Circuit Court for Queen Anne's County
Case No. C-17-CR-22-000390

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2378

September Term, 2023

RAED AL-ATIYYAT

v.

STATE OF MARYLAND

Arthur,
Reed,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: June 18, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

On September 22, 2022, Raed Al-Atiyyat, the Appellant, was charged in Queen Anne's County with Second-Degree Rape, Fourth-Degree Sex Offense, Sex Abuse of a Minor, Second-Degree Assault, and Unnatural or Perverted Practice for engaging in sexual contact with one of his daughters. The Appellant was tried on July 12 and July 13, 2023. The court entered a judgment of acquittal on the Second-Degree Rape charge and found the Appellant guilty on the rest of the counts. On January 18, 2024, the trial court merged all of the convictions into the sex abuse of a minor count and then sentenced the Appellant to the maximum sentence of twenty-five years of incarceration. The Appellant then appealed his conviction on February 15, 2024.

In bringing his appeal, Appellant presents two questions for appellate review:

I. Did the trial court violate the Appellant's right to confront witnesses when the court denied the Appellant's request to strike the witness' testimony after she declined to answer questions on cross-examination?

II. Was the evidence sufficient to convict the Appellant for Fourth-Degree Sex Offense and Second-Degree Assault?[1]

[1] The Appellant's questions, as originally phrased were:

I. Did the trial court violate the Appellant's right to confront and cross-examine witnesses by refusing to strike the testimony of the State's expert witness who refused to answer questions from the Appellant and the court on cross-examination?

II. Was the evidence sufficient to sustain Appellant's convictions for Fourth Degree Sex Offense and Second Degree Assault?

For the following reasons, we affirm the judgments of the Circuit Court for Queen Anne's County.

FACTUAL & PROCEDURAL BACKGROUND

On September 22, 2022, Appellant was charged in Queen Anne's County with Second-Degree Rape, Fourth-Degree Sex Offense, Sex Abuse of a Minor, Second-Degree Assault, and Unnatural or Perverted Practice. His case initially proceeded to trial by jury from March 6 through March 8, 2023, before the Honorable Brett Wilson (Senior Judge). That trial ended in a mistrial due to a hung jury.

The Appellant was retried again on July 12 and July 13, 2023, still before Judge Wilson but without a jury. At the end of the State's case in chief, the court granted the Appellant's motion for judgment of acquittal as to the count of Second-Degree Rape. Ruling from the bench, Judge Wilson found the Appellant guilty on the remaining counts. Judge Wilson also found that all of the offenses merged into the sexual abuse of a minor count. On January 18, 2024, the trial court sentenced the Appellant to the maximum sentence of twenty-five years of incarceration. The Appellant then appealed his conviction on February 15, 2024.

A. Facts

F.A.,[2] one of the Appellant's daughters, testified how on the morning of August 1, 2022, she and her siblings worked on their family's farm. In the afternoon, her mother and

[2] F.A. was eighteen at the trial, but a minor when the relevant events occurred, so pursuant to Maryland Rule 8-125 we will use the victim's initials.

one of her siblings left to run errands. F.A.'s father, the Appellant, told her other two sisters and her brother to go take naps. The Appellant told F.A. to come to his room.

F.A. went to the Appellant's bedroom. The Appellant held her and kissed her "for a while" on his bed. At some point, the Appellant got up to take a shower and then returned fully naked. F.A. said that the Appellant wanted her to "hold his sperm in [her] mouth" and then he asked if she "wanted to suck it," suggesting that she perform oral sex. F.A. testified that she was on the Appellant's lap while he used a "hard grasp" to push her head into his neck. The Appellant then put F.A. on her knees and put his legs over her shoulders. The Appellant thrust his hips upwards while his penis was in F.A.'s mouth until he ejaculated.

F.A. then described how, with the Appellant's ejaculate still in her mouth, she went to the bathroom next to the bedroom and spit out the sperm into her retainer case. She then put the sperm from the retainer case into an empty pill bottle.[3] She then took both items, put them in a Ziploc bag, and wrote a date and time on them.

