Circuit Court for Baltimore City
Case Nos. 116195022 & 116195023

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 852 & 2874

September Term, 2017 & September Term 2018

KENNETH WAYNE BRYANT

v.

STATE OF MARYLAND

Graeff,
Beachley,
Alpert, Paul E.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Alpert, J.

Filed: October 28, 2019

After a jury trial in the Circuit Court for Baltimore City in two consolidated cases, Kenneth Bryant, appellant, was found guilty of three counts of sexual abuse of a minor and one count each of second-degree sexual offense, third-degree sexual offense, and fourth-degree sexual offense. The court sentenced appellant to a total aggregate sentence of twenty years.[1] In these consolidated appeals, appellant presents two questions for our review, which we have rephrased slightly:

> I. Did the circuit err or abuse its discretion by admitting irrelevant and unfairly prejudicial evidence?
>
> II. Did the circuit court err by not merging the convictions for third-degree sexual offense and second-degree sexual offense for sentencing purposes?

For the following reasons, we answer the first question in the negative and the second question in the affirmative. Accordingly, we affirm the judgments of conviction, but vacate appellant's sentences and remand for resentencing consistent with this opinion.

FACTS AND PROCEEDINGS

In two indictments, 116195022 ("022 Case") and 116195023 ("023 Case"), appellant was charged with numerous counts of child sexual abuse and related offenses against his ex-fiancé's daughter, A.B., occurring at two different addresses in Baltimore City when A.B. was between the ages of 4 and 9. The charges against him were tried to a jury over two days in April 2017.[2] The State called three witnesses: A.B., then age 16;

[1] We shall discuss the specific sentences imposed, *infra*.

[2] A prior trial ended in a mistrial on January 26, 2017.

D.B., her mother; and Deveial Foster, the leader of the women's ministry at a church where A.B. disclosed some of the abuse. Appellant testified in his case. The following pertinent evidence was adduced at trial.

In November 2005, D.B.; A.B., then age 4; and A.B.'s younger brother moved to Baltimore City from New York. Appellant, who was in a relationship with D.B., moved in with them at a house on Seamon Avenue in southwest Baltimore. The charges in the 022 Case stem from conduct at this address.

D.B. worked outside the home. When D.B. was working and A.B. stayed home from school due to her asthma, appellant took care of her. On one of those occasions, when A.B. was four or five years old, she walked in on appellant in his bed, masturbating under his covers. She asked appellant what he was doing, and he responded by showing her his penis, telling her she could touch it, and suggesting that she "lick it like it's a lollipop." A.B. complied with appellant's directions and he ejaculated in her mouth. A.B. was "shocked."

After that incident, appellant told A.B. to "do sexual things" whenever she was in his care. He "touch[ed] her inappropriately[,]" made her undress in his presence, directed her to perform fellatio on him, and forced her to play card games with cards depicting sexual acts on them.[3] A.B. recalled that the sexual abuse was happening around the time that she received a bicycle as a present. D.B. testified that A.B. received a bicycle for Christmas in 2005 or 2006.

[3] D.B. testified that appellant owned sexually explicit playing cards.

When A.B. was in the third grade, she and her family moved to east Baltimore, to a house on Orleans Street. Appellant continued to live with D.B. at the new house. The charges in the 023 Case stem from conduct at this address.

On one occasion at the Orleans Street address, appellant directed A.B. to remove her clothing and he performed cunnilingus on her. Sometime after that incident, A.B. decided that she would tell her mother if appellant touched her or forced her to touch him again. Thereafter, when A.B. was clothed in pajamas, appellant began tickling her. He placed one hand on her breast area and one hand between her legs, on top of her clothing, while he tickled her.

A.B. soon told D.B. about appellant touching her over her pajamas, but not about any of the other sexual abuse. D.B. confronted appellant and kicked him out of the house.

Many years later, on Saturday, April 30, 2016, A.B. and D.B. attended a religious service at the "Reaching Out to Help You" church. During the sermon, which focused on forgiveness, A.B. cried out, "he touched me!" She had a "mental breakdown" and began crying. A.B. told D.B. everything that appellant had done to her over the years. D.B. called A.B.'s school counselor the next week and made a police report.

Appellant, then age 57, testified that he was addicted to drugs while living with D.B. He spent time in jail and in a residential drug treatment facility between March 2008 and June 2009. He claimed that D.B. kicked him out of the Orleans Street house

because he relapsed. He acknowledged that he took care of A.B. and her younger brother "from time to time[.]" He denied ever having touched A.B. inappropriately.

