Circuit Court for Prince George's County
Case No.: CT121611X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1607

September Term, 2021

ERNEST WILEY

v.

STATE OF MARYLAND

Graeff,
Zic,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: September 28, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 2013, a jury in the Circuit Court for Prince George's County found appellant, Ernest Wiley, guilty of sex abuse of a minor, second-degree rape, and second-degree assault. The court sentenced him to 25 years, all but 20 years suspended, for sex offense of a minor, a concurrent term of 20 years for second-degree rape, and a concurrent term of 10 years for second-degree assault. On direct appeal, Wiley challenged his convictions based on an allegation that the prosecutor had vouched for the victim in closing argument. This Court rejected the claim and affirmed the judgments. *Wiley v. State*, No. 1174, September Term, 2013 (filed August 5, 2014).

In 2021, Wiley, representing himself, filed a Rule 4-345(a) motion to correct an illegal sentence in which he maintained that his sentence for second-degree assault should have merged with his sentence for second-degree rape because the convictions were based upon "the same act" and nothing at trial distinguished actions constituting second-degree rape from actions constituting second-degree assault. The circuit court summarily denied relief. Wiley appeals that ruling. For the reasons to be discussed, we shall hold that the convictions should have merged for sentencing purposes in this instance and accordingly, we shall vacate the sentence for second-degree assault.

BACKGROUND

Pursuant to an indictment filed in November 2012, Wiley was charged with sex abuse of a minor, second-degree rape, and second-degree assault for an incident alleged to have occurred between September 1, 2004 through December 31, 2004. He was also charged with similar offenses involving the same victim for an incident that allegedly occurred between April 1, 2005 through June 30, 2005. The jury convicted him of the

charges related to the 2004 incident and acquitted him of the charges related to the 2005 incident. Accordingly, our focus is on the convictions related to the 2004 incident and the evidence elicited at trial with respect thereto.

In its brief opening statement, the State informed the jury that Wiley "assaulted and raped a child. The defendant, Ernest Wiley, assaulted and raped [the complainant]."

The evidence at trial established that Wiley's wife was "best friends" with the complainant's mother. When the complainant was 10 years old, she would ride the bus home from school, go into her home and change out of her uniform, and Wiley would then pick her up and take her to his house to stay until her mother returned from work. One day after school, sometime between September and December 2004, the complainant (19 years old at the time of trial), testified that she came home from school and while she was changing her clothes, Wiley entered her bedroom and said that her mother thought she was having sex and that he would show her how it was done. The witness testified that she thought the comment was "strange" because she had "looked at him as a father, so for him to say that was odd." As she went to leave the room, Wiley "pulled [her] back and onto [her] bed, and he pulled [her] pants off, pulled his pants off, and [she] cried, and [she] screamed, and he . . . forced his penis into [her] vagina." She related that, although she attempted to kick and punch him, Wiley had her "pinned down" to prevent her from moving. She further related that Wiley "just kept screwing [her] and screwing [her] until he – until he was done, and he pulled his penis out and ejaculated on [the] floor." She then "just fell to the floor."

The State then proceeded with the following inquiry:

PROSECUTOR: Going to go back for a minute. You indicated that the defendant threw you onto your bed?

WITNESS: Yes, ma'am.

PROSECUTOR: Where was the bed in the room?

WITNESS: It was a twin-size bed. It was longs ways, so it was up against the wall.

PROSECUTOR: It was long ways in the corner of the room?

WITNESS: Yes, ma'am.

PROSECUTOR: You said the defendant through [sic] your – how did he throw you onto the bed?

WITNESS: More like a forceful push.

PROSECUTOR: When you say, 'push,' how did he push you?

***

Stand up, turn around. You want to stand here, show the ladies and gentlemen of the jury how was he pushing you?

WITNESS: That way. (Indicating.)

PROSECUTOR: How did he put his hand on you[;] around your waist?

WITNESS: Yes. (Indicating.)

PROSECUTOR: And he pushed you on the bed?

WITNESS: Yes.

The court's instructions to the jury at the close of evidence included the following:

The defendant is charged with the crime of second degree rape. In order to convict the defendant of second degree rape, the State must prove, first, that the defendant had vaginal intercourse with [the alleged victim].

> Two, that [the alleged victim] was under 14 years of age at the time of the act.
>
> And, three, that the defendant is at least four years older than [the alleged victim].
>
> ***
>
> The defendant, lastly, is charged with the crime of second degree assault. Assault is causing offensive physical contact or physical harm to another person. In order to convict the defendant of assault, the State must prove, first, that the defendant caused offensive physical contact or physical harm to the victim;
>
> Two, that the contact was the result of intentional or reckless act of the defendant and was not accidental;
>
> And, three, that the contact was not consented to by the victim or was not legally justified.

In closing statements, the prosecutor reminded the jury that, "[a]t the beginning of this case, I told you that the defendant had assaulted and raped a child. And now you have heard testimony, very heart-wrenching credible testimony from [the victim] about the act that occurred to her, the rape by the defendant, Ernest Wiley while she was in his care and custody."

