Circuit Court for St. Mary's County
Case No. 18-K-15-000081

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 191

September Term, 2017

DAVID THOMAS

v.

STATE OF MARYLAND

Leahy,
Reed,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: January 2, 2019

Following an incident at the home of J.N.[1] in St. Mary's County on November 21, 2014, the details of which are contested, David Thomas, appellant, was charged with one count each of attempted first and second degree murder, attempted common law rape, attempted first-degree rape, attempted first-degree sex offense, use of a firearm in perpetration of a felony, first-degree assault, armed robbery, illegal possession of a regulated firearm, convicted felon in possession of a firearm, and two counts of failure to register as a sex offender.

Prior to trial, Thomas entered a guilty plea to one of the failure to register counts. The State entered a *nol pros* of the other failure to register count and the armed robbery count.[2] After a hearing, the court denied Thomas's motion to suppress statements made by him to police investigators during three separate interrogation sessions. Thomas proceeded to trial before a jury on the remaining charges. The jury returned guilty verdicts on the remaining eight counts.[3]

[1] In keeping with the policy of this Court, we do not identify, by name, victims of sexual assault offenses.

[2] At the close of the State's case-in-chief, the State also entered a *nol pros* of the attempted first-degree sex offense count, leaving eight of the twelve counts for the jury's consideration.

[3] The court sentenced Thomas as follows: attempted murder, life suspended to 30 years; attempted first-degree rape, life suspended to 20 years; use of a firearm, 20 years; first-degree assault, 25 years; failure to register, three years; felon in possession of a firearm, 15 years (later reduced to five years). For sentencing purposes, the offenses for attempted second-degree murder, attempted common law rape, and illegal possession of a regulated firearm merged into attempted first-degree murder, attempted first-degree rape, and convicted felon in possession of firearm, respectively, as lesser included offenses. The sentences were all consecutive, resulting in a total executed sentence of 103 years.

In this appeal, Thomas presents the following questions for our consideration, which as slightly rephrased, are:

1. Did the trial court err by failing to suppress his statements to investigators?

2. Did the trial court err by allowing the J.N. to testify in rebuttal that Thomas had lied in his testimony?

3. Did the trial court err by allowing the State to introduce rebuttal evidence that had not been provided to defense counsel?

4. Was the evidence sufficient to convict Thomas of attempted rape?

5. Should the trial court have merged Thomas's first-degree assault conviction for sentencing purposes?

We shall affirm the judgments of conviction. Nonetheless, we shall remand to the circuit court for resentencing consistent with this opinion.

Because Thomas raises only a limited challenge to the sufficiency of the evidence, we need not offer a detailed recitation of the underlying events that resulted in the charges against him. *See, Washington v. State*, 190 Md. App. 168, 171 (2010). We shall, however, refer to the evidence in detail as necessary to our discussion of Thomas's claims of error.

1. Suppression

Soon after the event, Thomas was questioned by police and gave statements that were audio-recorded and later reduced to writing, which Thomas moved to suppress.[4] After a hearing, the motion to suppress was denied.

[4] The statements were made during three police interviews and were produced in the form of three transcripts and audio recordings. The motion to suppress sought to preclude the

At trial, as a result of its understanding of defense counsel's request that "the State play all [three] of the [interview audio recording] tapes from the beginning to end or none of them," the State produced redacted transcriptions of the statements, advising the court that it would offer them with "the exact redactions that [defense counsel had] requested."[5] Despite having stated on the record that there was, "No objection[ ]" to the admission of the transcripts, the court affirmed that the statements were to be admitted without objection, to which defense counsel responded to the court, "Correct." Thus, the State asserts that Thomas has waived our review of the suppression ruling.

