Circuit Court for Baltimore City
Case No. 117289007

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2931

September Term, 2018

DONTE OAKLEY

v.

STATE OF MARYLAND

Nazarian,
Beachley,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: June 5, 2020

After a jury trial in the Circuit Court for Baltimore City, Donte Oakley was convicted of second-degree rape, second-, third-, and fourth-degree sex offenses, and second-degree assault. The court sentenced him to two enhanced sentences of life imprisonment on the second-degree rape and second-degree sex offense convictions, and to a consecutive twenty years for the remaining offenses.

On appeal, Mr. Oakley alleges several errors during trial and sentencing. The State disputes the trial errors, but agrees that the life sentence for second-degree sexual offense and the sentences for third- and fourth-degree sexual offense and second-degree sexual assault should be vacated. We affirm the convictions, vacate the sentences other than the life sentence for second-degree rape, and remand for resentencing on the second-degree sexual assault conviction.

I. BACKGROUND

On September 19, 2017, Mr. Oakley was charged with second-degree rape, second- , third-, and fourth-degree sex offenses, and second-degree assault. A jury trial was held between August 27 and 31, 2018 and the jury convicted Mr. Oakley of all offenses. After sentencing, he filed a timely notice of appeal. Although Mr. Oakley does not challenge the sufficiency of the evidence underlying his convictions, his contentions on appeal require us to recount the relevant portions of the trial testimony. *See Goldstein v. State*, 220 Md. 39, 42 (1959) ("To understand the contentions made, it is necessary to relate some of the background of the case."); *Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

On the evening of September 9, 2017, and into the early morning hours the next day, Mr. Oakley and V.S. attended a party at a friend's house in Baltimore City. They did not know each other beforehand. At the party, a sexual encounter occurred between them. The dispute at trial centered around whether the encounter was consensual. Ms. S testified that the encounter was not consensual, and that the incident unfolded in the following way:

> [MS. S]: So I'm in the bathroom. I'm on the toilet, you know, pants all the way down to damn near my ankles, using the bathroom. I was taking literally a dump and [] urinating or whatever, urinating and defecating.
>
> Like I said, I'm in my own little world, got my eyes closed, just, like I said, in my own mind, enjoying the atmosphere[.]
>
> [THE STATE]: Okay.
>
> [MS. S]: [Enjoying] the overall atmosphere. And before anything, I–before I could really even finish using the bathroom, I hear something. I ain't know what it was because, like I said, you know, music was playing. It was a lot of people still there. Didn't know really what it was.
>
> And before I could open my eyes, what's his name, Mr. Oakley ran–rushed through the door, shoved his penis in my–in my mouth, shoved his penis in my mouth, forced me to give him fellatio.

Then she testified that Mr. Oakley pushed her to the bathroom floor and raped her:

> [THE STATE]: Now, just to recap, you said that your pants were down around your ankles and he put you to the floor. Now, did he–
>
> [MS. S]: No, he knocked me to the floor.
>
> [THE STATE]: Knocked you to the floor.
>
> [MS. S]: Yes.
>
> [THE STATE]: Did you experience any sort of pain when he knocked you to the floor?
>
> [MS. S]: Yes. . . . Shoulder, my arm, my legs. . . .

***

> [THE STATE]: . . . after you were down on the ground, what happened after you were on the ground, after he put you on the ground?
>
> [MS. S]: Um, he shoved his penis in my vagina, in this old dyke, lesbian vagina.
>
> [THE STATE]: All right. What happened next?
>
> [MS. S]: And I was bleeding. [] I was on the floor. And like I said, I had–it was like an out-of-body experience because I'm not used to being in no type of predicament, definitely not with ever a male or any female. I'm not ever been in no type of predicament like that. I made sure–you know, you recheck and recheck [] your space and who you're around. . . .
>
> [THE STATE]: Okay. All right. So the next question would be do you remember whether he used a condom?
>
> [MS. S]: No, I do not.
>
> [THE STATE]: All right. Now, once he had penetrated your vagina with his penis, what happened?
>
> [MS. S]: I was done. I was done.

