Circuit Court for Montgomery County
Case No. 133853C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 351

September Term, 2019

MARTIN MOISE CHERY

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Adkins, Sally D., J.

Filed: August 24, 2020

After a jury trial in the Circuit Court for Montgomery County, Appellant Martin Moise Chery was convicted of two counts of first-degree rape, one count of false imprisonment, and one count of first-degree assault. This appeal followed.

FACTS AND PROCEDURAL HISTORY

On March 28, 2018, C.J.[1] visited an apartment belonging to Mike Antoine and Steve Isaac. C.J. had been there previously with a teen girl she looked after, whose boyfriend, Jordan Cobbs, frequented the apartment. While there, C.J. would often play dominoes with Cobbs and his friends, including Antoine, David Akoma, Tombong Saidy, and the Appellant, Martin Moise Chery.

This apartment's dominoes rules required participants to take one shot of alcohol if they passed (a move in the game), and two shots if they lost.[2] Alternatively, female players could remove an article of clothing instead of drinking.[3] C.J., still new to the game, eventually consumed "five cups" of alcohol, and started feeling unwell. After a trip to the restroom, C.J. returned to the dominoes table and told the others that she wanted to go home. Chery replied that she "could piss everybody else off," but she "couldn't piss him off," and placed a "shiny silver" gun on the table. C.J. testified that this made her feel nervous—and that she felt like she could not leave.

[1] We refer to the victim, an adult, by her initials in order to protect her identity.

[2] A shot is usually 1–1.5 ounces.

[3] This alternative, devised by Chery, applied exclusively to C.J., the only female player present.

C.J. continued to play dominoes, but switched from the penalty shot to removing articles of clothing. Eventually, she removed all of her clothing, and after another trip to the restroom, returned to find that her clothes were gone. C.J. again said that she wanted to go home. Chery responded that her "only option" was to win her clothing back. C.J. thus resumed playing, switching back to drinking the penalty shots. She consumed "another three to four cups" of alcohol.

Eventually C.J. told the group she was tired and did not feel good. She testified that Chery told her to go lay down in Isaac's bedroom, and then he followed her into the bedroom and began touching her. Chery claims that he entered the room with her after they had a conversation with Saidy about having sex. In the bedroom, C.J. told Chery to stop, but he refused. Chery briefly left the bedroom, and then came back with Cobbs, Saidy, Akoma, and Antoine. All of the men started touching her, and Chery forced her to perform oral sex on him while someone else attempted to have intercourse with her. Chery then began to have intercourse with her while Antoine forced her to perform oral sex. When he was finished, Chery left the room, and Cobbs and Saidy then forced themselves on C.J.

C.J. eventually took a shower, and returned to the bedroom, where she declined Antoine's request for oral sex. Antoine responded by taking her clothes and demanding she get out of his apartment. C.J. asked Chery to get her clothes back, but he declined to confront Antoine because of Antoine's reputation for being violent when drinking. C.J. fell asleep in the apartment.

Later that night, she woke up, found some shorts in Isaac's room, and left. On the walk to a friend's house, C.J. called her mother, and recounted what had happened to her. After arriving at a friend's house, her mother picked her up and took her to the hospital.

After an investigation, Chery was charged with two counts of first-degree rape, two counts of second-degree rape, two counts of first-degree assault, and one count of false imprisonment. A jury found Chery guilty of both counts of first-degree rape, one count of first-degree assault, and one count of false imprisonment. It acquitted him of the first-degree assault allegation stemming from an incident that occurred a week before the rape, on March 20, when he sent C.J. a threatening text message accompanied by a photo of him holding a gun. Chery was sentenced to consecutive twenty-five-year prison terms for the rape convictions, and concurrent sentences of five years for the assault conviction, and two years for the false imprisonment conviction.

Chery presents us the following questions on appeal:

1. Did the Administrative Judge abuse his discretion in finding good cause to postpone trial beyond Mr. Chery's *Hicks* date?

2. Did the trial court err in admitting highly prejudicial Instagram photographs into evidence?

3. Did the trial court err in allowing inadmissible hearsay into evidence?

4. Did the trial court err in failing to merge first-degree assault into first-degree rape?

5. Did the trial court err in failing to merge false imprisonment into first-degree rape?

We answer Questions 1, 2, 3, and 5 in the negative, and affirm the circuit court's judgments regarding those issues. As to Question 4, for the reasons discussed below, we shall vacate the first-degree assault sentence.

