Circuit Court for Baltimore City
Case No. 115229020-21

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1928

September Term, 2016

DAVID MCCLOUD

v.

STATE OF MARYLAND

Leahy,
Reed,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: April 20, 2018

Appellant David McCloud was accused of sexually assaulting a ten year old child on multiple occasions in 2014. A jury in the Circuit Court for Baltimore City convicted appellant of one second-degree sex offense charge, two third-degree sex offense charges, two fourth-degree sex offense charges, and one perverted sex practice charge.

Appellant presents the three following questions:

1. Did the trial court abuse its discretion in denying a mistrial request when the State's witness related to the jury that Mr. McCloud had recently returned home from jail?

2. Did the trial court err in permitting the prosecutor to vouch during closing argument for its primary witness?

3. Must Mr. McCloud's conviction for perverted sexual practice merge into his conviction for second-degree sex offense?

FACTUAL AND PROCEDURAL BACKGROUND

The victim, C.T., who was ten years old at the time of the abuse, was the younger sister of appellant's ex-girlfriend. C.T. asserted that appellant engaged in vaginal and oral sex with her on several occasions in 2014 at two residences in Baltimore City, first at 812 Jack Street and then at 3802 Saint Margaret Street. Appellant was twenty-seven years old at the time of the alleged incidents.

Appellant lived at 812 Jack Street with C.T.'s older sister Danielle Brown, Ms. Brown's two young children (an infant with appellant and a six year old boy from another relationship), C.T.'s twenty year old brother Anthony, and appellant's mother and step-father. While appellant lived there, C.T.'s mother had, at least two or three times, dropped her off on a weekday, along with several of her sisters, to visit their "baby

nephew." C.T. testified that appellant had sex with her twice at 812 Jack Street when she was visiting the residence.

On the first occasion, during February 2014, C.T. was sleeping in bed in her sister's bedroom on the second floor, when appellant came into the room and tried to put his penis in her vagina. She woke and told him to stop, but he ignored her. C.T. testified that she did not scream because appellant put his hand over her mouth. After it was over, appellant told her to wash out her vagina. C.T. testified that appellant told her not to tell anyone or else he would hurt her sister and nephews. According to C.T., her younger nephews were home at the time on the first floor, but no other adults were home.

The second occasion at 812 Jack Street occurred when she was in the basement laundering her school clothes for the next day. Appellant came "downstairs with a blanket," "laid it on the floor," and "started having sex with [her]." She said that, afterward, appellant put the blanket in the washing machine. In regard to the Jack Street incidents, C.T. described appellant's penis as "long and hairy" and said he wore a clear condom.

Around April 2014, appellant and Ms. Brown, along with Ms. Brown's two children and her brother Anthony, moved from 812 Jack Street to 3802 Saint Margaret Street. There, on one occasion, while C.T. had been watching the Disney Channel on TV in the second-floor guest room, appellant came into the room and "just start[ed] putting his penis in [her] mouth." He was standing, and she was on her knees. "Sperm," which

looked like "spit," came out of his penis, and "[f]rom [her] mouth," appellant told her to put it "[i]nto the trash can."[1]

C.T. described, with less detail, another occasion when appellant had oral sex followed by vaginal sex with her in the same guest room. According to C.T., nothing was spoken during the encounter, and appellant left the room afterward. C.T. did not recall how many times appellant had sex, either oral or vaginal, with her at this residence. She said that it stopped when appellant moved out.

Testifying for the State, Danielle Brown stated that she and appellant were in a romantic relationship and engaged in 2014 while they lived at 812 Jack Street. They had a son together in September 2013, and appellant's mother moved in with them a month afterward to help with the baby. During this period, Ms. Brown worked as a lab tech at Sinai Hospital in Baltimore on weekdays from 6:00 a.m. to 2:30 p.m. Appellant worked from around 5:00 am until the afternoon when Ms. Brown picked him up in their shared car to return home. Ms. Brown testified that appellant and C.T. were never alone at the apartment together because she and appellant were "glued together" and "in love at that time." She also testified that they had an active sex life. Shortly after moving to Saint Margaret Street, Ms. Brown and appellant broke up, and appellant moved out.

