Circuit Court for Anne Arundel County
Case No. C-02-CR-20-001566

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1445

September Term, 2021

JAMES E. JOHNSON

v.

STATE OF MARYLAND

Nazarian,
Reed,
Albright,

JJ.

Opinion by Nazarian, J.

Filed: September 16, 2022

James Johnson was convicted in the Circuit Court for Anne Arundel County of second-degree assault he committed against a woman he met on Match.com. On appeal, Mr. Johnson argues the circuit court erred in excluding him from a portion of *voir dire* and in permitting two police officers to testify over a hearsay objection. He also argues that his sentence is illegal because it should be limited to the maximum term allowed for fourth-degree sex offense. The court sentenced him to ten years with all but eighteen months suspended. We disagree with Mr. Johnson's first two contentions, but we agree that his sentence is illegal. We affirm his conviction, reverse his sentence, and remand for resentencing.

I. BACKGROUND

In the early hours of August 15, 2020, Corporal Sean Slattery of the Carroll County Police Department pulled a driver over on suspicion of drinking and driving. She appeared upset, asked Corporal Slattery for help, and told him she had been sexually assaulted by Mr. Johnson. The State later indicted Mr. Johnson on four offenses: second-degree rape, third-degree sexual offense, fourth-degree sexual offense, and second-degree assault.

A. *Voir Dire* And Jury Selection.

The events precipitating the first issue on appeal arose during *voir dire*. On day one of trial, the court addressed Mr. Johnson before beginning the jury selection process. The court explained to him that he had a right to be present at bench conferences and that he would remain behind in the courtroom for the beginning of jury selection because of

COVID-19 protocol:

> I want to let you know that you have a right to be present at all bench conferences during the course of the jury selection. I'm going to want the State here. I'm going to want your attorney here. I'm going to want you over here if you want to come up. And I want you to stand back a little bit aways from, like, when we do the jurors when they come, I'm not going to the jurors that way. The jurors will be from there because I'm doing it individually, but when we come up here, you won't have to come up here for that. But if we ever come up here in front of the jury, if you want to come up, I want you over here. Okay? You don't have to, you're not required to, but you have the right to be brought up to there.

Next, the court discussed the jury selection process with defense counsel and the State:

> THE COURT: Is the jury ready?
>
> THE CLERK: I haven't heard back yet. Let me call.
>
> [COUNSEL FOR MR. JOHNSON]: Your Honor, I'm guessing we're picking under the COVID rules, in the library and then coming back here?
>
> THE COURT: Yes. Yes. Now, did you do one with me a while ago?
>
> [COUNSEL FOR MR. JOHNSON]: I did.
>
> ***
>
> THE COURT: Oh, you all stay here. Well, let me back up. Mr. Johnson stays here. Correct, Sheriff?
>
> THE SHERIFF: I'm not sure how they do it.
>
> THE CLERK: Your Honor, it's your preference. It's your preference.
>
> THE COURT: Mr. Johnson stays here. I will give the attorneys the ability to come. You don't see just as much on this as you will—can we get the setup—
>
> ***
>
> I want that on and I want to make sure the recording is on so you can hear what we do in there.
>
> [COUNSEL FOR MR. JOHNSON]: You'll be able to see.

***

> THE COURT: and so can we hear them? Can you stand around to make sure we can hear them?
>
> THE CLERK: Yes.

The court then asked the *voir dire* questions to the entire pool with both defense counsel and the State in the courthouse library, but it appears from the record that Mr. Johnson was not present for this process and remained behind in the courtroom. Before leaving Mr. Johnson, the court stated, "I want that on and I want to make sure the recording is on so you can hear what we do in there." And defense counsel indicated that Mr. Johnson would "be able to see."

Once the pool was questioned, the presiding judge, defense counsel, and the State returned to the courtroom, rejoining Mr. Johnson. The circuit court then asked individual venire members to explain any possible biases or issues they may have based on their initial answers to the *voir dire* questions.

B. The Trial.

Because the issues raised in this case flow primarily from the trial itself, we recount the evidence and testimony as the parties presented it.

Mr. Johnson and the victim met on Match.com in 2020, exchanged messages, and made plans to meet in person. On August 14, 2020, the victim traveled to Mr. Johnson's home in Maryland to hang out. Over the course of the evening, both parties consumed alcohol. At the end of the evening, the parties engaged in intercourse and the victim left Mr. Johnson's house in her own vehicle. The dispute at trial centered around whether the sexual contact was consensual.

The victim testified that the sexual contact was not consensual, that "everything went black," and when she came to, Mr. Johnson was sexually assaulting her while holding her knees down with his arms. Mr. Johnson told a different story. He maintained that the encounter was consensual and, at trial, he testified to that effect. After leaving Mr. Johnson's house, the victim was pulled over by Corporal Slattery on suspicion of drinking and driving. The victim testified that she told the officer she needed help and that she had been assaulted. She then proceeded to give Corporal Slattery a detailed account of what she experienced at Mr. Johnson's house.