In the 022 Case (Seamon Avenue address), the jury found appellant guilty of one count of child sexual abuse between May 1, 2005 and December 31, 2005 (Count 1) and one count of child sexual abuse between January 1, 2006 and December 31, 2006 (Count 7). In the 023 Case (Orleans Street address), the jury found appellant guilty of one count of child sexual abuse between July 1, 2009 and October 31, 2009 (Count 1), sexual offense in the second degree (Count 2), sexual offense in the third degree (Count 3), and sexual offense in the fourth degree (Count 4).

In the 022 Case, the court sentenced appellant to 10 years for Count 1 and a concurrent 10-year sentence for Count 7. In the 023 Case, the court sentenced appellant to 10 years for Count 1, to run concurrent to Count 1 in the 022 Case; to five years for Count 2, to run consecutive to Count 1 in the 022 Case; to five years for Count 3, to run consecutive to Count 2; and to one year for Count 4, to run concurrent to Count 3. These appeals followed.[4]

We shall include additional facts as necessary to our resolution of the issues.

[4] A timely notice of appeal was filed in the 022 Case. In expedited post-conviction proceedings, appellant was granted permission to note a belated appeal in the 023 Case.

DISCUSSION

I.

On cross-examination, defense counsel impeached A.B.'s credibility by trying to pin down specific dates for the incidents of alleged sexual abuse, by questioning why A.B. failed to tell anyone about the abuse while it was happening, and by suggesting that A.B.'s use of the term "ejaculate" during direct examination was evidence that her testimony had been coached by D.B. or the prosecutor. A.B. struggled to answer many questions, answering "I don't know" or "I don't remember" to thirteen questions posed to her by defense counsel.

At the outset of the prosecutor's redirect examination of A.B., the following colloquy occurred:

> [PROSECUTOR]: [A.B.], how does being here today make you feel?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: You can answer.
>
> [A.B.]: I feel – I feel – I feel frustrated and betrayed that this is even happening to me in the first place and I feel used and this shouldn't have happened to anyone or anybody that's had to go through this. But at the same time, I'm happy because people know and I'm able to say what's been going on with me and that people can finally know and I don't have to carry this huge weight on me anymore. So I'm feeling a lot of mixed emotions and – I don't have to go through this by myself anymore.

Appellant contends that the trial court erred by overruling defense counsel's objection to the above question because "A.B.'s feelings about being in court and

testifying were not relevant[.]" He asserts that A.B.'s "answer to the question was more akin to evidence of how the crime had affected her[,]" which was appropriate for a victim impact statement but was irrelevant at trial. Further, any relevance was outweighed by the danger of unfair prejudice. The erroneous admission of the testimony was not harmless, in appellant's view, because it could have swayed the jurors to decide the case based upon sympathy for A.B.

The State responds that the question asked by the prosecutor was not objectionable because it could have elicited "relevant information that would assist the jury in assessing [A.B.]'s credibility." It asserts that appellant failed to preserve any complaint about the "content of [A.B.]'s answer" to the question because he did not move to strike the answer given on the ground that it was unresponsive and irrelevant. In any event, the State maintains that A.B.'s testimony was relevant and admissible.

Evidence is relevant if it tends to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. A court lacks discretion to admit irrelevant evidence. *Smith v. State*, 218 Md. App. 689, 704 (2014) (citing Md. Rule 5-402). We review the court's determination that evidence is relevant *de novo*. *Id*. (citing *Brethren Mut. Ins. Co. v. Suchoza*, 212 Md. App. 43, 52 (2013)).

Relevant evidence may nevertheless be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless

presentation of cumulative evidence." Md. Rule 5-403. We review a court's decision weighing the probative value of evidence against the danger of unfair prejudice for an abuse of discretion. *See, e.g., Collins v. State*, 164 Md. App. 582, 609 (2005) ("The trial court's . . . decision to admit relevant evidence over an objection that the evidence is unfairly prejudicial[] will not be reversed absent an abuse of discretion.").

