Circuit Court for Worcester County
Case No. C-23-CR-21-000042

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1188

September Term, 2023

ARLIN PIERCE DULEY

v.

STATE OF MARYLAND

Wells, C.J.,
Tang,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: January 13, 2026

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

Arlin Pierce Duley, appellant, was charged with second-degree rape, third-degree sexual offense, fourth-degree sexual offense, and second-degree assault of his niece, C.A. A two-day jury trial took place in the Circuit Court for Worcester County from May 9-10, 2023. The jury convicted appellant on all counts. The court sentenced appellant to eighteen years' imprisonment, with all but twelve years suspended, for the second-degree rape conviction, and a ten year concurrent sentence for the third-degree sexual offense conviction, plus five years' probation upon release. The remaining convictions were merged for sentencing purposes.

On appeal, appellant presents three questions for our review:

1. Did the trial court abuse its discretion when it refused to strike Juror 3 and replace him with an alternate after the juror revealed a connection with the prosecutor's family?

2. Did the trial court abuse its discretion when it refused to permit defense counsel to introduce parts of [appellant]'s call to his sister pursuant to the doctrine of verbal completeness?

3. Must [appellant]'s [conviction] for third-degree sex[ual] offense be merged into his [conviction] for second-degree rape [for sentencing purposes]?

BACKGROUND

In July 2019, appellant, his sister, mother, and thirteen-year-old niece, C.A., took a vacation to Ocean City, Maryland. They all stayed in one hotel room with two queen sized beds. The plan was for C.A. and her mother to sleep in one bed and for appellant and his mother to sleep in the other; but on the first night C.A. and her mother had a fight, and C.A. no longer felt comfortable sleeping in the same bed with her mother. Appellant offered for

C.A. to sleep in the queen bed with him and that he would put up a "pillow wall" between them.

According to her testimony at trial, C.A. woke up the next morning around 3 a.m. to appellant "half on top of" her with his right hand rubbing her lower back and his right leg between her legs. Appellant then moved his hand under her shorts and underwear and put his fingers into her vagina. Appellant moved his hand "kind of like inside out, and back and forth." Appellant then removed his fingers and rolled to the other side of the bed. C.A. heard "the sound of, like, nails on dry skin if you scratch it" for about three minutes. After the noise stopped, appellant went into the bathroom. C.A. then got up and went outside to the patio. A few minutes later appellant joined C.A. on the patio and unsuccessfully attempted to start a conversation with her. They both went back to bed where C.A. "curled up in a ball."

The next morning, while his sister and mother were still asleep, appellant apologized to C.A. and hugged her after she attempted to lean away from him. Later that morning, C.A. confided in her mother that appellant had "put his hands under my shirt last night. It was really weird." Both C.A.'s mother and grandmother suggested appellant was a "sleep cuddler." C.A. slept in the bed with her mother on the second night, and the next day they went home.

A week after the vacation, C.A. wrote a letter to her mother that stated in more detail where appellant had touched her. Her mother again suggested that appellant was a "sleep cuddler." C.A. continued to be haunted by the incident and in March or April of 2020 she

wrote another letter that she read to her therapist. C.A. also gave a statement to a social worker at the Child Advocacy Center in Anne Arundel County and agreed to speak with law enforcement.

After C.A. was interviewed, Corporal Christopher Wrench of the Ocean City Police Department met with K.A., C.A.'s mother and appellant's sister, to conduct a controlled call with appellant. The call between K.A. and appellant occurred on May 28, 2020, and a portion of the call was played for the jury. Appellant maintained that he did not remember touching C.A., but if he did then it was an accident that could have happened while he was asleep.

Corporal Wrench and Detective David Whitmer interviewed appellant immediately after the controlled called. During the interview appellant maintained that he had "no recollection" of touching C.A. Detective Whitmer asked appellant if it was possible that he touched C.A. and appellant responded "I don't know. I guess it is possible. . . Because I've been told that I initiated sex in my sleep before." Later in the interview appellant stated that "I suspect that she had a bad dream, but there is a possibility that I did something in my sleep." This interview was also played for the jury.