The victim went to the hospital and was visited there by Sergeant Roger Schwarb of the Maryland State Police around 8:00 a.m. Sergeant Schwarb testified on day one of the trial that he asked the victim questions about the assault. During this testimony, defense counsel objected without stating a specific reason, and the court asked the State what hearsay exception this testimony fell under:

> [THE STATE]: And this was at 7:00 when you—or you got the call at 7:00. What time did you actually get to the hospital?
>
> [SERGEANT SCHWARB]: It was approximately 8:00, between 8:00 and 8:15. It was around 8:14.
>
> [THE STATE]: Okay. And when you responded to the hospital, did you encounter her—when you encountered her, did you speak with her with other people present or was it just you and her?
>
> [SERGEANT SCHWARB]: It was she and I.
>
> [THE STATE]: Okay. And can you tell us what, if anything, she advised you?
>
> [COUNSEL FOR MR. JOHNSON]: Objection.
>
> [THE STATE]: May we approach?

> THE COURT: You may. . . .
>
> What's the exception?
>
> [THE STATE]: No. [Prompt] report, sexually assaulted behavior.
>
> THE COURT: Did, can she report to a police officer or is it a report to medical? Isn't it medical?
>
> [THE STATE]: No. The [prompt] report can be anyone and you can have any number witnesses. It's 801.1 and I forget I have—I have it pulled up, Your Honor. Do you have it with you?
>
> THE COURT: I just want to make sure we get it right.
>
> [THE STATE]: Sure. No, I understand. And then I was also going to argue, also in 801.1, it's a prior inconsistent statement because I believe Defense is attempting to impeach her by the mere fact of his cross examination from the DUI, but the prompt report that Your Honor wants us to—

During this sidebar, the State retrieved the Maryland Rules and confirmed that the prompt report exception was Maryland Rule 5-802.1(d).[1] Defense counsel then argued that the victim's complaint to Corporal Slattery was not prompt:

> [COUNSEL FOR MR. JOHNSON]: I would argue it's not prompt. This is—she don't know when it happened now, so I—
>
> THE COURT: Well, it happened after 14.
>
> [COUNSEL FOR MR. JOHNSON]: Happened after 14.
>
> THE COURT: Probably after 17.
>
> [COUNSEL FOR MR. JOHNSON]: And this is at—
>
> THE COURT: 7:00—
>
> [COUNSEL FOR MR. JOHNSON]: 8:00. 8:00 in the morning.

[1] If a witness testifies at trial and is subject to cross-examination, their previous "statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony" may be admitted. Md. Rule 5-802.1(d).

> THE COURT: Okay. Overrule your objection. I'm going to let her speak.

After the objection was overruled, Sergeant Schwarb testified about what the victim told him after the alleged sexual assault, without further objection from defense counsel.

On day two of trial, the State called Corporal Slattery and asked him to describe his encounter with the victim:

> [THE STATE]: And can you tell the ladies and gentlemen of the jury what, if anything, she said about the date, knowing that this was 12:35 a.m. on 8/15?
>
> [COUNSEL FOR MR. JOHNSON]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> Do you want to approach?
>
> [COUNSEL FOR MR. JOHNSON]: No, Your Honor.
>
> THE COURT: Okay.

Once the State began to ask Corporal Slattery for specific details about what the victim told him, defense counsel noted a "continuing objection to any of the hearsay[,]" with the court surmising that this complaint was even closer in time:

> [THE STATE]: And what, if any, information did she give you about those events?
>
> [CORPORAL SLATTERY]: So she had—
>
> [COUNSEL FOR MR. JOHNSON]: Objection. May we approach?
>
> ***
>
> I understand Your Honor's ruling yesterday. I just, I was making an objection. We just have a continuing objection to any of the hearsay.
>
> THE COURT: I understand. And then per the previous recent report of sexual abuse under 5-802.1, I think it comes into—
>
> [THE STATE]: And I'd also, just also add today that it would

> be an excited utterance as well.
>
> THE COURT: It would be. That's a closer call, but I think—but I would argue that if I'd be one of the attorneys.
>
> [COUNSEL FOR MR. JOHNSON]: I just want just a continued objection to it so I don't have to—
>
> THE COURT: I understand. You can have a continued objection, anything she says to third parties after the event. If for some reason we get way out in the world—
>
> [THE STATE]: Certainly.
>
> THE COURT: —we may talk, but this one's even closer in time than yesterday, so.
>
> [COUNSEL FOR MR. JOHNSON]: I understand, Your Honor.

No further objection was noted by the defense.

At the end of the trial, the court submitted the charges of second-degree rape, third-degree sexual offense, fourth-degree sexual offense, and second-degree assault to the jury. The jury acquitted Mr. Johnson of second-degree rape, third-degree sexual offense, and fourth-degree sexual offense and found him guilty of second-degree assault.