After the encounter concluded, Mr. Oakley left the bathroom:

> [THE STATE]: Okay. So at some point he left, is that true?
>
> [MS. S]: Yes, he did.
>
> [THE STATE]: All right. What happened after he left?
>
> [MS. S]: When he left, I still was on the floor. And like I said, I was on the floor like, oh, my God, like did this–did this happen to me? This person shove a dick in my mouth, throw me on the floor, rape me, like–and I got to go downstairs or got to tell some–I got to tell somebody. My mind was just like so crazy because it was–like I said before–
>
> [THE STATE]: Okay. So . . . What, if anything, did you try to do . . . after he left?
>
> [MS. S]: [] when I got myself and my mind and my body and my soul and my spirit together, up off the floor, feeling crushed, hurt, abused, misused, when I got up off this floor, it was a table full of bleach wipes. I wiped my face, my mouth,

> my vagina out, bleeding, and I'm just sitting there like, oh, my God.
>
> And I kept the wipes with me. I kept those bleach wipes with me, but I threw the bloody ones in the little trash can, and I'm like–and I'm like just getting myself together, like, oh, my God, like I just got raped.

And further details emerged during cross-examination:

> [DEFENSE COUNSEL]: You said he knocked you to the floor?
>
> [MS. S]: I am sitting on the toilet. He shoved his penis in my mouth, threw me to the floor. My pants are around my ankles. Couldn't kick . . . couldn't do none of that because he had my shoulders and threw me to the floor. He was on top of me.
>
> [DEFENSE COUNSEL]: When he got on top of you, did you struggle?
>
> [MS. S]: Definitely was a struggle. [] My pants was already down, my vagina was already exposed, and he shoved his dick . . . in my vagina.
>
> [DEFENSE COUNSEL]: Did [] you yell?
>
> [MS. S]: They couldn't hear me. The music was playing loud, like I said. . . . Couldn't nobody hear me. He [] told me
>
> [THE COURT]: The question was–
>
> [MS. S]: [] to shut the fuck up.
>
> [THE COURT]: [] the question was–
>
> [MS. S]: Yes, I did.
>
> [THE COURT]: [] did you yell?
>
> [MS. S]: Yes, I did. He told me to shut the fuck up. . . . and he was covering my mouth. Shut the fuck up. Turned my head to the side. Shut the fuck up. Had his arm lunged into my neck while he was fucking me, while he was shoving his dick in and out of my vagina and raping me.

Mr. Oakley maintains that the encounter was consensual, and at trial, he called several witnesses to support that position. The defense called Mr. Oakley's friend, Shaynell

Crosby, who attended the party with Mr. Oakley and testified that she "observed [Ms. S] dancing with Donte. . . . interacting, [] talking, [] and [] saying that he was cute." Defense counsel also called the host of the party, Tiana Nelson, who testified that she saw Ms. S after she emerged from the bathroom:

> [DEFENSE COUNSEL]: Did you see her again at the party? At this point, after you've seen Donte coming down the stairs, did you see [Ms. S] again?
>
> MS. NELSON: Yes. She was sitting at the bottom of the steps. . . .
>
> [DEFENSE COUNSEL]: When you didn't see them, did you do anything at that point? Did you–
>
> MS. NELSON: Yeah, I told him that he had to leave.
>
> [DEFENSE COUNSEL]: Okay. Did you, yourself, have any contact with [Ms. S] around the time that Donte–
>
> MS. NELSON: No, but I asked her was she okay. She told me yeah.
>
> [DEFENSE COUNSEL]: Was she angry?
>
> MS. NELSON: No. She was sitting at the bottom of the steps, and when she got up, she was like where am I? And I was like what? What you mean?
>
> [DEFENSE COUNSEL]: Did anything else happen at that point?
>
> MS. NELSON: So everybody was picking their stuff up to leave. She was the last to leave out, and she asked me a question. She said [] is he related to a certain person that has like HIV, and I was like no. And she was like okay. And it was like a relief for her, and she just went on about her business. She didn't give me no indication that she was raped or nothing.

Katrina Wright, another partygoer, also testified about what happened after Mr. Oakley came downstairs:

> [DEFENSE COUNSEL]: What happened after [] he came downstairs and you all were in conversation, what happened

> after that? . . .
>
> MS. WRIGHT: We was just conversating, laughing, and saying everything is okay, like, you know, it happens, you know. We have those oops moments, you know. It's human, you know. We all friends, you know. Come chill with us.
>
> Because when I went upstairs to use the bathroom after he came down, I seen [Ms. S] sitting up on the steps. And when I came back from using the bathroom, I was like–I came downstairs to Ms. Tiana and the rest of them, and I said she on the steps, you all. She heard everything we said. . .
>
> [DEFENSE COUNSEL]: Then what happened after that?
>
> MS. WRIGHT: Then she came down the steps. [Ms. S] came down the steps after I let everyone know that she was on the steps and she heard everything we was saying. She came down the steps like, Ms. Tiana, when you going to have another motherfucking party like this? . . .
>
> When are you going to have another motherfucking party like this? I had fun. This motherfucking party was fun, and all this. So we –
>
> [DEFENSE COUNSEL]: When she came downstairs, was she angry?
>
> MS. WRIGHT: No. This is how she came down (indicating). She came downstairs like, oh, when you going to have another motherfucking party? I had a ball. We having fun. This chick was fun and all this. Like that's how it was.