DISCUSSION

I. Did the Trial Court Abuse its Discretion When it Refused to Strike Juror 3 and Replace Him with an Alternate After the Juror Revealed a Connection with the Prosecutor's Family?

A. Background

On the first day of trial, after opening statements, the trial court received a note from Juror 3 stating that he "[m]ay have connection w/ an attorney." Although during voir dire Juror 3 denied having a connection with the prosecutors, Juror 3 explained that he did not realize his connection with one of the prosecutors until he saw her father in the courtroom. Juror 3 stated that he had never met the prosecutor, but her brother was the CFO of the real estate development and management company for which he worked. The following exchange between the court and Juror 3 took place:

> [THE COURT]: Would the fact that you believe that -- well, the information you provided to this Court, would that in any way prevent you or substantially impair you from rendering a fair and impartial verdict if select -- not selected -- as a juror in this case?
>
> [JUROR 3]: No. But I felt that that was a decision for the Court to make.
>
> [THE COURT]: I appreciate you letting me know that. But **I want to confirm that in spite of the fact that you may know [the prosecutor]'s father or somehow know his company, that would not in any way prevent you from listening objectively and giving both the State and the defendant a fair trial and rendering a fair and impartial verdict based on the evidence presented and the Court's instruction on the law; is that correct?**
>
> [JUROR 3]: **Correct.**

(Emphasis added).

After the above voir dire with Juror 3, the trial court asked counsel to approach the bench, and the following discussion occurred:

> [THE COURT]: I just wanted to bring you up. I voir dired juror No. 3, but I wanted to give you both an opportunity to make any comment that you would like to make. I find that he's a reasonable individual. He's answered the question. I'm inclined to leave him on the jury, but I will be happy to entertain any motion, counsel.

[DEFENSE COUNSEL]: I would just note for the record that I understand that he indicated that he doesn't know [the prosecutor] personally, but that her brother is the CFO or chief financial officer is what I take that to mean of the company that he works for, meaning, his job and livelihood is tied directly to her family.

Her father who works for the company –

[PROSECUTION]: No.

[DEFENSE COUNSEL]: I'm sorry. Her father, that he's familiar with, is also present in court and certainly will know the outcome of this case.

Certainly even if the Court doesn't find that that's sufficient to result in a strike for cause, certainly I would have made a request to strike for cause had I been given that information during the voir dire process.

But also, if the Court had declined that, I would have considered striking this particular juror using a peremptory strike and adjusting my peremptory strikes accordingly given that information and the ties to [the prosecutor]'s family. That is my concern.

I would ask that the Court consider striking him from the jury in light of the inability for counsel to do that in light of the timing of the information.

[THE COURT]: I think it's fair to say that he didn't even know -- I had all three of the lawyers stand up. He clearly indicated he does not recognize [the prosecutor], but didn't recognize her by association until she showed up to give her opening statement. So that is unintentional certainly on his part.

* * *

[THE COURT]: I'm not going to strike him. The Court is persuaded, mindful of Judge Bell's opinion in the *Dingle* case, that the Court makes the determination after voir diring the potential jurors whether or not they would be allowed to remain.

The Court is persuaded that he was candid with the Court. He initiated the conversation wanting us to know that it was a tangential relationship. I'm persuaded that he could be fair and impartial. I'm not going to strike him.

(Emphasis added).

B. Standard of Review

Under Maryland Rule 4-312(g)(3), a trial judge can remove a juror any time before the jury retires to deliberate on a verdict if the judge finds that the juror is unable or disqualified from performing his or her duty. Our Court will not reverse a trial judge's decision to remove a juror "absent a clear abuse of discretion or prejudice." *State v. Cook*, 338 Md. 598, 620 (1995).

C. Arguments of the Parties

Although Juror 3 stated that he could be fair and impartial, appellant contends that the trial court did not directly ask the juror if his connection with the prosecutor's brother would lead him to take his finances into account when rendering a verdict. Appellant argues that "in reaching a verdict, Juror 3 would consider the impact his decision might have on his financial future if the jury were to render a verdict that upset the prosecutor and in turn the prosecutor's brother." Appellant asserts that, because financial considerations are not a proper basis for a verdict, the trial court abused its discretion when it refused to remove Juror 3 and replace him with an alternate juror.

