

Circuit Court for Prince George's County  
Case No. CT-110647-X

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 583

September Term, 2021

---

KEVIN WAGES

v.

STATE OF MARYLAND

---

Fader, C.J.,  
Berger,  
Raker, Irma S.  
(Senior Judge, Specially Assigned),

JJ.

---

Opinion by Berger, J.

---

Filed: April 8, 2022

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

In 2011, a jury sitting in the Circuit Court for Prince George’s County found appellant, Kevin Lenard Wages, guilty of sexual offense in the second degree and false imprisonment. The court sentenced him to 20 years’ imprisonment for the sexual offense and a concurrent term of 30 years’ imprisonment, all but 15 years suspended, for false imprisonment, to be followed by 5 years’ probation. We affirmed those judgments in an unreported opinion. *Wages v. State*, No. 497, Sept. Term, 2012 (filed Jul. 24, 2013).

Wages filed a postconviction petition as well as a supplemental petition.<sup>1</sup> Following a hearing, the circuit court denied all claims in both petitions. Wages filed applications for leave to appeal, raising, among other questions, the following:

- I. Whether the trial court imposed an illegal sentence in failing to merge false imprisonment into second-degree sexual offense because there was factual ambiguity as to whether the two offenses were based upon the same acts.
- II. In the alternative, whether appellate counsel rendered ineffective assistance in failing to argue on direct appeal that the factual ambiguity in this case required merger.

We granted the application, limited to those two questions, and transferred the case to the regular appellate docket. For the reasons that follow, we reverse.

### **BACKGROUND**

We must set forth factual and procedural background in some detail to decide the issues before us. We quote our unreported opinion in Wages’s direct appeal for context:

---

<sup>1</sup> Although the supplemental petition, filed with the assistance of counsel, was styled an “Amended Petition,” its claims did not supplant or supersede the claims raised in Wages’s original *pro se* petition.

[J.], aged nineteen at the time of trial, testified that, on March 29, 2011, she, her mother, [S.] and her mother's boyfriend, [Wages], lived together in an apartment on County Road, Prince George's County. [J.] awoke at approximately 8:00 that morning to find [Wages] standing in her previously locked bedroom with a knife in his hand. When she reached for her cell phone, [Wages] grabbed it, approached her with the knife and told her to accompany him into his and [S.'s] bedroom because "he needed to have a talk with [her]."

[J.] testified that, scared for her life and not understanding his request, she followed [Wages] to his room, where he sat her down on the bed and advised that he had caught her mother cheating on him; as proof, he showed her a video of her mother fellating another man. Because of her mother's philandering, [Wages] told her, [J.] was "going to give [him] something in return for some kind of way of revenge."

Brandishing the knife, [Wages] demanded that [J.] have intercourse with him. In an attempt to dissuade him, [J.] told [Wages] she had a sexually transmitted disease. Undaunted, [Wages] demanded that she fellate him instead; while making his demand, he held the knife to her neck. [J.] acquiesced and performed oral sex on [Wages]. After he ejaculated in her mouth, she spit his semen out into the sink shared by [Wages] and [S.].

[J.] observed [Wages] record the incident on his cell phone. Upon completion of the sexual act, he threatened that, if she told anyone what had transpired, he would upload the video onto Facebook and hurt her mother. [J.] said [Wages] also forced her to sign a note indicating that she had consented to the oral sex.

After [J.] had cleaned up, [Wages] permitted her to return to her bedroom. He returned her cell phone to her and, after approximately two hours of conversation with her boyfriend as to whether she should contact the police, [J.] called the police when she thought [Wages] was distracted by another phone call. Several police officers arrived approximately ten minutes later to find [J.] in her locked bedroom crying, "hysterical" and an "emotional wreck." [J.]

walked the female police officers through the apartment detailing what had happened. [J.] stated that the knife that the police located in a kitchen drawer was the one [Wages] had employed during the incident.

*Wages*, slip op. at 1-3 (footnotes omitted).<sup>2</sup>

The following month, an eight-count indictment was returned, by the Grand Jury for Prince George’s County, charging Wages with: first-degree sexual offense, second-degree sexual offense, third-degree sexual offense, false imprisonment, carrying a dangerous weapon openly with the intent to injure, first-degree burglary, third-degree burglary, and secretly recording and storing a video recording of [S.] without her consent. Each sexual offense was charged in the statutory short form prescribed in Criminal Law Article, § 3-317, and the count alleging false imprisonment similarly stated, “Kevin Lenard Wages on or about the 29th day of March, two thousand and eleven, in Prince George’s County, did unlawfully falsely imprison [J.] and did, without the consent and without lawful authority, restrain the said [J.], in violation of the common law of Maryland, and against the peace, government and dignity of the State.” The case proceeded to a jury trial on all but the last count of the indictment, which was dismissed during a pretrial motions hearing.<sup>3</sup>

---

<sup>2</sup> To protect the victim’s privacy, we redact her identity as well as those of other witnesses who knew her personally. *See. e.g., Juan Pablo B. v. State*, 252 Md. App. 624, 629 & n.3 (2021), *cert. granted*, \_\_\_ Md. \_\_\_ (Jan. 11, 2022).

<sup>3</sup> Count 8 alleged a violation of Criminal Law Article, § 7-308(c), which prohibits the knowing delivery of a recorded article “embodying a performance without the consent of the performer,” because Wages previously had recorded his erstwhile girlfriend, S., fellating another man and then, without S.’s consent, forced J. to watch the recording and

(continued)

During opening statement, the prosecutor addressed the jury as follows:

[J.] is the victim of the sexual assault in this case. You will hear that Kevin Wages suspected that his girlfriend was cheating on him, so on March 29, 2011, he broke into [J.'s] locked bedroom door at knife point, got her out of her bed, showed her a video of her mom [] performing a sex act, fellatio. . . .