In reviewing the testimony, the prosecutor stated: "[The child] just went home to change her clothes out of her blue and white school uniform. The defendant came into her room, forced her, picked her up, pushed her on to the bed, and he raped her. He inserted his penis into her vagina." After reviewing additional testimony, the prosecutor stated that "[n]ow is the time to apply what you heard, to the law." The State then reviewed the jury instruction on second-degree rape and argued that the evidence elicited at trial established

that Wiley was guilty of that offense based on his age, the victim's age, and the evidence that he had engaged in vaginal intercourse with the victim.

The prosecutor then discussed, in turn, second-degree sex offense and child sex abuse. Finally, the prosecutor turned to second degree assault and stated:

> The last thing the defendant is charged with is second degree assault causing offensive physical contact or physical harm to another person. In order to convict the State must prove – the State submits it has proven – that the defendant caused offensive physical contact or physical harm to the victim, obviously raping her, performing cunnilingus.[1] All of those acts physically harmful, grabbing her, throwing her onto the bed, raping her.
>
> Two, that the contact was a result of intentional or reckless act of the defendant and was not accidental. Ladies and gentlemen, this was no accident.
>
> Three, that the contact was not consented to by the victim, not legally justified.
>
> First of all, this little girl is a little girl. This is a child.
>
> And, second, the victim, [name], testified, no, she never consented. Ms. [name] never, ever consented to these acts.

In rebuttal closing argument, after responding to the defense's closing statements, the prosecutor urged the jury to "find the defendant guilty of all counts[,]" stating: "The defendant is guilty. He raped, he assaulted, he attacked [the victim]."

The verdict sheet, as to the 2004 incident, asked the jury to respond to the following:

> 1. Is the defendant, Ernest Wiley, not guilty or guilty of the Sexual Abuse of [name], a minor, while he had temporary care, custody and

[1] The trial transcript indicates that the cunnilingus was in relation to the 2005 allegations, charges the jury found Wiley not guilty of. There was no evidence of cunnilingus in relation to the 2004 incident.

responsibility for her between September 1, 2004 and December 31, 2004?

Not Guilty _____or Guilty _____

2. Is the defendant, Ernest Wiley, not guilty or guilty of the Second Degree Rape of [name] between September 1, 2004 and December 31, 2004?

Not Guilty _____or Guilty _____

3. Is the defendant, Ernest Wiley, not guilty or guilty of the Second Degree Assault of [name] between September 1, 2004 and December 31, 2004?

Not Guilty _____or Guilty _____

As noted, the jury returned guilty verdicts for all three of these counts. The court sentenced Wiley to 25 years' imprisonment, with all but 20 suspended, for child sex abuse, 20 years for second-degree rape, and to 10 years for second-degree assault. The court ordered that the sentences run concurrently with each other. The court also imposed a five-year term of supervised probation upon release. Wiley did not challenge his sentence on direct appeal.

DISCUSSION

On appeal, Wiley asserts that his sentence for second-degree assault is illegal because it should have merged into his sentence for second-degree rape under the required evidence test as set forth in *Blockburger v. U.S.*, 284 U.S. 299 (1932).[2] He points to excerpts from the State's closing argument and states:

[2] An allegation that a sentence is illegal because it should have merged under the required evidence test or rule of lenity may be raised in a Rule 4-345(a) motion. *Pair v. State*, 202 Md. App. 617, 624, *cert. denied*, 425 Md. 397 (2012). The State does not contend otherwise.

> It can be said because the State explained the jury instructions to the jury for clarification during closing arguments, that reasonably the jury believed that the assault was the same as the rape. The sexual conduct require[d] to convict appellant of 2nd degree rape, as what the State shed light on the element of those counts in its closing arguments, was the same offensive or unlawful touching upon which appellant's 2nd degree assault was predicted [sic]. Therefore, the "merger doctrine" of the Blockburger analysis would unquestionably apply because when you break down a criminal charge to its elements and consider it in that form, one of those crimes or sets of elements, is cognizable or not under the law, is essential to the Blockburger analysis.

The State responds that the convictions do not merge for sentencing purposes under the required evidence test because statutory rape in the second-degree is a strict liability crime that required the State to prove the ages of Wiley and the victim and that he engaged in vaginal intercourse with her, whereas second-degree assault required the State to prove that Wiley caused an offensive or harmful contact with the victim that was either intentional or reckless and was not consented to. Thus, the State maintains that none of the "elements of second-degree assault are contained in the statutory modality of second-degree rape." Moreover, the State, citing *State v. Boozer*, 304 Md. 98 (1985), asserts that even if the "statutory rape and assault convictions were based on the same or overlapping conduct [that] does not mean that he is entitled to merger under the required evidence test." *See Boozer* 304 Md. at 105 ("The courts in this country have had little difficulty in concluding that 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.").

"Under the required evidence test, convictions of two charges based on the same facts merge for sentencing purposes when the two charges are effectively the same offense

or when one of the charges is a lesser-included offense of the other – *i.e.*, the lesser offense consists of the same elements as the other, but the other offense also requires proof of an additional element." *Clark v. State*, 473 Md. 607, 616 (2021) (footnote and citation omitted). Accordingly, "[i]f each offense contains an element that the other does not, then convictions of the two offenses do not merge under the required evidence test." *Id*. (citing *State v. Lancaster*, 332 Md. 385, 391-92 (1993)).