Sometime in 2015, Ms. Brown took C.T. to an ice cream shop and initiated a conversation with her "about sex" that brought the allegations against appellant to light. The conversation started because there had been "an allegation" that C.T. had been

[1] C.T. clarified that the "trash can" was actually a plastic grocery store bag hanging on the door.

abused by a man who was not appellant.[2] Ms. Brown explained that "[b]ecause [C.T.] was found to have sex with someone else . . . I was asking was there anyone else basically, like where it started." When C.T., in response, "said my ex," Ms. Brown understood that to mean that appellant had had sex with her.

Ms. Brown told their mother what C.T. had said, and their mother reported the allegations to the police. Detective Mohammed Ali, who investigated the case, sent C.T. and her mother to the Baltimore Child Abuse Center. There, an interview of C.T. was conducted, but no forensic evidence was collected because the alleged abuse occurred over a year earlier.

Appellant's mother, Shara Hall, testified for the defense. Ms. Hall moved into the Jack Street residence after the birth of appellant's and Ms. Brown's son in September 2013 to be a caregiver for the baby. She and her husband resided in a room on the second floor next to Ms. Brown's room, where the first incident allegedly happened. Ms. Hall would "watch the girls when they came over." Her husband did not work and stayed at home most of the time due to health issues, leaving only to buy groceries. Ms. Hall further testified that Ms. Brown and appellant were always together at the house, and that she had never seen C.T. and appellant alone together. Ms. Hall and her husband did not move to the Saint Margaret Street residence with appellant.

[2] According to Ms. Brown, Myron Battle, a friend of hers, was accused of having inappropriate sexual contact with C.T. sometime in 2015, and he was charged and pled guilty. The defense's theory in this case was that C.T. fabricated the allegations against appellant based on the abuse she suffered at the hands of Mr. Battle.

Appellant testified that he never engaged in any kind of sexual contact with C.T. and was never alone with her at either the Jack Street or Saint Margaret Street residences. Appellant did not have any notion as to why C.T. would make up accusations against him. He said that she visited "not very often" and usually with her sisters and mother, and that she had stayed overnight only "once or twice." He said he would "laugh, joke, [and] talk to the kids," but he did not "do too much horseplay."

He explained that he worked several jobs, including at a cement company or with a temp agency on weekdays, as well as with a catering company on weekends, which kept him out of the house. On cross-examination, he admitted, however, there were times when he wouldn't have work and stayed at home, while Ms. Brown was at work. Appellant testified that he and Ms. Brown were "together like glue" because they were "head-over-heels" in love. When asked why they broke up, appellant answered, "[S]ometimes I don't know why, but other times finances, money disagreements, issues with, you know, parenting issues." He also said that Ms. Brown's mother "despised" him.

The State charged appellant with: two counts of second-degree rape; two counts of first-degree sex offense; two counts of second-degree sex offense; two counts of third-degree sex offense; two counts of fourth-degree sex offense; two counts of sex abuse of a minor; two counts of unnatural and perverted sex practice; and two counts of second-degree assault. Before and during trial, the State entered a nolle prosequi on all charges of first-degree sex offense and sexual abuse of a minor.

The jury acquitted appellant of both rape charges, both second-degree assault charges, one charge of second-degree sex offense, and one charge of perverted sex practice. The jury convicted appellant of one second-degree sex offense charge, both third-degree sex offense charges, both fourth-degree sex offense charges, and one perverted sex practice charge.[3]

This appeal followed. We shall include additional details in our discussion.

DISCUSSION

I.

Mistrial

Appellant contends that a statement made by a State's witness was so prejudicial that the trial court's denial of his motion for a mistrial was an abuse of discretion. During Danielle Brown's direct examination, the prosecutor asked if her mother had lived with her:

[PROSECUTOR]: Now in 2014 was your mom living with you?