F.A. testified that she did not say no to the Appellant that day because she was "scared" of him. F.A. said the Appellant did not beat her or her siblings anymore but she was "still scared of him when he got irritated or mad" so she wanted to be on her "best behavior doing whatever he wanted." She also testified that "[she] felt like [she] couldn't get away" because "it's happened many times before" and "[she] felt used to it." She described how as the daughter of the house "[she] had to do what was asked, [she] had to

[3] The pill bottle had previously had rubbing alcohol in it, as it was used for F.A.'s earrings. The retainer case was "kind of clean" as it still was used for F.A.'s retainer and would be washed with soap and water. The case was her travel case, and the retainer was in a different case.

respect [her] parents." Her sister similarly testified that F.A. had to take care of everything and make sure that the Appellant "was satisfied."

F.A. testified she had not discussed with her sisters a plan to get a DNA sample from the Appellant. F.A. had been told that if she went to a nearby college, she was required to be at home two evenings and the weekend. F.A. expressed that she was possibly concerned about the Appellant forcing her into a marriage on an upcoming trip to Jordan. F.A. testified that she had told some prior incidents to her therapist, but those incidents never got reported.

Later on August 1, F.A. told her sister, S.A., what happened to her, and S.A. took the bag with the containers and put it in a wardrobe in her bedroom. F.A. also told her uncle, Zachary Taimeh, about what happened over the chat platform Discord. A week prior, Mr. Taimeh had told F.A. and some of her sisters that they needed to try and document what was happening at home. Mr. Taimeh reported the Appellant two days later to Child Protective Services.

On the same day, the Maryland State Police, with members of Queen Anne's County Child Protective Services, went to the Appellant's home in response to the claims of sexual assault. The retainer case and pill bottle were given to Master Trooper Kelly Jaskiewicz. F.A. also gave Trooper Kelly a pair of pajama pants with the Appellant's dried sperm from an incident a few weeks prior.

B. Testimony of Amy Kelly

At trial, Amy Kelly testified for the State. Ms. Kelly said she had worked for the Maryland State Police Forensic Sciences Division for over twenty-three years and was now

a Forensic Scientist – Advanced. She was offered as an expert in forensic serology, which is the study of bodily fluids, and DNA analysis. She concluded that the DNA profile found on a swab from the pill container and retainer container was from the Appellant.[4] Ms. Kelly testified that she did not test for saliva on these items because it would have used a portion of the swab that would have then been unavailable for DNA analysis. The pajama pants provided by F.A. were positive for alternate light source testing, which meant there were body fluids[5] present, and there was male DNA found to be present, but not enough to expect to see a DNA profile.

Then on cross-examination, the Appellant asked about saliva testing. The Appellant then asked "[a]nd if a person held ejaculate in their mouth and than [sic] spit it out that could lead to a person's DNA in a sample?" Ms. Kelly responded that "That's beyond what I'm here to testify for here. I'm to testify what my DNA results were. I can't determine how this sample was placed on or treated before I got the swab into the lab." She further clarified that her "testimony here is to discuss the source of the DNA that [she] found, not necessarily the activity that may have happened before that DNA was deposited." After she again refused to answer the hypothetical, the Appellant moved to strike Ms. Kelly as an expert. Judge Wilson then instructed Ms. Kelly to answer the question. Ms. Kelly responded that she is not an expert in "activity levels" and what "may have happened before

[4] An issue at trial was that a single swab was used for both the pill bottle and the retainer container. Another swab was used to collect DNA from the fluid that was later transferred from the pill bottle to a glass vial.

[5] As Ms. Kelly clarified later, body fluids include semen and saliva, but not touch DNA.

that DNA was deposited." She explained that activity level is "how the DNA came to be on an item" but her expertise was only about the source of DNA, not what led to it being deposited.

Judge Wilson again denied the Appellant's motion to disqualify her as an expert, but said that not answering the question about saliva "will affect not the admissibility, but the weight [of her testimony] in the [c]ourt's consideration." Judge Wilson then told the Appellant to move on to another topic and the Appellant continued with cross-examination.