The State responds that the trial court did not abuse its discretion. According to the State, the court voir dired Juror 3 about his connections with one of the prosecutors, and based on the juror's answers, the court was persuaded that the juror's failure to disclose the relationship before trial was inadvertent and that Juror 3 would be fair and impartial. State compares the instant case to *Burkett v. State*, 21 Md. App. 438 (1974) and *Leach v. State*,

47 Md. App. 611 (1981), because both cases involved jurors inadvertently failing to disclose their respective connections to the case during voir dire. According to the State, "[t]he trial court's discretionary determination should be upheld because, as in *Burkett* and *Leach*, the trial court had the opportunity to question Juror Number 3 on the record and the questioning showed no prejudice or bias."

D. Analysis

As in *Burkett* and *Leach*, the trial court here determined that Juror 3's omission was unintentional, the relationship between Juror 3 and the prosecutor was minimal, and Juror 3 could still be fair and impartial based on his answers to the court's additional voir dire questions. Although appellant argues that the court did not specifically ask about financial considerations in its voir dire, the court did ask Juror 3 whether "the information you provided to this Court, would that in any way prevent you or substantially impair you from rendering a fair and impartial verdict if select -- not selected -- as a juror in this case?" Because Juror 3 had just informed the court that he worked for a company whose CFO was the prosecutor's brother, the court's broad question encompassed whether Juror 3's financial ties to such company would "in any way" prevent or substantially impair his ability to render a fair and impartial verdict. The court was persuaded by Juror 3's honesty in coming forward with the information about his connection to the prosecutor's brother and his candor during voir dire. This Court concludes that the trial court did not abuse its discretion when it refused to strike Juror 3, because the court took appropriate steps to determine that Juror 3 could be fair and impartial.

II. Did the Trial Court Abuse its Discretion When it Refused to Permit Defense Counsel to Introduce Parts of [Appellant]'s Call to His Sister Pursuant to the Doctrine of Verbal Completeness?

A. Background

As stated above, the State introduced at trial portions of a phone call between K.A. and appellant. The State indicated that they planned to redact parts of the call in which appellant described a prior incident of waking up during a sexual act. The State argued that such parts of the call were inadmissible because they were "self-serving." Appellant objected to the proposed redactions and argued that the redactions were admissible under the doctrine of verbal completeness because the redactions explained appellant's statements made in the admitted portions of the call that it was possible that he touched C.A. in his sleep. The redactions are:

> K.A.: Have you ever -- have you ever had anybody tell you [that] you do stuff in your sleep?
>
> [APPELLANT]: Yes.
>
> * * *
>
> [APPELLANT]: . . . I -- the -- the only fucked up thing is I woke up in the middle of having sex before.
>
> K.A.: Do you think that's what happened?
>
> [APPELLANT]: No, I don't, but -- because of my fuckin' history, it's questionable.
>
> * * *
>
> K.A.: . . . I know people have sleep sex and wake up in the middle of it.
>
> [APPELLANT]: So, I'm not the only one?

K.A.: No.

[APPELLANT]: And that happened to me, like, twelve -- thirteen -- twelve years ago.

The trial court overruled appellant's objections. Citing *Richardson v. State*, 324 Md. 611 (1991), the court reasoned that the above redactions did not aid in the construction of the parts of the call that the State was planning to admit.

B. Standard of Review

A trial court's determination of whether statements are admissible under the doctrine of verbal completeness is reviewed for abuse of discretion. *Westley v. State*, 251 Md. App. 365, 416 (2021).

C. Arguments of the Parties

Appellant argues that the trial court abused its discretion when it allowed the State's proposed redactions. Appellant explains that "[w]hen one party introduces part of a written or recorded statement, the doctrine of verbal completeness permits the adverse party to introduce other portions of the statement if those other portions serve to explain the previously-admitted parts." Appellant argues that the redacted statements about his past sexual experiences while asleep explained the admitted statements that it was possible that he touched C.A. in his sleep.