C. Sentencing.

During sentencing, Mr. Johnson argued that second-degree assault, the one charge for which he was convicted, was a lesser-included offense of fourth-degree sexual offense, and therefore that the sentencing range for fourth-degree sexual offense bounded the sentence the court could impose on him. The maximum sentence for fourth-degree sexual offense is one year of imprisonment. The State disagreed and the court rejected the defense's argument. The court stated that it was "not bound by the law of the fourth-degree sex offense" for sentencing purposes because Mr. Johnson had been acquitted of that

offense and was gaining the benefit of not having to register as a sex offender. However, the court reasoned, "[h]ad [Mr. Johnson] been found guilty of the fourth-degree sex offense and the second-degree assault, the State would have been bound by a one-year sentence." The court imposed a ten-year sentence and suspended all but eighteen months.

Mr. Johnson filed a motion to correct an illegal sentence on March 8, 2022. That motion was denied on March 24, 2022 without a hearing. This timely appeal followed.

II. DISCUSSION

On appeal, Mr. Johnson raises three questions, and we have rephrased them.[2] He contends *first* that the trial court improperly excluded him from *voir dire*. *Second,* he argues the trial court allowed Corporal Slattery and Sergeant Schwarb to testify under Maryland

[2] Mr. Johnson phrased his Questions Presented as follows:

1. Did the court err in excluding Mr. Johnson from the *voir dire*?
2. Did the court err in permitting two officers to testify to the narrative details of [the victim's] complaint?
3. Did the court err in imposing a sentence greater than the maximum penalty for fourth degree sexual offense, of which Mr. Johnson was acquitted?

The State phrased its Questions Presented as follows:

1. Should this Court decline to consider whether Johnson was improperly excluded from the selection of jurors?
2. If considered, did the court act in its discretion in admitting the victim's prompt report of a sexual assault?
3. Did the court correctly decline to limit Johnson's sentence for second-degree assault to the maximum sentence that could have been imposed for fourth-degree sex offense, a count for which Johnson was acquitted?

Rule 5-802.1(d) improperly. *Third*, he argues that his sentence is illegal because the court imposed a sentence greater than the maximum penalty for fourth-degree sexual offense.

A. Mr. Johnson Waived His Right To Be Present During The Initial *Voir Dire* Process.

We begin with Mr. Johnson's argument that the circuit court erred when it excluded him from the initial portion of jury selection. The State's primary rejoinder is that he waived his right to be present by not challenging the manner in which the court conducted *voir dire*. Mr. Johnson concedes this in his brief but urges us nonetheless to undertake plain error review.

If presented, we review the method of conducting *voir dire* under an abuse of discretion standard. *Wright v. State*, 411 Md. 503, 508 (2009). A defendant shall be present at all times when required by the court. Md. Rule 4-231(a). The right to be present during all critical stages of trial includes *voir dire* proceedings, which allows the defendant "to be brought face to face with the jurors at the time when the challenges are made." *Bedford v. State*, 317 Md. 659, 672 (1989) (cleaned up). A "defendant must be afforded every opportunity to 'size up' [the] jury and to fully examine each juror so as to assist counsel in determining which jurors should be disqualified for cause or even for no cause at all." *Id.* at 673 (citation omitted).

But that right is waivable. Mr. Johnson points to *Bedford v. State* and *State v. Yancey*, 442 Md. 616 (2015), two cases distinguishable from this one. In *Bedford*, the defendant "complained to the trial judge that he was not allowed to sit next to his counsel but was forced to sit some ten feet away flanked by two deputy sheriffs." 317 Md. at 668–

69. Mr. Bedford's counsel objected to the seating arrangement and described the arrangement for the record. *Id.* The trial judge attempted to rectify the situation by moving Mr. Bedford within six feet of defense counsel. *Id.* But defense counsel also objected to the new arrangement because it implied that Mr. Bedford was potentially dangerous, even to his own attorney. *Id.* at 670. The Court of Appeals did not decide whether the *voir dire* in Mr. Bedford's case constituted reversible error because it reversed on other grounds. *Id.* at 675. However, the Court did note that Mr. Bedford's ability to communicate with his attorney was "unquestionably hampered and undermined." *Id.*

Similarly, in *Yancey*, the defendant asked to be present during bench conferences without the sheriff standing by him and without his leg irons on. 442 Md. at 617. The court denied Mr. Yancey's request to be unshackled and suggested that Mr. Yancey's counsel advise Mr. Yancey of any bench conversations. *Id.* at 620. Counsel objected, arguing that it was prejudicial for Mr. Yancey not to be able to exercise his right to be present at bench conferences. *Id.* at 622. During *voir dire*, bench conferences with potential jury members occurred and Mr. Yancey was not permitted to be present. *Id.* But after *voir dire*, the sheriff permitted Mr. Yancey's leg irons to be removed and he was permitted to approach the bench. *Id.* In that case, the State confessed error and the Court of Appeals held that Mr. Yancey's exclusion was not harmless beyond a reasonable doubt because he "was excluded from the *entirety* of all of the bench conferences" during the *voir dire* process. *Id.* at 629.

