Circuit Court for Montgomery County
Case No. 131359C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 153

September Term, 2018

DEREK ANTOINE COLLINS SPENCER

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: March 7, 2019

Derek Antoine Collins Spencer ("Spencer") was charged, in the Circuit Court for Montgomery County, with: 1) third degree sexual offense; 2) fourth degree sexual offense; and, 3) second degree assault. A jury, after a three day trial in November 2017, returned guilty verdicts on all counts. The court sentenced Spencer to ten years, with all but seven years suspended, for the third degree sex offense, and one year concurrent on each of the other convictions. This timely appeal followed.

QUESTIONS PRESENTED

Spencer presents the following questions for our consideration (we rephrase the first question slightly):[1]

> 1. Did the circuit court abuse its discretion in admitting [the victim's] statement to her mother?
> 2. Did the circuit court abuse its discretion in refusing to propound Appellant's missing evidence instruction?
> 3. Must the sentences for fourth degree sexual offense and second degree assault merge into the sentence for third degree sexual offense?

For reasons to be explained, we answer the first two questions in the negative. We answer the third question in the affirmative.

FACTUAL AND PROCEDUAL BACKGROUND

According to her testimony, thirteen-year-old S.T. spent the night of 8 August 2016 at her cousin's (Erin's) apartment in Rockville with Erin and another cousin (DeShawn).[2]

[1] Spencer framed this question as:

> 1. Did the circuit court abuse its discretion in admitting the complainant's statement to her mother as a prior consistent statement?

[2] S.T., who was fifteen years old at the time of trial, testified that DeShawn was nineteen years old and Erin was "older than [DeShawn]."

Appellant, who was Erin's boyfriend at the time, was at the apartment that night as well. According to S.T., Spencer, who was drinking beer, appeared inebriated.

Around 11:00 p.m., S.T. left the living room (where she had been watching a movie) and went to a bedroom that she was to share with DeShawn. S.T. changed into sweatpants and a sweatshirt as bed clothes. She and DeShawn went to sleep in the same bed.

S.T., who was sleeping on her stomach, woke around 4:00 a.m. to the sensation of a lick "[l]ike in between [her] legs," in the area "in between like where [her] vagina is and [her] butt." She noted that her sweatpants were down to her knees. She turned over and saw Spencer slide under the bed. S.T., in an attempt not to startle Spencer into fleeing, texted DeShawn (in the bed next to her) to wake her up.[3] DeShawn did not respond, so S.T. tapped her until she woke. S.T. encouraged DeShawn to look under the bed, where she saw Spencer. Both girls stepped over Spencer, who did not fit completely under the bed, and alerted Erin of Spencer's presence in their sleeping quarters.

Erin confronted Spencer, yelling at him and asking why he was in the room where the girls were sleeping. As she did this, Spencer "was just laying [sic] there like he was asleep." Erin ejected ultimately Spencer from the apartment around 5:00 a.m.

At approximately 6:00 a.m., S.T. communicated to a friend what happened in the bedroom. Erin counseled S.T. and her friend that they should not tell anyone what happened because Erin's baby might be taken away from her by the authorities if the events of that night became publicized. She promised S.T. that she would "handle it."

[3] We suppose this is how young Gen-Z individuals think these days.

S.T. did not tell her mother, Kym, about the incident until "a couple days after S.T.'s birthday," which was November 6 (approximately three months after the incident). Kym (who lived with S.T. in Prince George's County) called the police and reported the incident promptly upon learning of it. A Prince George's County police officer responded initially, but the matter was referred to Montgomery County law enforcement because of where the incident occurred.

Trial began on 6 November 2017. At trial, in addition to S.T.'s testimony, her fifteen-year-old friend (to whom she confided promptly about the August 8 incident of the previous year) testified on behalf of the prosecution. She stated that S.T. sounded "scared or nervous" on the video chat line call on that morning. She testified additionally that S.T. told her that Spencer had licked her "on the butt" and that her butt was wet as a result.