DISCUSSION

Question 1

Chery first claims that the circuit court's administrative judge abused his discretion in finding good cause to postpone trial beyond the *Hicks* date, i.e., Chery's statutory right to face trial within 180 days of appearance of counsel or the first appearance of the defendant before the circuit court, whichever comes first. Md. Code (2001, 2018 Repl. Vol.) § 6-103(a) of the Criminal Procedure Article ("CP"); Md. Rule 4-271. *See State v. Hicks*, 285 Md. 310, 335 (1979) (the statutory deadline is mandatory, and dismissal is ordinarily an appropriate sanction for violation).

Chery's trial was originally scheduled for October 15, 2018, and his *Hicks* date was December 4, 2018. Just over three weeks before the scheduled start of the trial, on September 20, the State moved to compel a new DNA sample from Chery, which Chery opposed. Because new testing results would not be processed in time for the October 15 trial date, the State also moved for a postponement. Judge Cummins of the Circuit Court for Montgomery County heard the State's motion, at which the State explained that it was seeking new DNA samples because Detective Wendy Giovacchini, the "primary witness within the chain of custody," had a credibility problem. In fact, she was subject to an internal affairs investigation, and as a matter of office policy, could not be called as a

witness. Chery objected to any continuance and refused to waive his *Hicks* date, arguing that Giovacchini's "unavailability" did not amount to good cause for postponement. Judge Cummins tentatively re-scheduled Chery's trial date, subject to a good cause finding by Administrative Judge Robert Greenberg.

The State explained its position to Judge Greenberg:

> The detective that is involved with the buccal swab, she's not actually the one who took the buccal. Detective Theresa Durham actually does the buccal swab but then she passes it along to Detective Wendy Giovacchini who then seals the items and then bar codes them into evidence and they're placed into evidence. Detective Giovacchini is no longer available for the State to call [as] a witness, so in order to shore up the DNA, we have to get new samples from all of the defendants.[4]

Chery opposed any continuance for lack of good cause. Judge Greenberg ruled:

> Well, for the reasons that I stated earlier[5] but at least for Mr. Chery's benefit, and [Chery's defense counsel] is here and heard me, first of all it's a serious case. Without DNA evidence, there's going to be a large hole in the State's case and the State just apparently discovered within a week or so about the unavailability of the detective. So, for those reasons,

[4] This testimony comes from the transcript of Chery's co-defendant, Jordan Cobbs. The State's motions to compel DNA and postpone trial were for all of the co-defendants.

[5] Earlier, Judge Greenberg had granted the State's postponement request against Cobbs:

> Look, it's a close question for me because this matter's been postponed once before and it is a matter of the State trying to shore up its case, but it is an unusual circumstance. If the defendants were continuing, continued to be incarcerated, I might have a much different view and I'm reluctant at any rate to find good cause but I'm going to find it because I think it's a serious case.

> I'm going to find good cause to postpone the matter until January 29th at 9:30.

To postpone a trial beyond a defendant's *Hicks* date, this Court has stated that three conditions must be satisfied: "first, a party or the court . . . must request the postponement; second, good cause must be shown by the moving party; [and] third, the County Administrative Judge or a judge designated by him must approve the extension of the trial date." *Reed v. State*, 78 Md. App. 522, 534 (1989). When reviewing an administrative judge's good-cause determination, "appellate courts shall not find an absence of good cause unless the defendant meets the burden of demonstrating either a clear abuse of discretion or a lack of good cause as a matter of law." *Moody v. State*, 209 Md. App. 366, 374 (2013) (cleaned up). The administrative judge's determination carries a heavy presumption of validity, and is "rarely subject to reversal on review." *Fields v. State*, 172 Md. App. 496, 521 (2007), *cert. denied*, 399 Md. 593 (2007).

Chery claims that Judge Greenberg abused his discretion because Giovacchini's credibility problems did not make her "unavailable," and do not constitute good cause, and thus Chery's right to a speedy trial was violated. The State avers that Chery's claim must fail because delays associated with obtaining DNA evidence are a widely accepted basis for finding good cause to postpone a trial.