[BROWN]: She had stayed with me for a short period of time.

[PROSECUTOR]: Do you know when that was?

[BROWN]: When did she move out?

[PROSECUTOR]: Yeah, do you recall when she moved out?

[3] With regard to the charges related to 812 Jack Street, appellant was found guilty of only one count of third-degree sex offense and one count of fourth-degree sex offense.

With regard to the charges related to 3802 Saint Margaret Street, appellant was found guilty of one count of second-degree sex offense, one count of third-degree sex offense, one count of fourth-degree sex offense, and one count of perverted sex practice.

[BROWN]: **She moved out when Mr. McCloud came home from jail.**

[PROSECUTOR]: When did he come home?

[BROWN]: I believe it was February.

[PROSECUTOR]: Of what year?

[BROWN]: Of -- hold on -- of 2015?

[DEFENSE COUNSEL]: Your Honor, may we approach?

[BROWN]: I'm not -- I don't remember the date of what year that was.

[THE COURT]: Sure, come on up.

(Emphasis added). At the bench, the following occurred:

[DEFENSE COUNSEL]: Your Honor, I'm going to move for a mistrial. The State's witness just put up Mr. McCloud coming home from jail.

[THE COURT]: It doesn't mean that she did not indicate that he was convicted of anything. It could have been that he was just merely arrested of anything. What was he in jail for?

[PROSECUTOR]: I didn't know she was going to say that.

[THE COURT]: What was he in jail for? What was he in jail for?

[DEFENSE COUNSEL]: Attempted first degree murder.

[THE COURT]: Was he acquitted?

[DEFENSE COUNSEL]: No.

[THE COURT]: Okay. He served a sentence?

[DEFENSE COUNSEL]: Yes.

[THE COURT]: Okay. I will instruct the jury to disregard the witness's last answer.

[DEFENSE CONSEL]: Yes, Your Honor. Thank you.

When the parties returned to their tables, the court said to the jury, "Ladies and gentlemen, please disregard the last answer from the witness."

The grant or denial of a motion for a mistrial lies within the discretion of the trial judge, the exercise of which we do not reverse absent an abuse of discretion. *Kosmas v. State*, 316 Md. 587, 594 (1989); *Nash v. State*, 439 Md. 53, 66-67 (2014), *cert. denied*, *Nash v. Maryland*, 135 S. Ct. 284 (2014). When a witness makes an inadmissible statement before the jury that prejudices the defendant, we consider "whether the prejudice to the defendant was so substantial that he was deprived of a fair trial." *Kosmas*, 316 Md. at 594-95.

"A mistrial is 'an extreme sanction' that courts generally resort to only when 'no other remedy will suffice to cure the prejudice.' " *Webster v. State*, 151 Md. App. 527, 556 (2003) (quoting *Burks v. State*, 96 Md. App. 173, 187 (1993)). When the trial judge gives a curative instruction to disregard inadmissible evidence, we consider its "efficacy" and determine whether "the damage in the form of prejudice to the defendant transcended the curative effect of the instruction." *Kosmas v. State*, 316 Md. 587, 594 (1989)

The Court of Appeals has identified five factors relevant to a mistrial determination:

> whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists[.]"

Rainville v. State, 328 Md. 398, 408 (1992) (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)). These factors are not exclusive and do not comprise the test; they are "simply helpful in the resolution of the question." *Kosmas*, 316 Md. at 594-95.

