

Circuit Court for Prince George's County
Case No. CT200360X

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 1664

September Term, 2021

JAVON JAMES GROSS

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Friedman,

JJ.

Opinion by Nazarian, J.

Filed: March 30, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

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

After a jury trial in August 2021, Javon Gross was convicted of second-degree rape and second-degree assault. Mr. Gross now challenges the decision of the trial court to limit his cross-examination of the victim, its refusal to merge the second-degree rape and second-degree assault convictions for the purposes of sentencing, and its denial of Mr. Gross's request to cross-examine the victim after she presented an impact statement at his sentencing hearing. We affirm his convictions, vacate his sentences, and remand to the circuit court for resentencing.

I. BACKGROUND

A. The Trial.

This case stems from allegations by Mr. Gross's former girlfriend, R.M.,¹ that he raped and assaulted her on January 23, 2020. At trial, Ms. M described her relationship with Mr. Gross as "on and off" and toxic in the time leading up to the incident. The two ended their relationship on Christmas Day 2019, when Mr. Gross resumed his relationship with his child's mother, L.C. Shortly after Christmas, Ms. C contacted Ms. M and asked her to move out of Mr. Gross's apartment, so Ms. M returned to the apartment and retrieved her belongings and any items that she had paid for. The court precluded Mr. Gross from questioning Ms. M about whether she tampered with any of Mr. Gross's belongings or whether she poured water on Ms. C's children during her visit to the apartment.

Despite the end of their romantic relationship, Mr. Gross and Ms. M kept in contact

¹ We've replaced the names of individuals involved in this matter with randomized initials to protect their privacy.

through January 2020. On January 23, 2020, Mr. Gross and Ms. M planned to celebrate Ms. M's birthday, which was the previous day. They met at a friend's house in Washington, D.C. and rode together in Mr. Gross's car on their way back to Maryland. While Mr. Gross was driving, he noticed a text message on Ms. M's phone from a man, went through the messages on her phone, and started beating Ms. M with his fist. According to Ms. M, Mr. Gross drove them to a wooded street, pulled the car over, came around to and opened the passenger side door, and started beating Ms. M again. Ms. M testified that Mr. Gross also strangled her and caused her to pass out.

The next thing Ms. M recalled was awakening in Mr. Gross's bed. Ms. M testified that when Mr. Gross noticed that she was awake, he started to hit her with his fist and caused her to pass out again. When she regained consciousness, Mr. Gross began stomping on her head with his foot, causing her to pass out yet again.

The next time Ms. M regained consciousness, she was on her stomach and Mr. Gross was on top of her, having sex with her. Ms. M testified that she passed out again, and when she woke up on the morning of January 24, 2020, she didn't see Mr. Gross in the bedroom. She couldn't find her keys or phone, so she walked across the street to a beauty supply store where she was able to use their phone and call her cousin, R.W. She asked Mr. W to take her to see her best friend, X, at his workplace, to talk through the incident.

After X's shift, Ms. M went with him to his house and described the incident to X's mom, P.W. Ms. M decided to go to the emergency room at Bowie Health Center, where photographs of Ms. M's bruises and other injuries were taken. The hospital notified the

Prince George’s County Police Department, and a police officer arrived at the hospital and questioned Ms. M. Ms. M then was directed to Prince George’s Hospital Center to be examined by a forensic nurse examiner. Because no one there could examine Ms. M that day, she returned to the hospital for a sexual assault exam on January 25, 2020. A strangulation examination also was performed on Ms. M on January 28, 2020.

In addition to presenting Ms. M’s testimony, the State called Ms. W, law enforcement officers involved in the investigation, and medical examiners to testify at trial. Ms. W testified that on January 24, 2020, when X brought Ms. M to their house, Ms. M appeared bruised, had a black eye, and was limping. Ms. M also appeared to be crying. Ms. W took Ms. M to the emergency room because “[s]he was badly hurt.”

At the hospital, Corporal Alyssa Tomaselli of the Prince George’s County Police Department questioned Ms. M about the assault. Corporal Tomaselli testified that Ms. M appeared motionless and “had that blank kind of stare to her.” Ms. M told Corporal Tomaselli that later in the evening on January 23, 2020, she had gotten into an argument with an ex-boyfriend over a message on her phone and that he had beaten and strangled her. Ms. M also told Corporal Tomaselli that she was in and out of consciousness and at some point woke up in his house or apartment, where every time she regained consciousness he beat her again. After questioning Ms. M, Corporal Tomaselli notified the domestic violence unit. Detective Dashaun Randall of the sexual assault unit began his investigation on January 28, 2020, and that investigation led to the arrest of Mr. Gross on February 6, 2020.