C. Judge Wilson's Verdict

At the end of the State's case, Judge Wilson dismissed the Second-Degree Rape charge because Second-Degree Rape has an element of force and Judge Wilson determined that "parental guidance" which "children are conditioned to respond to" and obey did not equal the force needed for Second-Degree Rape. At the conclusion of trial, Judge Wilson gave his ruling from the bench. Judge Wilson commented that he was "unimpressed" with the State's investigation and the serologist's testimony was "bizarre." He described how he thought the State's investigation was "lazy." He was confused by the lack of amylase testing to determine if F.A.'s saliva was present. Because of the lack of proper forensic testing, Judge Wilson said that "means we have to make our decision based on testimony and other evidence." Judge Wilson found that the testimony of F.A. was credible. Combining that with the evidence of the Appellant's sperm, Judge Wilson said he was able "to accept the allegations of the State to some extent." Based on this evidence, he found the Appellant guilty on the remaining four counts, as described above.

DISCUSSION

Whether Appellant's Confrontation Clause Right was Violated

A. Parties' Contentions

On this first issue, Appellant argues that his right to confront witnesses was violated when the State's expert refused to answer questions "relevant to serology and DNA testing and also [the Appellant's] theory of defense." As a result, Ms. Kelly's testimony should have been stricken because the Appellant could not effectively cross-examine her. The Appellant claims the trial court abused its discretion by not disqualifying Ms. Kelly and striking her testimony because the court did not apply the standard from *United States v. Cardillo*, 316 F.2d 606 (2d Cir. 1963). Specifically, the Appellant says the trial court failed to "consider whether Ms. Kelly was refusing to respond to cross-examination that was collateral in nature."

The State argues that the hypothetical posed by the Appellant did not pertain to Ms. Kelly's direct examination and did not affect her credibility. The State argues that the purpose of Appellant's cross examination of Ms. Kelly was to establish that the Appellant's ejaculate had never been in F.A.'s mouth, to corroborate his theory that she fabricated the crime. The State argued that on direct, they never asked questions about "how DNA might come to be in an evidence sample or how DNA may be transferred from one object to another." According to the State, Ms. Kelly's refusal to answer a question about activity did not interfere with the Appellant's right to cross-examine her about the topics of her direct testimony or about the truthfulness or credibility of that testimony.

B. Standard of Review

Whether there was a violation of the Confrontation Clause is a question of law, which we review *de novo*. *Langley v. State*, 421 Md. 560, 567 (2011); *see also Snowden v. State*, 156 Md. App. 139, 143 n.4 (2004), *aff'd*, 385 Md. 64 (2005) ("We . . . apply the *de novo* standard of review to the issue of whether the Confrontation Clause was violated in this case."). The "Confrontation Clause does not prevent a trial judge from imposing limits on cross-examination." *Pantazes v. State*, 376 Md. 661, 680 (2003). The scope of cross-examination is "within the sound discretion of the trial court." *Id.* at 681. We therefore review restrictions on the scope of cross-examination for an abuse of discretion, which requires a determination of whether the limitations "inhibited the ability of the defendant to receive a fair trial." *Id.* at 681–82. However, trial courts have no discretion to "apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature." *Wilson-X v. Dep't of Hum. Res.*, 403 Md. 667, 675 (2008); *see also Sexton v. State*, 258 Md. App. 525, 541–42 (2023) (stating that even under an abuse of discretion standard "the circuit court's discretion is tempered by the requirement that the court apply the correct legal standards") (internal quotations and citation omitted).

C. Analysis

The Confrontation Clause provides defendants with a right "to be confronted with the witnesses against [them]." U.S. Const. amend. VI.; *see also* Md. Const. Decl. of Rts. Art. 21 ("That in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath . . . ."). Central to this right is the opportunity to cross-examine witnesses. *Pantazes*, 376 Md. at 680; *see also Davis v. Alaska*, 415 U.S. 308, 316 (1974)

(stating that "[c]ross examination is the principal means by which the believability of a witness and the truth of his testimony are tested"). As a result, a criminal defendant's due process rights are violated when the cross examination of a government witness has been unreasonably limited. *United States v. Cardillo*, 315 F.2d 606, 611 (2d Cir. 1963).