Appellant contends that this case cannot be distinguished from *Rainville v. State*, 328 Md. 398 (1992). In *Rainville*, the defendant was charged with various offenses arising from the alleged rape and sexual abuse of a seven year old girl. *Id.* at 399. At the time of the incident, Rainville was renting a room in the house of the girl's mother. *Id.* at 400. The girl and her nine year old brother had gone into Rainville's room to watch television when the alleged crimes took place. *Id.* Just prior to the girl's reporting of abuse, Rainville had been arrested for child abuse, third degree sexual offense, and battery of the girl's brother. *Id.* at 400-01. The State tried to consolidate the trials on the charges relating to the girl and her brother, but the motion was denied. *Id.* at 401. At trial on the charges relating to the girl, the following question and response between the prosecutor and the girl's mother occurred:

> PROSECUTOR: Now, if you would, describe for the gentlemen of the jury [your daughter's] demeanor when she told you about the incident?
>
> THE MOTHER: She was very upset. I had noticed for several days a difference in her actions. She came to me and she said where [Rainville] was in jail for what he had done to [the brother] that she was not afraid to tell me what happened.

Id. at 401. The defense moved immediately for a mistrial, but the trial court denied the motion, giving instead the following curative instruction to the jury:

> Gentlemen of the jury, the witness just alluded to some other incident that has nothing to do with this case, and you should not in any way consider what she has said, and you should put it out of your mind and forget about it. Does anybody have any questions about that? Okay. Let's go.

Id. at 402.

The Court of Appeals, considering the *Guesfeird* factors, decided that although the mother's remark was isolated, unsolicited, and inadvertent, the statement was impactful because the case against Rainville "rested almost entirely upon the testimony of a seven-year-old girl," whom Rainville "adamantly denied ever having touched." 328 Md. at 409. The Court further noted a lack of physical evidence of abuse or rape, inconsistencies in the testimony of several witnesses at trial and in their prior statements, and evidence of antagonism between Rainville and the mother. *Id.* at 409-10. In light of those circumstances, the Court concluded that informing the jury that Rainville "was in jail for what he had done to [the brother]" "almost certainly had a substantial and irreversible impact upon the jurors, and may well have meant the difference between acquittal and conviction." *Id.* at 410. In the Court's view, the curative instruction "no matter how quickly or ably given" could not "salvage a fair trial for the defendant." *Id.* at 411.

This Court elaborated on *Rainville* in *Mitchell v. State*, 132 Md. App. 312, 328 (2000), *rev'd on other grounds*, 363 Md. 130 (2001), explaining that the mother's testimony had the effect of "indicat[ing] that [Rainville] had engaged in the same or similar criminal activity with her son, likely invoking the inference in the jury's mind that

Rainville was a serial child abuser" and that "Rainville had sought to avoid the possibility of such testimony by opposing the consolidation of his trials."

In *Mitchell*, a witness who knew Mitchell, when asked by the prosecutor if she had not seen him for about a year after the shooting, testified, ". . . I didn't see him again until I ran into a friend of his, and *he told me that he* [Mitchell] *was locked up*." 132 Md. App. at 323 (emphasis in original). This Court was "not persuaded that any significant damage resulted from [the witness's] remark, as it was a single, isolated statement that was wholly unresponsive to the State's question, and the court's curative instruction was adequate to overcome any taint." *Id.* at 328-29.

In *Jones v. State*, 310 Md. 569 (1987), *rev'd on other grounds*, 486 U.S. 1050 (1988), a witness who made an in-court identification of the defendant, was asked by the prosecutor whether she had ever seen Jones before. The witness responded, "I had went to visit him with my husband at Lewisburg." *Id.* at 587. The defense moved for a mistrial, arguing that the statement that Jones was "at Lewisburg" would be interpreted by the jury to mean that at one time he was an inmate at the Lewisburg Federal Correctional Institution. *Id.* The Court of Appeals held that mistrial was not required because "[a]lthough it may be generally known that a federal prison is located at Lewisburg, Pennsylvania, no mention was made of Jones's prior criminal record or that he had been an inmate at the prison." *Id.* at 588.