As the State rightly points out, the need to obtain DNA examinations and evidence frequently constitutes good cause for continuances beyond the *Hicks* date. *See, e.g.*, *Tunnell v. State*, 466 Md. 565, 583 (2020); *Peters v. State*, 224 Md. App. 306 (2015); *Choate v. State*, 214 Md. App. 118 (2013). Despite the State's assertion, however, this was

not a delay associated with obtaining DNA evidence. This postponement was for DNA re-collection, because the State's chain-of-custody was tainted by a detective's credibility issues. We agree with the State's characterization of its request as "self-serving," and therefore cannot support the State's implication that Chery should have acquiesced to the re-collection of his DNA and the continuance beyond his *Hicks* date "to ensure the integrity of important evidence" because it "also serve[s] the interests of Chery." A criminal defendant has no obligation to, as Judge Greenberg aptly described it, help "the State try[] to shore up its case." We see no reason why a criminal defendant should be expected to delay his day in court in order to help the State.[6]

Despite that, the *Hicks* date, embodied in CP § 6-103 and Rule 4-271, is intended to "prevent *chronic* delay." *State v. Toney*, 315 Md. 122, 134 (1989) (emphasis in original). That is, "when a delay is the result of an isolated instance rather than a recurring problem leading to chronic trial delays the administrative judge's finding of good cause should be upheld." *Id.* at 134 (cleaned up). In *Toney*, e.g., the Court of Appeals upheld a good-cause finding based on the prosecutor's unavailability because "the administrative judge could have properly concluded, as he did, that the delay in trying Toney was caused by an unusual situation and not by a chronic or recurring problem." *Id.* at 135.

Here, like in *Toney*, there is no evidence of chronic delay. This is an isolated example—an "unusual circumstance" as Judge Greenberg noted. In his thoughtful

[6] Here, it is questionable how valuable the DNA evidence would have been against Chery, as he alerted the State of his consent defense well before trial, and indeed, acknowledged having sexual intercourse with C.J. during trial.

analysis, Judge Greenberg discussed and weighed relevant factors, including the fact that the defendants were not currently incarcerated, and the severity of the case. Judge Greenberg was thus within his discretion in deciding that there was good cause to delay beyond the *Hicks* date in order to obtain DNA evidence. The Administrative Judge's ruling was discretionary, and he is in a place to direct his criminal docket. His analysis makes clear that it was a close call—which we do not disagree with—but we shall hold that Judge Greenberg clearly acted within his discretion in finding good cause.

Question 2

Before trial, the State moved *in limine* to admit two photos that it found on Instagram, which depict Chery holding a handgun.[7] The State argued that the photos were relevant to show that Chery "had the means to commit . . . first-degree rape and first-degree assault." The court granted the motion, finding that:

> With respect to the balancing of the probative nature [versus] the prejudicial value of the photographs, I do find that the scale tips in favor that probative nature of the photographs, that they are probative to the charge[s] . . . .

At trial, the photos were admitted over Chery's general objection.

Chery argues that the photos should have been excluded under Md. Rule 5-404(b), "Other Crimes, Wrongs, or Acts." He advances a propensity evidence argument that the photos are evidence which tends to show that the accused committed another crime independent of that for which he is on trial. A bedrock of American jurisprudence is that

[7] The photos were posted to the social media application on December 9, 2017, and March 13, 2018.

propensity evidence is inadmissible. *See Hurst v. State*, 400 Md. 397, 407 (2007) ("The primary concern underlying the Rule is a fear that jurors will conclude from evidence of other bad acts that the defendant is a bad person and should therefore be convicted, or deserves punishment for other bad conduct and so may be convicted even though the evidence is lacking." (cleaned up)). Chery claims that the photos do not fit within the "means to commit a crime" exception to the propensity rule because that exception focuses on the identity of the perpetrator, and here there was no dispute that Chery and C.J. had sexual intercourse. The State counters that gun possession is not a "bad act" or "other crime," and therefore Rule 5-404(b) does not apply. Alternatively, it says that if the Rule does apply, the photos were properly admitted under the "means to commit a crime" exception.

Before we discuss the Rule itself, we first shall address the State's contention that it does not apply, because gun possession is not a "bad act" or "other crime." The cases the State offers to support its contention—*Klauenberg v. State*, 355 Md. 528 (1999), and *Wheeler v. State*, 88 Md. App. 512 (1991)—do not exclude gun possession from Rule 5-404(b), but rather say that gun possession *alone* is not a "bad act." They do not support the State's blanket statement that the Rule never applies to evidence of gun possession.[8]

[8] In *Klauenberg*, evidence of two guns and 600 rounds of ammunition in the home of the defendant was not a "bad act" because there was "no indication that [the] firearms were obtained or possessed illegally." *Klauenberg v. State*, 355 Md. 528, 551 (1999) (cleaned up). In *Wheeler*, this Court similarly said, "showing someone a gun, *without more*, is, as far as we know, not a crime unless a criminal statute is involved." *Wheeler v. State*, 88 Md. App. 512, 527 n.10 (1991) (emphasis added).