He showed [J.], her mother, a picture of her mother on a recording device of her performing a sex act, and says this is what you are going to have to do to me. Your mother is cheating on me.

This is what you are going to have to do to me. Despite her pleas of saying no, she will tell you that he that he initially wanted to have vaginal intercourse. She said, I have a disease. And he says you are going to have to do something. You are going to service me in some fashion. And at knife point with the camera recording device in hand, he forced her to suck his penis. He recorded it and he threatened to place it on Facebook if she told anyone what he had just done to her.

He kept her from using her cell phone. She went back [to] her room, where they went. Over time, he gave her the cell phone, and because of fear that he could still hear, because she could hear him moving about the apartment, she texted her boyfriend [R.], and told him this man's just committed a sexual assault against me.

Only when she felt comfortable enough to make a call. She'll tell you, Kevin Wages became distracted talking on the phone to someone, then she felt his attention was distracted enough where she could make a call.

I'm not real familiar with a Skype. Apparently, the boyfriend was on the line while she Skyped the police. And

---

demanded that she service him likewise. The court granted a defense motion to dismiss that count of the indictment because it had not been charged properly (the offense appeared to sound more in a violation of the Maryland Wiretap Act, but there was no allegation of when or where the recording had been made).

you’ll hear Miss [J.] was in her bedroom. She could hear the police bang on her door for him, to someone to answer the door.

At trial, eleven witnesses testified for the State,<sup>4</sup> but only J.’s testimony (which is summarized above) had any relevance to the issue before us, which is whether the second-degree sexual offense and the false imprisonment were based upon the same or separate acts. Wages testified on his own behalf. We summarized that testimony in our opinion in his direct appeal:

He stated that his relationship with [J.] had begun as somewhat strained, but she eventually became “a little bit flirtatious” with him, ultimately escalating her behavior with him to kissing and two incidents of sexual intercourse at the end of February and the beginning of March 2011; [Wages] subsequently discovered [S.] was having an affair. Feeling guilty about the sexual relationship with [J.], he ended their affair.

On the morning of the alleged incident, he testified that he was “pretty upset, pretty conflicted” after having discovered that [S.] was cheating on him. [Wages] decided to tell [J.] that her mother was not “the church-going, sanctified woman that she pretends to be,” and that she and her mother were going to have to move out of the apartment; accordingly, [Wages] knocked on [J.’s] bedroom door several times.

The door opened several inches and, when he pushed it open, he saw [J.] climbing back into her bed. [Wages] testified that he told [J.] that he needed to speak to her and he, therefore, asked her to follow him to his room. She followed him willingly and, when she entered the room, she lay down on his bed. [Wages] then told [J.] about her mother’s affair and showed her the video of her mother fellating another man.

---

<sup>4</sup> The other State’s witnesses included police officers who had performed various tasks either in responding to the crime scene or in furthering the investigation in this case, as well as J.’s boyfriend (with whom she had communicated shortly after the sexual assault) and the forensic scientist who had performed DNA testing and analysis.

When [Wages] told her she would have to move out of the apartment, she cried and said, “it’s not fair. I didn’t do anything.” As an alternative to eviction, [J.] suggested that [Wages] have an affair with a prostitute or “crack head” as retaliation for her mother’s betrayal.

[Wages] stated that [S.] would not care about a prostitute or crack head; the only person she cared about was [J.]. He then suggested that he have an affair with her. She demurred, saying she had a sexually transmitted disease, but when he advised “there’s more than one way to have sex,” she agreed to oral sex.

He asked her to write a note as to why she was undertaking that course of action because [S.] had told him that [J.] had previously made an unsubstantiated claim regarding a sexual assault by another boyfriend of her mother. [J.] wrote two versions of the note and he put the signed note in his dresser drawer.

When [Wages] returned to the bed, [J.] was on her knees, crying. [Wages] told her that she did not have to perform oral sex, but she twice said she would. As she fellated him, [Wages] filmed the incident on the same camera he had used to show [J.] the video of her mother.

Afterwards, [Wages] saw [J.] spit the ejaculate into her hands, wipe her hands on the carpet and leave the room. He admitted to telling her that he might show the video to her mother and her boyfriend and post it on Facebook.

Thereafter, [Wages] heard [J.] in the bathroom and the kitchen, but he went back to sleep in his bedroom. [Wages] testified that he was shocked when the police later rushed into the apartment and arrested him.

*Wages*, slip op. at 3-5 (footnotes omitted).

Following the close of all the evidence, the jury was given a verdict sheet and was instructed as follows:

THE COURT: All right. Members of the Jury, you have copies of the verdict sheet, and I'd like to read along with you the questions presented on the verdict. Question one, do you find the Defendant Kevin Lenard Wages guilty or not guilty of first degree sexual offense?

If you found the defendant guilty of question one, stop, and proceed to question four. There is no need to answer question two, and three.

If you found the defendant not guilty of question number one, please proceed to question two. Question two, do you find the defendant, Kevin Lenard Wages guilty or not guilty of second degree sexual offense?

If you found the defendant guilty of question number two, stop, and proceed to question number four. There is no need to answer question three.

If you found the defendant not guilty of question two, please proceed to question three.

Question three, do you find the defendant Kevin Lenard Wages guilty or not guilty of third degree sexual offense?

Question four, do you find the defendant Kevin Lenard Wages guilty or not guilty of the charge of false imprisonment?

Question five, do you find the defendant Kevin Lenard Wages guilty or not guilty of carrying a dangerous weapon openly?

Question six, do you find the Defendant Kevin Lenard Wages guilty or not guilty of first degree burglary of a dwelling?

If you found the defendant guilty of question number six, stop. There is no need to answer question number seven.