Ms. M’s medical examiners testified about her physical injuries, including but not limited to bruising on her entire body, pain and swelling around her neck, and tears and abrasions on her internal genitalia. The jury also heard from a forensic chemist, Joseph Rose, who testified about his analysis of the evidence collected during Ms. M’s medical examinations. After analyzing a vaginal swab from Ms. M, Mr. Rose identified sperm on the swab and found a mixture DNA profile from two people: a major male contributor whose DNA profile was consistent with Mr. Gross’s and a minor contributor consistent with Ms. M’s DNA profile. Mr. Rose also identified the presence of sperm on the underwear Ms. M was wearing on January 23, 2020.

The defense presented no witnesses. The jury found Mr. Gross guilty of second-degree rape, third-degree sex offense, second-degree assault, and fourth-degree sex offense.

B. Sentencing.

The court held a sentencing hearing on December 3, 2021. Several witnesses, including Mr. Gross’s parents, Ms. C, and Ms. M presented statements. Defense counsel sought permission to cross-examine Ms. M after her statement, but the court denied this request, stating, “This is not a trial. This is a sentencing.” At the conclusion of the hearing, the court sentenced Mr. Gross to twenty years with all but ten years suspended for second-degree rape and a consecutive ten years with all but three suspended for second-degree assault; he was given credit for time served. Mr. Gross filed this timely appeal. We discuss additional facts below as necessary.

II. DISCUSSION

Mr. Gross alleges that the court erred in three ways:² (1) by limiting his cross-examination of Ms. M improperly; (2) by failing to merge Mr. Gross's second-degree rape and second-degree assault convictions for sentencing; and (3) by precluding Mr. Gross from questioning Ms. M after she provided an impact statement at his sentencing hearing. We hold that the court did not err in limiting Mr. Gross's cross-examination of Ms. M, but we agree with Mr. Gross and the State that his sentences for second-degree rape and second-degree assault merge and that the court erred in refusing to allow Mr. Gross to question Ms. M at sentencing.

² Mr. Gross phrased his Questions Presented as follows:

1. Did the circuit court err in restricting cross-examination of [R.M.] at trial on matters pertaining to her credibility?
2. Must Appellant's convictions for second degree assault and second degree rape merge for purposes of sentencing?
3. Did the circuit court err in barring Appellant from questioning [R.M.] after she provided a victim impact statement at sentencing?

The State phrased its Questions Presented as follows:

1. Did the trial court properly exercise its discretion when it sustained the State's objections to Gross's cross-examination of [R.M.]?
2. Did the trial court err when it imposed separate sentences for Gross's convictions for second-degree rape and second-degree assault?
3. Did the trial court err when it disallowed cross examination of [R.M.] at Gross's sentencing?

A. The Trial Court Didn't Err In Limiting Mr. Gross's Cross-Examination Of Ms. M.

The Confrontation Clause protects a defendant's right to cross-examine adverse witnesses. *See* US CONST. amend. VI; Md. Decl. of Rts., art. 21; *Peterson v. State*, 444 Md. 105, 112 (2015). This right includes the opportunity to question witnesses about their biases and motives to testify, both of which may bear on the credibility of their testimony. *Martinez v. State*, 416 Md. 418, 428 (2010). A trial court must permit a defendant to engage in a “threshold level of inquiry” of witnesses that allows jurors to draw inferences about the reliability and credibility of witnesses. *Peterson*, 444 Md. at 122 (*quoting Martinez*, 416 Md. at 428). But “[o]nce the constitutional threshold is met, trial courts may limit the scope of cross-examination ‘when necessary for witness safety or to prevent harassment, prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant.’” *Id.* at 122–23 (*quoting Martinez*, 416 Md. at 428); *see also* Md. Rule 5-611 (the trial court may exercise control over how a witness is questioned to further the truth-seeking function of a trial, to avoid wasting time, and to protect witnesses from harassment or embarrassment). And although a defendant has “wide latitude to cross-examine a witness as to bias or prejudices . . . the questioning must not be allowed to stray into collateral matters which would obscure the trial issues and lead to the factfinder’s confusion.” *Smallwood v. State*, 320 Md. 300, 307–08 (1990) (citations omitted).