Maryland Rule 4-252(h)(2)(c) provides, in relevant part, that "[a] pretrial ruling denying [a] motion to suppress [evidence] is reviewable … on appeal of a conviction[.]" even if no contemporaneous objection is made at trial. *See generally Jackson v. State*, 52 Md. App. 327 (1982). However, "if a pretrial motion is denied and at trial appellant says he has no objection to the admission of the contested evidence, his statement effects a waiver." *Jackson*, 52 Md. App. at 332 (citing *Erman v. State*, 49 Md. App. 605, 630 (1981)). It has been "long-established that '[f]orfeiture is the failure to make a timely assertion of a right, whereas waiver is the intentional relinquishment or abandonment of a

admission of evidence as to all three interviews based on challenges to the voluntariness of the statements and whether Thomas had been properly advised pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).

[5] Subsequent to the court's denial of the motion to suppress, Thomas filed a pre-trial motion *in limine* seeking to have certain statements concerning his prior convictions redacted from both the recordings and the transcripts. At the motions hearing, the State agreed to redact those statements from both the recordings and the transcripts prior to producing them at trial.

known right.'" *Joyner v. State*, 208 Md. App. 500, 512 (2012) (quoting *Savoy v. State*, 420 Md. 232, 240 (2011)). The motion to suppress having been heard and ruled on more than one year prior to trial, coupled with counsel's repeated affirmative acquiescence to the State's offer of the redacted transcripts at trial, support Thomas's waiver of the issue.

In his reply brief, Thomas argues that the cases relied on by the State's waiver argument "were all decided over 30 years ago[,]" but he provides us with no authority that indicates that *Jackson* and *Erman* are not still good law.

We agree with the State that the suppression question is not preserved for appellate review.

2. The victim's rebuttal testimony

Thomas next posits that the trial court abused its discretion by permitting certain parts of J.N.'s rebuttal testimony. The following colloquy transpired, which is the foundation of Thomas' challenge on appeal:

> [STATE]: Okay. [J.N.], let me ask you some questions that are a little bit hypothetical, okay.
>
> If somebody said that Mr. Thomas had been in your house on a regular basis, what would your response to that be?
>
> [DEFENSE COUNESL]: Objection.
>
> [WITNESS]: That would be a lie.
>
> THE COURT: Overruled.

Over the course of its rebuttal inquiry, the State followed that question with nine other substantive questions, posed hypothetically, to which the witness answered in various iterations of her answer to the first question – "That would be a lie."

Thomas asserts that the State's continuing inquiry along that line amounted to prohibited were-they-lying questions.

A. Preservation

The State responds, first, that defense counsel objected only to the first of the "hypothetical" questions, but to none of the following questions and, as a result, review of the court's ruling to the latter questions has not been preserved.

Thomas concedes that he did not object to each of the hypothetical questions. He asserts, however, that because he objected to the first question in the series, he "alerted the judge to his objection to the questions, and [when] the court overruled it…. [n]othing more was necessary to preserve the issue." To support his proposition that a single objection was sufficient, Thomas relies on *Hunter v. State*, 397 Md. 580 (2007), wherein the Court held that, "under the circumstances of [this] case, the trial judge erred, as a matter of law, by permitting the State to ask the petitioner if other witnesses were lying[,]" 397 Md. at 597, because "in *Hunter* itself the were-they-lying questions at issue were not all objected to." (Citation omitted)**.**

Notably, in *Hunter*, the issue of preservation was not raised or addressed by the Court in its consideration of the appeal. Further, unlike the present case, Hunter's counsel

interposed objections to more than one "were-they-lying" question in the line of questioning by the prosecutor.