But Mr. Johnson faces a hurdle that Mr. Bedford and Mr. Yancey didn't: he never objected to the process or raised the issue in the circuit court, so we agree with the State

that the issue is not preserved for appeal. *See Heineman v. Bright*, 140 Md. App. 658, 671 (2001) (*citing* Maryland Rule 8-131 for the premise that this Court "will not decide any non-jurisdictional issue unless the issue plainly appears by the record to have been raised in or decided by the trial court."). In *Bedford*, the defendant brought his complaint to the attention of the trial judge, who then had the opportunity to address and correct the seating arrangement. 317 Md. at 669. Although the correction was still prejudicial to Mr. Bedford, the issue was not waived because the trial judge had an opportunity to address it. *Id.* Similarly, Mr. Yancey "requested to be at the bench during *voir dire* bench conferences." 442 Md. at 630. No such request was made here. Therefore, Mr. Johnson waived his right to be present, and we decline to exercise our discretion to apply plain error review and address this argument.

B. Mr. Johnson's Hearsay Argument Is Not Preserved.

Second, Mr. Johnson argues that the officers' hearsay testimony was inadmissible under Maryland Rule 5-801(d). Specifically, he argues that it exceeded the scope of the prompt complaint exception because the testimony provided by both officers included too many narrative details about the assault.[3] The State argues that Mr. Johnson objected on

[3] Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and generally is inadmissible. Md. Rules 5-801, 5-802. A hearsay statement may be admitted, however, if it falls within one of the recognized exceptions. One category of exceptions is prior statements by witnesses. If a witness testifies at trial and is subject to cross-examination, their previous "statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony" may be admitted. Md. Rule 5-802.1(d). We'll refer to this as the prompt complaint exception.

different grounds during trial—that the complaint made by the victim to the officers was not prompt—and therefore Mr. Johnson's argument on appeal is not preserved for our review. We agree with the State.

Maryland Rule 8-131(a) provides, in pertinent part:

> Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

In *Ray v. State*, 435 Md. 1, 20 (2013), the Court of Appeals explained that the term "issue," as it is used in Rule 8-131(a), "is a point in dispute between two or more parties . . . . Alternatively, an issue may be a concern or problem or the point at which an unsettled matter is ready for a decision." (cleaned up). Further, the term "decide" means "to make a final choice or judgment about; to select as a course of action; or to infer on the basis of evidence. The term implies previous consideration of a matter causing doubt, wavering, debate, or controversy." *Ray*, 435 Md. at 21–22 (cleaned up).

"Exactly what must be done to 'preserve' an erroneous ruling depends upon a number of circumstances. It is trial counsel's responsibility to let the court know what you want and, when necessary, to explain why your request should be granted." J. Murphy, *Maryland Evidence Handbook*, § 100, p.3 (4th ed. 2010). An objection to the admission of evidence must be made at the time the evidence is offered or soon after, or else the objection is waived. Md. Rule 4-323(a). The grounds for objection need not be stated unless the court, at the request of a party or on its own initiative, directs the objecting party to do so.

Id. But "where an appellant states specific grounds when objecting to evidence at trial, the appellant [] forfeit[s] all other grounds for objection on appeal." *Perry v. State*, 229 Md. App. 687, 709 (2016) (*citing Klauenberg v. State*, 355 Md. 528, 541 (1999)); *see Monk v. State*, 94 Md. App. 738, 746 (1993) ("Because appellant did indeed set forth a specific ground for his objection, we consider all other grounds—including the ground stated in appellant's brief before this court—as waived.").

With this background in mind, we recount and analyze each officer's testimony in turn.

1. Sergeant Schwarb's testimony.

On day one of trial, Sergeant Schwarb was called as a witness for the State. When asked what the victim told him about the assault, defense counsel objected. This objection was aimed at the promptness of the victim's complaint:

> [COUNSEL FOR MR. JOHNSON]: I would argue it's not prompt. This is—she don't know when it happened now, so I—
>
> THE COURT: Well it happened after 14.
>
> [COUNSEL FOR MR. JOHNSON]: Happened after 14.
>
> THE COURT: Probably after 17.
>
> [COUNSEL FOR MR. JOHNSON]: And this is at—
>
> THE COURT: 7:00—
>
> [COUNSEL FOR MR. JOHNSON]: 8:00. 8:00 in the morning.
>
> THE COURT: Okay. Overrule your objection.

The objection was overruled, and Sergeant Schwarb testified in detail with no further objection from defense counsel. The question of whether Sergeant Schwarb's testimony exceeded the scope of the prompt complaint exception was not raised below. By objecting

to hearsay on the grounds of promptness and nothing further, Mr. Johnson cannot say now that the narrative details exceeded the scope of the complaint. The only "issue" before the trial court was the promptness of the victim's complaint, a point that the court decided by overruling that objection.