Ms. S testified that the next day she decided to seek medical treatment because her "vaginal area was fucked up and hurting." She testified that she went first to Harbor Hospital, where they "did an overall regular exam." She was then escorted by police officers to Mercy Medical Center, where a nurse performed a sexual assault examination where oral and genital swabs were taken. The nurse testified that she observed two abrasions on Ms. S's knee and one on her right elbow. She also observed that Ms. S had "a reddened area across the bottom of her cervical os," active bleeding "at the left side of her

cervical os," and "multiple linear abrasions from her posterior fourchette to her fossa navicularis," which are parts of the vagina "right below the hymen." The nurse testified further that Ms. S was not menstruating at the time of the exam.

On September 13, 2017, Detective Amy Strand took Ms. S's statement at the Baltimore City Police Department. Ms. S provided Detective Strand with a group photograph from the party that included Mr. Oakley. Detective Strand cropped the photo and, using a name and description provided by Ms. S, "created a looking-to-identify flier and circulated it through the Baltimore City Police Department only." Through that, Detective Strand was provided "a full name with a photo, and a height and a weight." She used that photo in a photo array she assembled. Ms. S identified Mr. Oakley in the photo array. Detective Strand then obtained a search and seizure warrant to collect DNA from Mr. Oakley via oral swabs.

The State called a forensic analyst to testify about the results of the DNA analysis. The analyst testified that the serologist identified sperm from the vagina and vaginal cervical swabs. The analyst testified further that the "sperm fraction yielded a single source male DNA profile" and "Donte Oakley [was] the source of the profile."

After three days of trial, the jury found Mr. Oakley guilty of the following offenses: (1) second-degree rape, (2) second-degree sex offense, (3) third-degree sex offense, (4) fourth-degree sex offense, and (5) second-degree assault. He was sentenced separately for each of the crimes. He received concurrent, enhanced sentences of life imprisonment for both second-degree rape and second-degree sex offense. For third- and fourth-degree

sex offense, he received separate sentences of twenty years that run concurrently to each other but consecutively to the life sentence. For second-degree assault, he received a sentence of ten years that runs concurrently with his sentences for third- and fourth-degree sex offenses.

Mr. Oakley noted a timely appeal. We supply additional facts as necessary below.

II. DISCUSSION

On appeal, Mr. Oakley asserts numerous errors at trial and sentencing.[1] We have grouped them into trial errors and sentencing errors and address them in that order. For

[1] Mr. Oakley framed his Questions Presented as follows:

1. Did the trial court err or abuse its discretion in admitting evidence that a warrant had issued against Appellant on the basis of a judicial finding of probable cause?
2. Did the trial court err or abuse its discretion in permitting prosecutorial closing argument which denigrated defense counsel, appealed to the passions and prejudices of the jury, and was based on facts not in evidence?
3. Did the trial court err or abuse its discretion in permitting the complaining witness to characterize Mr. Oakley as "sick," "psycho," and "sadistic"?
4. Did the trial court err or abuse its discretion in excluding evidence that tended to show that the complaining witness had consented to the sexual encounter with Appellant?
5. Is Appellant entitled to have the sentences for assault and third and fourth degree sexual offenses vacated under the doctrine of merger, and did the court impose illegal sentences for third and fourth-degree sexual offenses?
6. Did the trial court err in admitting hearsay evidence during the State's case in rebuttal?
7. Was Appellant erroneously subjected to two life sentences?

the reasons we explain below, we affirm the convictions, vacate the sentences other than the life sentence for second-degree rape, and remand for resentencing for second-degree sexual assault.

A. Allegations of Trial Error

Mr. Oakley challenges five decisions the court made during his trial. He argues *first* that the trial court abused its discretion when it allowed Detective Strand to testify that she obtained his DNA pursuant to a search warrant issued on probable cause. *Second*, he contends that the trial court abused its discretion when it allowed the prosecutor to make improper comments during closing argument. *Third*, he claims that the trial court abused its discretion when it allowed the victim to characterize him as "sick," "psycho," and "sadistic" during her testimony. He argues *fourth* that the trial court abused its discretion in limiting the testimony of defense witnesses, he says, whose testimony would have proven that Ms. S consented to the sexual encounter. And *fifth*, he argues that the trial court abused its discretion by allowing Detective Strand to testify that Ms. Nelson revealed that Ms. S told her that Mr. Oakley tried to rape her. As to all of these arguments, we hold that the trial court did not abuse its discretion, and that even if it did, any errors were harmless.