Kym testified also for the prosecution. She stated that she noticed a change in S.T.'s demeanor when she picked her up after S.T. spent the time at Erin's apartment. When she questioned S.T. regarding those changes, S.T. responded initially by crying and stating "Erin told me not to tell you." S.T. disclosed eventually that "she was awakened by a feeling, what she thought was a wet tongue on her, going up her behind." Kym testified additionally that when she called Erin regarding the incident, Erin at first denied having any knowledge of the incident. Later in the conversation, Erin claimed that she "took care of that" by "sp[eaking] to authorities about what happened."

Erin testified in the defense case-in-chief. She claimed that Spencer left her apartment initially between 1:30 a.m. and 2:00 a.m. on the night in question. Spencer had his own key to the dwelling and returned while the occupants were sleeping. She claimed

that she found Spencer asleep on the floor in DeShawn's and S.T.'s room and kicked him "at least 20 times" in an effort to wake him up. According to Erin, S.T. never told her that she had been touched in any manner by Spencer.

The defense called also DeShawn as a witness. She testified, somewhat consistently with S.T.'s account, that S.T. woke her up to tell her that Spencer was on the floor under their bed. Upon seeing Spencer under the bed, DeShawn went to notify Erin. According to DeShawn, the next day, S.T. told her "in a jokingly manner" that Spencer had licked her. She opined, however, that sometimes S.T. would tell the truth and sometimes she wouldn't.

I. The circuit court did not err in admitting Kym's testimony regarding S.T.'s statement to her.

Kym testified at trial regarding her conversation with S.T. about the event where Spencer licked her. Spencer argues that S.T.'s statement to Kym regarding the incident constituted inadmissible hearsay.

> [Kym]: So [S.T.] proceeded to tell me that she was asleep and her and DeShawn would sleep in, in the same bed and she was asleep and she was awakened by feeling what she thought was a wet tongue on her, going up her behind.
>
> [State's Attorney]: And go on.
>
> [Kym]: And she said it's, that's what basically startled her and woke her up and then she looked down, her pants were down, and she said, and I know I didn't go to sleep with my pants down like that. Why would I go to sleep with my pants down? And she proceeded to say that Erin had, her and DeShawn, she texted DeShawn on her iPad, iPod, because she didn't want [Spencer] to know she was awake. She said he had peeked his head up and she saw him peek his head up and get back down, and she didn't want him to - - she wanted DeShawn to know he was in the room and she texted

> DeShawn, she tried to wake her and text her and DeShawn did wake up and they proceeded to go get Erin.[4]

Defense counsel lodged an objection after this testimony. The following colloquy ensued at the bench:

> [Defense Counsel]: This is a prior, consistent statement being offered to bolster the credibility of the complaining witness and no other reason. It's impermissible. There's no legal reason for them, for her to elicit a prior, consistent statement from this witness.
>
> [The Court]: Except, I mean she's been impeached with respect to bias and also some other motives to fabricate and she's fabricated (unintelligible).
>
> [Defense Counsel]: Well—
>
> [The Court]: So the fact this prior consistent statement occurring within a month or two when there's also been examination and cross-examination of this conversation she had with her mother, she's already testified to it.
>
> [Defense Counsel]: Well, if it's offered to rehabilitate the fact that the – I would ask that the State, what the, what they're offering it for.
>
> [The State]: I think [defense counsel] said it, it's a prior consistent statement.
>
> * * *
>
> [Defense Counsel]: The, the, I believe the proffer, evidence that can come in at this point from this witness would merely be the fact that she made a disclosure. She asked her what happened and she told her about things that happened and, therefore, [Kym] called the police. Now the fact that she's going to now get in and re-describe in detail the accusations is a prior consistent statement and if it's being offered to rehabilitate, the only, the only thing that a witness can say for rehabilitation is to detract from the impeachment, not merely repeat the accusations. …
>
> [The Court]: Okay. I don't believe that line of cases applies when you're

[4] The parties agreed that this statement should not be admitted as substantive evidence of guilt. The jury was instructed that Kym's testimony regarding S.T.'s disclosure "was permitted only to help you decide whether to believe the testimony that [S.T.] gave during this trial."