In the case at bar, we agree with the State that appellant failed to preserve his challenge to A.B.'s answer because he only objected to the prosecutor's question. Ordinarily, to preserve an appellate challenge to objectionable testimony, "an objection must be made when the question [seeking to elicit that testimony] is asked or, if the answer is objectionable, then at that time by motion to strike." *Ware v. State*, 170 Md. App. 1, 19 (2006); *see also* 1 *McCormick on Evidence* § 52 (7th ed. 2016) (explaining that when faced with a "question which is unobjectionable" that is "followed by a partially or completely nonresponsive answer" the questioner should move to strike the answer). "Unquestionably, a motion to strike out an answer is the correct action to take where an objection to a proper question is overruled but the answer is unresponsive or otherwise inadmissible." *Ross v. State*, 276 Md. 664, 672 (1976) (citation omitted).

The prosecutor's question – asking how "being [in court] today ma[d]e [A.B.] feel?" – was not objectionable. As explained, on cross-examination, A.B.'s credibility had been undermined and, on redirect examination, the prosecutor sought to rehabilitate her. The question challenged on appeal properly could have elicited testimony that A.B. was nervous or scared to testify in court. That testimony would have been admissible to

show why A.B. struggled to answer some of the questions posed to her on cross-examination. Thus, the circuit court did not err by overruling defense counsel's objection to the question. To the extent that A.B.'s answer to that question, which was largely unresponsive and focused upon how the sexual abuse had made her feel and had impacted her life, was inadmissible, appellant was obligated to object and move to strike the answer. *See id.* at 672. Having failed to do so, appellant has not preserved this issue for our review.

Even if this issue were preserved, however, we would have found it without merit. "[A] witness's credibility is always relevant." *Devincentz v. State*, 460 Md. 518, 551 (2018). A.B.'s testimony about the "mixed emotions" she was experiencing during her testimony was relevant to the jury's assessment of her credibility and was admissible for that limited purpose.

II.

Appellant contends the circuit court erred by not merging for sentencing purposes his convictions in the 023 Case for sexual offense in the second degree (Count II), codified at Md. Code (2002 Repl. Vol., 2009 Supp.), section 3-306 of the Criminal Law Article, and sexual offense in the third degree (Count III), codified at Crim. Law section 3-307. As discussed, appellant was sentenced to five years for sexual offense in the second degree and five years for sexual offense in the third degree, with each sentence to run consecutive to other sentences imposed.

Both counts charged appellant with conduct occurring at the Orleans Street address between July 1, 2009 and October 31, 2009. A.B. testified to two incidents at the Orleans Street address in that time frame: 1) appellant performing cunnilingus on her and 2) appellant putting his hands on her breasts and her vagina, over her clothing.

The court instructed the jurors as follows as to these charges:

> The defendant is charged with the crime of second degree sexual offense. In order to convict the defendant of second degree sexual offense, the State must prove that the defendant committed fellatio[5] or cunnilingus with [A.B.], that [A.B.] was under 14 years of age at the time of the act, and that the defendant was then at least four years older than [A.B.]. Fellatio means that another applied her mouth to the sexual organ [of] the male defendant. Cunnilingus means that the defendant applied his mouth to the sexual organ of a female.
>
> The defendant is charged with a crime of third degree sexual offense. In order to convict the defendant of third degree sexual offense, the State must prove that the defendant had sexual contact with [A.B.], that [A.B.] was under 14 years of age at the time of the act, and that the defendant is at least four years older than [A.B.]. Sexual contact means the intentional touching of [A.B.]'s genital or other intimate area for the purpose of sexual arousal or gratification, or for abuse of either party. It does not include acts commonly expressive of familial or friendly affection or acts for accepted medical purposes.

As pertinent, the prosecutor argued as following in closing:

> Then later on in 2009, [A.B.] testified that there was a couple of incidents that occurred when they moved to their new house on Orleans Street where they still live. The defendant, he performed or tried to perform cunnilingus on her and her testimony was that hurt and she didn't realize, didn't understand what was going on. . . .

[5] There was no testimony or other evidence that fellatio occurred at the Orleans Street address.

> And then the final straw. . . . In 2009, the defendant puts his hand inappropriately touching her vagina and her area up here (indicating) and [A.B.] tells her mom.