1. Search warrant testimony

At trial, the State asked Detective Strand about the search warrant she executed to obtain Mr. Oakley's DNA:

> [THE STATE]: Now, what does that mean to have that search warrant to take oral swabs?
>
> [DETECTIVE STRAND]: It's a legal way to obtain his DNA from a judge stating that I have legal right to and probable

> cause based on the case information.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [DEFENSE COUNSEL]: Move to strike.
>
> [THE STATE]: I'm sorry. Maybe I'm–maybe I asked that wrong. What I'm asking is what does that document allow you to do?

Mr. Oakley asserts that "[t]his exchange presents an issue that has not been settled by Maryland law: whether it is prejudicial error for a trial court to permit a prosecutor to elicit testimony that a judge on the basis of a probable cause finding has approved a search warrant for DNA evidence taken from a defendant." He urges us to "join the consensus of out-of-state courts and hold that such prosecutorial conduct is prejudicial error." We decline.

Mr. Oakley offers no authority from Maryland in support of his position, and we haven't found any either. We agree with the State that "[a]lmost all of the cases [cited by Mr. Oakley] involved contraband found as the result of a search warrant executed for the defendant's person or premises and the error was not that a witness testified about the search warrant, it was that the prosecutor misleadingly overstated the significance of the warrant by repeatedly referring to it and eliciting evidence about it." Either way, "considerable leeway is allowed for proof of facts which are not offered as bearing on the dispute, but as details which fill in the background and give it continuity, interest[,] and color." *Weiner v. State*, 55 Md. App. 548, 555 (1983). This evidence is excluded only "if the factual scenario may unduly arouse the jury's emotions of prejudice, hostility[,] or sympathy." *Id.* The fact that there was a search warrant allowing DNA samples to be taken

from Mr. Oakley was not prejudicial to him at trial. He never disputed that a sexual encounter occurred or that DNA testing was appropriate to confirm it, nor does he claim that there was anything improper about the warrant or the way it was executed. The trial court did not err in overruling his objection to this isolated statement about a warrant supported by probable cause.

2. Prosecutor's closing argument

Mr. Oakley takes issue with two comments the State made in closing argument. He asserts that the following comment was improper because it argued facts not in evidence and engaged the passions and prejudices of the jury:

> [THE STATE]: Why would she not tell people? I think that she–the State would submit that there was some embarrassment there. How–you, once again, don't leave your common sense at the door. How many times have you read in the newspaper about women–
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE STATE]: –who have been victims of rape–
>
> THE COURT: Overruled.
>
> [THE STATE] –and what it's like for them and the trauma that they undergo and how they have to think carefully about whether or not they're going to report, and who they're going to report it to because they don't want to be victimized like [Ms. S] was victimized?

He also claims that in another comment by the prosecutor, "the State seriously denigrated defense counsel's ethics without the slightest basis for doing so":

> [THE STATE]: And hiding the ball, trashing the victim is the type of thing that defense attorneys like to engage in–
>
> [DEFENSE COUNSEL]: Objection
>
> THE COURT: Overruled

> [THE STATE]: –and that's why [Defense Counsel] wants you to look at page 6 here.

The trial judge "is in the best position to evaluate the propriety of a closing argument. . . ." *Ingram v. State*, 427 Md. 717, 726 (2012) (*citing Mitchell v. State*, 408 Md. 368, 380–81 (2009)). We don't disturb the ruling at trial "unless there has been an abuse of discretion of a character likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 243 (1995) (*citing Henry v. State*, 324 Md. 204, 231 (1991), *cert. denied*, 503 U.S. 972 (1992)). The trial judge has broad discretion in evaluating the propriety of closing arguments. *See Shelton v. State*, 207 Md. App. 363, 386 (2012).

Attorneys have "great leeway" in making closing arguments. *See Lawson v. State*, 389 Md. 570, 608 (2005); *Degren v. State*, 352 Md. 400, 429 (1999); *Henry*, 324 Md. at 230. That said, prosecutors must "remain within the bounds of the evidence presented at trial and refrain from appealing to the jury's passions or prejudices." *Lawson*, 389 Md. at 608. "When improper comments are made during . . . closing arguments, we give much deference to the trial court in exercising its discretion." *Id.* But when "there are multiple inappropriate statements and the trial court fails to cure the prejudice created by the cumulative effect of those statements, the admissibility of such statements may amount to more than harmless error." *Id.*

Although the prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935). And arguing facts not in evidence during closing

argument "is highly improper." *Fuentes v. State*, 454 Md. 296, 319 (2017). "Courts consistently have deemed improper comments made during closing argument that invite the jury to draw inferences from information that was not admitted at trial." *Spain v. State*, 386 Md. 145, 156 (2005).