> talking about a conversation that a prior witness was, who had also testified in court (unintelligible) testified about and was cross-examined about, and then this is another participant in the same conversation, I believe that the State or the other party can inquire about the conversation and they're not as limited as you suggest. Overruled.

The State retorts that the trial judge did not abuse his discretion in allowing the testimony from Kym. The statement was admissible, according to the State, as a prompt complaint of sexual assault and/or the prior consistent statement exceptions to the rule against hearsay.

A. Standard of Review

We examine ordinarily a trial court's determination of admissibility for an abuse of discretion. *Wheeler v. State*, 459 Md. 555, 561, 187 A.3d 641, 645 (2018). To determine whether hearsay evidence falls within an exception to the rule against hearsay, however, we utilize a two-level inquiry: the trial court's factual findings are accorded deference, but its legal conclusions are reviewed without deference. *Gordon v. State*, 431 Md. 527, 538, 66 A.3d 647, 653 (2013).

B. Analysis

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. Hearsay is not admissible ordinarily at trial. Md. Rule 5-802. A statement that would be hearsay ordinarily may be admitted, however, if the statement is excluded specifically from the hearsay rule or if the statement falls within enumerated exceptions to the rule. *See* Md. Rules 5-802.1, 5-803, and 5-804.

To begin, we consider into which, if any, exception to the hearsay rule Kym's statement might fall. Although the circuit court did not specify upon which basis the testimony was admitted, "a reviewing court may uphold the final judgment of a lower court on any ground adequately shown by the record." *Rush v. State*, 403 Md. 68, 103, 939 A.2d 689, 709 (2008).

The Maryland Rules exclude explicitly from hearsay a "statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony." Md. Rule 5-802.1 (d). In order for a prompt complaint of sexual assault to be admissible, the declarant is required to have testified at trial and be subject to cross-examination about the statement. Those requirements were met here.

The purpose of Maryland's exclusion of a prompt complaint of sexual assault from the hearsay ban serves "to corroborate the victim's testimony, and not simply to combat stereotypes held by jurors regarding non-reporting victims." *Gaerian v. State*, 159 Md. App. 527, 537, 860 A.2d 396, 401 (2004) (internal citation omitted). Essentially, the exception aims to prevent the inference that "because the victim did not complain[,] no outrage had in fact transpired." *Nelson v. State*, 137 Md. App. 402, 416, 768 A.2d 738, 746 (2001). It follows that "references to the complaint may be restricted to the fact that the complaint was made, the circumstances under which it was made, and the identification of the culprit, rather than recounting the substance of the complaint in full detail." *Gaerian*, 159 Md. App. at 538, 860 A.2d at 402 (internal citation omitted).

There is no bright line test to ascertain when a complaint of sexual assault is prompt

or not. Rather, determining promptness is within the discretion of the trial court and "measured by the expectation of what a reasonable victim, considering age and family involvement and other circumstances, would probably do by way of complaining once it became safe and feasible to do so." *Id.* at 545, A.2d at 406. To be prompt, the victim must have made a complaint without an unexplained delay from the time of the offense. *Id*. at 541, A.2d at 404.

Although S.T. told promptly her 15-year-old friend and DeShawn of what she claimed Spencer had done, it took her three months to confront Kym with news. The delay can be explained by the combination of S.T.'s youthful age at the time and the confluence of the familial complexities regarding S.T. promising Erin that she would not tell anyone else and the alleged peril of Erin having her baby removed from her home. S.T. was thirteen years old at the time of the assault and had just turned fourteen when she made the revelation to her mother. Her youth, coupled with the facts that Erin told S.T. not to tell anyone, that she will "handle it," and that she may lose her baby if the authorities found out about Spencer's actions in Erin's apartment that August 2016 morning, explains why S.T. was reluctant to tell her mother what happened earlier than when she did.

Moreover, Kym's testimony was cumulative in the main. S.T. testified prior to Kym and gave her full account of the events. Kym testified to contradict the negative inference, raised by the defense during the cross-examination of S.T., that her behavior was inconsistent with the behavior of a young girl who had been assaulted sexually. The trial judge did not err in admitting Kym's testimony regarding S.T.'s statement.

