Circuit Court for Frederick County
Case No.: C-10-CR-18-000255

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2289

September Term, 2024

MARC ANTHONY AGUIRRE

v.

STATE OF MARYLAND

Graeff,
Beachley,
Kenney, James A., III.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: September 11, 2025

*This is a per curiam opinion. Under Rule 1-104, the opinion is not precedent within the rule of stare decisis, nor may it be cited as persuasive authority.

In 2018, Marc Anthony Aguirre, appellant, appeared in the Circuit Court for Frederick County and pursuant to a plea agreement entered an *Alford* plea to fourth-degree sexual offense and a guilty plea to second-degree assault. The court sentenced him to ten years' imprisonment, all but 18 months suspended, for second-degree assault and to a consecutive term of one year, all suspended, for fourth-degree sex offense, to be followed by a five-year term of supervised probation upon release. Mr. Aguirre did not seek leave to appeal.

In January 2025, Mr. Aguirre, representing himself, filed a Rule 4-345(a) motion to correct an illegal sentence in which he appears to have argued that his convictions should have merged for sentencing purposes. The State opposed the motion, and the circuit court denied relief. Mr. Aguirre appeals that ruling. For the reasons to be discussed, we shall affirm the judgment.

BACKGROUND

Mr. Aguirre was charged, by Indictment, with three counts: sexual abuse of a minor, third-degree sex offense, and second-degree assault. Each count indicated that the offense took place against on February 11, 2018 against LR, a minor. At the outset of the plea hearing, the State informed the court that Mr. Aguirre would enter an *Alford* plea to an amended count two, that is, to fourth-degree sexual offense and a guilty plea to second-degree assault. In doing so, the prosecutor stated that "the facts the State will read into the proffer [in support of the pleas] will indicate that those are two separate counts. They do no[t] merge."

In examining Mr. Aguirre before accepting the pleas, the court confirmed that he had discussed with his attorney the State's evidence in this case and that he understood the elements of each offense. The colloquy continued:

> THE COURT: Now, fourth-degree sex offense can be - - there are a number of different ways that a fourth-degree sex offense can occur. But basically it's some kind – ordinarily, it's usually some kind of nonconsensual touching of a sexual or private part of another person and/or there's usually a difference in age between the alleged victim and the defendant. You understand that?
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> AGUIRRE: Yes.
>
> THE COURT: Okay. And with the second-degree assault, that's any kind of non-consensual touching and/or placing someone in fear of a non-consensual touching. You understand that?
>
> AGUIRRE: Yes.

In its statement of facts in support of the pleas, the prosecutor related, among other things, that if the case had proceeded to trial, the State would have presented evidence that on February 11, 2018 the police responded to an apartment in the 1400 block of King Parkway and LR's mother informed them that her daughter had told her that Mr. Aguirre, who roomed with them in the home, had touched her inappropriately in the early morning hours of that day. In a "forensic interview" with LR, who was 10 years old at the time of the incident, she related that she woke up in the bedroom where she was sleeping after

> feeling some pain in her vaginal area and found the defendant standing at the foot of the bed with his hands down her pants. **She kicked him away. He again came back and touched her again**. She **again** fought him off and he left the room and she locked the door. She then woke up her mother and told her what had happened.
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> ***
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> A SAFE exam was conducted and there was some touch DNA that was recovered that was consistent with what [LR] reported.

The defense had no additions or corrections to the State's proffer.

DISCUSSION

Mr. Aguirre asserts that his sentence for second-degree assault should merge into his sentence for fourth-degree sexual assault as the former is a lesser included offense of the latter. He claims that, at the plea hearing, the State "did not support the court's determination that the second-degree assault was a sufficiently separate and distinct act from the fourth-degree sexual offense as to permit a separate sentence." And he points out that the Indictment did not "identify the act or acts which constituted each crime" and maintains that any "ambiguity in the charging document or as to how the fact-finder understood the charges must be resolved in the defendant's favor."

The State correctly acknowledges that, where merger is required, the sentence may be corrected pursuant to a Rule 4-345(a) motion. *See Koushall v. State*, 479 Md. 124, 148 (2022). The State, however, asserts that merger was not required in this case, noting that at the outset of the plea hearing the prosecutor "expressly articulated that the fourth-degree sexual offense and the second-degree assault were two separate counts that 'do no[t] merge.'" Moreover, the State maintains that in its proffer of facts it related that there were two distinct acts which, on appeal, it describes as follows: "[t]he first act, supporting Aguirre's conviction for fourth-degree sexual offense, was when Aguirre put his hands down the minor victim's pants, causing her to awaken due to 'pain in her vaginal area'" and the "second act, supporting Aguirre's conviction for second-degree assault, was when, after the victim 'kicked him away[,] he 'again came back and touched her again.'" Consequently, despite the closeness in time between the two acts, the State maintains that

they were "separate insults" to the victim and a break in conduct "between the first nonconsensual sexual touching and the second touching (not expressly described as sexual), such that separate sentences are appropriate."

Merger "is the mechanism used to protect a convicted defendant from multiple punishments for the same offense." *State v. Frazier*, 469 Md. 627, 641 (2020) (cleaned up). Merger is proper "'when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other.'" *Id*. (quoting *Brooks v. State*, 439 Md. 698, 737 (2014)). "Both elements must be satisfied before merger is required." *Id*.

We agree with the State that the convictions in this case were based on separate and distinct acts and, therefore, merger was not required. First, the pleas entered in this case were the result of a plea agreement reached by the parties. The State agreed to amend count two from third-degree sex offense to fourth-degree sex offense and Mr. Aguirre agreed to enter an *Alford* plea to that crime. Mr. Aguirre agreed to plead guilty to count three, second-degree assault, and the State agreed to nol pros count one, sexual abuse of a minor. In relating the details of this agreement to the court, the prosecutor emphasized that "the facts the State will read into the proffer will indicate that those are two separate counts. They do no[t] merge." The defense did not raise any objection or disagree with that statement. As part of the plea bargain, the State also agreed to seek a sentence of 10 years, all but 18 months suspended, for second-degree assault and a consecutive one-year term, all suspended, for fourth-degree sexual offense. Thus, we disagree with Mr. Aguirre that

there was "ambiguity . . . as to how the fact-finder understood the charges." To the contrary, the State made it clear to the court at the outset of the plea hearing that the pleas were based on two distinct counts that would be sentenced separately, that is, they would not merge.

Moreover, the proffer of facts in support of the pleas described two offenses. The first offense the State described as the victim waking up "because she was feeling some pain in her vaginal area and found the defendant standing at the foot of the bed with his hands down her pants." Those facts support the conviction for fourth-degree sex offense. Then, the State proffered that, after the victim "kicked him away[]" following the initial insult to her person, "[h]e **again** came back and **touched her again**. She **again** fought him off[.]" (Emphasis added.) Those facts support the conviction for second-degree assault of the battery type. As the Maryland Supreme Court has observed, "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).

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.