Mr. Oakley cites *Lee v. State*, 405 Md. 148 (2008) for the proposition "that it is improper for a prosecutor to communicate to a jury that a conviction is necessary to address a broader crime problem." In *Lee*, the Court of Appeals held the following:

> In asserting that the jurors should consider their own interest and those of their fellow Baltimoreans, and should clean up the streets to protect the public safety of their community, the State clearly invoked the prohibited 'golden rule' argument . . . calling for the jury to indulge itself in a form of *vigilante justice* rather than engaging in a deliberative process of evaluating the evidence.[2]

Id. at 172–73. But the prosecutor's comment in this case did not invoke the "golden rule" argument, nor did it ask jury members to put themselves in the shoes of the victim rather than deliberate as they were charged. The prosecutor's comment about women in the newspaper being victims of rape was an oblique reference to a broad issue, and was not improper.

On the other hand, the prosecutor's comment about defense counsel "hiding the ball" straddled the line. The jury might have viewed it as a generic description of trial tactics, but it readily "could have been interpreted by the jury to mean that defense counsel

[2] A "golden rule" argument is one in which a litigant asks the jury to place themselves in the shoes of the victim, *Lawson v. State*, 389 Md. 570, 593 n.11 (2005), or in which an attorney appeals to the jury's own interests, *Hill v. State*, 355 Md. 206, 214–15 (1999).

suborned perjury or that he fabricated the defense." *Reidy v. State*, 8 Md. App. 169, 173 (1969). It would have been better for the court to have sustained defense counsel's objection.

Even so, after examining whether the error "contribute[d] to the verdict," *Lee*, 405 Md. at 174, we are persuaded beyond a reasonable doubt that the decision was harmless. The Court of Appeals has identified three factors for us to consider in assessing the harmlessness of improper comments at closing argument: (1) the "severity of the remarks"; (2) "the measures taken [by the trial court] to cure any potential prejudice; and (3) "the weight of the evidence against the accused." *Id.* at 165. Not every improper remark mandates reversal—"reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Degren v. State*, 352 Md. 400, 431 (1999) (cleaned up).

The comment made by the prosecutor accusing defense counsel of "hiding the ball," although inappropriate, was unlikely to have misled or influenced the jury to the prejudice of Mr. Oakley. *See Beads v. State*, 422 Md. 1, 8, 10–11 (2011) (holding the prosecutor's comments that "the Defense's specific role in this case is to get their defendants off" and "[i]t is their job, and they do it well, to throw up some smoke, to lob a grenade, to confuse" were inappropriate but did not mislead or influence the jury to the prejudice of the accused). Although the case came down to a credibility battle between Ms. S and Mr. Oakley, her testimony combined with the testimony of Detective Strand and the physical evidence were compelling and tipped the credibility scale strongly in Ms. S's favor. And again, the

inappropriate statement was made only once and not repeated. *Cf. Lawson*, 389 Md. at 608.

3. Ms. S's direct examination

During her direct examination at trial, Ms. S characterized Mr. Oakley as a "sick psycho sadistic person," to the objection of defense counsel:

> [MS. S]: It was . . . so disheartening because, like I said, from that point, I'm trying to find out who this person was. Like I said, didn't know who he was.
>
> So I went through all of my friends, their friend lists, their friends' friends, because I was doing my own detective to find out who he was. Couldn't find him.
>
> But to my own demise, my pictures and my photos and my videos, this **sick psycho sadistic person** was in the photos–
>
> [DEFENSE COUNSEL]: Objection.
>
> [COUNSEL FOR THE STATE]: Okay.
>
> [MS. S]: [] standing behind me.
>
> [THE COURT]: Overruled.

(emphasis added). Mr. Oakley argues that "[b]y overruling the objection, the judge could only have signaled to the jury the propriety of this gross breach of courtroom decorum and fairness to a presumptively innocent accused." Mr. Oakley contends that "the use of such severe pejorative labels is improper as appealing to the passions and prejudices of the jury." But he cites no authority for the proposition that characterizations of the defendant by a *witness* are prejudicial, and the difference between the speaker here and the closing argument cases he does cite matters.

"[T]he conduct of a criminal trial is committed to the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse." *Choate v. State*, 214 Md. App. 118, 151 (2013) (*quoting Bruce v. State*,

351 Md. 387, 393 (1998)). We defer to the trial judge because "[t]he judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able to ascertain the demeanor of the witnesses and to note the reaction of the jurors and counsel to inadmissible matters." *State v. Hawkins*, 326 Md. 270, 278 (1992).