While it is true "that the 'effect of a general objection in this State is far-reaching…. [and] that when the trial court does not request a statement of the grounds for an objection, a general objection is sufficient to preserve all grounds which may exist[,]'" *Wilder v. State*, 191 Md. App. 319, 355 (2010) (quoting *Boyd v. State*, 399 Md. 457, 476 (2007)), so too is it that, "[g]enerally speaking, specific objection should be made to each question propounded, if the answer thereto is claimed to be inadmissible." *Addison v. State*, 188 Md. App. 165, 175 (2009) (quoting *Kang v. State*, 393 Md. 97, 119 (2006)). Consistent with Rule 4-323(b), providing that "the court may grant a continuing objection to a line of questions by an opposing party[,]" the Court of Appeals has explained that, "[a]s indicated by the text of the rule, this reprieve from the contemporaneous objection rule is obtained only through a discretionary grant by the trial judge." *Kang*, 393 Md. at 120. *Accord Fone v. State*, 233 Md. App. 88, 113 (2017) (providing that, in order "to preserve an objection, a party must either 'object each time a question concerning the [matter is] posed or … request a continuing objection to the entire line of questioning.'" (quoting *Wimbish v. State*, 201 Md. App. 239, 261 (2011))). No such request was made or entertained by the trial court.

To suggest that the context of his single objection to the State's first question was sufficient to apply to the entire line of hypothetical questions, Thomas asserts that after his objection to the first question, "[t]he other questions and answers followed immediately,

or soon after, and were impermissible for the exact same reason." He refers, in passing, to *Blanks v. State*, 406 Md. 526, 538 (2008) and *Johnson v. State*, 325 Md. 511, 514-15 (1992) for support.

In *Blanks*, the questions asked that drew objections concerned attorney-client privilege conversations between the defendant and his counsel. 406 Md. at 533-35. There, the Court of Appeals concluded that "no further objection was necessary" because "[defense counsel] objected to the first question that approached the timing and content of [defendant's] communications with counsel, explained at the bench his concern that the questions invaded the attorney-client privilege, and re-objected when the court permitted the inquiry to resume." *Id*. at 538. Contrary to the present appeal, Blanks's counsel made several general objections throughout the line of questioning as well as soliciting a bench conference and explained to the court the reasons for his continuous objections. *Id*. at 533-35.

Such was not the situation in the instant case. Defense counsel objected to the first of the series of question, which inquired, "what would your response to that be?" That inquiry left the door open for J.N. to respond by disagreeing with the hypothetical testimony, by offering that such testimony would be mistaken, or by challenging its veracity, as she did. The questions that followed, however, especially after having elicited J.N.'s unequivocal declaration that it "would be a lie," transcended into questions that, as the State concedes, "called expressly for J.N.'s opinion as to the statements' truth or

falsity." Despite that fact, no other objection to either the State's questions or J.N.'s answers were interposed.

While we find Thomas's assertion of preservation to be somewhat tenuous, we shall proceed, *arguendo,* to a discussion of the merits of his claims that J.N.'s rebuttal testimony consisted of prohibited were-they-lying questions.

B. Were-They-Lying

Clearly, witnesses ought not to be permitted to opine on the credibility of another witness, as the State concedes. "In a criminal case tried before a jury, a fundamental principle is that the credibility of a witness and the weight to be accorded the witness' testimony are solely within the province of the jury." *Bohnert v. State*, 312 Md. 266, 277 (1988) (citing *Battle v. State*, 287 Md. 675, 685 (1980)).

The State asserts that the questions asked by the prosecutor were not "were-they-lying" questions in the traditional sense, but were designed to point out J.N.'s refutation of Thomas' own exculpatory testimony in contradiction to her testimony in the State's case in chief.

At that point, the jury had heard diametrically opposed version of the events from J.N. and Thomas, who elected to testify in his defense. The rebuttal testimony, in our view, did no more that provide clarity to that disparity. It was offered by the State, as it normally would be, to bolster the State's evidence in support of the State's burden of proof of the crimes charged.

Among the objected-to questions was: "If somebody said that you went to McDonald's to meet Mr. Thomas to buy drugs?" J.N. responded: "That would be a lie." Had the prosecutor merely asked J.N.: "Mr. Thomas testified that you went to McDonald's to buy drugs. Did you do so?" J.N.'s presumed answer "No" would not have given rise to the claimed assertion that the question was designed to obtain a prohibited "were-they-lying" response, or to a sustainable objection. Had the prosecutor chosen to ask J.N. direct questions seeking either a "yes" or "no" response, rather than convoluted or hypothetical questions, there could have been no sustainable challenge.