Further, according to appellant, "[u]nder the doctrine of verbal completeness, the remainder of the statement that the adverse party wants to introduce should be excluded if 'the danger of prejudice outweighs the explanatory value.'" *Conyers v. State*, 345 Md. 525,

542 (1997). Appellant claims that the redacted statements about his prior sexual experiences did not prejudice the State or embarrass, implicate, or concern anyone other than appellant. Even if there was a risk of prejudice to the State, according to appellant, the explanatory value outweighed the risk of prejudice.

Although appellant admits that the redacted statements are hearsay, appellant argues that the statements sought to be admitted under the doctrine of verbal completeness do "'not have to be independently admissible.'" *Otto v. State*, 459 Md. 423, 451 (2018). Citing *Otto*, appellant explains that inadmissible portions can be admitted if the statements are "'particularly helpful in explaining a partial statement and that explanatory value is not substantially outweighed by the danger of unfair prejudice, waste of time, or confusion.'" *Id.* Appellant asserts that the redacted statements were helpful in explaining the unredacted portions of the call and that admitting these statements would not result in unfair prejudice to the State, a waste of time, or confuse the jury. Appellant concludes that the trial court abused its discretion when it overruled appellant's objections to the proposed redactions.

Appellant also argues that that the trial court's abuse of discretion was not harmless. According to appellant, the disputed redactions provided context to his statements that it was "possible" that he assaulted C.A. in his sleep. Appellant argues that, because the State highlighted to the jury appellant's statements that it was "possible" he assaulted C.A., we cannot hold that the trial court's error in redacting the explanatory statements did not influence the jury's verdict.

The State responds that appellant's redacted statements about his prior sexual history are not allowed under the doctrine of verbal completeness because the statements are hearsay. According to the State, our Supreme Court in *Conyers*, ruled that "'[t]he doctrine of verbal completeness does not allow evidence that is otherwise inadmissible as hearsay to become admissible solely because it is derived from a single writing or conversation.'" 345 Md. at 545. The State contends that appellant's statements do not fall within any hearsay exceptions.

Specifically, the State argues that appellant's affirmative answer to K.A.'s question, "[H]ave you ever had anybody tell you [that] you do stuff in your sleep?" constitutes double hearsay because he was relaying to K.A. statements that someone else made to him. The State contends that appellant did not identify any hearsay exception that would allow the double hearsay statement to be admissible. The State argues further that appellant's other statements about his prior sexual history are inadmissible because they are irrelevant. According to the State, the statements are irrelevant because "those experiences did not have any tendency to make it more probable or less probable that on *this* occasion [appellant] sexually abused C.A." (Emphasis in original). The State asserts that appellant "did not say that he had a history of initiating sexual activity while he was asleep; he said that he had experienced 'girls having sex with [him] in [his] sleep' and had woken up engaged in sexual intercourse." According to the State, "[t]hroughout that call, [appellant's] position was that he had no recollection of what transpired with C.A., not that

[he] woke up mid-sex act or that C.A. had initiated the sexual activity with him while he was sleeping."

D. Analysis

The doctrine of verbal completeness is derived from two sources in Maryland law: Maryland Rule 5-106 and the common law. *Otto*, 459 Md. at 447. Rule 5-106 provides:

> When part or all of a writing or recorded statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.
>
> **Committee note:** The change that this Rule effects in the common law is one of timing, rather than of admissibility. The Rule does not provide for the admission of otherwise inadmissible evidence, except to the extent that it is necessary, in fairness, to explain what the opposing party has elicited. In that event, a limiting instruction that the evidence was admitted not as substantive proof but as explanatory of the other evidence would be appropriate. *See Richardson v. State,* 324 Md. 611 (1991). The Rule thus provides for the alternative of an earlier admission of evidence with regard to writings or recorded statements than does the common law rule of completeness. The timing under the common law remains applicable to oral statements and also remains as an alternative with regard to writings and recorded statements.