Maryland Rule 5-404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

The exceptions identified in Rule 5-404(b) "are 'neither mutually exclusive nor collectively exhaustive.'" *Emory v. State*, 101 Md. App. 585, 616 (1994) (cleaned up). The Court of Appeals has recognized the "means to commit a crime" exception. *See Hayes v. State*, 3 Md. App. 4, 8 (1968) ("It is always relevant to show that the defendant before the date of the crime had in his possession the means for its commission."); *Ware v. State*, 360 Md. 650, 676 (2000) (testimony was relevant "to establish that [the defendant] possessed a gun" before a shooting).

Trial courts should apply a three-part test to determine admissibility under Rule 5-404(b). First, the court determines whether the evidence is relevant to prove something beyond criminal propensity, i.e., whether it falls into one of the recognized exceptions. *See Page v. State*, 222 Md. App. 648, 661 (2015). We review this determination without deference. Next, the court determines whether the crime or bad act has been proved by clear and convincing evidence. *Id.* There is no question here that the photos are of Chery. Finally, the court weighs the probative value of the evidence against the potential for unfair prejudice. This is reviewed for an abuse of discretion. *Id.*

We are not convinced that the "means to commit a crime" exception only focuses on the perpetrator's identity, and therefore does not apply here. In *Reed v. State*, 68 Md.

App. 320, 330 (1986), the appellant-defendant contended that a witness's testimony that he saw the defendant with a gun two years before the shooting was propensity evidence. We disagreed, and held that the evidence was probative to show that the appellant possessed the type of weapon employed in the shooting. *Id.* Here, the State sought to prove Chery had committed a first-degree assault on March 20, 2018, by sending C.J. a threatening text message accompanied by a photo of him holding a gun. It also sought to prove another first-degree assault, as well as both first-degree rapes, on March 28, by intimidating C.J. with a handgun on the dominoes table. Similar to *Reed*, evidence that Chery possessed the type of weapon employed in those alleged crimes falls squarely within the "means to commit a crime" exception. *See also Ware*, 360 Md. at 676.

Chery also challenges the third step in our Rule 5-404(b) analysis, arguing that the photos should have been excluded because they were "highly prejudicial" toward him, and outweigh any probative value. He asserts that the photos have minimal probative value because the guns in the photos were black, and C.J. testified that the gun he placed on the domino table on the 28th was a "shiny silver" one. He points to *Smith v. State*, 218 Md. App. 689 (2014), in support of his position.

In *Smith*, the defendant was charged with shooting his roommate. *Id.* at 696. On appeal, Smith argued against the trial court's admission of evidence that he owned eight guns, and that ammunition was found in his apartment after the shooting. *Id.* at 703. We noted there that the record did not establish how that evidence was relevant, and held, "[w]ithout a more direct or tangible connection to the events surrounding *this shooting*, the

evidence of other weapons and ammunition owned by [the defendant] failed the probativity/prejudice balancing test, and the trial court erred by admitting it." *Id.* at 706 (emphasis in original). During the investigation, Smith told investigators that he owned the gun that shot his roommate. *Id.* at 696–97. Nevertheless, this Court said that "[n]either the State nor the trial judge articulated how the[e] evidence was relevant to whether Mr. Smith committed the alleged crimes." *Id.* at 705–06.

This case is distinguishable from *Smith*. Here, the State clearly argued the photos' relevancy, which the judge considered and discussed, finding that the photos are "probative to the charge[s] of first-degree assault and first-degree rape." We also see a direct connection between the evidence and the crimes alleged. C.J. testified that Chery sent her a threatening picture of a gun on the 20th, and threatened her with a gun on the 28th. Photos of Chery with a gun—the most recent posted only one week before the first alleged assault—are tangible, probative evidence that he had the means to commit those alleged crimes.[9] In other words, the photos have probative value.

The color of the guns in the Instagram photo—black—as opposed to C.J.'s description of Chery's gun as "shiny silver," does not go to probative value, but rather to weight. The jury could have believed that C.J. confused the color of the gun; it was up to the jury to decide whether the color differential was material and consequently how much weight to assign to the photos.

[9] No actual gun of Chery's was presented at trial as evidence, which heightens the probative value of any evidence indicating that Chery had guns.