Even were we to find the admission of this line of questioning was in error, such error would have been harmless. *See Wilder*, 191 Md. App. at 369 (in cases where there is error, it "will be deemed harmless if a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict" (citing *Dorsey v. State*, 276 Md. 638, 659 (1976))).

Thomas contends that admission of the rebuttal testimony was "incredibly harmful" because, "[r]ather than simply testifying to her own version of events, the State's chief witness repeatedly testified that he was lying." Further, that "[s]he testified about the credibility of the defendant–whose case depended largely on the jury believing his version of events."

In contrast, the State avers that "if allowing [those] questions was error, it was error only of the most technical kind, and could not have had a prejudicial effect in this case." For support, it applies the analysis from *Hunter v. State* for similar questions, which

provided "[t]he possible prejudicial effect of the 'were-they-lying' questions is demonstrated by the number and the combination of the questions themselves, the repeated emphasis on them during the State's closing argument, and, most importantly, the jury's behavior during its deliberations." 397 Md. at 597.

In considering these arguments, we look to the context of the testimony, indeed the totality of the evidence, as it related to the entire case. *See Tyner v. State*, 417 Md. 611, 617 (2011) (explaining that, when a reviewing court reviews questionable testimony, it "must consider not only precisely what the focal testimony was at trial, but also the context in which it was used").

The claim that the court improperly admitted were-they-lying questions arose at the point at which Thomas, in his testimony, suggested that he was acquainted with J.N. because "… she knows me from a drug deal." He continued, "She's a middle person of a drug deal." "That's how I know her." Absent those allegations by Thomas, there would have been no need for J.N.'s rebuttal testimony which, in our view, was presented – perhaps inarticulately – for the limited purpose of contesting Thomas's testimony.

Looking to *Hunter*, we find nothing in the number or combination of questions, and no repeated emphasis on them in the State's closing argument. Nor, unlike the jury had done in *Hunter*, did the jurors submit any questions to the trial court relating to the State's hypothetical questions, or ask for further instruction or advice during their relatively brief (two hour) deliberation.

Further, the evidence presented to the jury, without the additional hypothetical questions, was substantial, consisting of, *inter alia*: photographs of the injuries J.N. sustained as a result of being strangled, DNA evidence from a piece of the coffee mug J.N. said she had given Thomas coffee in, the neighbor's testimony about J.N.'s appearance and the 911 phone call, J.N.'s testimony of the events, testimony from the medical staff who treated her, the three transcripts of the police interrogations of Thomas, and J.N.'s testimony of her phone's call log.

We find no abuse of discretion in the trial court's ruling.

3. The telephone records

The evidence revealed that J.N. allowed Thomas into her home in response to his request to use her telephone, and that he dialed several numbers on her cell phone before he attacked her. The cell phone, which was recovered by investigators from a wooded area near her home, was admitted into evidence without objection. Thomas testified to never having seen the phone until it was shown to him at trial.

Called in rebuttal, J.N. identified the phone as hers and testified, with reference to the phone's call-log, to five outgoing calls, made from her phone on the morning of the attack, to numbers with which she was unfamiliar. Prior to J.N.'s rebuttal testimony, defense counsel successfully objected, based on a discovery violation, to the State's attempted introduction of a portion of a 3,000-page report related to her cell phone use and the corresponding testimony by Corporal Robert Merritt as to the contents of the report. On appeal, Thomas argues that "the court erred in deciding that J.N. could testify to the

same information on her phone after it was powered up as she sat on the witness stand." **(**Emphasis in original).

The State contends initially that the question has not been preserved because defense counsel's discovery-based objections to the report were insufficiently precise to relate to the information taken directly from the phone itself. We view that argument as overly technical and shall consider the merits of Thomas's challenge.