Neither party cites any authority or decision addressing merger of statutory second-degree rape and second-degree assault. We, however, find *Biggus v. State*, 323 Md. 339 (1991) instructive. In that case, the defendant was convicted of third-degree sex offense under former Article 27, § 464B of the Maryland Code (1987 Repl. Vol., 1990 Supp.), which prohibited, among other things, sexual contact "[w]ith another person who is under 14 years of age and the person performing the sexual contact is four or more years older than the victim." Article 27, § 464B(3). The victim was a 13-year-old boy and Biggus was more than four years older than him. *Id*. at 344. Biggus was also convicted of common law battery "based on the same incident of digital anal penetration." *Id*. at 352. On appeal, Biggus argued that the convictions should have merged for sentencing purposes. The Court of Appeals agreed that, under the required evidence test, third-degree sex offense and battery should have merged in this case and thus vacated the sentence for battery. *Id*. at 351, 357.

In addressing the issue, the Court of Appeals first noted that third-degree sex offense and battery "are clearly distinct criminal offenses, even if based on the same act or acts." *Id.* at 350. The Court concluded that "the intentional unlawful digital anal penetration of

the victim by Biggus was a battery." *Id*. at 351. Third-degree sexual offense also required an "unlawful touching[,]" specifically "sexual contact," and additional elements not required for a battery, such as, in one modality, the age of the parties. *Id*. The Court, therefore, found that sexual offense in the third-degree has "elements which are not required for a battery." *Id*. "Nonetheless, the unlawful sexual contact required for a violation of [the third-degree sex offense statute] constitutes a battery." *Id*. The Court, therefore, held that "the elements of a battery are included within a third degree sexual offense, and there is a merger under the required evidence test." *Id*.

In *State v. Frazier*, 469 Md. 627 (2020), the Court of Appeals held that second-degree assault of the common law battery type merges with fourth-degree sex offense when based on the same act or acts because "the elements of second-degree assault are identical to those required for fourth-degree sexual offense, with the exception of one element—that the assaultive conduct be sexual in nature." *Id*. at 645. "In other words, the sexual contact element is what distinguishes fourth-degree sexual offense from any other 'touching' sufficient for second-degree assault." *Id*.

We are persuaded that, under the required evidence test, a second-degree assault of the battery modality (unlawful physical contact) merges into a conviction for statutory second-degree rape where the battery was based on the same act (unlawful vaginal intercourse) that constituted the rape. The unlawful vaginal intercourse element is what distinguishes second-degree rape from any other unlawful physical contact sufficient for second-degree assault and, therefore, common law battery is a lesser included offense of second-degree rape when the two offenses are based upon the same act.

Although the Court of Appeals in *Biggus* noted that the evidence at trial had included the fact that, after the sexual assault, Biggus had grabbed and punched the victim when the boy attempted to escape, the battery charge was not based on that behavior but solely on the sexual contact. 323 Md. at 352 n.3. If the battery had been based on the grabbing and punching, the Court of Appeals noted that "separate convictions and sentences for third degree sexual offense and for battery would have been permissible." *Id*. Finally, the Court stated that "if there had been ambiguity as to the basis for the battery conviction, it would have been resolved in favor of the defendant and, thus, in favor of a single sentence." *Id*. (citing *Snowden v. State*, 321 Md. 612, 618-19 (1991)).

Here, if the record was clear that the jury had convicted Wiley of second-degree assault based on grabbing the victim and throwing her on the bed, a separate sentence for that offense would have been permissible because it constituted a separate and distinct insult to the victim. But the record is far from clear. In closing statements, when arguing that the State had proven that Wiley had committed a second-degree assault, the prosecutor stated: "[T]he defendant caused offensive physical contact or physical harm to the victim. Obviously raping her, performing cunnilingus.[3] *All of those acts physically harmful, grabbing her, throwing her onto the bed, raping her*." (Emphasis added.) In other words, when addressing second-degree assault with the jury, the prosecutor did not distinguish the grabbing and throwing of the victim from the rape. And neither the indictment nor verdict sheet described the act or acts constituting the second-degree assault. In short, because it

[3] *See* footnote 1, *supra*.

is not clear whether the jury based the assault conviction on the grabbing and throwing (in addition to the rape) or solely on the rape, we must resolve the ambiguity in Wiley's favor of a single sentence for second-degree rape and second-degree assault by merging the latter into the former. *Snowden*, 321 Md. at 619 (stating that where the trier of facts' rationale in entering multiple convictions is not readily apparent such that it is possible that the convictions were based on the same underlying acts, "we are constrained to give the [defendant] the benefit of the doubt and merge" the sentences).

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY DENYING MOTION TO CORRECT ILLEGAL SENTENCE REVERSED.

SENTENCE FOR SECOND-DEGREE ASSAULT VACATED.

COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.