The admissibility issues surrounding publicly available photos—posted on social media—is a complex and evolving one—and one worth considering. Here, however, Chery's propensity argument does not quite carry the day. The photos here: (1) fit into the Rule 5-404(b) "means to commit a crime exception," (2) have probative value, and (3) that value is not outweighed by any risk of unfair prejudice to Chery. Earlier in the trial, the photo Chery texted to C.J. showing him pointing a gun at the camera was admitted, without challenge, into evidence. Thus, the jury had already seen a photo of Chery with a gun. Showing them two other similar photos will not have sufficient impact on the jury to cause "unfair prejudice." We therefore shall hold that the trial court acted within its discretion in admitting the Instagram photos into evidence.

Question 3

Following C.J.'s testimony, the State called her mother, Ms. Laws, to the stand. Laws's testimony essentially corroborated C.J.'s version of events. She recounted two phone calls from her daughter on March 28. The first call was brief, and Laws described her daughter as sounding "out of sorts," and "didn't sound like herself." Laws testified that in the second call, hours later, C.J. told her what happened to her at Antoine's apartment. Defense counsel made a hearsay objection as soon as the State asked Laws to relay the specifics of what her daughter said, but the trial court overruled the objection, finding the statements were a "prompt report of sexual assault," admissible as a hearsay

exception under Rule 5-802.1(d).[10] Laws continued with an extensive narrative testimony echoing C.J.'s testimony.

Hearsay is a statement offered into evidence to prove the truth of the matter asserted but made by someone other than the declarant testifying at trial. Md. Rule 5-801(c). As a rule of exclusion, hearsay is inadmissible unless an exception applies. Md. Rule 5-802. We review without deference whether the trial court properly admitted hearsay evidence under an exception. *See Muhammad v. State*, 223 Md. App. 255, 265–66 (2015).

C.J.'s statement to her mother late in the evening of March 28 was hearsay, as it was an out-of-court statement offered at trial to prove its truth. Therefore, it was not admissible unless it met the requirements of one of the exceptions to the rule against hearsay. Despite Laws's statements being admitted at trial pursuant to the "prompt report" exception, both Chery and the State now agree that—because of its narrative nature—Laws's testimony exceeded the limited scope of this hearsay exception. The purpose of the "prompt report" exception is to allow the State to offer 'some corroboration' of the victim's testimony. *See Muhammad*, 223 Md. App. at 268.

> The purpose of the exception is fulfilled by allowing the State to introduce, in its case-in-chief, the basics of the complaint,

[10] Rule 5-802.1(d) states:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule: (d) 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.

> *i.e.*, the time, date, crime, and identity of the perpetrator. The narrative details of the complaint are not admissible, as they exceed the limited corroborative scope of the exception.

Id. As such, we agree with Chery and the State that Laws's testimony does not fall under the "prompt report" exception.

The State, however, now argues that the testimony was nonetheless properly admitted as rehabilitation evidence under Rules 5-802.1(b) and 5-616(c)(2).[11] It contends that the defense made several attacks on C.J.'s credibility, which were logically rebutted by her statement to her mother. These attacks, according to the State, include: (1) Chery's opening statement, which claimed that the incident involved consensual sex and that "[l]ots of people have sex with this girl" because "[t]hat's what she did"; (2) cross-examination of C.J. about her failure to report the rape to friends; and (3) cross-examination of C.J. about her failure to give a detailed description of the rape to her mother and a police officer. Chery counters that the defense never impeached C.J., but simply disagreed with her as to whether the sex was consensual, and therefore the court erred in admitting any rehabilitation evidence.

[11] The State claims that this issue is not preserved because, at the bench after Chery's objection, the discussion focused on whether the *timing* of C.J.'s phone calls to her mother exceeded the "prompt report" exception's scope, rather than whether the *narrative nature of the testimony* did. We disagree.

Chery had immediately objected after the State asked Laws, "[w]hat did she tell you about what happened that day?" At the bench, the court queried, "as for your objection, I presume hearsay?" Chery's counsel responded affirmatively. The timing of Chery's objection indicates his objection took issue with a presumed narrative response to the question. We find this sufficient to preserve the issue.

Rule 5-802.1(b) is an exception to the rule against hearsay, allowing for the admission of a "statement that is consistent with the declarant's testimony, if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive." Likewise, Rule 5-616(c)(2) is another exception, and states that "a witness whose credibility has been attacked may be rehabilitated by, except as provided by statute, evidence of the witness's prior statements that are consistent with the witness's present testimony, when their having been made detracts from the impeachment."