As to the merits, the State argues that

> the trial court excluded the phone dump [the 3,000-page report] but permitted the same evidence to come in through J.N.'s testimony about the call log of her phone itself. Thomas never claimed he was denied access to the cellphone in discovery, and indeed had already consented to admission of the phone into evidence.

We have consistently held that "[t]he admissibility of evidence is left to the sound discretion of the trial court." *Mines v. State*, 208 Md. App. 280, 291 (2012) (citing Rule 5-104(a)). This is especially so, in the context of this case, when the question of admissibility of the evidence is based solely on an alleged discovery violation. *See* Rule 4-263(n) (outlining a court's discretion for discovery violations, that it "may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances"). We review evidentiary rulings for abuse of discretion and will not disturb a ruling thereon absent a clear showing of abuse of that discretion. *Mines*, 208 Md. App. at 291-92 (quoting *Decker v. State*, 408 Md. 631, 649

(2009)). "An abuse of discretion occurs when a decision is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Id*. at 292 (quoting *Gray v. State*, 388 Md. 366, 383 (2005)).

We consider Thomas's successful argument to the trial court that resulted in the State's failure to admit the 3,000-page report into evidence or receive Corporal Merritt's testimony as to its contents, and his appellate argument that the court erred in permitting J.N. to testify from information contained on her phone, to be separate and distinct issues, as did the trial court. The court's initial ruling on the admission of the report and testimony from Corporal Merritt was based on the State's failure to provide a copy of the 3,000-page report and to disclose to the defense that Merritt would be offered as a rebuttal expert to testify about its contents. The court ruled: "The request to put Merritt on the stand to talk about the call to the wife's employment is denied. He is an expert. He cannot be qualified as an expert without having been so identified --"

The court concluded that Merritt would need to be qualified as an expert to offer testimony about the phone records, and if the State wanted that information admitted, it needed to "ask [Thomas] about it, or produce somebody that is both competent to testify and made known to [Thomas] so he can defend against it." This is precisely what the State did when it called [J.N.] to testify about her phone and the call-log. Neither of the court's rulings on the issue precluded admission of the information; rather, it challenged the State's proposed avenue for its admission.

We cannot conclude that the inadmissibility of the phone records, as offered, renders information taken directly from the phone, which was not the subject of the discovery violation, to be likewise inadmissible. Further, the phone had been previously admitted into evidence without objection. As such, we find no abuse of discretion in the court's ruling.

4. Sufficiency of the evidence – attempted rape

Thomas next asserts that the State failed "to provide sufficient evidence of both attempted first-degree rape and attempted common law rape because it failed to prove that [he] intended to rape J.N." The State responds in two respects: first, that Thomas's claim is not preserved and, second, that on the merits, the evidence was sufficient to support the verdicts.

We first take up the State's preservation argument, which the State argues is two-fold. The State points out that defense counsel did not, either at the close of the State's case-in-chief, or the close of the defense case, argue motions for judgment of acquittal with the particularity required by Md. Rule 4-324.[6] *See* Md. Rule 4-324(a) (requiring for motions for judgment of acquittal that "defendant shall state with particularity all reasons why the motion should be granted"). In fact, after renewing the motion without any

[6] Defense counsel did argue his motion for acquittal of the two charges of illegal possession of a regulated firearm with particularity. Those rulings, however, are not implicated in this appeal. Further, those arguments do not apply to the remaining charges for the purpose of preservation. *See Hobby v. State*, 436 Md. 526, 540 (2014) (holding that "'[t]he issue of sufficiency of the evidence is not preserved when [the defendant]'s motion for judgment of acquittal is on a ground different than that set forth on appeal.'" (quoting *Anthony v. State*, 117 Md. App. 119, 126 (1997))).

additional arguments, the court specifically asked counsel, "can you point to any testimony from your client or the Officers or any of your witnesses that I should grant your motion on any of the eight remaining charges?" Despite the opportunity to highlight any evidentiary shortcomings in the State's case, Thomas's counsel responded:

> No, there's no additional, I don't think there's any more additional on my side of the case. I think the evidence as far as those charges is, is the same, essentially. The slightly different standard of where you're at now, Your Honor --
>
> * * *
>
> -- is different, as you stated.
>
> So I don't have any evidence that was garnered. I would just rest on the same argument as far as the firearm being a, either discharges the projectile, the, or capable of being readily transformed issue as, and design, those are the three I guess prongs or elements, any one of which would satisfy I guess that statute. And I don't believe there's any evidence as far as a firearm to sustain that based on those three, I guess, prongs.