If you found the defendant not guilty of question number six, please proceed to question, and it says here, three, but it would be question seven. So I'll make that change.

Question seven, do you find the Defendant Kevin Lenard Wages guilty or not guilty of third degree burglary?

After reading through the verdict sheet with the jury, the court instructed the jury about the elements of the crimes charged:

The defendant is charged with the crime of first degree sexual offense.

In order to convict the defendant, the State must prove all of the elements of forcible second degree sexual offense, and must also prove one or more of the following circumstances:

One, the defendant used or displayed a dangerous weapon or an object, that [the victim] reasonably concluded was a dangerous weapon, and two, that the defendant committed the offense in connection with a burglary in the first or third degree.

[Definition of dangerous weapon]

The defendant is charged with the crime of second degree sexual offense. In order to convict defendant of second degree sexual offense, the State must prove, one, that the defendant committed fellatio with [the victim]. Two, that the act was committed by force or threat of force. And three, that the act was committed without the consent of [the victim].

[Definitions of fellatio, force, resistance, and consent]

The defendant is charged with the crime of third degree sexual offense. In order to convict the defendant of third degree sexual offense, the State must prove, one, that the defendant had sexual contact with [the victim]. Two, that the sexual contact was made against the will, and without the consent of [the victim]. And three, that one or more of the following circumstances (a) the defendant used or displayed a dangerous weapon, or an object that [the victim] reasonably concluded was a dangerous weapon, or that the defendant committed the offense in connection with a burglary in the first or third degree.

[Definitions of sexual contact and dangerous weapon]

The defendant is charged with burglary in the first degree. Burglary in the first degree is the breaking and entering of someone else's dwelling with the intent to commit theft or a crime of violence.

In order to convict the defendant of burglary in the first degree, the State must prove, one, that there was a breaking. Two, that there was an entry. Three, that the break and entry was into someone else's dwelling. Four, that it was done with the intent to commit a sexual offense therein. And five, that the defendant was the person who committed the act.

[Definitions of breaking and dwelling]

The defendant is charged with burglary in the third degree. Burglary in the third degree is the breaking and entering of someone else's dwelling with the intent to commit any crime.

In order to convict the defendant of burglary in the third degree, the State must prove, one, that there was a breaking. Two, that there was an entry. Three, that is breaking and entry was into someone else's dwelling.

Four, that this was done with the intent to commit a crime inside. And five, that the defendant was the person who committed the act.

[Definitions of breaking and dwelling]

The defendant is charged with the crime of carrying a dangerous weapon openly, with the intent to injure another person.

In order to convict the defendant, the State must prove that the defendant wore or carried a dangerous weapon, and that it was carried openly with the intent to injure another person.

[Definition of dangerous weapon]

The defendant has been charged with the crime of false imprisonment.

False imprisonment is the detainment or confinement of a person, against her will through force or threat of force.

In order to convict the defendant -- strike that. In order for the defendant to be found guilty of guilty of this offense, the State must prove beyond a reasonable doubt that defendant detained or confined the victim. Two, the detainment or confinement of the victim was against her will. And three, the defendant used force or threat of force to detain or confine the victim.

After the court finished instructing the jury, the parties delivered their closing arguments. The prosecutor exhorted the jury:

Good afternoon again, Ladies and Gentlemen. [J.] lived through a nightmare. On March 29, she was in her bedroom sleeping when she awoke and found Kevin Wages standing over her, armed with a knife.

He forced her, he took her from her room to his bedroom and he forced her to watch a videotape of her mother performing fellatio on another person. He told her, that's what you are going to have to do for me. I found out your mom was cheating on me, and you are going to have to do something.

He was not moved by her tears. He was not moved by her sobs. She had said she had an STD to prevent him or to discourage him from raping her as well. And he said, you are going to do something. And what does he do? He gets his camera. That same camera that he used it to record or to show her the recording of her mother, and he recorded a sexual assault.

He recorded, I submit to you, when you listen to section 20 of the tape, the 20 seconds in, you hear her sobs.

And he says, words to the effect I am going to give you one more chance. That infers that there was some discussion,

some resistance earlier. She was pleading with him, don't do this. I didn't do anything.

Some of what he said on the stand was, I think accurate, I didn't do anything. Why are you doing this to me, words to that effect.

He was not moved by any of that. He was erect. He enjoyed this and he filmed her as she is sobbing and weeping. And he is erect, and he climaxes, ejaculates in her mouth.

She spits out the semen and she cleans, goes and rids her body of the semen as best you can. And she contacts her boyfriend. She's obviously devastated, contacts her boyfriend, was texting or Skyping with him. I'm not real familiar with all those forms of technology, but they were communicating back and forth. And you heard she was still deeply disturbed by this man.

She didn't know what he was capable of. He just committed a sexual assault against her and she had to work up the courage to feel comfortable to go and to talk, to run the risk of him coming to her door.

What are you doing? Who are you calling, the police, and having him inflict further punishment on her. But there does come a time where she works up the courage to contact the police. Then you hear there is some back and forth. They ask her to stay on the line, assure safety, make sure she is in a safe area.

And there's knocking at the door. The policeman told you that there was a delay of several minutes. And we have been considering perhaps having to kick the door in at some point because no one was coming to the door.

Finally Kevin Wages comes to the door. They go back into the locked bedroom. [J.] is still in her bedroom, locked. They are telling her, we are the police. We are here.

The prosecutor continued:

I could take you through what the charges are.<sup>[5]</sup> It is a straight forward case. It's like a textbook, like a crime you see out of the movies so to speak. Somebody coming with a blade at you, forcing you to do something against your will. That is a sixth degree sexual offense.<sup>[6]</sup>

He's shown no reason why he would not use that blade. It's apparent from the conversation that little nugget that was on the table, this is the last time that there was something going on.