Therefore, to determine if Chery made "an express or implied charge against [C.J.] of fabrication," we look to the State's three claims of impeaching circumstances: (1) Chery's opening statement, (2) cross-examination of C.J. about her failure to tell her friend about the rape the next morning, and (3) cross-examination of C.J. about her failure to discuss details of the rape with her mother and the police the next day. Md. Rule 5-802.1(b).

Chery claims the defense never impeached C.J., "both sides simply disagreed about whether [C.J.] and Mr. Chery had consensual sex." Chery's opening statement tells a different story, where counsel states, "[t]his case is about the fact that [C.J.] is not telling the truth . . . ." This is more than just a *statement* of Chery's version of events. It is *argument*, an "express . . . charge against the declarant of fabrication," which the jury could rightly construe as an impeachment of C.J.'s credibility and character. Md. Rule 5-802.1(b).

We next look Chery's cross-examination of C.J. about her failure to tell her friend about the rape. Defense counsel asked C.J. the following:

> [DEFENSE COUNSEL] Q.: In the course of your testimony, you talked about taking a nap, talked about having a shower, talked about not calling your friends, and everybody else, but you sent this text to your friend Kassandra?
>
> [C.J.] A.: Yes.
>
> Q.: But you didn't say in there, I have been violated, and forcibly raped, and I need help[.] [Y]ou didn't say that, did you?
>
> A.: That's not a conversation I would have with somebody over text, that's why I asked her to please call me.
>
> ***
>
> Q.: And did you tell Jackie?
>
> A.: No, I didn't.

This line of questioning, about C.J.'s supposed failure to promptly report her rape to her friends, is an "implied charge of fabrication," and an example of the defense trying to establish "the failure of a sex offense victim to complain at the time of the crime or shortly thereafter," which the Court of Appeals defined as an "impeaching circumstance." *State v. Werner*, 302 Md. 550, 565 (1985). Chery also tries to establish a "failure of a sex offense victim to complain" through cross-examination of C.J. discussing the rape with the police and her mother:

> [DEFENSE COUNSEL] Q.: Now, when you were walking home to Jackie's, and you called your mother, is that right?
>
> [C.J.] A.: Correct.

Q.: On your phone?

A.: Correct.

Q.: With your phone, you could have called 9-1-1, the police, isn't that right?

A.: Correct.

Q.: You didn't, right?

A.: Correct.

Q.: All right. Did you ever call the police about any of these incidents? Did you call?

A.: No.

***

[DEFENSE COUNSEL] Q.: All right. When you went in the car with your mother, you gave her no details of any of this, is that right?

[C.J.] A.: I outlined it.

Q.: And when you went to Montgomery General to the hospital there, a police officer came and talked with you, a uniformed police officer—

A.: Correct.

Q.: Do you remember that? Because I believe it was Officer Cadigan, and he came in, and he- - did you tell him any of the details of this case?

A.: Yes, I did.

Q.: All of the details?

> A.: Yes, and that's why he asked my mother if I told her some of this.
>
> Q.: Yes. And she said, no, you didn't tell you [sic] anything?
>
> A.: No, she said yes.
>
> Q.: Yes. You told her everything, is that right?
>
> A.: I said I told her some of it. And he said, so, your story's consistent, and she said, yes, her story's consistent with what she's telling me with what she told me.
>
> Q.: But you didn't -- he questioned whether you were telling him everything, is that right?
>
> ***
>
> Q.: . . . Officer Cadigan wanted to pursue all of this, and find out whether you were being consistent in what you were saying?
>
> A.: Right.

We are convinced, then, that Chery attacked C.J.'s credibility—expressly in his opening statement, and impliedly through cross-examination. These are impeaching circumstances, which "can then be explained by the State." *Id.* In other words, these circumstances open the door to rebuttal evidence under Md. Rule 5-802.1(b). To do so, the State used Laws, whose testimony about the details of the rape—provided to her by C.J. the day of—logically rebuts the impeachment of C.J.'s truthfulness and credibility. As such, the testimony, although improperly admitted under the "prompt exception" exception, does fall within an exception to the rule against hearsay as "a statement that is

consistent with the declarant's testimony . . . offered to rebut [a] . . . charge against the declarant of fabrication . . . ." Md. Rule 5-802.1(b).[12]

Questions 4–5

Chery advances two merger arguments. First, he argues that his first-degree assault conviction should have been merged into his first-degree rape conviction, and second, that his false imprisonment conviction should have been merged into his first-degree rape conviction.