However, the right to cross examination "is not boundless." *Pantazes*, 376 Md. at 680. Trial courts may place reasonable limits on cross examination and the defendant's rights may "bow to accommodate other legitimate interests in the criminal trial process." *Id.* at 681 (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)). Despite the trial court's right to impose these limits, "[o]nly when defense counsel has been "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness, is the right of confrontation satisfied." *Hall v. State*, 233 Md. App. 118, 133 (2017) (quoting *Martinez v. State*, 416 Md. 418, 428 (2010)).

The Appellant argues the *Cardillo* standard controls the trial court's decision on whether or not to strike Ms. Kelly's testimony. *United States v. Cardillo*, 316 F.2d 606 (2d Cir. 1963); *see also Thomas v. State*, 63 Md. App. 337, 345–46 (1985) (citing the same standard). In *Cardillo*, the Second Circuit created categories to help determine whether cross-examination has been unreasonably limited. 316 F.2d at 611. In that case, a witness asserted their Fifth Amendment privilege against self-incrimination. *Id.* at 610. The court wrote "a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters

about which the witness testified on direct examination." *Id.* at 611. The first category, where the privilege is invoked for "purely collateral matters," "there is little danger of prejudice to the defendant" and the testimony should not be stricken. *Id.* The second category, where the privilege is used to "preclude[] inquiry into the details of [their] direct testimony," creates a "substantial danger" to the defendant and therefore the testimony "should be stricken in whole or in part." *Id.* The third category would be when the answer is "connected solely with one phase of the case" and a partial striking might suffice. *Id.*

The United States Court of Appeals for the Fourth Circuit has stated that "striking the entire testimony is a drastic remedy and is not to be lightly done." *United States v. Curry*, 993 F.2d 43, 45 (4th Cir. 1993). The court there said it might be appropriate "if the refusal to answer frustrates the defendant's ability 'to test the credibility of the witness and the truthfulness of his earlier testimony.'" *Id.* (quoting *Lawson v. Murray*, 837 F.2d 653, 656 (4th Cir. 1988)).

The issue here is which *Cardillo* category Ms. Kelly's refusal to answer questions falls into. We first note that this case differs from the typical application of *Cardillo*, which usually involves the assertion of the Fifth Amendment privilege not to testify by a witness, preventing the defendant from properly cross-examining them. *See, e.g.*, *Thomas v. State*, 63 Md. App. 337, 346 (1985) (holding that the witness asserted his Fifth Amendment privilege as to collateral matters so there was no violation of the Confrontation Clause). Instead, this is a case where the State's expert refused to answer a cross examination question from the Appellant.

There are few cases where an expert witness refused to answer cross-examination questions but none in Maryland. The Appellant cited *People v. Price*, 821 P.2d 610 (Cal. 1994). In *Price*, the defense proposed an expert on prison gangs, and he had opinions about the gang involved in the specific case based on interviews with members. *Id.* at 664. The expert would not reveal the names of the AB members since he had not obtained their permission. *Id.* Since he would not disclose his sources, the prosecution could not effectively cross-examine him, and the court declined to admit the expert's testimony as a result. *Id.* The Supreme Court of California ruled there was no error in the trial court's decision. *Id.* The court asserted that "[i]f a witness frustrates cross-examination by declining to answer some or all of the questions, the court may strike all or part of the witness's testimony." *Id.* Since the trial judge knew that the witness was going to refuse to answer questions about the sources for his opinion, the court properly declined to admit the testimony in the first place. *Id.*

The State, in a similar vein, found *New York v. Quackenbush*. 44 A.D.2d 736 (1974). In that case, the defendant was alleged to have sold LSD to an informant. *Id.* at 736. The state had a chemical expert who performed four tests to determine the chemical composition of the pill. *Id.* The witness refused to reveal how two of the tests were conducted or their results. *Id.* The trial court had denied the defendant's motion to strike the expert. *Id.* The appellate court reversed because the state's case "was premised entirely upon the identity of the drug as LSD" and the proof offered was insufficient to show the pill was LSD. *Id.* at 736–37.