She is, she was trying to plead with him, trying to persuade him not to go through with this act, but no, that did not move him.

\* \* \*

I have another chance to address you. I ask you to find him guilty of each of the charges presented in the verdict sheet.

This was a forcible entry into her bedroom. After that it carried over to his room where he did everything that she told you. She did everything that she said she did. It's clearly corroborated in the timing of these disclosures, I think is critical. She told you everything before the police found one single iota of evidence.

She told them what happened right there on the scene before they got the search warrants. We have everything else, and you have everything you need to convict this man and find him guilty of all charges presented in the verdict sheet.

Finally, in rebuttal, the prosecutor said:

You look at the tape. It is horrible. And I agree it's a horrible, first degree sex offense that's been captured here.

---

<sup>5</sup> The prosecutor did not, however, follow through on his promise.

<sup>6</sup> Presumably, this is a transcription error. Viewed in proper context, it appears the prosecutor must have said, "That is a first degree sexual offense."

And again, I can't get into his mind and understand why he would, why he would even do this.

\* \* \*

Find him guilty of all the charges presented on the verdict sheet.

After deliberating for less than two hours, the jury found Wages guilty of second-degree sexual offense and false imprisonment, and it acquitted him of first-degree sexual offense, carrying a dangerous weapon openly with the intent to injure, and first- and third-degree burglary.<sup>7</sup> The court subsequently sentenced Wages to 20 years' imprisonment for second-degree sexual offense and a concurrent term of 30 years' imprisonment, all but 15 years suspended, for false imprisonment, to be followed by 5 years' supervised probation. *Wages, supra*, slip op. at 1 n.2.

Wages appealed, contending that the trial court erred in failing to merge false imprisonment into second-degree sexual offense for sentencing purposes because the victim had been detained “only” for “the time that was sufficient to accomplish the second degree sexual offense.” Brief of Appellant, *Wages v. State*, No. 497, Sept. Term, 2012, at 12. He relied primarily upon *Hawkins v. State*, 34 Md. App. 82, 92 (1976), which held that

---

<sup>7</sup> The jury did not return a verdict on the charge of third-degree sexual offense because it found Wages guilty of second-degree sexual offense, and it had been instructed, under that circumstance, not to consider the charge of third-degree sexual offense.

false imprisonment merges into rape under the required evidence test when “the victim was detained only a sufficient time to accomplish the rape.”<sup>8</sup>

In an unreported opinion, we upheld Wages’s convictions, reasoning that J. had been “detained for a period of time which exceeded that sufficient to accomplish the sexual offense” and that, furthermore, “the charge of false imprisonment was supported by facts independent of the facts supporting the charge of second-degree sexual offense.” *Wages*, slip op. at 8.

In 2015, Wages filed *pro se* a postconviction petition, in the Circuit Court for Prince George’s County, raising seven claims of ineffective assistance of trial counsel as well as a cumulative effect claim. Four years later, with the assistance of counsel, Wages filed a supplemental postconviction petition, raising two additional claims: (1) that the trial court had imposed an illegal sentence in failing to merge false imprisonment into second-degree sexual offense because there was factual ambiguity as to whether the two offenses were based upon the same acts; and (2) in the alternative, that appellate counsel had rendered ineffective assistance in failing to argue on direct appeal that the factual ambiguity in this case required merger.

Following a hearing, the postconviction court issued a memorandum opinion and order denying all of Wages’s postconviction claims. Regarding the claims raised in

---

<sup>8</sup> We emphasized that to “hold otherwise would be to hold that in every case of rape, a conviction for false imprisonment would also be proper,” but we further observed that “confinement after or before the rape is committed would preclude the merger.” *Hawkins*, 34 Md. App. at 92.

Wages’s supplemental petition, the postconviction court relied upon the law of the case doctrine to conclude that the underlying claim of illegality was barred because it had been decided previously on direct appeal, and it further concluded that Wages failed to prove that appellate counsel had performed deficiently in failing to raise the underlying claim.

Wages, acting through counsel, filed an application for leave to appeal, challenging the postconviction court’s denial of the claims he had raised in his supplemental petition.<sup>9</sup> In addition, he filed, *pro se*, a separate application for leave to appeal, challenging the postconviction court’s denial of the claims he had raised in his original petition. We granted the first application, limited to the two issues raised in the application filed by the Public Defender, and transferred the case to the regular appellate docket.

## **DISCUSSION**

### **Parties’ Contentions**

Wages contends that the postconviction court erred in declining to address the merits of his illegal sentence claim under the law of the case doctrine because the ground of illegality he alleges now is different than the one he alleged on direct appeal. He further contends that his separate sentences for second-degree sexual offense and false imprisonment are inherently illegal because there was ambiguity as to whether the offenses

---

<sup>9</sup> The postconviction court originally entered its memorandum opinion and order denying Wages’s petitions on July 1, 2020. Because neither Wages nor his postconviction counsel timely received copies of those documents, counsel filed an unopposed motion to redate the order, which the circuit court granted.

were based upon the same or different acts, and such an ambiguity must be resolved in favor of merger.<sup>10</sup>

The State counters that the postconviction court correctly applied law of the case “because [our] decision on direct appeal foreclosed [Wages’s] claim.” According to the State, we held in Wages’s direct appeal that the “facts necessary to prove that [Wages] was guilty of the second-degree sexual offense were not sufficient to convict him of false imprisonment in this case,” *Wages*, slip op. at 9, and we therefore necessarily held that there was no “ambiguity as to whether false imprisonment occurred as part of the second-degree sexual offense.” The State, therefore, maintains that, although Wages did not raise ambiguity as a ground for merger on direct appeal, our holding “indicated that such an argument would not have been successful.”