II. The circuit court did not abuse its discretion in refusing to propound Appellant's missing evidence instruction.

At trial, defense counsel called Montgomery County Detective David Cary ("Detective Cary") as a witness to testify regarding his contact with Prince George's County Police Officer Cory Nelson.[5] Detective Cary completed a suspected child abuse investigative report, which contained his notes from his conversation with Officer Nelson, introduced as Defense Exhibit 5. In those notes, Detective Cary wrote that S.T. told him "she had been licked on the butt." Defense counsel attempted to impeach S.T.'s credibility by eliciting from Detective Cary that Officer Nelson told him that S.T. stated that Spencer had licked her vagina.[6] The State objected after defense counsel questioned Detective Cary regarding his conversation with Officer Nelson. The following bench conference ensued:

> [Defense Counsel]: So perhaps this might be out of order, but, because Officer Nelson can't come until tomorrow morning, so what I'll, I'll proffer to the Court that what Officer Nelson is going to testify is that he does not remember what the victim reported to him, that he took written notes and that he later destroyed those notes and so they no longer exist. And I, what I want to do is confront Detective Cary about his note in the referral sheet where he wrote what Officer Nelson told . . . him, which is that he licked her vagina.
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> * * *
>
> [The Court]: Well, but, if, if the Prince George's County police officer doesn't remember what she told him, how does what she told somebody else come in? Why is it admissible?

[5] Officer Nelson interviewed S.T. initially in Prince George's County (where the incident was reported), but transferred the matter to Montgomery County law enforcement because that is where the incident occurred. Officer Nelson took notes in a notebook during his interview with S.T., but disposed of the notebook later when it became full.

[6] Officer Nelson was out-of-the country and thus unable to testify until after Detective Cary's questioning at trial.

> [Defense Counsel]: It's not being offered for the truth, it's being offered to impeach the credibility of the, of the complaining witness.
>
> * * *
>
> [Defense Counsel]: Right. And so the fact that there is now the notes that Officer Nelson took from that interview have been destroyed by the State, it's, well, they were destroyed by a State agent and which is the subject of a future missing evidence instruction we'll be giving the Court. The impeachment now is that Officer Nelson doesn't remember, but he remembers what Officer Nelson told him or he may remember, he may, he has a note that Officer Nelson told him that she licked, he licked her vagina.
>
> [The Court]: Right, but through this witness, that note is being offered for the truth of the statement asserted in the note, so it's still hearsay. You can use that arguably to refresh Nelson's recollection. If it refreshes his collection, fine, but it's hearsay to this witness.

Officer Nelson testified that he remembered interviewing S.T., but could not recall exactly what she had told him. He testified further that looking at Detective Cary's notes from their conversation did not refresh his recollection. He remembered only that "it was a sexual assault allegation." In response to this, defense counsel asked for the following missing evidence instruction at the close of trial:

> You have heard the testimony that Officer Cory Nelson, a State agent, has destroyed evidence in this case by failing to preserve notes of his interview with [S.T.] and/or her family.
>
> If this evidence was peculiarly within the power of the State, but was not produced and the absence was not sufficiently accounted for or explained, then you may decide that the evidence would have been favorable to the defense.

The court refused to propound the requested instruction.

A. Standard of Review

We review ordinarily a trial court's decision whether to propound a requested jury

instruction for an abuse of discretion. *Cost v. State*, 417 Md. 360, 369, 10 A.3d 184, 189 (2010). A missing evidence instruction "generally need not be given; the failure to give such an instruction is neither error nor an abuse of discretion." *Patterson v. State*, 356 Md. 677, 688, 741 A.2d 1119, 1125 (1999).

B. Analysis

Defense counsel relies on *Cost* for the proposition that the trial court here abused its discretion in failing to propound the requested jury instruction. In *Cost*, the destroyed evidence consisted of blood-stained linens and clothing, and dried blood on the floor of a prison cell where an inmate was stabbed allegedly. *Id.* at 380. The evidence was destroyed in the normal course of facility maintenance before it could be tested forensically. *Id.* at 366. The Court of Appeals, deeming the destroyed evidence "highly relevant" to the critical factual issues of whether the victim was stabbed and whether it caused the victim to bleed significantly, held that the failure to give a missing evidence instruction, under these circumstances, was an abuse of discretion. *Id*. at 378-80. Notably, the Court determined that its relevant factual scenario made *Cost* an "exceptional" case where the refusal to give a missing evidence instruction was an abuse of discretion. *Id*. at 378.