2. Corporal Slattery's testimony.

On day two of trial, the State asked Corporal Slattery to tell the jury what, if anything, the victim told him after she was pulled over leaving Mr. Johnson's house. Defense counsel objected without stating a basis and the court overruled the objection, asking defense counsel if they wanted to approach, which defense counsel declined. Once the State began to ask Corporal Slattery for specific details about what the victim told him, the defense noted a "continuing objection" to the hearsay:

> [THE STATE]: And what, if any, information did she give you about those events?
>
> [CORPORAL SLATTERY]: So she had—
>
> [COUNSEL FOR MR. JOHNSON]: Objection. May we approach?
>
> ***
>
> I understand Your Honor's ruling yesterday. I just, I was making an objection. We just have a continuing objection to any of the hearsay.
>
> THE COURT: I understand. And then per the previous recent report of sexual abuse under 5-802.1, I think it comes into—
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> [COUNSEL FOR MR. JOHNSON]: I just want just a continued objection to it so I don't have to—
>
> THE COURT: I understand. You can have a continued objection, anything she says to third parties after the event. If for some reason we get way out in the world—

> [THE STATE]: Certainly.
>
> THE COURT: —we may talk, but this one's even closer in time than yesterday, so.
>
> [COUNSEL FOR MR. JOHNSON]: I understand, Your Honor.

The court noted that Corporal Slattery's testimony was "even closer in time than" Sergeant Schwarb's because Corporal Slattery pulled the victim over the night of the assault and Sergeant Schwarb interviewed the victim the next morning. Ostensibly, the court's remark addressed defense counsel's earlier promptness argument because this was defense counsel's only basis for objecting to that point.

At no point did the defense challenge either officer's testimony about the narrative details of the victim's complaint, nor did defense counsel approach or ask to clarify its objections. Indeed, both officers continued testifying and describing their experiences with the victim with no further objection. When responding to the objections, the court indicated that it understood the objection to be about the timing of the complaints and counsel expressed no dissatisfaction with the court's ruling. There is nothing in the record revealing objections to the narrative details of the complaint, and we cannot read them into the record before us. *See Perry*, 229 Md. App. at 710 (indicating that "the [trial] court was not even able to hazard a guess" when defense counsel failed to challenge the witness's testimony as an expert).

C. Mr. Johnson's Sentence Is Illegal.

Lastly, Mr. Johnson argues that the circuit court erred by imposing a sentence greater than the maximum for fourth-degree sex offense, an offense of which he was

acquitted at trial. He contends that the charges for second-degree assault and fourth-degree sex offense were grounded in identical facts and, had he been convicted of both, the assault charge would have merged into the sexual offense charge. His sentence, ten years with all but eighteen months suspended, exceeds the maximum for fourth-degree sex offense, which is one year. And although he was acquitted of the sex offense charge, he argues, that greater offense would have cabined the sentencing range for his assault conviction if he had been convicted of both. He cannot be worse off for having been acquitted, he concludes.

The State doesn't disagree with Mr. Johnson's analysis, but counters "that the second-degree assault [conviction] was not based on the act comprising the fourth-degree sex offense" and, therefore, should not merge. Mr. Johnson responds that "the evidence, the prosecutor's arguments, and the trial court's own statements show that the holding of [the victim's] knees and the sexual intercourse made up a single act." Mr. Johnson also notes that the circuit court confirmed that both the fourth-degree sex offense and the second-degree assault "were predicated upon a single act—the sexual intercourse[,] when it agreed that had Mr. Johnson been convicted of both offenses, the sentences for both convictions would have merged."

The illegality of a sentence is a question of law that we review *de novo*. *Carlini v. State*, 215 Md. App. 415, 443 (2013). Maryland Rule 4-345(a) permits a court to "correct an illegal sentence at any time." An illegal sentence is "limited to those situations in which the illegality inheres in the sentence itself . . . ." *Chaney v. State*, 397 Md. 460, 466 (2007).

"A sentence that is not permitted by statute is an illegal sentence." *Holmes v. State*, 362 Md. 190, 195–96 (2000); *see State v. Crawley*, 455 Md. 52, 66 (2017) (citation omitted) ("Courts do not possess the authority to impose a sentence that does not comport with a legislatively-mandated sentence, and any such sentence must be corrected to remedy the illegality.").

1. Merger, generally.

The doctrine of merger stems from the Fifth Amendment's prohibition against double jeopardy. The Fifth Amendment "prohibits both successive prosecutions for the same offense as well as multiple punishment[s] for the same offense." *Newton v. State*, 280 Md. 260, 263 (1977) (citations omitted). "Merger protects a convicted defendant from multiple punishments for the same offense." *Brooks v. State*, 439 Md. 698, 737 (2014) (citation omitted). The Court of Appeals "has required merger 'when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other.'" *State v. Frazier*, 469 Md. 627, 641 (2020) (*quoting Brooks*, 439 Md. at 737). Both requirements must be met for merger. *Id.*

The State concedes that the offenses, and from there, the sentences, merge under the required evidence test if the "acts" under both are the same.[4] *Tolen v. State*, 242 Md. App.