### **Analysis**

#### **I. Whether the law of the case doctrine bars Wages’s illegal sentence claim.**

Unlike the more typical postconviction case raising claims of ineffective assistance of counsel (in violation of the Sixth Amendment), this appeal is based upon an illegal sentence claim.<sup>11</sup> It also implicates the law of the case doctrine. We begin by setting forth

---

<sup>10</sup> In addition, Wages contends that appellate counsel was ineffective in failing to raise, on direct appeal, the argument he now raises in postconviction. Given our resolution of this appeal, we need not address this contention, nor do we address the State’s argument to the contrary.

<sup>11</sup> Although Wages’s *pro se* postconviction petition raised seven allegations of ineffective assistance of trial counsel as well as a claim based upon the cumulative effect of those alleged attorney errors, all of which were denied by the postconviction court, none of those claims is before us in this appeal. Wages’s supplemental postconviction petition, (continued)

the pertinent law governing illegal sentence claims and the application of the law of the case doctrine to such claims.

A. *Illegal Sentences under Rule 4-345(a)*

“An intrinsically illegal sentence is a sentence not permitted by law.” *Juan Pablo B. v. State*, 252 Md. App. 624, 638 (2021) (citations and quotations omitted), *cert. granted*, \_\_ Md. \_\_ (Jan. 11, 2022). Maryland Rule 4-345(a) provides that a “court may correct” such a sentence “at any time.” An illegal sentence claim is not subject to waiver or forfeiture. “If a sentence is ‘illegal’ within the meaning of” Rule 4-345(a), “the defendant may file a motion in the trial court to ‘correct’ it, notwithstanding that (1) no objection was made when the sentence was imposed, (2) the defendant purported to consent to it, or (3) the sentence was not challenged in a timely-filed direct appeal.” *Chaney v. State*, 397 Md. 460, 466 (2007). In other words, Rule 4-345(a) operates as an exception to finality because it allows “collateral and belated attacks on” a sentence and excludes “waiver as a bar to relief.” *Chaney*, 397 Md. at 466.

Although it has become common practice to raise such a claim through a motion to correct an illegal sentence under Maryland Rule 4-345(a), an illegal sentence claim

---

filed with the assistance of counsel, raised an illegal sentence claim and a claim of ineffective assistance of appellate counsel for failure to raise the same illegal sentence claim on direct appeal. The postconviction court denied those claims as well, and this appeal challenges only the postconviction court’s denial of the claims raised in the supplemental petition. Our resolution of this appeal does not require us to address the claim of ineffective assistance of appellate counsel.

nonetheless may be litigated in a postconviction proceeding.<sup>12</sup> Md. Code (2001, 2018 Repl. Vol.), Criminal Procedure Article (“CP”), § 7-102(a)(3)-(4). The imposition of separate sentences where merger requires the imposition of a single sentence results in an inherent illegality within the meaning of Rule 4-345(a), *Pair v. State*, 202 Md. App. 617, 624 (2011), and is therefore cognizable in a postconviction proceeding.

*B. Law of the Case*

The law of the case doctrine is one of several common law doctrines (others include *res judicata* and *stare decisis*) that restrict the reconsideration of issues of law that previously have been decided by a court. In Maryland, the law of the case doctrine provides generally that a decision rendered in a prior appeal is binding in a subsequent appeal in the same case. *Nichols v. State* (“*Nichols III*”), 461 Md. 572, 578 (2018).<sup>13</sup> Moreover, the law of the case doctrine may apply not only to issues that previously were decided, but also to issues that “could have been raised and decided.” *Id.* (quoting *Dep’t of Pub. Safety & Corr. Servs. v. Doe*, 439 Md. 201, 216-17 (2014)). Its purpose is to promote interests of finality by preventing “piecemeal litigation,” since, otherwise, “any party could institute as many

---

<sup>12</sup> Illegal sentence claims have always been cognizable in postconviction proceedings. Compare Md. Code (2001, 2018 Repl. Vol.), Criminal Procedure Article (“CP”), § 7-102(a)(3)-(4), with Md. Code (1957, 1959 Cum. Supp.), Art. 27, § 645A(a). Since the Court of Appeals held, in *State v. Kanaras*, 357 Md. 170, 184 (1999), that a direct appeal lies from the denial of a motion to correct an illegal sentence, it has become common practice to raise such claims separately from postconviction proceedings because the latter generally are limited to a single petition and more restricted rights of appeal. Nevertheless, there is no requirement to do so.

<sup>13</sup> We will find it useful to discuss two prior iterations of *Nichols*’s appeals in the same case, which we will denote as “*Nichols I*” and “*Nichols II*.”

successive appeals as his [or her] imagination could produce new reasons to assign as to why his [or her] side should prevail, and the litigation would never terminate.” *Id.* (quoting *Dabbs v. Anne Arundel Cty.*, 458 Md. 331, 345 n.15 (2018)) (cleaned up).

Similarly, under the doctrine of *res judicata*, “a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action and is conclusive, not only as to all matters decided in the original suit, but also as to matters that could have been litigated in the original suit.” *Bank of New York Mellon v. Georg*, 456 Md. 616, 668 (2017) (citation and quotation omitted). “The law of the case doctrine,” on the other hand, differs from *res judicata* “in that it applies to court decisions made in the same, rather than a subsequent, case.” *Scott v. State*, 379 Md. 170, 182 n.6 (2004).

