense were based on different acts.[8] As a result, we hold that merger of those offenses was not required.

Mr. Dubon-Mejia also contends that his conviction for second-degree assault should have merged into his conviction for second-degree rape for sentencing purposes.[9] The State disagrees and points to the prosecutor's closing argument, in which he informed the jury that the second-degree assault "c[ould] be the kissing on the neck" to which Mr. Dubon-Mejia had also admitted. Although it is possible that the jury predicated its conviction for second-degree assault on that act, the prosecutor's closing argument on that point does not approach the same clarity of distinction that he drew between the conduct underlying the third-degree sexual offense and second-degree rape charges. To the contrary, the reference to "kissing on the neck" seems to have been a suggestion made in passing, not a statement defining the conduct that the jury must find to have occurred to

[8] Notably, Mr. Dubon-Mejia admitted both to engaging in vaginal intercourse with S.A. and to touching her vagina with his hand. This is thus not a case in which there is any question concerning whether the jury determined that the defendant engaged in different acts supporting multiple convictions. The only contested issue with respect to either second-degree rape or third-degree sexual offense was consent, which was identical as to both offenses. Indeed, in light of Mr. Dubon-Mejia's admissions concerning his separate acts, it is frankly difficult to discern how a reasonable jury could have found him guilty of either second-degree rape or third-degree sexual offense, but not both.

[9] Second-degree assault is a lesser-included offense of second-degree rape. *See generally Paige*, 222 Md. App. at 207. As a result, whether merger was required depends on whether the convictions were premised on the same act. *See Nicolas*, 426 Md. at 408.

convict Mr. Dubon-Mejia of that offense. The indictment, verdict sheet, and jury instructions are similarly unenlightening with respect to differentiating the act or acts on which the second-degree assault charge was based from those underlying the third-degree sexual offense and second-degree rape charges. We therefore lack confidence that the jury convicted Mr. Dubon-Mejia of second-degree assault based on a kiss rather than on the acts supporting his other convictions. Accordingly, we must vacate the sentence for second-degree assault. We will otherwise affirm the convictions.

SENTENCES FOR SECOND-DEGREE ASSAULT AND FOURTH-DEGREE SEXUAL OFFENSE VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY OTHERWISE AFFIRMED. COSTS ASSESSED THREE QUARTERS TO APPELLANT AND ONE QUARTER TO BALTIMORE COUNTY.