Moreover, the State posits, defense counsel made no motion for judgment of acquittal at the close of all of the evidence after both the State and Thomas presented rebuttal evidence. We agree with the State that Thomas has not preserved this question for our review. Nonetheless, in the interest of completeness, we shall review his claims.

Our review of challenges to the sufficiency of the evidence to convict has been often stated. Evidence to convict will be deemed sufficient if "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Maryland courts have applied the identical standard. *Derr v. State*, 434 Md. 88, 129 (2013). *Accord Smith v. State*, 374 Md. 527, 533-34 (2003) (collecting cases).

As a reviewing court, we "'do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence[,]'" *Bordley v. State*, 205 Md. App. 692, 717 (2012) (quoting *Smith v. State*, 415 Md. 174, 185 (2010)), and must "'defer to any possible reasonable inferences the trier of fact could have drawn from the admitted evidence[.]'" *Hobby v. State*, 436 Md. 526, 538 (2014) (quoting *Titus v. State*, 423 Md. 548, 557-58 (2011)). The *Hobby* Court added that it is immaterial "'whether the trier of fact could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence.'" *Id.* (quoting *Titus*, 423 Md. at 558).

Indeed, we have recently said: "[I]f two inferences reasonably could be drawn, one consistent with guilt and the other consistent with innocence, the choice of which of these inferences to draw is exclusively that of the fact-finding jury and not that of a court assessing the legal sufficiency of the evidence." *Ross v. State*, 232 Md. App. 72, 98 (2017).

Conversely, Thomas points out that "a conviction may not be sustained on proof amounting only to strong suspicion or mere probability." *Larocca v. State*, 164 Md. App. 460, 472 (2005) (quotations and citation omitted). Moreover, "evidence which merely arouses suspicion or leaves room for conjecture is obviously insufficient. [Evidence] must do more than raise the possibility or even the probability of guilt….'" *Taylor v. State*, 346 Md. 452, 458 (1997) (quoting 1 UNDERHILL, CRIMINAL EVIDENCE § 17, at 29 (6th ed. 1973)).

In order to convict Thomas of attempted common law rape and attempted first-degree rape, the evidence needed to support a reasonable conclusion by the jury that the

State proved beyond a reasonable doubt the elements of each offense. The court instructed the jury:

> Attempted Common Law Rape is a substantial step beyond mere preparation toward the commission of Common Law Rape. Common Law Rape is sexual intercourse against a person's will by force or threat of force.
>
> In order to convict [Thomas] of Attempted Common Law Rape, the State must prove the following four things: One, that [Thomas] took a substantial step beyond mere preparation toward the commission of Common Law Rape; two, that [Thomas] had the apparent ability at that time to commit the crime of Common Law Rape; and three, that [Thomas] actually intended to have sexual intercourse with [J.N.] against her will; and four, that [Thomas] used force or the threat of force against [J.N.].

The court instructed further:

> In order to convict [Thomas] of Attempted Rape in the First Degree, the State must prove, one, that [Thomas] took a substantial step beyond mere preparation toward the commission of the crime of Rape in the First Degree; and, two, that [Thomas] intended to commit the crime of Rape in the First Degree.
>
> * * *
>
> [T]he State must prove all of the elements of attempted forcible Second Degree Rape and also must prove one or more of the following circumstances: One, [Thomas] used or displayed a dangerous weapon or an object that [J.N.] reasonably concluded was a dangerous weapon; two, [Thomas] strangled or caused serious physical injury to [J.N.] in the course of committing the offense; or three, [Thomas] threatened or placed [J.N.] in reasonable fear that [she] would be imminently subjected to death, strangulation or serious physical injury.