“The law of the case doctrine lies somewhere beyond *stare decisis* and short of *res judicata*.” *Tu v. State*, 336 Md. 406, 416 (1994). Like *stare decisis*, the law of the case “deals with the circumstances that permit reconsideration of issues of law.” *Id.* (citation and quotation omitted). “The difference is that while *stare decisis* is concerned with the effect of a final judgment as establishing a legal principle that is binding as a precedent in other pending and future cases, the law of the case doctrine is concerned with the extent to which the law applied in decisions at various stages of the same litigation becomes the governing principle in later stages.” *Id.*

C. *Reconciling Rule 4-345(a) and the Law of the Case Doctrine*

The law of the case doctrine, which acts to bar relitigation of issues that were (or could have been) litigated previously, operates in tension with Maryland Rule 4-345(a), which governs motions to correct inherently illegal sentences and provides that a court may

correct such a sentence “at any time.” In that context, the law of the case doctrine promotes finality by precluding consideration of issues that either were or could have been litigated in a prior proceeding in the same case, while Rule 4-345(a) operates as an exception to finality.

In the not-too-distant past, it was unclear whether the law of the case doctrine even applies to illegal sentence claims. In *Scott*, 379 Md. 170, the Court of Appeals held that it does, although it disapproved of the manner in which the trial court had applied the doctrine in that case.<sup>14</sup> *Id.* at 182-83.

*Nichols III* addressed the application of the law of the case doctrine to illegal sentence claims and resolved the inherent tension between the law of the case and Rule 4-345(a). We turn next to examine that decision in greater detail.

Nichols was charged with, among other things, kidnapping, conspiracy to commit kidnapping, false imprisonment, and conspiracy to commit false imprisonment. A jury sitting in the Circuit Court for Baltimore City found Nichols guilty of false imprisonment and conspiracy to commit false imprisonment but acquitted him of kidnapping and

---

<sup>14</sup> *Scott* held that in Maryland, the law of the case operates vertically downward in that trial courts generally are bound by appellate rulings in earlier iterations of the same case. That aspect of the law of the case doctrine is called the mandate rule. *Tu*, 336 Md. at 416. This is in contrast with how the law of the case operates in some other jurisdictions. *See, e.g., Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (stating that, under federal law, “the doctrine applies as much to the decisions of a coordinate court in the same case as to a court’s own decisions”).

conspiracy to commit kidnapping.<sup>15</sup> *Nichols v. State*, No. 169, Sept. Term, 2014, at 2 (filed Feb. 4, 2016) (“*Nichols I*”). The court sentenced Nichols to life imprisonment, with all but 50 years suspended, for false imprisonment and a concurrent term of 50 years’ imprisonment for conspiracy to commit false imprisonment, as well as additional terms for other offenses. *Id.*

On appeal, Nichols claimed that his sentences for false imprisonment and conspiracy to commit false imprisonment were illegal because he had been charged with, but acquitted of, the greater offenses of kidnapping and conspiracy to commit kidnapping, which carry maximum penalties of 30 years’ imprisonment. *Id.*; Brief of Appellant, *Nichols v. State*, No. 169, Sept. Term, 2014, at 15-18. We held that, because false imprisonment is a lesser included offense of kidnapping, and because the maximum penalty for kidnapping is 30 years’ imprisonment, the life-suspend-all-but-50-year sentence for false imprisonment was illegal, and we vacated and remanded for re-sentencing as to that charge. *Nichols I*, slip op. at 10-11. We further held that conspiracy to commit false imprisonment is not a lesser included offense of conspiracy to commit kidnapping, and we concluded that the 50-year sentence for conspiracy to commit false imprisonment was not illegal. *Id.* at 11-13 & n.5.

At the re-sentencing hearing following remand, Nichols contended that the 50-year sentence for conspiracy to commit false imprisonment “should be capped at 30 years

---

<sup>15</sup> The jury found Nichols guilty of additional offenses, *Nichols III*, 461 Md. at 579, but those are not relevant for our purposes.

because the sentence for false imprisonment was capped at 30 years as per the *Nichols I* mandate.” *Nichols v. State*, No. 1277, Sept. Term, 2016, at 4 (filed Dec. 19, 2017) (“*Nichols II*”). The circuit court “refused to revisit the sentence for conspiracy to commit false imprisonment because it read the *Nichols I* mandate as affirming that conviction and sentence,” and it sentenced Nichols to 30 years’ imprisonment for false imprisonment, to be served consecutively to the other sentences, which resulted in an increase in the term of active incarceration from 50 years to 80 years. *Id.* at 4-5.

Nichols again appealed, claiming that the 50-year sentence for conspiracy to commit false imprisonment was illegal.<sup>16</sup> He reasoned as follows:

(1) as we recognized in *Nichols I*, false imprisonment is a lesser included offense of kidnapping (citing *Paz v. State*, 125 Md. App. 729, 739 (1999));

(2) he was tried on charges of kidnapping and false imprisonment and acquitted of kidnapping, thereby limiting the maximum penalty for false imprisonment to the 30-year statutory cap for kidnapping (citing *Simms v. State*, 288 Md. 712, 724 (1980));

(3) because, under the circumstances of this case, the maximum penalty for the common law crime of false imprisonment was 30 years’ imprisonment, that must also be the maximum penalty for conspiracy to commit false imprisonment, because Criminal Law Article (“CL”), § 1-202 provides that the “punishment of a person who is convicted of conspiracy may not exceed the maximum punishment for the crime that the person conspired to commit.”

---

<sup>16</sup> Nichols further contended that the court illegally increased his sentence by imposing the sentence for false imprisonment to run consecutively to the other sentences because, in doing so, it increased his term of active incarceration from 50 to 80 years. We agreed with Nichols on that point, and we vacated and remanded for re-sentencing on that charge. *Nichols II*, slip op. at 9-14.

Brief of Appellant, *Nichols v. State*, No. 1277, Sept. Term, 2016, at 6-8.

We rejected that claim, reasoning that, although the claimed violation of CL § 1-202 was not raised in *Nichols I* and was therefore “not addressed by the *Nichols I* panel,” it “could have been raised and decided” in the previous appeal and was therefore barred by the law of the case doctrine. *Nichols II*, slip op. at 7 (citation and quotation omitted).

