Circuit Court for Anne Arundel County
Case No. C-02-CR-23-000759

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 325

September Term, 2024

DONNEY CLIFFORD JOHNSON

v.

STATE OF MARYLAND

Shaw,
Ripken,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: March 28, 2025

*This is a per curiam opinion. Under Rule 1-104, the opinion is not precedent within the rule of stare decisis, nor may it be cited as persuasive authority.

Convicted by a jury in the Circuit Court for Anne Arundel County of fourth degree sexual offense and second degree assault, Donney Clifford Johnson, appellant, presents for our review a single issue: whether the court erred in failing to merge the conviction of second degree assault into the conviction of fourth degree sexual offense and imposing a separate sentence for each offense. For the reasons that follow, we shall remand the case with instructions to vacate the sentence for second degree assault and merge the conviction for that offense into the conviction for fourth degree sexual offense. We shall otherwise affirm the judgments of the circuit court.

Mr. Johnson was initially charged by indictment with second degree rape, first degree assault, and related offenses. At trial, the State called A., who testified that on July 14, 2022, she and Mr. Johnson went to his room at the Aloft hotel in Linthicum to obtain some drinks. Mr. Johnson subsequently pinned A. to the bed, choked and grabbed her, put a condom on his penis, and penetrated A.'s vagina with his penis. Mr. Johnson later pushed A. so that she "was facedown" and "penetrat[ed her] with his penis from behind, into her vagina." After A. went to the bathroom, Mr. Johnson again "tossed [her] back on the bed, facedown, and commenced to rape" her by "penetrating [her] with his penis in [her] vagina." A. went to the bathroom a second time, after which Mr. Johnson "rap[ed her] again from behind, penetrating with his penis in [her] vagina." A. again stated that she "needed to go to the bathroom," but instead "open[ed] the door," "grab[bed a] towel," and "ran for [her] life down the hallway."

Following the close of the evidence, the jury acquitted Mr. Johnson of second degree rape and first degree assault, but convicted him of fourth degree sexual offense and second

degree assault. The court subsequently sentenced Mr. Johnson to a term of imprisonment of one year for fourth degree sexual offense. For second degree assault, the court sentenced Mr. Johnson to a term of imprisonment of ten years, all but one year suspended, to be served consecutively to the sentence for fourth degree sexual offense.

Mr. Johnson contends that "[u]nder the required evidence test, the[] two convictions should have been merged for sentencing purposes and, under *State v. Frazier*, 469 Md. 627 (2020), no sentence should have been imposed for the lesser included offense of second degree assault." (Footnote omitted.) The State concurs, noting "that when convictions for second-degree assault of the battery modality and fourth-degree sexual offense of the nonconsensual sexual contact modality are based on the same act or acts, they merge for sentencing under the required-evidence test," and "in such a circumstance, second-degree assault must merge into fourth-degree sexual offense, rather than vice versa." *See id.* at 644-47. The State further notes that although, "in 2023, the General Assembly responded to *Frazier* by amending the fourth-degree sexual offense statute to add an express anti-merger provision," *see* Md. Code (2002, 2021 Repl. Vol., 2023 Supp.), § 3-308(e)(2) of the Criminal Law Article ("CR") (a "sentence imposed under this section may be imposed separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation of this section"), the offense in this case "was committed in July 2022, before the effective date of the 2023 amendment." Finally, the State notes that "[o]n this record, . . . the State cannot argue that it is unambiguously clear that the jury's convictions rested on separate acts," because the "indictment did not specify the discrete conduct that underlay each count," the jury instructions and verdict sheet "did not specify

that different conduct was the basis for the two charges," and "the prosecutor's closing argument did not disambiguate the conduct underlying the two counts." We agree with the parties that under these circumstances, merger is appropriate. *See Morris v. State*, 192 Md. App. 1, 39 (2010) ("when the indictment or jury's verdict reflects ambiguity as to whether the jury based its convictions on distinct acts, the ambiguity must be resolved in favor of the defendant" (citations omitted)). Accordingly, we remand the case with instructions to vacate the sentence for second degree assault and merge the conviction for that offense.[1]

CASE REMANDED TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY WITH INSTRUCTIONS TO VACATE THE SENTENCE FOR SECOND DEGREE ASSAULT AND MERGE THE CONVICTION FOR THAT OFFENSE. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.

[1]As the court sentenced Mr. Johnson to the maximum term of imprisonment allowed for fourth degree sexual offense, *see* CR § 3-308(d)(1), we decline to order re-sentencing.