The court then defined the State's burden of proof for attempted second-degree rape, as applied to this case, "that [Thomas] attempted to have vaginal intercourse with [J.N.], that the act was committed by force or threat of force, and that the act was committed without the consent of [J.N.]."

We recount J.N.'s testimony of events that occurred in her home after she permitted Thomas to enter for his stated reason of the need to use her telephone:

> [J.N.]: So I was talking to him a little more and as he had mentioned something about, as we were talking about family, that he had done some bad things and that his family didn't talk to him a lot.
>
> So at that point I felt a little uncomfortable, so I walked into the kitchen and I was just I think messing with the dishes. And I heard a noise almost sounding like a cell phone ring and at that point I didn't really think much of it, but at that point he came into the kitchen and, he grabbed me at gunpoint and then walked me back into the living room, which was the next room over.
>
> He had said where's the phone, because you know I had mentioned we had heard a phone ring and I said I don't have a phone. He proceeded to pat me down, pin me -- I was pinned to the couch and he patted me down and I did not have the, a phone and so then he asked me to take my pants off. And I said no, I will not do that. So he asked me a few more times and I proceeded to say no.
>
> And then after a few times he put the gun back to my head and he said I'm going to count down from three, take your pants off, and I said I will not. I put my hands over my face and he counted down from three.
>
> And at three he actually did put the gun down and then he put his arms around my neck and strangled me. The last thing I remember saying is Lord help me, because I knew at that point that's the only, only person who could. And then I went unconscious.
>
> [STATE]: [J.N.], when you say he was holding you at gunpoint, did you see the gun?
>
> [J.N.]: Yes.

Based on J.N.'s telling of the events, the jury was presented with the opportunity to draw several possible inferences, ranging from his intent to commit rape, his intent to commit some other offense, his intent to merely frighten her, his intent to merely assault

her or, perhaps, his intent to commit a theft of her clothing or, as Thomas suggests, his intent to commit some other sexual offense.

We reiterate that it was the jury's choice to draw a reasonable inference from the evidence that supported the finding of guilt of an attempt to commit rape. The jury was not obliged to draw any possible alternative inferences. We are satisfied that the inference drawn by the jury – that Thomas intended to commit the rape of J.N. and that, in the use of firearm and his physical assault of her, he took a substantial step beyond mere preparation toward commission of his intended crime.

5. Merger

For Thomas's convictions of attempted first-degree murder and first-degree assault, the court imposed a separate, and consecutive, sentence for each offense. Thomas contends that the conviction for first-degree assault should have been merged with the conviction for attempted first-degree murder.

As Thomas recognizes in his brief, a defendant may be convicted of first-degree assault based on one of two modalities – attempting or intending to cause serious physical injury, or use of a firearm. Md. Code (2002, 2012 Repl. Vol.), Criminal Law, § 3-202. In his argument, Thomas contends that the record is unclear as to which modality formed the basis of the first-degree assault conviction. He also suggests, citing *Dixon v. State*, 364 Md. 209 (2001), that his conviction was based on the serious physical injury modality. Hence, he continues, merger into the attempted first-degree murder conviction is required.

The court instructed the jury, separately, on both first-degree assault modalities. In sentencing Thomas for first-degree assault, the court noted: "Count 7 is First Degree Assault. This is separate from the choking that led to the Attempted Murder, this is the handgun in the commission of the crime of violence, and it is a First Degree Assault by definition …."