The common law doctrine of verbal completeness was explained by our Supreme Court in *Feigley v. Baltimore Transit Co.*, 211 Md. 1 (1956). As discussed by *Otto*, the *Feigley* Court

> recognized that a blanket rule allowing the remainder of a conversation could spur additional evidentiary issues, and implemented limits "as to the scope, and limits of the right." The Court limited the doctrine of verbal completeness' application, while still maintaining the general principle. We recognized three corollaries to the rule:
>
> [1] No utterance irrelevant to the issue is receivable;

> [2] No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable;
>
> [3] The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony.

459 Md. at 449-50 (internal citations omitted).

Our Supreme Court further limited the common law doctrine of verbal completeness in *Richardson* and *Conyers*.

> *Richardson* orders that where the remaining evidence, if otherwise inadmissible, is more prejudicial than probative, a trial court may exclude the evidence. A reading of *Conyers* dictates that a statement does not have to be independently admissible. **However, evidence that is otherwise inadmissible does not become admissible purely because it completes the thought or statement of the evidence offered pursuant to the doctrine of verbal completeness. Inadmissible evidence will only be admitted by the rule of completeness if it is particularly helpful in explaining a partial statement and that explanatory value is not substantially outweighed by the danger of unfair prejudice, waste of time, or confusion.**

Otto, 459 Md. at 451-52 (emphasis added).

In the instant case, the first disputed redacted portion of the call, in which K.A. asks appellant if he "had anybody tell you [that] you do stuff in your sleep" and appellant responds "[y]es," constitutes double hearsay. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Appellant's statement constitutes double hearsay because he was relaying information to K.A. that he heard from a third party, and the statement would be offered into evidence to prove that appellant had performed sexual acts in his sleep.

As stated in *Conyers*, the doctrine of verbal completeness does not allow the admission of inadmissible evidence simply because it completes the statement. 345 Md. at 545. Furthermore, the rules of evidence still apply to the admissibility of evidence under the doctrine of verbal completeness. *Lindsey v. State*, 235 Md. App. 299, 319 (2018). "[T]he doctrine does not allow into evidence an utterance that is otherwise inadmissible hearsay to become admissible solely because it is derived from a single writing or conversation." *Id.* Appellant made no argument that the above redacted statement falls within any exception to the hearsay rule.

As cited by appellant, in *Otto* the Supreme Court of Maryland explained that statements sought to be admitted under the doctrine of verbal completeness "[do] not have to be independently admissible" but "[i]nadmissible evidence will only be admitted by the rule of completeness if it is particularly helpful in explaining a partial statement and that explanatory value is not substantially outweighed by the danger of unfair prejudice, waste of time, or confusion." 459 Md. at 451-52. As correctly stated by the trial court, the statement regarding whether appellant had been told that he "[does] stuff in [his] sleep" did not aid in the explanation of the admitted statements. The admitted portions of the call already indicated that appellant had no memory of the assault, and he stated that if the assault did take place, then he "probably did it in [his] sleep."

The last two disputed redacted portions of the call are not admissible under the doctrine of verbal completeness because they are irrelevant. The statements describe how appellant had woken up in the middle of sex before the incident with C.A., but when asked

by K.A. if he thinks that's what happened in the instant case, appellant stated, "No, I don't." In addition, appellant never stated in the call that he woke up in the middle of his assault on C.A. He claimed that he did not remember the assault or he could have done it in his sleep. Thus it was not an abuse of discretion for the trial court to rule that the doctrine of verbal completeness did not apply to these redacted statements.

But, even if the trial court did abuse its discretion, the error was harmless. An error is harmless when "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, . . ." *Dorsey v. State*, 276 Md. 638, 659 (1976). Here, the error was harmless because the trial court admitted the following statements that appellant made to the detectives about his history of having sex in his sleep:

> DETECTIVE WHITMER: Arlin, let me ask you. Do you think it's possible that you did this?
>
> [APPELLANT]: I don't know. I guess it is possible.
>
> DETECTIVE WHITMER: Why do you think it's possible?
>
> [APPELLANT]: Because I've been told that I [have] initiated sex in my sleep before.
>
> CORPORAL WRENCH: How often does that happen?
>
> [APPELLANT]: Uhm – it happened one time for sure when I was seventeen or eighteen and then [you] could talk to couple other ex- girlfriends and see if there's any other times that it happened.