If a conviction is required to be merged for sentencing purposes, and it is not, then it is an illegal sentence, which courts may correct at any time. *See Britton v. State*, 201 Md. App. 589, 598–99 (2011). Md. Rule 4–345(a). Because an illegal sentence is a matter of law, we review without deference whether the trial court's sentencing conclusions were correct. *See Blickenstaff v. State*, 393 Md. 680, 683 (2006).

The Fifth Amendment's Double Jeopardy Clause, as applied to the states through the Fourteenth Amendment, states that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. In Maryland, this

[12] In *Cole v. State*, 83 Md. App. 279 (1990), this Court examined the history of the "prompt report" exception. We defined the exception: "it is established in Maryland that a complaint made by a rape victim may be admitted . . . as to the time, place, crime, and name of the wrongdoer." *Id.* at 294. We explained, however, that "[w]hen the victim's credibility has been impeached . . . [by] cross-examination . . . then the prior complaint . . . may come in in full detail as a prior consistent statement." *Id.* We also made clear that the defense of consent allows for the full terms and details of the complaint to come in. *Id.* *Cole* evidences the logical connection between the "prompt report" exception, and the rebuttal evidence exception, which were codified three years after we issued *Cole*, through the Legislature's adoption of Rule 5-802.1.

extends to forbidding a defendant from being "in jeopardy of being twice convicted and punished for the same crime." *State v. Griffiths*, 338 Md. 485, 489 (1995). Merger prevents this, as it protects "a convicted defendant from multiple punishments for the same offense." *Brooks v. State*, 439 Md. 698, 737 (2014).

Sentences require merger "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.* Under the required evidence test, as explained by the Supreme Court:

> [W]here 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 requires proof of a fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304 (1932). The 'statutory provisions' are criminal offenses, and when an offense 'requires proof of a fact,' that is an element of the crime. In *Thomas v. State*, the Court of Appeals explained:

> If each offense requires proof of a fact which the other does not, or in other words, if each offense contains an element which the other does not, the offenses are not the same for double jeopardy purposes even though arising from the same conduct or episode. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, the offenses are deemed to be the same for double jeopardy purposes.

Thomas v. State, 277 Md. 257, 267 (1976).

First, Chery argues that the trial court erred in failing to merge his first-degree assault conviction into his first-degree rape conviction. The State agrees. When the same

facts form the basis for both an assault and a rape, the assault is treated as a lesser included offense and merges for sentencing. *See Green v. State*, 243 Md. 75, 80–81 (1966); *Paige v. State*, 222 Md. App. 190, 207 (2015). Here, the jury was instructed that it could convict Chery of first-degree rape if the State proved all of the elements of forcible second-degree rape and one or more of four aggravating factors, including that Chery "used or displayed a dangerous weapon or an object that [C.J.] reasonably concluded was a dangerous weapon," or that he "committed the offense aided and abetted by others." Because C.J. testified that Chery put his gun on the table when she wanted to leave, and that he and others engaged in forced sex with her, there were two factual bases to support first-degree rape. One of those two—the placing of the gun on the table when C.J. wanted to leave—was the only factual basis for the first-degree assault conviction.

The critical question as to merger here is whether the two convictions are based "on the same act or acts," i.e., whether the act the jury relied on to convict Chery for assault—laying the gun on the table—was the same act the jury relied on for his first-degree rape conviction. In the State's closing argument, the prosecutor told the jury that the State had proved the existence of both aggravating factors, but that the jurors did not have to agree on which one to use as a basis to convict Chery of first-degree rape. It is therefore unclear whether the jury chose the use of a gun, or the aiding and abetting, to convict Chery of first-degree rape, or whether there was unanimity favoring one aggravating factor or the other. In circumstances such as this, "when the factual basis for a jury's verdict is not readily apparent, the court resolves factual ambiguities in the defendant's favor and merges

the convictions if those convictions also satisfy the required evidence test." *Brooks v. State*, 439 Md. 698, 739 (2014). As such, we agree with Chery and the State that these convictions also satisfy the required evidence test, and that Chery's first-degree assault conviction should have merged with a first-degree rape conviction.

Second, Chery asserts that the court similarly erred in failing to merge his false imprisonment conviction into his first-degree rape conviction. This time, the State disagrees, and counters that Chery's claim fails because there is a factual basis for finding that false imprisonment also occurred before the rape.