The Court of Appeals, however, disagreed and reversed in part.<sup>17</sup> *Nichols III*, 461 Md. 572. The Court declared:

Here, consistent with existing case law, we conclude that **the law of the case doctrine bars a trial court from considering under Maryland Rule 4-345(a) an issue as to the legality of a sentence where an appellate court has previously resolved the same issue.** The law of the case doctrine does not, however, bar a trial court from considering under Maryland Rule 4-345(a) an issue as to the legality of a sentence that an appellate court has not resolved. In addition, **the law of the case doctrine does not prohibit consideration of an issue as to the legality of a sentence under Maryland Rule 4-345(a) where a defendant could have raised, but failed to raise, the issue in a prior appeal.**

*Nichols III*, 461 Md. at 593 (emphasis added).

Thus, *Nichols III* reconciled the conflict between the law of the case doctrine and Rule 4-345(a) by narrowing the applicability of the law of the case doctrine to illegal sentence claims. Although, generally, the law of the case doctrine bars relitigation of an issue that either previously was decided or “could have been raised and decided” in a prior appeal, *Nichols III*, 461 Md. at 578 (citation and quotation omitted), the law of the case

---

<sup>17</sup> The Court of Appeals affirmed our holding regarding the illegal increase in sentence, *Nichols III*, 461 Md. at 607-08, which is not relevant to our analysis here.

doctrine, as applied to illegal sentence claims, bars relitigation of only those issues that actually were decided in a prior appeal.

Applying that holding to the case before it, the Court of Appeals concluded that the issue raised in *Nichols II* regarding the legality of the sentence for conspiracy to commit false imprisonment was not barred by the holding in *Nichols I* because, although the issues raised in both cases involved challenges to the same sentence, they were based upon two different legal theories and were, therefore, not the same issue. *Nichols III*, 461 Md. at 596-97.

*D. Application to the Present Case*

Turning to the instant case, we conclude that the issue raised on direct appeal regarding the legality of the sentence for false imprisonment and the issue raised in postconviction regarding the legality of the same sentence are not the same. The prior issue was whether Wages had confined the victim, J., only for a time period sufficient to commit the sexual offense. Brief of Appellant, *Wages v. State*, No. 497, Sept. Term, 2012, at 12. The issue in this case is whether the record is ambiguous as to whether the jury found that the false imprisonment and the second-degree sexual offense were based upon the same or different acts. Amended Postconviction Petition at 2.<sup>18</sup> We hold that the issue raised in

---

<sup>18</sup> We reject the State’s contention that, in *Wages*’s prior appeal, we “held” that “there was no[] ambiguity as to whether false imprisonment occurred as part of the second-degree sexual offense.” In support of that assertion, the State quotes our opinion in *Wages*’s direct appeal, where we noted:

The evidence that [Wages] committed these acts independent of, prior to and following the sexual offense, was

(continued)

this appeal is not the same as the issue raised previously on direct appeal, and therefore, the postconviction court erred in ruling that the present claim was barred by the law of the case.

## II. Whether Wages’s sentence for false imprisonment is illegal.

“The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides that no individual shall be tried or punished more than once for the same offense.” *State v. Frazier*, 469 Md. 627, 640 (2020) (citation omitted)

---

sufficient to support the charge of false imprisonment. The facts necessary to prove that [Wages] was guilty of the second-degree sexual offense were not sufficient to convict him of false imprisonment in this case.

*Wages*, slip op. at 9 (citations and quotations omitted).

As the Court of Appeals observed in *Nicolas v. State*, 426 Md. 385 (2012), it is error to analyze merger through the lens of legal sufficiency because doing so construes ambiguity in favor of the State instead of the defendant. *Id.* at 408 n.6. To the extent we may have done so in the prior appeal, the law of the case does not bar an appellate court from reconsidering such a question. *See Scott*, 379 Md. at 183 (noting that “[d]ecisions rendered by a prior appellate panel will generally govern the second appeal at the same appellate level as well, unless the previous decision is incorrect because it is out of keeping with controlling principles announced by a higher court and following the decision would result in manifest injustice”) (citation and quotation omitted).

In any event, the latter statement, that the “facts necessary to prove that [Wages] was guilty of the second-degree sexual offense were not sufficient to convict him of false imprisonment,” is a non sequitur. As long ago as *Hawkins*, we recognized that every rape (and therefore every second-degree sexual offense) requires confinement of the victim against her will and by force, that is, a false imprisonment. *Hawkins*, 34 Md. App. at 92. The question we addressed in *Wages*’s direct appeal was not whether false imprisonment occurred during the commission of second-degree sexual offense, but whether the victim was falsely imprisoned at other times during her ordeal.

(footnote omitted). “Merger is the common law principle that derives from the protections afforded by the Double Jeopardy Clause.” *Id.* at 641. It “protects a convicted defendant from multiple punishments for the same offense.” *Brooks v. State*, 439 Md. 698, 737 (2014) (citation omitted).

The “principal test for determining the identity of offenses” for purposes of merger “is the required evidence test.” *Dixon v. State*, 364 Md. 209, 236 (2001) (citations omitted). Two conditions are necessary for merger under the required evidence test: the offenses at issue must be the “same”; and they must be based upon the same act or acts. *Frazier*, 469 Md. at 641; *Brooks*, 439 Md. at 737.

Whether two offenses are the “same” for double jeopardy purposes is a term of art. Generally, it means that, when the elements of each offense are compared to each other, only one offense has additional, distinct elements. When that condition holds, the offense comprising fewer elements (the lesser included offense) is subsumed within the offense comprising a greater number of elements (the greater offense), and a sentence may be imposed only for the greater offense, regardless of the statutory maxima for the offenses.<sup>19</sup> *Frazier*, 469 Md. at 646-47.