Therefore, this Court can declare beyond a reasonable doubt that the error did not influence the verdict because the jury heard evidence that appellant had been told that he initiates sex in his sleep.

III. Must [Appellant's] [Conviction] for Third-Degree Sex[ual] Offense be Merged into His [conviction] for Second-Degree Rape [for Sentencing Purposes]?

A. Arguments of the Parties

Appellant contends that his second-degree rape and third-degree sexual offense sentences should merge under the required evidence test, the rule of lenity, or the principle of fundamental fairness. The State agrees with appellant that his sentences should merge, but argues that merger is required under the principle of fundamental fairness and not the required evidence test or the rule of lenity.[1] The State argues that the sentences should merge since "the State invited the jury to convict [appellant] of third-degree sexual offense based on conduct that was not separate from the second-degree rape." The State points to the prosecutor's closing argument:

> [T]he penetration is important because the *penetration is a distinction between the rape [in] the second degree and the third degree sex offense*. . .
>
> * * *

[1] The doctrine of merger in a criminal prosecution involves the merger of convictions, not sentences. In *In re Montrail M.*, 325 Md. 527, 533 (1992), the Supreme Court of Maryland stated that "[i]n a criminal prosecution, a merger does not serve to wipe out a conviction of the merged offense. The *conviction* simply flows into the *judgment* entered on the conviction into which it was merged." (Emphasis in original). For example, "under the required evidence test, the merger of a conviction for the lesser included offense into the conviction for the greater offense is *for sentencing purposes only* and results in a single sentence for the greater offense. The conviction for the lesser included offense survives the merger." *Moore v. State*, 198 Md. App. 655, 692 (2011) (emphasis in original).

> Third degree sex offense, ladies and gentlemen, is simple contact. So in that scenario, we're not talking about penetration. We're simply talking about contact. So if you don't believe that the defendant actually touched her – or penetrated her vaginal area, *but you do believe that he was touching her buttocks or her vaginal area that would constitute third degree sex offense*. Again, because she was under 14 years of age at the time of the act and the defendant being four years older than [C.A.].

(Emphasis in original).

The State contends that neither the trial court's instructions nor the verdict sheet specified that the third-degree sexual offense only consisted of appellant touching C.A.'s buttocks. The trial court's instructions on the third-degree sexual offense stated:

> Third degree sex offense. The defendant is charged with the crime of third degree sex offense. In order to convict the defendant of third degree sex offense, the State must prove that the defendant had sexual contact with [C.A.], that [C.A.] was under 14 years of age at the time of the act, and that the defendant is at least four years older than [C.A.].
>
> Sexual contact means the intentional touching of [C.A.]'s genital or anal area or other intimate area for the purpose of sexual arousal or gratification or for the abuse of either party. It does not include act commonly expressive of familial or friendly affection or acts for accepted medical purposes.

The State concludes that, because it is possible that the jury convicted appellant of third-degree sexual offense and second-degree rape based on the same act, it would be unfair to punish appellant for the same crime twice.

B. Analysis

After a review of the record, this Court concludes that it is impossible to determine what act the jury convicted appellant on for the third-degree sexual offense. In her closing argument, the prosecutor led the jury to believe that it could convict appellant of third-

degree sexual offense based on the same conduct that it could convict him for second-degree rape. We agree with the State that the principle of fundamental fairness requires appellant's conviction for third-degree sexual offense merge into his conviction for second-degree rape for sentencing purposes. Accordingly, the ten year concurrent sentence for appellant's third-degree sexual offense conviction must be vacated.

SENTENCE ON CONVICTION FOR THIRD-DEGREE SEXUAL OFFENSE VACATED; JUDGMENT ON CONVICTION FOR SECOND-DEGREE RAPE AFFIRMED. COSTS TO BE PAID TWO-THIRDS BY APPELLANT AND ONE-THIRD BY WORCESTER COUNTY.