[4] The principal test for determining whether offenses stemming from the same act must merge for sentencing purposes is the "required evidence" test. *Tolen*, 242 Md. App. at 305. Under that test, "'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other

288, 305 (2019); *see Frazier*, 469 Md. at 646–47 (a sentence may be imposed only for the offense having the additional elements, *i.e.*, the greater offense).

The State also appears to concede that if the offenses are based on the same act, the court must impose a sentence consistent with the greater offense, which in this case is fourth-degree sex offense. *See Simms v. State*, 288 Md. 712, 723–24 (1980), *superseded on other grounds in Robinson v. State*, 353 Md. 683 (1999) (explaining that "[t]o uphold the . . . sentences under these circumstances would be to sanction an extreme anomaly in the criminal law. It would permit a defendant to be punished more severely because of an acquittal on a charge. He would have fared better if he were less successful or had pled guilty to the greater charge"); *Williams v. State*, 187 Md. App. 470, 476 (2009) (noting that because Mr. Williams received a sentence "more severe than the maximum for which he was prosecuted, it would be unfair to permit the State to exact a more severe and unanticipated penalty from him than that which could have been imposed if the State had been wholly successful").

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does not.'" *Thomas v. State*, 277 Md. 257, 265 (1976) (*quoting Blockburger v. United States*, 284 U.S. 299, 304 (1932)). In other words, "'if each offense contains an element which the other does not, there is no merger . . . even though both offenses are based upon the same act or acts." *State v. Johnson*, 442 Md. 211, 218 (2015) (*quoting Nicolas v. State*, 426 Md. 385, 401–02 (2012)). But if "'only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, and where both offenses are based on the same act or acts[,] merger follows.'" *Id.* (*quoting Nicolas*, 426 Md. at 401–02).

If the required evidence test has not been satisfied, the court may seek other alternative courses for merger. This includes the rule of lenity and the "principle of fundamental fairness." *Johnson v. State*, 228 Md. App. 27, 46 (2016) (cleaned up).

The question, then, is whether Mr. Johnson's conviction for second-degree assault and the charge for fourth-degree sex offense were based on the same act or on separate and distinct acts.

2. Same act or different acts?

We start by distinguishing between the contact necessary for a second-degree assault and for fourth-degree sexual offense. Second-degree assault consists of three varieties: intent to frighten, attempted battery, and battery. *Snyder v. State*, 210 Md. App. 370, 381–82 (2013). The relevant modality here is battery, which consists of a harmful "offensive or unlawful touching." *Marlin v. State*, 192 Md. App. 134, 166 (2010). A fourth-degree sexual offense is "sexual contact with another without the consent of another." Md. Code (2002, 2021 Repl. Vol.), § 3-308(b)(1) of the Criminal Law Article ("CR"). "Sexual contact" is an "intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification or for the abuse of either party." CL § 3-301(e)(1). In comparing these elements, it is impossible to commit fourth-degree sexual offense without also committing second-degree assault. The only difference is that fourth-degree sexual offense requires *sexual* contact—a specific type of touching. Both Mr. Johnson and the victim agreed (and testified) that the sexual contact occurred; the disagreement centered on consent. But faced with these elements, the jury in this case reached an awkward compromise—it convicted Mr. Johnson for an assault, which both agree was sexual in nature, but acquitted him for the sexual contact.

The State argues that the "State's theory of the case, as presented to the jury," was

that the assault was completed when Mr. Johnson held down the victim's knees, and that this is "separate from the act underlying fourth-degree sex offense, 'sexual contact,' which the State argued was 'the vaginal intercourse and . . . the fellatio." Mr. Johnson counters that "the evidence, the prosecutor's arguments, and the trial court's own statements show that the holding of [the victim's] knees and the sexual intercourse made up a single act."

To determine whether two offenses were based on the same or different acts, we look to the charging document, the evidence adduced at trial, the jury instructions, and the verdict sheet. *See Brooks*, 439 Md. at 737 (resolving merger issue by reviewing the trial transcript, jury instructions, the State's closing argument, and the verdict sheet). Any ambiguity as to whether the two offenses are based upon the same act or acts is construed in favor of the defendant. *Frazier*, 469 Md. at 642.