Although both *Rainville* and this case are both "difficult case[s]" involving the sexual abuse of a minor, 328 Md. at 399, Danielle Brown's remark in this case was not

nearly as "substantial[ly] and irreversibl[y] impact[ful] upon the jurors" as the mother's testimony in *Rainville*. 328 Md. at 410. Ms. Brown's unsolicited and unresponsive statement that her mother had "moved out when Mr. McCloud came home from jail" indicated that appellant had been in jail some time in 2014. There was, however, no mention of why he was there or whether he had been convicted of a criminal offense. And, unlike *Rainville*, the reference to jail would not have suggested to the jurors that appellant was there for the same or similar criminal activity for which he was on trial. We also note that there were no substantial inconsistencies in the witness testimonies and no evidence of antagonism between appellant and Ms. Brown.

Considering the *Guesfeird* factors, Ms. Brown's remark was not solicited by the prosecutor and was a single, isolated, and inadvertent statement. And, she was not the principal witness upon whom this prosecution depended. That witness was C.T. On the other hand, because a great deal of other evidence did not exist, this case essentially rested on the testimony of C.T. and appellant, who testified in his defense. The credibility of the witnesses was crucial because the jury needed to decide whether it believed C.T.'s accusations or appellant's denials.

A jury is presumed to follow curative instructions. *Cantine v. State*, 160 Md. App. 391, 409 (2004). But, the curative instruction must be "timely, accurate, and effective." *Carter v. State*, 366 Md. 574, 589 (2001).

Appellant contends that the trial judge's curative instruction "please disregard the **last answer** from the witness" was ineffective to cure the prejudice to him because the

"last answer" from Ms. Brown was "I'm not -- I don't remember the date of what year that was." Therefore, the jury was not specifically instructed to disregard the inadmissible statement about appellant having come home from jail.

The curative instruction in this case may not have been as expansive as those in *Rainville* and *Cantine*,[4] but the instruction was not objected to by the appellant. And, in the context of the line of questioning and the bench conference that followed, it is reasonable that the jury understood "the last answer from the witness" to refer to the witness's statement about appellant having come home from jail. In short, we are not persuaded that the trial judge abused her discretion by denying the appellant the "extreme sanction" of a mistrial in this case.

II.

Closing Argument

Appellant contends that the prosecutor impermissibly vouched for C.T.'s credibility during closing argument. The State responds that the prosecutor's statements were proper inferences from the evidence, but even if they were improper, a reversal is not warranted.

The portion of the closing argument that is at issue is, as follows:

> [PROSECUTOR]: And I just want you to remember their testimony and who has a interest here. [C.T.] had no interest, she actually came forward a year after. A year after when she was no longer in the life of this

[4] In *Cantine v. State*, "[The trial court] told the jury that the statement was 'not evidence,' and that it 'should not be considered.' It then ordered jurors to 'strike' the statement from their notes, and not to 'reflect' on it, or 'consider' it." 160 Md. App. 391, 409 (2004).

> man. Remember that her sister said that they had broken up after 2014, she was with some other guy. [C.T.] hadn't, you know, if he was no longer in the picture and so, you know, Defense probably wants to say that she has a motive to come in here because she don't like him.
>
> But guess what? There was no testimony that they didn't get along, that [C.T.] hated him in any way. And guess what? No one got on the stand and said that [C.T.] is a liar. When [C.T.] went to her sister and told her what happened, what he had done to her, guess what, she went and told her mother and they told the police. You know why? **Because Danielle knows this child. Danielle knows that she doesn't make up any stories like this.**
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: It's arguments. Overruled. Go ahead.
>
> [PROSECUTOR]: And guess what? She believed her and that's why she did what she did. Because, guess what, if Danielle wanted to cover this up and not go forward and not tell anyone, she had the opportunity to say okay, well I'm not going to tell mom. We'll keep this between me and you. And guess what? [C.T.] wouldn't have said anything because just the child that she was.

(Emphasis added). Appellant contends that the prosecutor used Ms. Brown as a "proxy" to vouch for the victim's credibility, inferring from facts not in the evidence that Ms. Brown knew that the C.T. "doesn't make up any stories like this" and was therefore credible.