The part of S.T.'s testimony which defense counsel points to as "critical," i.e. whether S.T. referenced to "vagina" or "between my butt and vagina" in describing her account of Spencer's specific assault, does not rise to the level of "exceptional" circumstances as in *Cost*. Officer Nelson's notebook, at worst, may have demonstrated that 13-year-old S.T. was inconsistent as to where Spencer's tongue touched her. Regardless of this hypothetical inconsistency, Spencer's touching of S.T. in either area

would constitute the crimes for which he was convicted. Spencer was not entitled to the requested missing evidence jury instruction and the factual scenario at issue here is far from an "exceptional" case. The trial court did not abuse its discretion in refusing to propound Spencer's requested jury instruction.

III. The sentences for fourth degree sexual offense and second degree assault merge into the sentence for third degree sexual offense.

Spencer was charged and convicted in three counts – third degree sexual offense, fourth degree sexual offense, and sexual assault - relating to a single offensive contact with S.T. At sentencing, the following conversation took place:

> [The Court]: Thank you. [Assistant State's Attorney]. First, let me ask you, with respect to the sentences, is it your view that with respect to the counts that they do or don't merge for sentencing purposes?
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> [Assistant State's Attorney]: They do. The State believes that the fourth degree sex offense and the assault second degree because it arises out of one act, they do merge into third degree sex offense. So, --
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> [The Court]: So, for sentencing purposes, the max he faces is 10.
>
> [Assistant State's Attorney]: Correct.

Despite acknowledging that any sentences for the fourth degree sexual offense and the second degree assault convictions should merge into the sentence for the third degree sexual offense conviction, the court imposed separate (but concurrent) one-year sentences for each of the convictions discussed earlier to be merged for sentencing purposes.

"The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and

by Maryland common law." *Brooks v. State*, 439 Md. 698, 737, 98 A.3d 236, 258 (2014) (citing *Nicolas v. State*, 426 Md. 385, 400, 44 A.3d 396 (2012)). The purpose of merging convictions is to protect a convicted defendant from multiple punishments for the same offense. *Id.* Sentences for two or more convictions must be merged when "(1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other." *Id.* Failure to merge a sentence when it is required is an illegal sentence as a matter of law. *Latray v. State*, 221 Md. App. 544, 555, 109 A.3d 1265, 1271 (2015).

Second degree assault consists of: "(1) intent to frighten; (2) attempted battery, and (3) battery." *Snyder v. State*, 210 Md. App. 370, 382, 63 A.3d 128, 135 (2013). Battery consists of a harmful "offensive or unlawful touching." *Marlin v. State*, 192 Md. App. 134, 166, 993 A.2d 1141, 1160 (2010). A battery conviction merges into a third degree sexual offense conviction under the required evidence test when the sexual conduct involved in the sexual offense is also the basis for the assault conviction. *Biggus v. State*, 323 Md. 339, 351-52, 593 A.2d 1060, 1065 (1991).

Both third and fourth degree sexual offenses require a sexual contact with another person without the person's consent. A third degree sexual offense requires an additional element: the person performing the sexual contact must be at least four years older than the victim, who must be under fourteen years old. *See* Md. Code, Crim. Law § 3-307 (a)(3); *see also* Md. Code, Crim. Law § 3-308 (b)(1).

The three offenses for which Spencer was convicted were based on the same act.

The sexual conduct required to convict Spencer of third and fourth degree sexual offenses (the lick) was the same offensive or unlawful touching upon which his second degree assault was predicated. Accordingly, the sentences for second degree assault and fourth degree sexual offense were required to merge with Spencer's sentence for third degree sexual offense as lesser-included offenses based on the same act.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR RE-SENTENCING NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.