The verdict sheet was divided into two sections based upon the address where the charged conduct occurred. As pertinent, with respect to the Orleans Street address, the verdict sheet included five questions:

> 5) How do you find the defendant on the charge of **Sexual Abuse of a Minor, July 1, 2009 through October 31, 2009**?
>
> ___ Not Guilty ____ Guilty
>
> *If you find the Defendant Not Guilty, please proceed to Question 6, if you find the Defendant Guilty, please proceed to Question 7.*
>
> 6) How do you find the defendant on the charge of **Second Degree Assault, July 1, 2009 through October 31, 2009**?
>
> ___ Not Guilty ____ Guilty
>
> 7) How do you find the defendant on the charge of **Sexual Offense in the Third Degree (Age)**?
>
> ___ Not Guilty ____ Guilty
>
> 8) How do you find the defendant on the charge of **Sexual Offense in the Second Degree (Age)**?
>
> ___ Not Guilty ____ Guilty
>
> 9) How do you find the defendant on the charge of **Sexual Offense in the Fourth Degree**?
>
> ___ Not Guilty ____ Guilty
>
> *If you find the Defendant Not Guilty, please proceed to Question 10, if you find the Defendant Guilty, **Stop**.*

> 10) How do you find the defendant on the charge of **Unnatural and Perverted Sexual Practice with Another Person**?
>
> ___ Not Guilty ____ Guilty

(Emphasis in original.) The jurors answered "Guilty" to Questions 5, 7, 8, and 9 and, thus, did not answer Questions 6 and 10.

Appellant contends that the jury's findings that he committed a second- and a third-degree sexual offense could have arisen from the same conduct: appellant performing cunnilingus on A.B. He asserts that he is entitled to the presumption that the convictions were based upon the same conduct and, consequently, his convictions for third-degree sexual offense and second-degree sexual offense should have merged for sentencing purposes.

The State responds that we should "reject [appellant]'s claim that the jury's verdict is ambiguous" because the definition of "sexual contact" in 2009 was not satisfied by proof that appellant performed cunnilingus. It concedes that the jury was instructed that "sexual contact" meant any intentional touching of the victim's genital area for sexual gratification, arousal, or abuse, which did not exclude cunnilingus. The State nevertheless contends that the prosecutor's closing argument, coupled with the court's instructions on "as to how to progress through the verdict sheet" eliminated any ambiguity in the verdict on those counts. Alternatively, if this Court were to hold that merger was required, the State maintains that we should remand the case to the circuit court for a new sentencing hearing pursuant to Md. Rule 8-604(d), consistent with *Twigg v. State*, 447 Md. 1, 27-30 & n.14 (2014).

For the following reasons, we conclude that merger was required, and, consistent with *Twigg*, we shall vacate appellant's sentences on all counts and remand for resentencing. We explain. The double jeopardy clause of the fifth amendment to the federal constitution, which is applicable to the states, *see Benton v. Maryland*, 395 U.S. 784, 787 (1969), "forbids multiple convictions and sentences for the same offense." *Khalifa v. State*, 382 Md. 400, 432 (2004) (citations omitted). "Sentences for two convictions must be merged when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other." *Brooks v. State*, 439 Md. 698, 737 (2014). In *Nightingale v. State*, 312 Md. 699, 705 (1988), the Court of Appeals further clarified that "[w]hen a multi-purpose criminal statute is involved, we refine it by looking [only] at the alternative elements relevant to the case at hand."

With those principles in mind, we turn to the statutes at issue. Pursuant to Crim. Law section 3-306, the age-based variety of sexual offense in the second degree makes it a crime for a person to "engage in a sexual act" with a child who is under the age of 14 if the person is more than four years older than the child.[6] Pursuant to Crim. Law section 3-307, the age-based variety of sexual offense in the third degree makes it a crime for a person to "engage in sexual contact" with a child who is under the age of 14 if the person is more than four years older than the child. As relevant here, a "sexual act" is defined to

[6] This statute has since been repealed and reclassified as rape in the second degree. *See* 2017 Md. Laws, chs. 161, 162.

include "cunnilingus," Crim. Law § 3-301(e)(ii), and "sexual contact" is defined to include "an intentional touching of the victim's . . . genital, . . . or other intimate area" for "sexual arousal or gratification, or for the abuse of either party." Crim. Law § 3-301(f)(1).

Considering the two statutes, as refined to reflect only the elements relevant to the instant case, we conclude that the required evidence test was satisfied. Age-based sexual offense in the second degree required proof that when A.B. was under age 14, appellant, who was more than 4 years older than her, performed cunnilingus on her. Age-based sexual offense in the third degree required proof that when A.B. was under age 14, appellant, who was more than 4 years older than her, engaged in an intentional touching of her genital area for sexual arousal, gratification, or abuse. Cunnilingus also involves an intentional touching of the genital area for sexual arousal, gratification, or abuse and, thus, would satisfy either definition. *Cf. Vogel v. State*, 76 Md. App. 56, 66-67 & n.4 (1988), *aff'd* 315 Md. 458 (1989) (reasoning that an act of fellatio "would qualify as sexual contact" *and* would meet "the more strictly defined term 'sexual act'").