In *Frazier*, Mr. Frazier was convicted of second-degree assault and fourth-degree sexual offense and sentenced to ten years with all but five years suspended for the second-degree assault charge and one year for the fourth-degree sexual offense to run consecutively. *Id.* at 631. The Court of Appeals held that the offenses *and* their sentences merged because second-degree assault and fourth-degree sexual offense merge under the required evidence test. *Id.* And based on the record in that case, the Court held that the ambiguity as to whether the physical assault (choking and slapping the victim) was separate from the sexual conduct (vaginal penetration and fellatio) had to be resolved in favor of Mr. Frazier. *Id.* at 643. The record was "entirely unclear whether the jury based the two convictions on the same or different acts" based on the pattern jury instructions and the

"deficiencies associated with the presentation of the State's case." *Id.* The deficiencies included the prosecutor's opening and closing statements, where the events were repeatedly described "as 'continuing' from one place to the next, implying that the physical and sexual violence should be treated as one ongoing criminal act." *Id.* at 638. The Court found that "the prosecutor did not focus the attention of the jury on which acts formed the basis for the fourth-degree sexual offense conviction as distinguished from those acts that supported a conviction for second-degree assault." *Id.* at 643. And "the pattern jury instructions did not inform the jury that they must find acts of physical assault and separate acts of sexual contact to convict the defendant of both crimes." *Id.*

Our analysis is consistent with *Frazier*, with one caveat: in *Frazier*, the State failed to direct the jury's attention to the act or acts, separate from the sexual offense, that could support a conviction for second-degree assault. *Id.* Here, the State *did* attempt to distinguish the two acts during its closing remarks to the jury, mentioning the knee restraint during its discussion of second-degree assault:

> So for assault in the second degree, we have to prove that [Mr. Johnson] caused offensive physical contact to [the victim]. The State feels that we have done that, through the testimony of [the victim], when she testified that she awoke and her legs were already in the air, being held by [Mr. Johnson], and he was using this mechanism to then go on and sexually assault her.
>
> That the contact—the second element you would have to look at is that the contact was the result of an intentional or reckless act of [Mr. Johnson] and was not accidental. Clearly, when she came to, at one point, her legs were being held underneath her knees, by [Mr. Johnson]. And this was to effectuate the rest of the sexual assault. This contact was not consented to, as she was passed out, and, essentially, woke up to this occurring. This is assault in the second degree.

The State then discussed fourth-degree sexual offense:

> Fourth degree sexual offense is I have to prove that [Mr. Johnson] had sexual contact with [the victim].
>
> We have a number of ways we know there was sexual contact. [Mr. Johnson] testified that there was sexual contact, the victim testified there was sexual contact. We also had the sex—the forensic nurse examiner talk about the injuries, that there was sexual contact and she observed injuries. We have sexual contact in two ways. We have the vaginal intercourse and we have the fellatio. So there clearly was sexual contact.
>
> And the second thing for fourth degree sex offense that the State must prove, we have to prove that the sexual contact was made against the will and without the consent of [the victim]. How do we know that? [The victim] testified that she did not consent to this, in terms of the vaginal intercourse, that she woke up, and the vaginal intercourse was occurring, that she basically came to, after blacking out, this was occurring, and then blacked out again. In terms of the fellatio, [the victim] doesn't even remember the fellatio. So clearly, that was not consented to. So those are the two factors that the State must prove for fourth degree sexual offense.

Although it's possible that the jury predicated its conviction for second-degree assault on the act of holding the victim's knees down, the State's closing argument on that point does not approach the clarity necessary to distinguish the two acts. To the contrary, the reference that "her legs were already in the air, being held by [Mr. Johnson], and he was using this mechanism to then go on and sexually assault her" includes both the act of holding her legs and the "sexual assault." The State went on to make this point a second time, but again, included references to both the leg hold and the sexual assault, stating that "her legs were being held underneath her knees, by [Mr. Johnson]. And this was to effectuate the rest of the sexual assault."

So which is it? Is it the knee holding or the sexual assault on which a second-degree

assault could be based? The record reflects two separate acts of assaultive behavior, one in which Mr. Johnson held the victim's knees down and one in which he assaulted the victim with sexual contact. The offensive, unlawful touching on which Mr. Johnson's second-degree assault conviction was based *could* have been the sexual contact required for fourth-degree sexual offense, or the offensive, unlawful touching *could* have been Mr. Johnson holding the victim's knees down, both made without consent of the victim. It doesn't follow, though, that the jury could find that the victim consented to the sexual contact but did not consent to the knee holding. So although the second-degree assault conviction could have reasonably been based on Mr. Johnson's actions separate from the sexual offense itself, it's not readily apparent whether the jury actually came to that conclusion.

The rest of the record is equally unilluminating. The State's opening statement did not differentiate the two forms of assault:

> Her next memory is of waking up in a bedroom. She doesn't know how she got there. She's in the bedroom. Her legs are being held out. She's in a very uncomfortable position. She feels completely out of it. She feels drunk. She never consented to this, and she's actually being penetrated when she comes to. When she awakes from being unconscious, she's actually being penetrated, penile penetration in the vagina by [Mr. Johnson].