Mr. Gross complains of two lines of questioning he was precluded from exploring as he cross-examined Ms. M: *first*, according to Mr. Gross, the court precluded questioning “that painted [Ms. M] in a different light than that portrayed by the State”; and *second*, the

court sustained objections to “questions aimed at eliciting from [Ms. M] that Mr. Gross did not injure her in the manner to which she testified.” These euphemized descriptions elide the real purpose of the questions, though, and the State’s objections were sustained properly.

Mr. Gross tried to influence the jury’s impression of Ms. M by questioning her about her past sexual relationship with Mr. Gross:

[DEFENSE COUNSEL]: You actually had sex with him a couple of different times between—

[STATE]: Objection.

THE COURT: Approach.

* * *

THE COURT: Your objection is?

[STATE]: Whether or not they had sexual intercourse is not relevant.

[DEFENSE COUNSEL]: Well, between the time that she left at Christmas day and the time that this happened on January 23rd, I think it’s extremely relevant.

THE COURT: Why?

[DEFENSE COUNSEL]: Because it shows the nature of the friendship or whatever you call it.

THE COURT: Sustained.

Mr. Gross argues that the court should have allowed this line of questioning because it “suggested that their relationship was different than she made it seem in her testimony” and “it raised the possibility that the two did not even have sex on the evening of the alleged rape.” In response, the State argues that Mr. Gross hasn’t preserved his argument that he and Ms. M may not have engaged in sexual activity on the evening in question. Additionally, the State maintains that whether Mr. Gross and Ms. M had sexual intercourse

between their break-up and the incident is irrelevant to the issues of this case. We agree with the State that Mr. Gross hasn't preserved his argument that past instances of sexual intercourse between him and Ms. M calls into question whether they had sex on the night of the incident. Aside from the fact that it seems logically backward—recent and consensual post-breakup sexual activity makes sexual activity on the night in question *less* likely?—Mr. Gross didn't raise this argument in the trial court. He can't raise it now for the first time on appeal, and we decline to address it. Md. Rule 8-131(a) (“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 . . .”).

This takes us to Mr. Gross's second argument, that testimony about past sexual intercourse between Mr. Gross and Ms. M is relevant because it calls into question Ms. M's description of their relationship. Whether evidence is relevant is a question of law that we review *de novo*. *Perry v. Asphalt & Concrete Servs., Inc.*, 447 Md. 31, 49 (2016). Evidence is relevant if it has “any tendency 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. Although Maryland courts have found that evidence bearing on a witness's credibility is relevant, evidence intended to harass or humiliate the witness is not. *Cox v. State*, 51 Md. App. 271, 277 (1982). It's the trial court's obligation to exclude questions designed to annoy, harass, humiliate, or excite unfair prejudice against a witness. *Smith v. State*, 55 Md. App. 728, 733 (1983) (*citing Reese v. State*, 54 Md. App. 281, 289–90 (1983)). And this principle applies with special emphasis

in sex crime prosecutions subject to Md. Rule 5-412³—by statute, evidence of a witness’s prior sexual conduct, even with the defendant, is admissible only if it’s “material to a fact in issue in the case” and if “the inflammatory or prejudicial nature of the evidence does not outweigh its probative value.” Md. Code (2002, 2021 Repl. Vol.), § 3-319(b)(2)–(3) of the Criminal Law Article (“CR”). The questions at this juncture are whether the evidence Mr. Gross sought to elicit was relevant to the credibility of Ms. M’s actual testimony, not whether the evidence was relevant to the issues litigated at trial, *Reese*, 54 Md. App. at 287, and whether Mr. Gross was prejudiced by the court’s decision to limit cross-examination. *Smith*, 55 Md. App. at 733.