This case differs from the experts' refusals to answer questions in *Price* and *Quackenbush*. The unanswered questions in *Price* and *Quackenbush* went directly to the facts and data relied upon for the experts' conclusions in their cases, which would be central to their direct examination testimony and likely central to the cross examinations. Here, the unanswered question went towards a hypothetical that was not central to the conclusion Ms. Kelly provided about the source of the DNA collected. The Appellant's hypothetical question was "if a person held ejaculate in their mouth and than [sic] spit it out that could lead to a person's DNA in a sample?" At no point did Ms. Kelly, on direct, try to testify to *how* any genomic material ended up in the containers that she tested. Instead, she testified to the tests that she performed and her conclusion that the source of the material was the Appellant, but did not take it a step further to discuss the activity that may have resulted in that material being present. Ms. Kelly was forthcoming on questions about her data and sources and testing process, issues that were central to her direct examination testimony, but did not answer a question that exceeded the scope of her direct examination that asked about the activity that led to DNA being present.

In looking at the *Cardillo* categories, this case most neatly falls into the category of the question falling into a "collateral matter" based on the specific limited framing of Ms. Kelly's testimony. The Appellant asked a question about the "collateral matter" of DNA activity while Ms. Kelly's direct examination testimony focused on the source of DNA. As a result, as the State pointed out, if the Appellant wanted to discuss the possibility of saliva being present or not present in the containers and what that may mean for the activity that resulted in the found DNA, he was free to call his own DNA expert to testify to this point.

This is not to say that Ms. Kelly's actions were perfect. As Judge Wilson pointed out in making his ruling, Ms. Kelly's testimony was "bizarre." Judge Wilson said that "[i]t would seem to the court that you are qualified to make that answer or to give an answer to [the Appellant's question.]"[6] As a result, Judge Wilson instructed Ms. Kelly to answer the question, which she still refused to do. After a discussion of the meaning of activity levels, Judge Wilson denied the Appellant's motion to strike her testimony and instead clarified "that her expertise is in the testing of submitted samples and determining DNA profiles, as opposed to the broader qualification as an expert in the field of serology and DNA testing." He then clarified that she was permitted not to answer the question, but it would affect the weight of her testimony in the Court's consideration.

Ms. Kelly's refusal to answer did not frustrate "the defendant's ability to test the credibility of the witness and the truthfulness of his earlier testimony," which the Fourth Circuit said was an appropriate reason to strike testimony. *Curry*, 993 F.2d at 45 (internal quotation and citation omitted). Instead, Ms. Kelly's actions heavily impacted the weight of her testimony, as Judge Wilson said he was "unimpressed" with the State's investigation and confused by the lack of testing. As a result, his ruling relied on testimony and other evidence beyond the State's forensic testimony. As the factfinder, Judge Wilson was

[6] We also acknowledge that hypothetical questions are a proper mode of examination for expert witnesses. *Williams v. Dawidowicz*, 209 Md. 77, 87 (1956) ("If the expert opinion is reasonably calculated to assist the jury, and not to confuse it, such testimony is admissible, in the sound discretion of the trial court, and such opinion may properly be elicited by a hypothetical question."). Here, the Appellant had a proper mode of questioning to an expert, but the expert contended that it was outside the scope of her expert testimony.

permitted to make these determinations of credibility and weigh the evidence based on what he observed in trial. Rather than striking all of Ms. Kelly's testimony, Judge Wilson permitted her testimony on the tests of the submitted samples and otherwise discredited her testimony. We will not hold that Judge Wilson abused his discretion in making these determinations. As a result, we hold that the Appellant's Confrontation Clause Right was not violated in this case.

The Appellant also argued that the trial court abused its discretion by not using the *Cardillo* standard explicitly in his ruling. Judge Wilson did not explicitly cite or reference *Cardillo* in his ruling. Despite this, judges are presumed to know the law and apply it properly. *State v. Chaney*, 375 Md. 168, 179–81 (2003). The Appellant has the burden to rebut the general presumption of regularity in the trial court's proceedings. *Id.* at 184 (quoting *Bradley v. Hazard Technology Co.*, 340 Md. 202, 206 (1995)); *see, e.g.*, *Williamson v. State*, 284 Md. 212 (1979) (finding error when the trial court refused to consider precedent about suspending part of a life sentence); *Sanders v. State*, 105 Md. App. 247, 256–57 (1995) (finding the trial court was motivated by impermissible considerations in sentencing when he chose to follow a prior judge's sentence). As we discussed above, the trial court properly did not strike Ms. Kelly's testimony given that it fell into the third *Cardillo* category. The trial court here did not misstate the law or expressly refuse to follow established precedent.