"[C]ounsel is afforded wide latitude in presenting closing summation to the jury . . . and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Grandison v. State*, 341 Md. 175, 224 (1995) (citations omitted). But, a prosecutor during closing argument may not vouch for the credibility of a witness because it "infring[es] on a defendant's right to a fair trial." *Spain v. State*, 386 Md. 145, 153 (2005). Generally, vouching occurs when a prosecutor "place[s] the prestige of the

government behind a witness through personal assurances of the witness's veracity . . . or suggest[s] that information not presented to the jury supports the witness's testimony." *Spain*, 386 Md. at 153 (quoting *United States v. Daas*, 198 F.3d 1167, 1178 (9th Cir. 1999)). A prosecutor is not prohibited, however, from addressing witness credibility in closing because the "credibility of witnesses in a criminal trial often is . . . a critical issue for the jury to consider." *Sivells v. State*, 196 Md. App. 254, 278 (2010).

To determine whether a defendant was deprived of a fair trial due to improper vouching, we assess first whether the statements were, in fact, improper vouching, and, if they were, then whether their admission was harmless. *Sivells*, 196 Md. App. at 277, 288. "[I]n determining whether an error prejudiced the defendant, that is, whether the error was harmless, 'the determinative factor ... has been whether or not the [error], in relation to the totality of the evidence, played a significant role in influencing the rendition of the verdict, to the prejudice of the [defendant].'" *Degren v. State*, 352 Md. 400, 432 (1999) (quoting *Dorsey v. State*, 276 Md. 638, 653 (1976)). Under the doctrine of harmless error, we do not "reverse a conviction based on a trial court's error or abuse of discretion where [we are] satisfied beyond a reasonable doubt that the trial court's error or abuse of discretion did not 'influence the verdict' to the defendant's detriment." *Green v. State*, 456 Md. 97, 165 (2017) (quoting *Hall v. State*, 437 Md. 534, 540-41 (2014)) (internal citations omitted).

In *Spain*, the prosecutor during closing commented that a police officer witness lacked a motive to lie and that the officer did not lie because, if he were to do so, he

would suffer adverse consequences to his professional career and perjure himself. 386 Md. at 151-52. The Court held that the comments about the absence of a motive for the officer to lie did not constitute improper vouching because it "did not implicate any information that was outside the evidence presented at trial." *Id.* at 155.[5] Further, it noted that during opening and closing arguments, "it is common and permissible generally for the prosecutor and defense counsel to comment on, or attack, the credibility of witnesses presented." *Id.* at 154. The *Spain* Court also stated:

> Part of the analysis of credibility involves determining whether a witness has a motive or incentive not to tell the truth. *Cf. Pantazes v. State*, 376 Md. 661, 680, 831 A.2d 432, 443 (2003) (describing as important the right to cross-examination because it allows a defendant to demonstrate to the factfinder a witness's bias, interest, or motive to testify falsely). Attorneys therefore feel compelled frequently to comment on the motives, or absence thereof, that a witness may have for testifying in a particular way, so long as those conclusions may be inferred from the evidence introduced and admitted at trial. *See, e.g., U.S. v. Walker*, 155 F.3d 180, 187 (3d Cir. 1998) (finding that "where a prosecutor argues that a witness is being truthful based on the testimony given at trial, and does not assure the jury that the credibility of the witness [sic] based on his own personal knowledge, the prosecutor is engaging in proper argument and is not vouching").

386 Md. at 154-55 (citation omitted).

In this case, the prosecutor's comments on Ms. Brown's "know[ing]" her sister and "know[ing] that she doesn't make up any stories like this" were not based on any information that was outside the scope of the evidence. Ms. Brown had testified that she