In determining whether two offenses are based on the same or different acts, we construe an ambiguous record in favor of the defendant. Thus, “when the factual basis for

---

<sup>19</sup> The only exception to this rule, which is not applicable here, is where the legislature has expressly authorized multiple punishments for two offenses that otherwise constitute the “same” offense for double jeopardy purposes. *Missouri v. Hunter*, 459 U.S. 359, 365-69 (1983); *Frazier*, 469 Md. at 641.

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*, 439 Md. at 739 (citations omitted).

A. *Whether False Imprisonment and Second-Degree Sexual Offense are the “Same” Offense for Double Jeopardy Purposes*

The elements of false imprisonment are: (1) the defendant “confined or detained the victim”; (2) against the victim’s will; and (3) “the confinement or detention was accomplished by force or threat of force[.]” *Brooks*, 439 Md. at 738; *see also* Maryland Criminal Pattern Jury Instruction (“MPJI-Cr”) 4:13 (Maryland State Bar Association 2d ed. 2012). At the time of the offenses at issue in this case, the elements of second-degree sexual offense (fellatio) were:<sup>20</sup> (1) “the defendant committed fellatio with” the victim; (2) “the act was committed by force or threat of force”; and (3) “the act was committed without the consent of” the victim. MPJI-Cr 4:29.4 (“Repealed Sexual Offenses--Second Degree Sexual Offense”).

As the Court of Appeals observed in *Brooks*, “confinement or detention of the victim is necessarily part of the proof of a rape.” *Brooks*, 439 Md. at 738 (emphasis removed) (citing *Hawkins*, 34 Md. App. at 92). That observation applies equally to a sexual

---

<sup>20</sup> Effective October 1, 2017, sexual offense in the second-degree was subsumed within rape in the second-degree. 2017 Md. Laws, chs. 161, 162. Under current law, the conduct formerly comprising second-degree sexual offense would now be prohibited under the statute for second-degree rape. Md. Code (2002, 2021 Repl. Vol.), Criminal Law Article (“CL”), § 3-301(d), (g); § 3-304(a). Accordingly, the actus reus of second-degree rape has been redefined to encompass both vaginal intercourse as well as sexual acts that previously comprised second-degree sexual offense (such as anal penetration, anilingus, cunnilingus, and fellatio).

assault such as occurred here. Therefore, as in *Brooks*, “if the jury convicted [Wages] of false imprisonment for confinement *coincident with the* [second-degree sexual offense], the convictions merge for sentencing purposes.” *Id.*

*B. Whether False Imprisonment and Second-Degree Sexual Offense were Based on the Same or Different Acts*

We have set forth the relevant facts in this case in excruciating detail. After examining all those facts, which include the indictment, the prosecutor’s opening statement, testimony of the victim and the defendant, the verdict sheet, jury instructions, and the prosecutor’s closing and rebuttal arguments, we conclude that “the factual basis for [the] jury’s verdict is not readily apparent.” *Brooks*, 439 Md. at 739.

As in *Brooks*, J.’s “testimony in this case could support a finding that” Wages unlawfully confined her both prior to and after forcing her to fellate him (as we concluded on direct appeal, *Wages*, slip op. at 8-9),<sup>21</sup> and thus, “the false imprisonment conviction could have reasonably been based on [Wages’s] actions separate from the [sexual offense] itself.” *Brooks*, 439 Md. at 739. However, neither the indictment, the verdict sheet, nor the jury instructions indicate in any way that the jury was asked to consider whether false imprisonment and second-degree sexual offense were based on the same or different acts. Further, the various statements and arguments of the prosecutor do not shed any light on

---

<sup>21</sup> For example, J. testified that Wages forced her, at knife point, to follow him from her bedroom to his, where he forced her to watch the video depicting her mother performing a sexual act, all of which took place prior to the sexual act J. was forced to perform. Furthermore, J. testified that, after she was forced to fellate Wages, he forced her to write two versions of the note purporting to say that she had fellated him voluntarily (thus unlawfully confining her), and he further confined her to her bedroom thereafter.

the issue. Therefore, “it is not readily apparent whether the jury actually came to [the] conclusion” that false imprisonment and second-degree sexual offense were based upon different acts. Accordingly, we resolve those “factual ambiguities in the defendant’s favor” and merge the convictions because they “also satisfy the required evidence test.” *Id.* We, therefore, reverse the judgment of the postconviction court and remand with instructions to vacate Wages’s sentence for false imprisonment.

We further note that Wages was ordered to serve five years’ probation upon the conclusion of serving his sentence for false imprisonment but that, given our holding, there is no longer a suspended portion of any sentence remaining that can support imposing a term of probation. *Cathcart v. State*, 397 Md. 320, 326-27 (2007). Moreover, the sentence imposed for second-degree sexual offense is the statutory maximum of 20 years’ imprisonment. CL § 3-304(c)(1). The circuit court may, but is not required to, impose a different sentence on remand. Accordingly, if following remand, the circuit court wishes to impose a term of probation, it may resentence Wages by suspending part of his remaining sentence for second-degree sexual offense and imposing a term of probation. *See Twigg v. State*, 447 Md. 1, 20 (2016) (recognizing “the propriety of resentencing on a greater offense upon merger for sentencing purposes of a lesser included offense”).

**JUDGMENT OF THE CIRCUIT COURT  
FOR PRINCE GEORGE’S COUNTY  
REVERSED. SENTENCES FOR FALSE  
IMPRISONMENT AND SEXUAL  
OFFENSE IN THE SECOND DEGREE  
VACATED. CASE REMANDED TO THAT  
COURT FOR RESENTENCING ON THE  
CONVICTION FOR SECOND-DEGREE**

**SEXUAL OFFENSE. COSTS TO BE PAID  
BY PRINCE GEORGE’S COUNTY.**