It wasn’t and he wasn’t. The theory Mr. Gross sought to develop through this proposed line of cross-examination—which was not supported factually with any other evidence or testimony that he offered or proffered—was that Ms. M must be lying about the January 23, 2020 assault because she understated the nature of their relationship. But the fact of Ms. M’s recent sexual activity with Mr. Gross, if any, didn’t and couldn’t cast doubt about whether she was raped and assaulted on January 23, 2020. Nobody disputed that Mr. Gross and Ms. M had had a romantic relationship and that they remained in contact—and even planned to celebrate her birthday—after breaking up. He was permitted to question Ms. M in full about her version of events on January 23, 2020 and, as we discuss

³ Maryland Rule 5-412 requires that “[i]n prosecutions for any sex offense under Code, Criminal Law Article, Title 3, Subtitle 3 or a lesser included crime[,] . . . admissibility of evidence relating to the victim’s sexual history is governed by Code, Criminal Law Article, § 3-319.”

below, about her views on Mr. Gross’s relationship with Ms. C and her separation from Mr. Gross. To the extent he sought to establish that Ms. M’s former relationship with Mr. Gross could have motivated her to lie about him, the court gave him the opportunity to do so. The questioning the court precluded could only have piled on. The court reasonably could have viewed these questions as harassment that lacked sufficient probative value and that were purported to suggest to the jury that the parties’ previous sexual activity meant she was lying about being raped and assaulted on January 23. We see no error in the court’s decision to draw the line as it did and no prejudice to Mr. Gross, even if a different judge might have given him even more latitude than this judge did.

Furthermore, CR § 3-319 (commonly called the rape shield statute), which doesn’t appear in either parties’ briefs, prohibits evidence of a victim’s prior sexual conduct from being “referred to in a statement to a jury or introduced in a trial unless the court has first held a closed hearing and determined that the evidence is admissible.” CR § 3-319(c). This Court has held that “[w]here the defense seeks to offer into evidence specific instances of the victim’s prior sexual conduct[,] . . . there is a responsibility on the defense to raise the issue.” *Cantrell v. State*, 50 Md. App. 331, 335 (1981) (examining Art. 27 § 461A,⁴ which required an in-camera hearing to determine the admissibility of evidence of a victim’s prior sexual conduct). The closed hearing requirement resolves any admissibility issues of a

⁴ According to the Revisor’s Note to CR § 3-319, § 3-319 was “derived without substantive change from former Art. 27, § 461A.” See also *Westley v. State*, 251 Md. App. 365, 396 n.11 (2021) (explaining that “the primary difference between § 461A and the current § 3-319 is organizational.”).

victim’s prior sexual conduct outside the presence of the jury, protecting the victim from “undue embarrassment at trial.” *Smith v. State*, 71 Md. App. 165, 189 (1987).

During trial, defense counsel attempted to question Ms. M on her prior sexual encounters with Mr. Gross *before* addressing the admissibility of this evidence with the court in a closed hearing, in direct contravention of the rape shield statute. Moreover, Mr. Gross’s disregard of the rape shield statute demonstrates that this evidence isn’t relevant at all to Ms. M’s credibility; had this evidence truly been relevant, Mr. Gross would’ve pursued the proper procedure rather than trying to (mis)characterize it at trial as cross-examination about the tenor of their relationship. For all these reasons, we find that Mr. Gross’s questioning of Ms. M about her prior sexual conduct was properly excluded.

Mr. Gross also attempted to question Ms. M on whether she poured water on the children of Ms. C, Mr. Gross’s partner and the mother of Mr. Gross’s child:

[DEFENSE COUNSEL]: Okay. And you put the code in and you went in and poured water on the children; isn’t that correct?

[STATE]: Objection, Your Honor.

THE COURT: Approach.

* * *

[STATE]: How is this relevant?

[DEFENSE COUNSEL]: It is extremely relevant. It shows her state of mind. It shows that she’s aggressive. It shows a great deal. It goes to her credibility as well.

[STATE]: Her state of mind before any of this happened?

* * *

THE COURT: Her state of mind on [December] 27th?

[DEFENSE COUNSEL]: Right.

THE COURT: As opposed to January 22nd and 23rd?

[DEFENSE COUNSEL]: Even so, Your Honor, these things don't just burn out in five seconds and this stuff didn't happen in a vacuum. You don't have a little thing that says oh, here, January 23rd. That's what happened.

THE COURT: I gave you a little leeway, but you need to focus on the date of the incidents and anything related to the date of the incidents.

Defense counsel additionally proffered that this testimony established Ms. M's "prior bad acts":

[DEFENSE COUNSEL]: It's prior bad acts, Your Honor. And prior bad acts are relevant even if there are no court cases or charges that are filed.

THE COURT: Objection is sustained.

Defense counsel also attempted to ask Ms. M if she took any of Mr. Gross's belongings when she moved out of his apartment:

[DEFENSE COUNSEL]: Did you take anything of [Mr. Gross's] while you were there?