Even if the trial court did not apply the *Cardillo* standard it should not matter because the trial court's decision was the right outcome. The Maryland Supreme Court has repeatedly said:

> [W]here the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm. In other words, a trial court's decision may be correct although for a different reason than relied on by that court.

Robeson v State, 285 Md. 498, 502 (1979); *see also State v. Sewell*, 463 Md. 291, 316 n.7 (2019) (citing same). Therefore, even if the trial court did not apply the *Cardillo* standard, as we have applied it here, the trial court properly exercised its discretion in not excluding Ms. Kelly's testimony, but instead weighing her responses on cross examination towards her credibility.

Sufficiency of the Evidence

A. Parties' Contentions

The Appellant argues that the State failed to prove a lack of consent, which is required for a fourth-degree sexual offense or second-degree assault conviction. The Appellant argues the record did not support a lack of consent. The Appellant argues there was no evidence of any threats or subsequent verbal or physical resistance by F.A. and said that even if F.A. was scared of the Appellant, she did not provide a basis for that fear. Therefore, the Appellant argues there was insufficient evidence of lack of consent.

The State argues the Appellant overstated what evidence is required to show a lack of consent. The State says that proof of force or even a subjective fear of physical harm is not required, but instead the "controlling and abusive relationship and the resulting power imbalance between a victim and her attacker" constitutes "aggravating conduct" that puts the victim in fear of resisting. Further the State argues that there was sufficient evidence to show a lack of consent based on the Appellant's use of force to commit the sexual offense

and F.A.'s testimony of her fear. Therefore, the State argues they showed sufficient evidence to show a lack of consent and there was sufficient evidence to sustain the convictions.

B. Standard of Review

In reviewing whether the evidence was sufficient in an action tried without a jury "an appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). When the legal sufficiency of evidence underlying a conviction is challenged, the question before this Court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Taylor v. State*, 346 Md. 452, 457 (1997) (quoting *Jackson v. Virginia*, 443 U.S. 307, 313 (1979)). It is not our role to measure or weigh the credibility of the evidence—we are only concerned with "[w]hether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Id.* at 465 (citations omitted). "We give due regard to the [fact finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *State v. Suddith*, 379 Md. 425, 430 (2004) (quoting *State v. Smith*, 374 Md. 527, 533–34 (2003)) (internal quotations omitted).

C. Discussion

The Appellant is arguing there was insufficient evidence for his convictions of second-degree assault and fourth-degree sexual offense. A conviction for battery variety second-degree assault "requires legally sufficient proof that the perpetrator intended to cause harmful or offensive contact against a person *without that person's consent* and without legal justification." *Elias v. State*, 339 Md. 169, 183–84 (1995) (emphasis added); *see also Lewis v. State*, 263 Md. App. 631, 647 (2024), *reconsideration denied* (Dec. 30, 2024) (quoting *Nicolas v. State*, 426 Md. 385, 403 (2012)) ("[T]he battery variety of second-degree assault 'is committed by causing offensive physical contact with another person.'"). Sexual offense in the fourth-degree bars someone from engaging in "sexual contact with another without the consent of the other." Md. Code, Crim. Law § 3-308(b)(1).[7] For a fourth-degree sexual offense conviction, the State needs to prove a lack

[7] In *State v. Frazier*, the Supreme Court of Maryland held that "the fourth-degree sexual offense must merge with second-degree assault under Maryland merger law" because their elements are identical, except for the sexual offense act requiring that the assaultive conduct be sexual in nature. 469 Md. 627, 645 (2020). Then in 2023, the legislature amended the fourth-degree sexual offense statute with an anti-merger provision. Acts 2023, c. 730, § 1 (effective October 1, 2023). The statute now has a section stating:

> (e) (1) Unless specifically charged by the State, a violation of this section may not be considered a lesser included crime of any other crime.
> (2) A sentence imposed under this section may be imposed separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation of this section.