[5] With regard to the comments that, if he were to testify falsely, the officer would suffer adverse professional consequences, the Court held that they were improper. *Spain*, 386 Md. at 156-58. This kind of vouching is improper because it implies that the witness's status as a police officer entitles him or her to greater credibility than any other category of witness, *i.e.*, that a police officer is more credible simply because he or she is a police officer. *Id.*

and her sister had a "sister relationship, a good relationship." Likewise, C.T. had testified that she and Ms. Brown were "regular sisters." Also, C.T. explained that she loved her sister, they talked, and they did not argue a lot. Further, Ms. Brown had acknowledged that C.T. had told the truth when she previously reported that another man had abused her. That abuse was, after all, the impetus for Ms. Brown's initiating a conversation at the ice cream shop with C.T. about sex. In addition, after the objection to his comments was overruled, the prosecutor went on to say that it was because Ms. Brown believed C.T. that she went to tell their mother about what her sister had confided in her. The prosecutor argued that had Ms. Brown not believed C.T., she could have covered it up and not gone forward to tell anyone. In other words, the prosecutor was arguing that the jurors could properly infer from the evidence that Ms. Brown credited the victim's account when she had first heard it.

We hold that the prosecutor's comments were based on "the evidence or inferences reasonably drawn therefrom" and did not constitute improper "proxy" vouching for the victim's credibility. *Grandison*, 341 Md. at 224. And, had we deemed the prosecutor's comments improper, appellant would fare no better because, having reviewed the record, we are satisfied beyond a reasonable doubt that the comments did not influence the verdict in this case.

To be sure, C.T.'s credibility was important to the State's case because the case depended upon whether the jury believed C.T. or appellant. Nevertheless, the jurors were

properly instructed that closing arguments are not evidence and that they were the sole judges of who and what to believe, and they saw and heard both of them testify.

Ms. Brown's testimony overall did little to advance the State's case. Not only did she describe her sister as "quiet and a little sneaky," she minimized the opportunity that appellant would have had to be alone with C.T. She did testify that after the conversation where C.T. told Ms. Brown that she had been sexually abused by appellant, she simply told their mother. But, her only expressed comment about C.T.'s credibility involved abuse by someone other than appellant and that person's guilty plea to the charges. And, that comment arose in response to the prosecutor's question, "And so what [C.T.] mentioned [in that case] was true?" Ms. Brown responded "Yeah."

III.

Merger

At sentencing, the trial court merged both fourth-degree sex offense convictions into their associated third-degree sex offense convictions. Then, it sentenced appellant to: ten years for the first third-degree sex offense conviction; twenty consecutive years for the second-degree sex offense conviction; ten consecutive years for the second third-degree sex offense conviction; and one consecutive year for the perverted sexual practice conviction. The aggregate sentence was forty-one years imprisonment.

Appellant contends, and the State agrees, that his convictions of second-degree sexual offense and perverted sexual practice should merge. Both convictions were based on the same act of fellatio at the Saint Margaret Street residence. At sentencing, the

judge refused to merge the convictions based on a mistaken assertion by the sentencing prosecutor that the case involved both fellatio and anal intercourse:

> [PROSECUTOR]: I think in this case we have a second degree sex offense and a third degree sex offense that survive. And the reason why I think that is that he was found guilty of an unnatural and perverted practice, so obviously there was some sort of fellatio that the jury believed happened as well.
>
> [THE COURT]: That is correct.
>
> [PROSECUTOR]: And I think that there was testimony by the victim that there was some of, perhaps, anal intercourse that occurred.
>
> [THE COURT]: Mm-hmm.

When a conviction for perverted sex practice is based on an act of fellatio, it merges into an associated sex offense conviction under the required evidence test. *See State v. Lancaster*, 332 Md. 385 (1993) (holding that oral sex act offense merged into fourth-degree sex offense for sentencing purposes, even though the latter carried lower penalty). Under the required evidence test, "if 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) (internal citations omitted).

Because there was no evidence of anal intercourse at trial, we hold that appellant's perverted sex practice conviction merges into his second-degree sex offense conviction, and that the one year consecutive sentence on the former count must be vacated.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN PART. ONE YEAR SENTENCE FOR PERVERTED SEXUAL PRACTICE VACATED. COSTS TO BE PAID 2/3 BY APPELLANT AND 1/3 BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.