We haven't found, and Mr. Oakley hasn't cited, any authority in Maryland that would have compelled the trial judge to limit or strike Ms. S's testimony in this instance. To be sure, Ms. S was a difficult witness, but the statements came at a difficult point in her testimony, as she described her thought processes and feelings as she looked through her photos to try to identify her assailant. It was not error for the trial judge to allow her to do that. *Cf. Cornwell v. State*, 6 Md. App. 178, 184–85 (1969) (no error for allowing witness to characterize defendant as a "robber"). And a victim's colorful, even over-the-top, description of her alleged assailant is not the same as a lawyer's, and especially a prosecutor's, characterization of a defendant. For one thing, Ms. S's testimony was evidence—she was sworn, and the jury was free to credit and weigh her statements as it saw fit and in line with its ultimate sense of her credibility. In contrast, lawyers' statements and arguments are not evidence. They're argument, and the concern when lawyers characterize a defendant or a witness is that the jury might treat those statements as evidence—and even more so when a prosecutor cloaks such a characterization in official garb. Ms. S's testimony raises no such concerns. In the life of this case, Ms. S was involved in a sexual encounter that was the subject of the prosecution, and her role was to tell the jury what happened and what she perceived. The trial court did not abuse its discretion in

allowing her to fulfill that role.

4. Direct examination of the defense's witnesses

Mr. Oakley argues that the circuit court erred in sustaining the prosecutor's objection when, during his case in chief, his counsel questioned witnesses to "establish that [Ms. S] was flirting, acting flirtatiously, apparently believed that Mr. Oakley was 'cute,' tried to place her tongue in a witness's ear, and was 'talking sexual.'" He says the court erred in sustaining the objections because the testimony was relevant to whether "[Ms. S] consented, or did not consent, to sex with Mr. Oakley." We disagree.

We review the admissibility of evidence for abuse of discretion:

> A trial court is given wide latitude in controlling the admissibility of evidence. We review the trial court's decision under an abuse of discretion standard. Abuse occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law. If the trial court's ruling is reasonable, even if we believe it could have gone the other way, we will not disturb the ruling on appeal.

Taneja v. State, 231 Md. App. 1, 11–12 (2016) (cleaned up).

Maryland Rule 5-401 defines "relevant evidence" as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Relevance is a relational concept. . . . an item of evidence can be relevant only when, through proper analysis and reasoning, it is related logically to a matter at issue in the case, *i.e.*, one that is properly provable in the case." *Taneja*, 231 Md. App. at 11 (*quoting Snyder v. State*, 361 Md. 580, 591 (2000)) (emphasis omitted). Relevant evidence is admissible, and

"[e]vidence that is not relevant is not admissible." Md. Rule 5-402.

Whether Ms. S flirted or acted flirtatiously, believed Mr. Oakley was "cute," placed her tongue in somebody else's ear, or was "talking sexual" has no bearing on whether she consented to the sexual encounter with Mr. Oakley. We see this in the definition of second-degree rape itself: "A person may not engage in vaginal intercourse or a sexual contact with another: (1) by force, or the threat of force, without the consent of the other." Maryland Code (2002, 2012 Repl. Vol., 2019 Supp.), § 3-304(a) of the Criminal Law Article ("CL"). "Subsection (a)(1) . . . deals with an act of sexual intercourse committed on a victim who is both conscious and competent. Such a victim must make a choice: 'Yes, I will' or 'No, I won't.'" *Travis v. State*, 218 Md. App. 410, 428 (2014). And that choice is binary. *Id.* at 430. Ms. S's behavior at other times during the evening didn't bear at all on whether she consented to a sexual encounter with Mr. Oakley—a man she didn't know before—nor does it make any more probable that she said "Yes, I will" in the upstairs bathroom before the sexual encounter ensued.[3] Because her allegedly flirtatious behavior was not relevant to the inquiry under CL § 3-304(a), the trial court did not abuse its discretion in declining to admit testimony about it.[4]

[3] Ms. Nelson testified that Ms. S put her tongue in someone else's ear *after* the sexual encounter occurred. We don't see, and Mr. Oakley doesn't explain, how an action that took place after the sexual encounter occurred makes consent to the earlier sexual encounter any more likely.