Md. Code, Crim. Law § 3-308(e) (effective October 1, 2023). Based on the newly amended § 3-308(e), the Appellant's convictions (as sentencing took place in January of 2024 after this statute was in place) for both second-degree assault and fourth-degree sexual offense will not merge. While this statute specifically impacts sentencing these crimes, it does not displace the *Frazier* court's analysis of the overlap of the elements of second-degree assault and fourth-degree sexual offense.

of consent. *Perez v. State*, 201 Md. App. 276, 284–85 (2011); *see also Martin v. State*, 113 Md. App. 190, 241 (1996) ("Each of the four degrees of a sexual offense expressly requires that the prohibited sexual act or sexual contact be 'against the will and without the consent of the other person.'").

There is no dispute that the Appellant came into physical contact with F.A., and that his action of putting his penis into her mouth was sexual. The Appellant does dispute whether there was a lack of consent to that action. "Due process requires that the element of lack of consent actually be proved by legally sufficient evidence." *Travis v. State*, 218 Md. App. 410, 428 (2014) (analyzing consent in the context of the defendant raping an acquaintance who was asleep at the time). Lack of consent may be proved automatically based on the "status of the victim, as one unable to give consent or to give legally competent consent." *Id.* at 467.[8] "For the conscious and competent victim, mere passivity, as we have

[8] Maryland law was recently updated to state that "the existence of consent, lack of consent, or withdrawal of consent shall be determined based on a totality of the circumstances, including the words and conduct of the victim and the defendant." Md. Code, Crim. Law § 3-301.1(b)(1) (effective October 1, 2024). The statute reads, in part:

> (a) In this subtitle, "consent" means the clear and voluntary agreement by an individual to engage in vaginal intercourse, a sexual act, or sexual contact.
> (b) In this subtitle:
> (1) the existence of consent, lack of consent, or withdrawal of consent shall be determined based on a totality of the circumstances, including the words and conduct of the victim and the defendant;
> (2) consent may be withdrawn before or during vaginal intercourse, a sexual act, or sexual contact;
> (3) the lack of consent may be communicated through words or conduct;

stated, is not enough. Some at least modest verbal or physical resistance must be shown by a victim or some additional or aggravating conduct on the part of the predator must be shown that either overcomes resistance or puts the victim in reasonable fear of resisting." *Id.* at 466; *see also id.* at 428 ("The law looks for express negation or implicit negation as evidenced by some degree of physical resistance or an explanation of why the will to resist was overcome by force or fear of harm."). We previously stated how there is "a wide difference between consent and a submission to the act. Consent may involve submission, but submission does not necessarily imply consent. Furthermore, submission to a compelling force, or as a result of being put in fear, is not consent." *State v. Rusk*, 289 Md. 230, 242 (1981) (quoting *Hazel v. State*, 221 Md. 464, 469 (1960)).

Turning to this case, the trial court found that the testimony of F.A. was credible. In *Travis*, we wrote that "[a]ll that matters at this juncture is that the factfinding judge believed the victim's story." *Travis*, 218 Md. App. at 423. "Appellate concern is not with what **should** be believed, but only with what **could** be believed." *Id.* (emphasis in original). Therefore, we look at F.A.'s testimony to determine if her testimony provided sufficient facts to determine she did not consent to the sexual actions.

> . . .
> (5) submission as a result of fear, threat, or coercion does not constitute consent if the individual alleged to have performed the act in violation of this subtitle knows or reasonably should know that the victim would submit as a result of fear, threat, or coercion[.]

Md. Code, Crim. Law § 3-301.1. This statute became effective while this case was on appeal and was not in effect at the time of the Appellant's offense.

F.A. was conscious and competent and there was an absence of verbal or physical resistance on her part. F.A.'s testimony showed that her actions were both "submission to a compelling force" and the "result of being put in fear," which both meant her actions were not performed with consent. *Rusk*, 289 Md. at 242. For submission to a compelling force, F.A.'s described the Appellant using a "hard grasp" to push her head into his neck to make her kiss it. Then F.A. described how the Appellant was "putting [her] on [her] knees" then "put his hands on [her] head" before he put his penis into her mouth. The facts sufficiently showed that these actions of the Appellant "putting" F.A. into position was submission to the Appellant's compelling force.