We reject the State's argument that because the definition of "sexual contact" could have excluded acts in which an individual's mouth or tongue penetrated another individual's genital opening, it necessarily excluded cunnilingus and eliminated any ambiguity in the jury's verdict. *See* Crim. Law § 3-301(f)(2) (sexual contact includes "an act . . . in which a part of an individual's body, *except the* penis, *mouth, or tongue,* penetrates, however slightly, into another individual's genital opening") (emphasis

added). First, as the State concedes, the court did not instruct the jury on that aspect of the definition of sexual contact and, thus, the jury's findings could not possibly have been based upon that distinction. Second, even if the court had included the Crim. Law § 3-301(f)(2) language in its instructions, the jury nevertheless could have found appellant guilty of aged-based sexual offense in the third degree based upon the act of cunnilingus testified to by A.B. This Court has held that "the 'sexual act' cunnilingus does not require penetration of the genitals." *Partain v. State*, 63 Md. App. 260, 266 (1985). Here, A.B. testified that appellant "had his tongue . . . on . . . the outer part of [her] vagina" and that he "tried to . . . stick his tongue in her vagina[.]" (Emphasis added.) On this record, the jurors reasonably could have found that appellant engaged in cunnilingus without penetrating A.B.'s vaginal opening.

To be sure, the jury also could have found appellant guilty of age-based third-degree sexual offense based upon evidence that he touched A.B.'s vaginal area over her clothing. The record is ambiguous as to which conduct formed the basis for that conviction, however. In instructing the jury on the elements of the two relevant counts, the court did not differentiate between the two acts testified to by A.B. as occurring at the Orleans Street address. The court instructed the jurors that they were to "consider each charge separately and return a separate verdict for each charge," unless otherwise instructed. The jurors were not instructed that they could not convict appellant of sexual offense in the second degree and sexual offense in the third degree premised upon the same conduct, however. In closing argument, the prosecutor discussed the two incidents

described by A.B. that occurred at the Orleans Street address. He did not discuss the elements of any of the specific crimes charged, however, or specify how A.B.'s testimony satisfied those elements.

On this record, the jury only could have found appellant guilty of age-based second-degree sexual offense at the Orleans Street address based upon A.B.'s testimony that he engaged in cunnilingus. The jury could have found appellant guilty of age-based third-degree sexual offense based upon that same conduct *or* based upon A.B.'s testimony that appellant touched her vaginal area with his hand. "In these circumstances, we resolve the ambiguity in favor of [appellant]" and conclude that the conviction for third-degree sexual offense was based on the same conduct as the conviction for second-degree sexual offense and, thus, the offenses should have merged for purposes of sentencing. *Nightingale*, 312 Md. at 708; *see also Nicolas v. State*, 426 Md. 385, 412 (2012) (holding that the record was "ambiguous as to the factual bases for which the jury found [the defendant] guilty" of two crimes that satisfied the required evidence test and "resolv[ing] this factual ambiguity in [the defendant's] favor").

Appellant initially was sentenced to a total aggregate sentence of 20 years. After merging his sentence for third-degree sexual offense, his total aggregate sentence is 15 years. We exercise our discretion to vacate all of appellant's sentences to provide the circuit court with "maximum flexibility on remand to fashion a proper sentence," so long as it does not exceed his original aggregate sentence. *See Twigg*, 447 Md. at 27-30 & n.14 (holding that upon an appellate determination that merger was required for

sentencing purposes, the appellate court may vacate "all sentences originally imposed on those convictions and sentences left undisturbed on appeal, so as to provide the court maximum flexibility on remand to fashion a proper sentence that takes into account all of the relevant facts and circumstances" so long as the new sentences imposed do not, in the aggregate, exceed the original aggregate sentence).

ALL SENTENCES IN THE CONSOLIDATED CASES VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY OTHERWISE AFFIRMED. CASES REMANDED FOR RESENTENCING CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT EVENLY BETWEEN THE APPELLANT AND THE MAYOR AND CITY COUNCIL OF BALTIMORE.