[STATE]: Objection.

THE COURT: Objection is sustained.

Mr. Gross argues that these questions were designed to show that Ms. M acted in an aggressive manner toward him after their break-up and that her answers would have "contradicted her claim that she was not angry or vindictive as well as her claim that only he was violent." In response, the State argues that Ms. M's state of mind before the incident in question wasn't relevant, that Mr. Gross didn't proffer any factual basis for this line of questioning, "and whether it actually happened had the potential to veer into a mini-trial that would confuse the issues and distract the jury."

We agree with the State that these lines of questioning weren't relevant. The questions Mr. Gross sought to ask couldn't have had any bearing on Ms. M's credibility. Mr. Gross proffered no factual basis to support these accusations against Ms. M, and no other witness in the trial testified to whether these interactions occurred. Without any corroboration as to whether Ms. M committed these acts, we're left with two possibilities. *First*, if she denied pouring water on the children and taking Mr. Gross's belongings, the jury is left wondering why defense counsel asked the questions in the first place and whether, in the absence of any corroboration, she could be lying. *Second*, if she admitted to committing those acts, the jury might think she's a bad person—as prior bad acts evidence always does, the admissions would taint her character while, in this instance, saying nothing about the credibility of her accusations. Either way, this questioning wouldn't have assisted the jury in determining the truth and would only have served to confuse the jury and distract it from the charges brought against Mr. Gross. *See* Md. Rule 5-611. Again, the court gave Mr. Gross broad latitude to question Ms. M on her feelings about Mr. Gross's relationship with Ms. C and ample opportunity to cast doubt on the credibility of Ms. M's testimony by testing her version of events. And ultimately, counsel's argument revealed the true purpose of this questioning: by focusing on Ms. M's past actions (allegations that, again, were never supported with any testimony or evidence), the defense sought to attack her character instead of the credibility of her testimony and characterize

Ms. M as someone not worthy of belief, as no “Rebecca [of] Sunnybrook Farm.” We agree with the State that the court properly sustained the State’s objections to these questions.

Finally, defense counsel attempted to ask Ms. M a series of questions about how other individuals reacted to her appearance after the incident. Defense counsel asked whether a store employee who saw Ms. M after the incident asked why she had blood on her or “anything like that.” The State objected and the court sustained its objection. The court also sustained an objection when defense counsel asked whether Ms. M’s cousin, Mr. W, whom she called to pick her up from the store, said, “[H]ey, we need to get that guy locked up, meaning [Mr. Gross]?” Later during cross-examination, defense counsel asked, “And so [Mr. W] didn’t say, let’s call 911?” Again, the State objected, and the court sustained its objection.

Mr. Gross argues that these questions were “aimed at eliciting from Ms. M that Mr. Gross did not injure her in the manner to which she testified.” He posits that if those with whom Ms. M interacted after the incident didn’t “express concern about her injuries or recommend that she contact the authorities, the jury would have had more reason to doubt her account of the night before.” Because the relevance of this line of questioning turns on why individuals reacted or didn’t react a certain way, the State responds that the questioning called for speculation. The State also contends that to the extent that this line of questioning elicited statements from those individuals to be offered for the truth of the matter asserted, it called for inadmissible hearsay.

These questions were irrelevant and excluded properly. The reactions of other non-professional observers of Ms. M's appearance after the incident wouldn't or couldn't challenge the fact or extent of her injuries, which were photographed numerous times throughout the investigation and described to the jury by law enforcement and medical professionals (and the photographs were shown to the jury for them to draw their own conclusions). Mr. Gross was free to call and question any of those witnesses about what they did or didn't observe about Ms. M's injuries, but he didn't. The court didn't err when it prevented the defense from questioning Ms. M about whether or how other individuals reacted to her appearance and injuries after the incident.

B. Mr. Gross's Sentences For Second-Degree Rape And Second-Degree Assault Must Merge.

At trial, the closing arguments and the jury instructions directed the jury to determine, based on the evidence, whether Mr. Gross committed second-degree rape and second-degree assault. Both charges include elements of physical force or harm. The court gave the following instructions on second-degree rape:

Rape is engaging in vaginal intercourse or a sexual act by force or threat of force and without consent. In order to convict the defendant of second degree rape, the State must prove, one, that the defendant had vaginal intercourse with [Ms. M]; two, that the act was committed by force or threat of force; and three, that the act was committed without the consent of [Ms. M].