The elements of forcible second-degree rape and false imprisonment overlap, so if the jury convicts a defendant of false imprisonment for confinement "*coincident with the rape*, the convictions merge for sentencing purposes." *Brooks*, 439 Md. at 739 (emphasis in original). If, however, the confinement occurs before or after the rape, merger is precluded. *See id.* at 737 (relying on *Hawkins v. State*, 34 Md. App. 82. 92 (1976)). The "critical question," then, is "whether the rape conviction and the false imprisonment conviction [were] based on the same act or acts." *Id.* at 738–39 (cleaned up). In other words, whether it is "readily apparent whether the jury actually came to [the] conclusion" that the confinement was separate from the rape itself. *Id.* To answer that question, we look to the entire record, including closing arguments. *See Brooks*, 439 Md. at 741. Unfortunately, there was no special verdict sheet in this case, which might have helped with this review.

Looking to the record, C.J. testified that after drinking "five cups" of alcohol during the dominoes game, she felt sick and told the group the she wanted to go home. It was at that point that Chery put his gun on the table and said that C.J. "could piss everybody else off, but . . . couldn't piss him off." This, according to C.J., made her nervous, and she felt that she could not leave. That inability to leave led C.J. to continue playing dominoes, losing all of her clothes, drinking more alcohol, and eventually being directed to go to the bedroom. But she also testified that during the rape, she did not feel as if she could leave. She stated that when showering after the rape she "didn't feel comfortable trying to get up and run, because I knew I wouldn't have gotten very far."

Chery claims that the prosecutor here argued false imprisonment to the jury similarly to the prosecutor in *Brooks*. In *Brooks*, the Court of Appeals was asked to review a similar scenario and determine whether a false imprisonment conviction merged with a rape conviction. There, the prosecutor told the jury:

> The false imprisonment count. Requirements for that is that the defendant confined or detained the victim against her will using force or threat of force. The fact that he wouldn't let her out of his sight, he wouldn't let her out of the bedroom, he followed her everywhere that she wanted to go in the house, specifically told her she couldn't use the phone or call the police, these are all indications that he meant to keep her where she was in the bedroom. She wasn't free to leave. She wasn't even free to make a phone call.

Id. at 741–42. The Court stated that this "appeared to identify the entire period of time [that the defendant was with the victim] as the period of false imprisonment." *Id.* at 741. The Court also noted that the prosecutor's argument "invited the jury to consider the entire

period of the encounter," and that "the prosecutor did not suggest that the jury should consider the time before or after the rape separately in considering the false imprisonment count." *Id.* at 742.

Here, the prosecutor told the jury that Chery committed a first-degree assault by threatening C.J. with the gun, and then he pointed to those same facts as proof of false imprisonment:

> And then we have false imprisonment, which is the same, which is just about the same thing, that putting that gun on the table, she didn't want to leave. She wanted to go, but once that gun was brought out, she wasn't going anywhere. He detained her in that apartment.

In telling the jury that the confinement began when Chery put the gun on the table, he—unlike the prosecutor in *Brooks*—"suggest[ed] that the jury should consider the time before . . . the rape separately in considering the false imprisonment count." *Id.* This case is therefore distinguishable from *Brooks* because the jury was not invited "to consider the entire period of the encounter." *Id.*

Chery argues that the prosecutor's argument the jury during closing that, during the rape, "[t]hey wouldn't let her leave. . . . They were trying to keep her there" creates an ambiguity. We are not persuaded. To prevent the sentences from merging, there must be a factual basis that false imprisonment occurred before or after the rape. There is no restriction against the imprisonment also occurring during the rape, which is what the prosecutor suggested.

Because the record shows that the State identified a specific point at which false imprisonment occurred, and that specific point was well before the factual basis for rape, the separate sentences shall stand.

CONCLUSION

We shall affirm for Questions 1, 2, 3, and 5. Because the circuit court erred by not merging the first-degree assault conviction into a first-degree rape conviction, we vacate Chery's concurrent first-degree assault sentence. *See Carroll v. State*, 202 Md. App. 487, 518 (2011) ("[W]here merger is deemed to be appropriate, this Court merely vacates the sentence that should be merged without ordering a new sentencing hearing.").

JUDGMENTS OF CONVICTION BY THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. SENTENCE FOR FIRST-DEGREE ASSAULT VACATED. COSTS TO BE PAID 4/5THS BY APPELLANT, AND 1/5TH BY MONTGOMERY COUNTY.