Regarding F.A.'s fear, there was testimony that she did not say no to the Appellant because she was "scared" of him. F.A. had testified to a history of abuse against her and her sisters that made her "scared of [the Appellant] when he got irritated or mad." The fear testified to by F.A. was the kind that a jury could conclude "would well nigh render her mind incapable of continuing to resist." *Rusk*, 280 Md. at 243. Additionally, F.A. testified that as the daughter of the house "[she] had to do what was asked, [she] had to respect [her] parents." This deference to the Appellant as "the head of the house" furthered F.A.'s fear.[9]

[9] The State argued that the power imbalance between the assailant and his victim is an important factor to consider. The State points to another section of the sexual offense in the fourth-degree statute that prohibits sexual acts from persons in a position of authority against minors. Md. Code, Crim. Law § 3-308(c). The statute limits "[p]erson in a position of authority" to educational figures in schools like principals, teachers, and coaches. *Id.* at § 3-308(a)(2)(ii). While those categories of persons in a position of authority do not specifically apply to a father-daughter relationship specifically, they show evidence of an intent by the legislature to look at the power dynamic between the assailant and the victim for sexual offenses. The evidence shown at trial was that the Appellant was "the head of

This fear was compounded by F.A.'s inability to go to a safe alternative location, while she lived "in the middle of nowhere" with no nearby trusted neighbors. Her prior attempts to report these incidents to her therapist went nowhere as well.

Even though the Appellant did not threaten F.A. with imminent physical harm, the fear of imminent physical harm is not required to show the fear needed for lack of consent. *See Perez v. State*, 201 Md. App. 276 (2011). In *Perez*, the 14-year-old victim was digitally penetrated by her stepfather after he said he would throw away a positive drug test if she cooperated and threatened to tell the victim's mother she was not a virgin if she did not. *Id.* at 278. The victim "decided to let [the defendant] test her virginity for fear of getting into trouble with her mother or police." *Id.* After the defendant began his digital penetration of her vagina, the victim told him to stop multiple times and then pulled away and left after he refused. *Id.* at 278–79. The court found that the victim's testimony "was more than sufficient to permit a jury to find that she did not consent to the digital penetration." *Id.* at 286.[10] The court wrote that the "jury clearly chose to credit [the victim's] testimony that she was threatened or coerced into submitting to the penetration" based on her fear of getting into more trouble. *Id.* at 286–87.

the house" and in a position of authority within the household that would act as an additional coercive force against F.A.'s free will to consent.

[10] The primary issue on appeal was whether the trial court erred in giving an additional jury instruction about consent, where the court provided the response during deliberations: "Consent means actually agreeing to the act, rather than merely submitting as a result of threats or coercion." *Perez*, 201 Md. App. at 281. The court found that the jury instruction was an accurate rendition of Maryland law. *Id.* at 286.

Perez shows that the fear of harm required to show a lack of consent does not need to be a fear of physical harm or imminent harm. In *Perez*, the victim was afraid of her stepfather sharing the results of a failed drug test and telling her mother she was not a virgin, neither of which were physical harms and neither of which were imminent at the time of the threatened penetration. This testimony of F.A.'s fear was comparable the fear we found sufficient in *Perez*. Looking at the evidence in the light most favorable to the State, the factfinder could find that the victim, F.A. was threatened or coerced into submitting based on her fear of getting into more trouble. F.A. clearly testified that she was afraid of her father and therefore that fear prevented her from willingly consenting to the sexual contact.

Based on both the force that the Appellant used and the fear described by F.A., she did not consent to the Appellant's actions. Therefore, based on the evidence presented, there was sufficient evidence of a lack of consent. As a result, there was sufficient evidence for the convictions for second degree assault and fourth degree sexual offense.

CONCLUSION

Accordingly, we affirm the judgment of the Circuit Court for Queen Anne's County.

JUDGMENTS OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.