The court also instructed the jury on the battery modality of assault:

Assault is causing offensive physical contact to another person. In order to convict the defendant of assault, the State must prove, one, that the defendant caused physical harm to [Ms. M]; two, that the contact was the result of an intentional or

reckless act of the defendant and was not accidental; and three, that the contact was not consented to by [Ms. M].”

The court could have but didn’t instruct the jury on whether the same conduct could meet the physical harm element for assault and the force element for rape.

After the court instructed the jury, the State argued in its closing statement that the elements of assault were met by Mr. Gross beating and strangling Ms. M:

We’re going to start with second degree assault. The State has to prove that the defendant caused physical harm to Ms. [M].

* * *

[Ms. M] told you that he dug his nails into the side of her face. She told you that he beat on her in the car. She told you that he was still driving that car while he was beating on her and she was captive in the passenger’s seat. She told you that eventually, he took her to this dark wooded area and he beat on her there.

He puts her in a choke hold in the car. . . . When he sees she’s awake, beats on her some more. She told you that at a certain point, he stomped on her head.

And when explaining how the State proved the force element of second-degree rape, the State described the same conduct that it had argued formed the basis for the assault:

So in this particular case, if you find the fact that he had beaten her so badly, had strangled her multiple times, that every time she woke up in his house, he continued beating on her, those are all things that can be considered force or threat of force that would put her in fear.

At the sentencing hearing, both the State and Mr. Gross presented argument on whether the second-degree rape and assault convictions merged. The State argued that the second-degree assault conviction was based on “separate acts from the rape.” The defense argued that the State didn’t identify separate acts to form the basis for each element of

second-degree rape and second-degree assault. The court didn't merge the convictions and sentenced Mr. Gross to twenty years with all but ten years suspended for second-degree rape and a consecutive ten years with all but three suspended for second-degree assault.

Mr. Gross argues now that the jury may have convicted Mr. Gross “based on the same conduct that satisfied either the force or penetration elements of second degree rape,” and thus that his second-degree rape and second-degree assault convictions merge. The State agrees and explains that “because the record is ambiguous as to the factual basis for the jury’s verdict, . . . [Mr.] Gross is entitled to vacation of his sentence for second-degree assault.”

“A failure to merge a sentence is considered to be an ‘illegal sentence’ within the contemplation of [Md. Rule 4-345].” *Pair v. State*, 202 Md. App. 617, 624 (2011). We have the power to correct an illegal sentence at any time, Md. Rule 4-345, and we review the legality of the sentence *de novo*. *Bonilla v. State*, 443 Md. 1, 6 (2015).

The common law principle of merger stems from the protections afforded by the Double Jeopardy Clause against multiple punishments for the same offense. US CONST. amend. V; *Butler v. State*, 255 Md. App. 477, 497–98 (2022). Most commonly, we apply the required evidence test to determine whether two convictions merge for sentencing purposes. *McGrath v. State*, 356 Md. 20, 23 (1999). Under the required evidence test, we determine first whether the convictions are based on the same act or acts. *Morgan v. State*, 252 Md. App. 439, 460 (2021). We review the State’s closing argument, charging document, jury instructions, verdict sheet, and evidence introduced at trial, and if the record

is ambiguous whether the convictions are based on the same acts, we construe it in favor of the defendant. *Butler*, 255 Md. App. at 498, 501–02. If the convictions unambiguously are based on separate acts by the defendant, there is no merger; if the convictions are based on the same conduct, we examine the elements of both offenses. “[I]f all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter.” *Snowden v. State*, 321 Md. 612, 617 (1991) (quoting *State v. Jenkins*, 307 Md. 501, 517 (1986)). In cases where merger applies, a court generally is precluded from imposing separate sentences, and a sentence may only be imposed for the offense containing the additional element. *Paige v. State*, 222 Md. App. 190, 206–07 (2015).