The indictment charged each of the offenses using the statutory short form without describing any particular acts.[5] Each count alleged simply that Mr. Johnson, "on or about August 14, 2020 in Anne Arundel County," did commit the particular crime against the

[5] *See* CR §§ 3-317 (short form indictment for rape and sexual offenses), 3-206 (short form indictment for assault).

victim.[6] Similarly, neither the verdict sheet nor the jury instructions indicated the specific act or acts on which the offenses were based. The jury instructions tracked the Maryland Pattern Jury Instructions but didn't specify that the jury must find that the second-degree assault occurred separately from the fourth-degree sexual offense to convict Mr. Johnson of both offenses.[7] *See Brooks*, 439 Md. at 741–42 (reasoning that false imprisonment must

[6] Neither party raised *Thompson v. State*, 119 Md. App. 606, 621–22 (1998), which would typically resolve the merger question by focusing on the charging document:

> [I]n a multicount indictment where a count qualifies in all regards as a lesser included offense within a greater inclusive offense which is also charged, that count will be presumptively deemed to be a lesser included offense unless the charging document clearly indicates that such is not the case and that other unrelated criminal conduct is intended to be the subject of the count.

Analyzing this case against *Thompson* leads to the same result: because the indictment didn't accuse Mr. Johnson of a separate assault, the assault is presumed to be part of the sex offenses that were charged.

[7] The jury was instructed on fourth-degree sex offense as follows:

> In order to convict [Mr. Johnson] of fourth degree sex offense, the State must prove, 1) that [Mr. Johnson] had sexual contact with [the victim] and that the sexual contact was made against the will and without the consent of [the victim]. Sexual contact means the intentional touching of [the victim's] genital or anal areas or other intimate parts for the purposes of sexual arousal or gratification, or for the abuse of either party. Evidence of [the victim's] physically resisted is not required.

The jury was instructed on second-degree assault as follows:

> Assault is the causing an offensive physical contact to another person. In order to convict [Mr. Johnson] of assault, the State must prove, 1) that [Mr. Johnson] caused offensive physical contact or physical harm to [the victim], and 2) that the contact was the result of an intentional or reckless act of [Mr. Johnson]

merge with first-degree rape because neither the jury instructions nor the record clearly established that the jury viewed the "encounter" as two distinct acts).

At the sentencing hearing, the court characterized the verdict as "compromised" and stated that based on the evidence, the assault was not a "consensual sex act." The court addressed factors it considered to be especially important to the sentencing decision, including "the injuries to the victim [which included] the damage to the area between her anus and her vagina." The court also was concerned with the "level of harm" and that an "excessive amount of force" was used. At no point did the court distinguish between Mr. Johnson's use of force in holding the victim's knees down and his use of force during the sexual act. The court seemed convinced that the jury compromised when convicting Mr. Johnson of second-degree assault.

Although the jury's reasons for convicting Mr. Johnson of second-degree assault but not fourth-degree sexual offense remain unknown, the court's explanation at sentencing is enlightening. By focusing the court's attention on the injuries to the victim's genital areas, and describing the assault as a nonconsensual sex act, the court viewed the assault as one act. Further, the court stated that had Mr. Johnson been convicted of both offenses, the State would have been bound by a one-year sentence. This conclusion, based on the testimony and evidence presented to the jury, demonstrates that the court viewed the

> and was not accidental, and 3) that the contact was not consented to by [the victim] or not legally justified.

incident as one act and not as separate, distinct acts. But the court erred in stating that because Mr. Johnson was acquitted of fourth-degree sexual offense, it was not bound by the maximum penalty for that offense: if the offenses are based on the same act, the sentencing range is defined by the greater offense, regardless of acquittal or conviction. *See Simms*, 288 Md. at 723–24; *Williams*, 187 Md. App. at 476.

We cannot conclude that the act of holding the victim's knees down and the sexual contact here were "separate acts resulting in distinct harms [which] may be charged and punished separately." *Latray v. State*, 221 Md. App. 544, 562 (2015); *see also State v. Boozer*, 304 Md. 98, 105 (1985) ("separate acts resulting in separate insults to the person of the victim may be separately charged and punished even though they occur in very close proximity to each other and even though they are part of a single criminal episode or transaction"). After examining the indictment, the State's opening statement, testimony of the victim and Mr. Johnson, the verdict sheet, the jury instructions and the State'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. And in the face of this ambiguity, "we are constrained to give [Mr. Johnson] the benefit of the doubt" and merge his sentences for the conviction of second-agree assault with the charge of fourth-degree sexual offense. *Snowden v. State*, 321 Md. 612, 619 (1991).

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED IN PART AND REVERSED IN PART AND REMANDED TO THE CIRCUIT COURT FOR RE-SENTENCING CONSISTENT WITH THIS OPINION.

COSTS TO BE DIVIDED EQUALLY BETWEEN THE APPELLANT AND ANNE ARUNDEL COUNTY.