At the sentencing hearing, the court, in sorting out the various convicted counts, engaged counsel in a discussion of potential merger issues:

> THE COURT: …. The First Degree Assault is sentenced.
>
> Now I reluctantly got to that, but there's no question the choking was the Attempted Murder and the handgun was the First Degree Assault.
>
> You don't disagree with that, do you, [defense counsel], despite --
>
> [DEFENSE COUNSEL]: No, Your Honor.
>
> THE COURT: -- the fact you might not like it?
>
> [DEFENSE COUNSEL]: No, well --
>
> THE COURT: Okay, he gets sentenced on Count 7 [first-degree assault] is my point.
>
> [DEFENSE COUNSEL]: Correct, Your Honor, I understand what Your Honor is saying.

In his opening brief, Thomas suggests that the State, in its closing argument in support of its evidence of a first-degree assault, emphasized the serious physical injury modality. In fact, in closing the State referred to each of the possible modalities, albeit briefly. The jury in turn, having been instructed specifically on each modality, returned a general verdict of guilty of first-degree assault, without specificity as to the modality relied

upon. The court, as we have noted, sentenced Thomas on the basis of the handgun modality. We agree with Thomas that the record does not disclose which modality was applied by the jury, thus creating an ambiguity.

Thomas urges us to apply the holding in *Dixon*, *supra,* and resolve the ambiguity in his favor by merging the *convictions*. In *Dixon*, the Court of Appeals determined that "modality (a)(1) of the first degree assault statute is a lesser included offense of the greater offense of attempted voluntary manslaughter, while (a)(2) is not a lesser included offense." 364 Md. at 241 (footnote omitted). Recognizing the two distinct modalities of the assault statute the Court also explained that if the appellate court "cannot determine under which modality the jury convicted [the defendant] of first degree assault[,]" *Id*. at 248, the court will "resolve the ambiguity in favor of [the defendant]." *Id*. (citing *Nightingale v. State*, 312 Md. 699, 708-09 (1988)). *See also Johnson v. State*, 228 Md. App. 27, 46 (recognizing "'the appropriate standard to apply when addressing a question of factual ambiguity in the context of merging convictions is to resolve the ambiguity in the defendant's favor in a situation where it is impossible to know for certain the rationale of the trier of fact for finding the convictions entered against the defendant'" (quoting *Nicolas v. State*, 426 Md. 385, 408 n. 6 (2012)), *cert. denied*, 450 Md. 120 (2016).

Because the record does not enable us to determine under which modality the jury convicted Thomas of first-degree assault, and because we conclude that the conduct that would establish each modality occurred so closely in time as to have essentially been part of the same transaction, the "remedy is to vacate only the sentence imposed upon the lesser

included offense, not the conviction itself." *Twigg v. State*, 447 Md. 1, 19 n.10 (2016). *Accord Brooks v. State*, 439 Md. 698, 737 (2014) ("Sentences for two 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." (citing *Nicolas*, 426 Md. at 400-02)).

Further, as the *Twigg* Court explained, because the sentence for the lesser included offense was effectively removed from the "sentencing package" and merged into the greater offense, the sentence for the greater offense can also be vacated to allow re-sentencing in accordance with intent of the original "sentencing package."[7] *Twigg*, 447 Md. at 28 (rationalizing that "'[a]fter an appellate court unwraps the package and removes one or more charges from its confines, the sentencing judge, … is in the best position to assess the effect of the withdrawal and to redefine the package's size and shape (if, indeed, redefinition seems appropriate)'" (quoting *United States v. Pimienta-Redondo*, 874 F.2d 9, 14 (1st Cir. 1989))).

JUDGMENTS OF CONVICTION AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR ST. MARY'S

[7] In re-sentencing of the attempted first-degree murder offense on remand, the new "sentencing package" aggregate may not exceed that aggregate sentences as originally imposed. *See, Twigg, supra*, 447 Md. at 30. *See also, Thomas v. State*, No. 1416, Sept. Term, 2017 (filed November 28, 2018).

COUNTY FOR RE-SENTENCING CONSISTENT WITH THIS OPINION. COSTS ASSESSED 80% TO APPELLANT AND 20% TO ST. MARY'S COUNTY.