[4] The State advances several alternative arguments here. With regard to Ms. S saying that Mr. Oakley was cute and was "talking sexual," the State argues that the trial judge "properly sustained the objection on grounds of hearsay." As for Ms. S acting flirtatiously, the State argues that the trial judge "properly sustained the objection because [the] testimony was both conclusory and not responsive to the question asked." Because we

5. Detective Strand's testimony regarding the interview

During its rebuttal case, the State re-called Detective Strand to testify about her interview with Ms. Nelson about the night of the incident:

> [THE STATE]: Okay. And did Ms. Nelson make any statements to you regarding what, if anything, [Ms. S] said to her that night?
>
> [DETECTIVE STRAND]: Yes.
>
> [THE STATE]: And what did Ms. Nelson tell you that [Ms. S] said to her?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [DETECTIVE STRAND]: I think he tried to rape me.

Mr. Oakley argues that this was hearsay within hearsay evidence not subject to an exception, and thereby inadmissible. The State responds that the statement from Ms. S to Ms. Nelson was admissible "as a prior inconsistent statement to impeach Nelson's testimony that she did not tell Detective Strand about V.S.'s report of rape." We agree with the State.

The evidence offered by the State here was not hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). "In any hearsay analysis, the first step is to identify what the extrajudicial statement was offered to prove."

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conclude that the evidence wasn't relevant, the first step in any admissibility analysis, we do not address the State's other admissibility arguments. *See* Md. Rule 5-402; *Molina v. State*, 244 Md. App. 67, 127 (2019) ("If, however, we determine that evidence was relevant, our review shifts to a consideration of whether the trial court's ruling was a sound exercise of discretion.").

Devincentz v. State, 460 Md. 518, 553 (2018). When a statement is offered to prove its truth, it is inadmissible hearsay. *Id.* But when evidence is offered only to impeach a witness and not as substantive evidence, it is not hearsay. *Id.* at 555. ("We have recognized that use of a statement for impeachment purposes is not hearsay, since only the fact that the statement was made is being offered, not the truth of the statement.") (cleaned up).

At trial, during Mr. Oakley's case-in-chief, the State asked Ms. Nelson on cross-examination whether she made that statement to Detective Strand:

> [THE STATE]: Okay. Now, you said that you talked to a detective from the Baltimore City Police Department. Do you remember when you talked to her?
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> [MS. NELSON]: It was like three days after that.
>
> [THE STATE]: Okay. And you said you don't know who it was, but it was a woman?
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> [MS. NELSON]: It was a woman. She took me downtown.
>
> [THE STATE]: All right. And, now, isn't it true that you told this detective that Ms. S[] told you I think he just tried to rape me?
>
> [MS. NELSON]: No.
>
> [THE STATE]: That's not true?
>
> [MS. NELSON]: That's not true.

The State later elicited testimony from Detective Strand that impeached Ms. Nelson's testimony. We review a decision to allow impeachment evidence for abuse of discretion. *See Thomas v. State*, 213 Md. App. 388, 405 (2013). "An abuse of discretion occurs 'where no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles." *Brass Metal Prods., Inc. v. E-J Enters., Inc.*, 189 Md. App. 310, 364 (2009) (*quoting King v. State*, 407 Md. 682, 697

(2009)). "[W]hether a trial court abused its discretion usually depends on the particular facts of the case and the context in which the discretion was exercised." *King*, 407 Md. at 696 (cleaned up).

Maryland Rule 5-616 permits extrinsic evidence of a prior inconsistent statement to be used for the purpose of impeachment, in accordance with Rule 5-613(b). Rule 5-613 reads as follows:

> **(a) Examining witness concerning prior statement.** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.
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> **(b) Extrinsic evidence of prior inconsistent statement of witness.** Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

From Rule 5-613, the Court of Appeals has derived the following checklist of basic foundational requirements that must be satisfied for a party to offer extrinsic evidence of a prior allegedly inconsistent oral statement of a witness:

> 1. The content of the statement and the circumstances under which it was made, including the person(s) to whom it was made, must be disclosed to the witness who is being impeached before the end of that witness's examination. Rule 5-613(a)(1), (b)(1).
> 2. The witness to be impeached must be given an opportunity

to explain or deny the allegedly inconsistent statement. Rule 5-613(a)(2), (b)(1).

3. The witness must have "failed to admit having made the statement." Rule 5-613(b)(1).
4. The statement must concern "a non-collateral matter"—in other words, the content of the statement must not be "collateral" to the issues at trial. Rule 5-613(b)(2).

Brooks v. State, 439 Md. 698, 717 (2014).