Offenses also may merge under the rule of lenity, which counsels in favor of merger “[i]f the intent of the legislature to impose separate punishments for multiple convictions arising out of the same conduct or transaction is unclear” *Id.* at 207. The rule of lenity may be invoked “[i]n cases where the jury may have relied upon evidence of the same act or acts to support more than one conviction” *Id.*

Although the jury in this case convicted Mr. Gross of both second-degree assault and second-degree rape, the record doesn’t reveal with precision whether the jury used the same instances of Mr. Gross’s conduct as the basis for the second-degree assault and second-degree rape convictions. The jury instructions don’t resolve this ambiguity because they fail to mention whether the same underlying conduct can prove elements of two different offenses. Similarly, the verdict sheet is silent on which instances of Mr. Gross’s

conduct could form the basis of each offense. Indeed, the State’s closing argument suggested that the jury *could* consider the assault to be the underlying conduct for the force element of second-degree rape. At best, this record is ambiguous as to what evidence the jury considered in convicting Mr. Gross of second-degree assault and rape, and the ambiguity must be resolved in favor of Mr. Gross. Therefore, the second-degree assault conviction should have been merged into the second-degree rape conviction under both the required evidence test and the rule of lenity, and we find that the court erred in imposing separate sentences for second-degree assault and second-degree rape. *See, e.g., Biggus v. State*, 323 Md. 339, 351 (1991) (“[W]here a defendant is convicted of a sexual offense and a common law assault or battery, and the threat of force or force or sexual contact involved in the sexual offense is also the basis for the assault or battery conviction, the assault or battery merges into the sexual offense under the required evidence test.” (citation omitted)).

C. The Court Erred In Precluding Mr. Gross From Questioning Ms. M After She Presented A Statement At Mr. Gross’s Sentencing Hearing.

At Mr. Gross’s sentencing hearing, Ms. M gave a statement in which she accused Mr. Gross of additional instances of assault and abuse. When defense counsel requested permission to question Ms. M about her statement, the court denied his request, stating, “This is not a trial. This is a sentencing.” Mr. Gross now argues that the court violated Md. Code (2001, 2018 Repl. Vol.), § 11-403(c) of the Criminal Procedure Article (“CP”) in denying his request to question Ms. M on her impact statement. The State agrees and so do we.

Trial courts can and must allow victims to testify about the impact of crimes committed against them, and “[a]n important step towards accomplishing that . . . is to accept victim impact testimony wherever possible.” *Cianos v. State*, 338 Md. 406, 413 (1995). Even so, that testimony may be tested by the accused. If a victim or their representative presents an impact statement to the court, CP § 11-403(c) states that “the defendant . . . may cross-examine the victim or the victim’s representative.” Although the court has discretion to limit the scope of cross-examination, *Grandison v. State*, 341 Md. 175, 207 (1995), “[a] trial court must exercise its discretion in accordance with correct legal standards. Where a trial court fails to do so, it abuses its discretion.” *Faulkner v. State*, 468 Md. 418, 460–61 (2020) (citations omitted). Here, the court didn’t exercise its discretion simply to limit the scope of cross-examination; it precluded *any* cross-examination based on the apparent belief that cross-examination is not permitted at a sentencing hearing and is permitted only at trial. The court erred as a matter of law in so concluding, and thus abused its discretion in denying Mr. Gross’s request to question Ms. M at the sentencing hearing.

“[W]hen an appellant, in a criminal case, establishes error, unless 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, such error cannot be deemed ‘harmless’ and a reversal is mandated.” *Dorsey v. State*, 276 Md. 638, 659 (1976).

The Supreme Court of Maryland (at the time named the Court of Appeals of Maryland)⁵ has held that the harmless error standard defined in *Dorsey* “applies not only to proceedings involving the determination of an individual’s guilt or innocence, but also to proceedings involving his sentence after conviction.” *King v. State*, 300 Md. 218, 224 (1984). The burden of establishing that the error was harmless lies with the State. *Smith v. State*, 367 Md. 348, 360 (2001). The parties agree that precluding Mr. Gross from questioning Ms. M at sentencing after she presented an impact statement isn’t harmless error. Because it’s unclear from the record what factors the court considered in sentencing Mr. Gross, the State concedes that it can’t prove beyond a reasonable doubt that this was harmless error, and we agree. And as a result of the two errors committed during sentencing, we vacate Mr. Gross’s sentences for second-degree rape and second-degree assault and remand for resentencing. *See* Md. Rule 8-604(d)(2).

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
AFFIRMED IN PART, VACATED IN
PART, AND REMANDED FOR FURTHER
PROCEEDINGS CONSISTENT WITH
THIS OPINION. COSTS TO BE DIVIDED
EQUALLY.**

⁵ At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) (“From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland . . .”).