Circuit Court for Prince George's County
Case No.: CT170204X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1681

September Term, 2017

EDGAR BONILLA

v.

STATE OF MARYLAND

Woodward, C.J.,
Friedman,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 2, 2018

Following a jury trial, in the Circuit Court for Prince George's County, Edgar Bonilla, appellant, was convicted of first-degree assault, second-degree assault, and reckless endangerment. Bonilla raises two issues on appeal: (1) whether the trial court erred in allowing the prosecutor to make an improper "golden rule" argument during closing, and (2) whether the trial court erred in imposing separate sentences for first-degree assault and reckless endangerment. For the reasons that follow, we affirm Bonilla's convictions but vacate his sentences and remand for resentencing.

At trial, the State presented evidence that Bonilla repeatedly choked his pregnant girlfriend during an argument, causing her to stop breathing and foam at the mouth. When his girlfriend tried to escape through the window, Bonilla grabbed her, threatened her family, and told her that he did not care if he killed her. Bonilla then grabbed a folding knife from his closet and pressed it against his girlfriend's neck for several minutes. She pleaded with Bonilla to let her go, but instead he pressed the tip of the knife against her back, sliced off her shirt and bra, and cut off some of her hair. Bonilla only stopped the assault after his three-year old son woke up.

Bonilla's girlfriend was unable to call the police until the next day because Bonilla had taken her phone. When the police arrived, they noticed that her eyes were red and that she had red scarring on the left and right side of her neck. The State also introduced photographs documenting her injuries. Bonilla's girlfriend was transported to the hospital, where it was determined that she had dilated two centimeters due to the stress of the assault. The police subsequently obtained a search warrant for Bonilla's residence and recovered a folding knife and the bra and shirt that Bonilla had cut from his girlfriend's body.

Bonilla first asserts that the trial court erred in allowing the prosecutor to make an improper "golden rule" argument in closing. During closing, the prosecutor argued that the jury could convict Bonilla of assault based on either his choking his girlfriend or his holding the folding knife to her back and neck. The prosecutor then made the following statement regarding the knife:

> Look at this thing. We keep calling it a pocket knife but look at it. If I – it is sharp. If I put this to your neck and I've got it lightly touching my neck, it is sharp. If I take this and stick it in your back. And she said, I felt it. I felt it pressing into my back. There is absolutely harm caused, right? *Can you imagine being choked and having this thing put at your neck?*

Defense counsel objected, arguing that the State was asking the jurors to put themselves in the position of a witness. The court overruled the objection, noting that it was closing argument and "[t]here wasn't anything prejudicial" in the prosecutor's remarks.

A "golden rule" argument is one "in which an arguing attorney asks the jury to place themselves in the shoes of the victim." *Lawson v. State*, 389 Md. 570, 594 n.11 (2005) (citation omitted). Such arguments are prohibited because they "encourage the jurors to abdicate their position of neutrality and decide cases on the basis of personal interest rather than the evidence." *Lawson*, 389 Md. at 594.

We agree that the State's argument was an impermissible "golden rule" argument and that the trial court erred in not sustaining defense counsel's objection. Nevertheless, reversal is not required. The comment regarding the knife was isolated and the jury was instructed that closing arguments were not evidence. Moreover, the State's case against Bonilla was strong as his girlfriend's testimony was corroborated by other evidence,

including photographs of her injuries, the observations of the responding officers, and the fact that her cut clothing was recovered from Bonilla's apartment. Therefore, we are not persuaded that "the jury were actually misled or were likely to have been misled or influenced to the prejudice of the accused by the remarks for the State's Attorney." *See Wilhem v. State*, 272 Md. 404, 415-15 (1974) (setting forth the standard for reversal when the prosecutor makes an improper closing argument).

Bonilla also contends, and the State agrees, that his conviction for reckless endangerment should have merged with his conviction for first-degree assault. In *Williams v. State*, 100 Md. App. 468, 510 (1994), this Court held that convictions for assault with intent to maim and reckless endangerment were not inconsistent where they were based on the "same act." Nevertheless, we concluded that merger was required because "the subjective *mens rea* of reckless indifference to a harmful consequence" had ripened "into the even more blameworthy specific intent to inflict the harm" that was required for the assault conviction. *Id.* Similarly, in *Marlin v. State*, we concluded that "under principles of fundamental fairness," reckless endangerment merges into first-degree assault by firearm where the defendant's "conduct as to the reckless endangerment involved the same conduct that formed the basis for the first-degree assault[.]" *Marlin*, 192 Md. App. 134, 171 (2010). We explained that, because "the evidence at trial pertained solely to a single act of shooting a single victim" and "no other conduct was involved in proving either offense," only one sentence was warranted. *Id*.

To be sure, the act or acts that served as the basis for Bonilla's reckless endangerment conviction may have been different from the act or acts that served as the

basis for the first-degree assault conviction because the State presented evidence of at least one instance in which appellant committed reckless endangerment that could be considered separate and distinct from the first-degree assault. However, the jury did not specify which act or acts served as the basis for its verdict of guilty on either charge, so it is also possible that these bases were the same. Because nothing in the record provides any conclusive help in resolving this factual ambiguity, we must resolve it in favor of Bonilla. *See Gerald v. State*, 137 Md. App. 295, 312 (2001) ("[A]ny ambiguity in . . . how the jury understood the charges must be resolved in [the defendant's] favor."). Because the jury's finding of reckless endangerment may have been based on the same conduct that supported the first-degree assault charge, we agree that merger is required.

Having determined that Bonilla's convictions should have merged, we agree with the State that the appropriate remedy is to vacate those sentences and remand for resentencing. Maryland Rule 8-604(d)(2) states that, "[i]n a criminal case, if the appellate court reverses the judgment for error in the sentence or sentencing proceeding, the Court shall remand the case for resentencing." Moreover, in *Twigg v. State*, 447 Md. 1, 28 (2016), the Court of Appeals noted that

> the original sentencing court is viewed as having imposed individual sentences merely as component parts or building blocks of a larger total punishment for the aggregate convictions, and, thus, to invalidate any part of that package without allowing the court thereafter to review and revise the remaining valid convictions would frustrate the court's sentencing intent.

(citation omitted). Accordingly, we remand the case to the lower court to address the issue of merger and re-sentencing as discussed in this opinion.[1]

APPELLANT'S SENTENCES VACATED. JUDGMENTS OTHERWISE AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE–HALF BY PRINCE GEORGE'S COUNTY.

[1] We note, that, upon remand, the court ordinarily may not impose an aggregate sentence greater than the sentence that it originally imposed. *Twigg*, 447 Md. at 30 n.14, ("The only caveat, aside from the exception set forth in [Md. Code (1988, 2013 Repl. Vol.), § 12-702(b)(1)-(3) of the Courts and Judicial Proceedings Article], is that any new sentence, in the aggregate, cannot exceed the aggregate sentence imposed originally.").