All of the foundational requirements mandated by Rule 5-613 were satisfied here. The first two are easy—the State asked Ms. Nelson about the allegedly inconsistent oral statement during his cross-examination of her, and disclosed both the circumstances of the statement (her interview with Detective Strand), and the person to whom it was made (Detective Strand), and in doing so, gave her the opportunity to explain or deny the statement. The third requirement was also satisfied—Ms. Nelson twice denied making the statement. The fourth requirement was also satisfied. At trial, the defense argued that the sexual encounter between Mr. Oakley and Ms. S was consensual and not rape. The alleged inconsistency in the prior oral statement concerned whether Ms. S told Ms. Nelson that she was raped, and therefore was not collateral to the issues at trial. And finally, the form of the evidence, which was through testimony, was proper here. *See, e.g.*, *Hardison v. State*, 118 Md. App. 225 (1997) (officer's testimony regarding an eyewitness's statement to him was admissible as extrinsic evidence of the witness's prior inconsistent statement). Accordingly, it was not an abuse of discretion to admit Detective Strand's testimony.

B. Sentencing

Mr. Oakley raises a number of challenges to his sentences. He asserts that the trial

court failed to merge the lesser sentences for second-degree assault, third-degree sex offense, and fourth-degree sex offense into second-degree sex offense. He argues as well that the trial court improperly sentenced him to duplicate enhanced sentences for second-degree rape and second-degree sex offense. The State agrees, and so do we.

The doctrine of merger stems from the Fifth Amendment's prohibition against double jeopardy. The Fifth Amendment "prohibits both successive prosecutions for the same offense as well as multiple punishment[s] for the same offense." *Newton v. State*, 280 Md. 260, 263 (1977). "Merger protects a convicted defendant from multiple punishments for the same offense." *Brooks v. State*, 439 Md. 698, 737 (2014). Sentences for multiple convictions must be merged when: "(1) the convictions are based on the same act or acts, and (2) under the required evidence test, the [] offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other." *Id.*

The principal test for determining whether offenses stemming from the same act must merge for sentencing purposes is the "required evidence" test. *Tolen v. State*, 242 Md. App. 288, 305 (2019). Under that test, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision required proof of a fact which the other does not." *Thomas v. State*, 277 Md. 257, 265 (1976) (*quoting Blockburger v. United States*, 284 U.S. 299, 304 (1932)). In other words, "if each offense contains an element which the other does not, there is no merger [] even though both offenses are based upon the same act or acts." *State v. Johnson*, 442 Md. 211, 218 (2015) (*quoting Nicolas v.*

State, 426 Md. 385, 402 (2012)). But if "only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, and where both offenses are based on the same act or acts[,] merger follows." *Id.* (*quoting Nicolas*, 426 Md. at 402).

Both parties agree that Mr. Oakley's sentences for third-degree sex offense, fourth-degree sex offense, and second-degree assault should merge into the sentence for second-degree sex offense. The jury was instructed as follows: that second-degree sex offense required "forced fellatio," third-degree sexual offense required sexual contact coupled with the threat that Ms. S would be subjected imminently to serious physical injury, fourth-degree sexual offense was defined for the jury as sexual contact against the will and without the consent of Ms. S, and second-degree assault was defined as battery. Both parties highlight that it was unclear exactly "what conduct the jury was required to find for these offenses that was distinct from either the touching that was part of the forced vaginal intercourse or the touching that was part of the forced fellatio." So in the face of this ambiguity, "we are constrained to give [Mr. Oakley] the benefit of the doubt and merge his sentence[s] for and conviction of" third-degree sex offense, fourth-degree sex offense, and second-degree assault into second-degree sex offense. *Snowden v. State*, 321 Md. 612, 619 (1991). Accordingly, we vacate Mr. Oakley's sentences for third-degree sex offense, fourth-degree sex offense, and second-degree assault.

With regard to the enhanced life sentences, both parties agree that Mr. Oakley was subject to sentence enhancement under CL § 3-313 because he had been convicted previously of second-degree rape. They concur also that Mr. Oakley should not have been

sentenced to two separate, enhanced terms under that provision for multiple convictions for crimes of violence arising from a single incident. *Williams v. State*, 220 Md. App. 27, 44 (2014), *cert. denied*, 441 Md. 219 (2015). They both ask that we vacate the life sentence for second-degree sex offense, and the State asks that we leave the life sentence for second-degree rape intact. We agree, and remand to the circuit court for non-enhanced resentencing on second-degree sexual offense (into which the other sexual offense charges and the assault charge have now merged). *See Jones v. State*, 336 Md. 255, 265 (1994) (holding that the rule of lenity requires that only one enhanced sentence be imposed for one instance of conduct).

JUDGMENTS OF CONVICTION AFFIRMED. SENTENCES OTHER THAN SENTENCE FOR SECOND-DEGREE RAPE VACATED AND CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR RESENTENCING CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY.