Circuit Court for Montgomery County
Case No. 134677C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1931

September Term, 2019

DUSTIN THOMAS ROGERS

v.

STATE OF MARYLAND

Fader, C.J.,
Friedman,
Shaw Geter,

JJ.

Opinion by Fader, C.J.

Filed: June 25, 2021

A jury sitting in the Circuit Court for Montgomery County convicted Dustin Rogers, the appellant, of first-degree rape and third-degree sexual offense against E.[1] The State's theory of prosecution was that on the night of October 2, 2018, E. was walking on a sidewalk along a highway when Mr. Rogers grabbed her by the shoulder and arms, put her in a chokehold, forced her onto the ground, and proceeded to digitally penetrate her both vaginally and anally. The State charged Mr. Rogers with two counts of first-degree rape by digital penetration (one for vaginal penetration and one for anal penetration) and one count of third-degree sexual offense by vaginal touching. At the State's request, in addition to the two counts of first-degree rape, the court submitted to the jury, as lesser-included offenses, two counts each of second-degree rape by digital penetration and third-degree sexual offense by touching.[2]

Mr. Rogers's defense was two-pronged. He acknowledged that E. had been physically assaulted. However, he argued that the State did not prove either that he was the perpetrator of the attack or that E. had been sexually assaulted. In connection with the latter argument, he requested that the court: (1) submit to the jury a charge of second-degree assault as a lesser-included offense of first-degree rape; and (2) instruct the jury concerning the offense of second-degree assault. The court declined both requests.

Following a trial, the jury convicted Mr. Rogers of first-degree rape by digital penetration of the vagina and third-degree sexual offense by anal touching. In this appeal,

[1] For privacy reasons, we use only an initial to identify the victim.

[2] As we will explain, the State entered a *nolle prosequi* as to the third-degree sexual offense count charged in the indictment.

Mr. Rogers contends that the court erred in refusing both to submit to the jury a charge of second-degree assault and to instruct the jury on that offense. For two reasons, we disagree. First, the evidence generated at trial did not provide a rational basis for the jury to conclude that Mr. Rogers was guilty of second-degree assault but not guilty of any sexual offense. Second, even if that were not the case, fundamental fairness did not require the court to permit the jury to consider a second-degree assault charge because the jury already had the option to convict Mr. Rogers of third-degree sexual offense, which is a crime of similar severity to second-degree assault. Accordingly, we will affirm Mr. Rogers's convictions.[3]

BACKGROUND

E. testified that on October 2, 2018, she had gone out dancing in downtown Washington, D.C. She then took the D.C. Metro to the Shady Grove station, arriving at approximately 11:00 p.m. E. began walking south along Rockville Pike. The side of the highway on which she was walking had "no main lighting, . . . but the light from th[e opposite] side of the street was more than enough to illuminate [her] side of the street."

E. initially did not see anyone else in the area. Eventually, an individual "walked in front of [her] and stayed in front of [her]" at a distance of no more than "15, 20 feet." While E. "purposefully" kept that distance from the individual, she observed that he twice looked back over his shoulder at her. After his second glance, and unable "to get a good look at the person's face," E. became concerned and attempted to cross to the "more brightly lit" side of the street.

[3] As a housekeeping matter, we will also grant Mr. Rogers's motion to withdraw and re-file his reply brief, which was filed before oral argument.

E. testified that when she attempted to cross the street, the individual closed the distance between them, "grabbed me by the upper shoulder region, and lifted me off the ground." When E. attempted to push her assailant away and escape, "he grabbed [her] from behind, and dragged [her] off to the sidewalk into the clearing." After they fell to the ground, E.'s face struck the dirt, and with her hands and knees on the ground, the assailant placed her in a chokehold with his left arm. The attacker then briefly groped her breast under her bra before unsuccessfully attempting to undo her belt buckle. E. provided the following account of what happened next:

[E.]: He attempted to go through the back end of my jeans.

[Prosecutor]: And was he able to go through the back of your jeans?

[E.]: Yes.

[Prosecutor]: Where did he put his hand underneath your jeans?

[E.]: He slipped his hand under my undergarments.

[Prosecutor]: And what part of your body did he touch?

[E.]: He touched my buttocks.

[Prosecutor]: And did he go within the buttock?

[E.]: Yes.

[Prosecutor]: Can you describe what he did?

[E.]: He penetrated my anus digitally.

. . . .

[Prosecutor]: Do you know how long that lasted?

[E.]: Maybe 10, 10 seconds.

[Prosecutor]: During this time, was the chokehold maintained around your neck?

[E.]: Yes.

[Prosecutor]: After he penetrated your anus, where did his hand go?

[E.]: He attempted to reach around the front of my pants.

. . . .

[Prosecutor]: And was he successful in reaching around to the front of your pants?

[E.]: Yes.

[Prosecutor]: And what did he do with his hand in the front of your pants?

[E.]: He touched my genitals.

[Prosecutor]: Can you describe what you mean he touched your genitals? What exactly did he touch?

[E.]: He put his finger first on my outer labia, and then between my inner and outer labia.

[Prosecutor]: Did he go inside the vagina with his hand?

[E.]: No.

E. testified that during the attack, she attempted to retrieve her cell phone, but the assailant punched her "in the back of the head," grabbed her phone, and "tossed it into the wooded area nearby." At some point thereafter, E. "play[ed] dead," "bolt[ed] out from under" him, and ran to a nearby building, where she told a security guard that she "had just been raped," and asked him to call the police.

When police arrived, E. provided a general description of the attacker's build, ethnicity, and clothing but acknowledged that she "was not able to observe any part of his

body" and did not "clearly" see his face at any point. E. further testified that she did not lose consciousness during the attack but kept her eyes closed. E. testified that she had sustained injuries including "a black eye, multiple bruises," and damage to her face.

Defense counsel cross-examined E. about a recorded audio statement she gave to a detective while waiting to be examined at the hospital. In the recording, E. told the detective that the perpetrator was a distance of 100 to 200 feet in front of her before the attack. When defense counsel asked about that statement, E. acknowledged that the estimate of ten to 15 feet that she had testified to on direct examination was "definitely incorrect." When questioned about some of the other statements she made to the detective, E. could not recall making the statements and suggested that some of them, at least as recorded, were incorrect. For example, when asked whether she recalled telling the detective that she was "wrestled back" by the assailant more than once when she "really started to fight against him," E. did not remember making the statement and responded that it "sounds like an abstraction of what happened." E. confirmed, however, that she did not observe her assailant's physical characteristics.[4]

Other Evidence Presented at Trial

Sandra Carlin, whom the court accepted as an expert in sexual offense forensic nurse examinations, testified that she conducted a physical examination shortly after E. arrived at the hospital. E. told Ms. Carlin that she had been digitally penetrated in both the vagina

[4] Defense counsel also elicited testimony from E. that before she was taken to the hospital, police detained an individual and took her on a show-up identification, but she did not identify the individual as the assailant. That individual was not Mr. Rogers.

and the anus and was punched, strangled, and fondled. During the physical examination, Ms. Carlin documented injuries to E.'s head, face, shoulders, right breast, forearm, finger, wrist, and leg. Both Ms. Carlin and another witness who was accepted as an expert in forensic nursing testified that E. had sustained injuries that were consistent with strangulation.

Ms. Carlin testified that E. declined a vaginal speculum examination. Ms. Carlin therefore conducted only an external examination of E.'s pelvic area, from which she did not identify any injuries to E.'s vagina or anus. Ms. Carlin also swabbed several parts of E.'s body for evidence collection, which included a swab of her neck and "an external genitalia swab on the outside of her vagina." Ms. Carlin also sent the underwear that E. was wearing during the attack, along with the other samples, for DNA analysis.

Paul Nelson, a forensic specialist for the Montgomery County Police Department, testified that, in addition to other items, he collected a pair of white earphones at the crime scene. Because the police initially believed the earphones belonged to E., Mr. Nelson placed them in the same, clear plastic bag that contained other items recovered from the scene, including E.'s cell phone and a folding knife, which were to be delivered to E. at the hospital. It turned out that the earphones did not belong to E. and were later identified as belonging to the perpetrator. Ms. Carlin testified that when she initially met E. in her hospital room, E. was in possession of that plastic bag, which was unsealed. At that time, E. was also in possession of a separate, brown paper bag containing the clothes and underwear that she had been wearing during the attack.

Law enforcement officers testified that they identified Mr. Rogers as a suspect from surveillance footage and arrested him the day after the attack. The State introduced photographs taken upon Mr. Rogers's arrest of a "very large bruise" on his shoulder and "[s]cratches or abrasions" on his back. Police also collected a buccal swab sample from Mr. Rogers for DNA identification.

DNA Evidence

Chandra Christenson, who was accepted as an "expert in DNA analysis comparison and evaluation," conducted DNA analysis of E.'s "neck sample, underwear front sample, underwear back sample, . . . as well as the right hand and left hand swabs." Regarding one of the underwear samples, Ms. Christenson testified that because "[t]he victim statement indicated only that [E.] had been touched," she did not look for bodily fluids, but conducted DNA skin cell (also known as "touch") analysis.

Ms. Christenson concluded that one of the underwear samples contained "a mix of DNA from at least three people with a major female contributor," who was E. Ms. Christenson ascertained that at least one of the "minor" contributors was male, but she could not make an identification "due to mixture complexity and limited data." From the other underwear sample, Ms. Christenson detected DNA "from at least two contributors," with E. as the major contributor and at least one male contributor. Ms. Christenson explained, however, that the level of male DNA was too low to make a reliable identification. She further testified that no male DNA was found on the external genital swab sample, but that male DNA was detected in anal, perianal, buttocks, breast, oral, and face swab samples.

On cross-examination, Ms. Christenson provided the following testimony:

> [Defense Counsel]: Okay. So, if, when, if you were to, and using your example, place your, touch an object and leave your DNA there, that would be considered like a direct transfer of DNA, right?
>
> [Ms. Christenson]: Correct.
>
> [Defense Counsel]: Now if I were to go and then touch the same place on the wood railing that you touched, I very well might pick up your DNA on my hand, right?
>
> [Ms. Christenson]: Yes.
>
> [Defense Counsel]: Okay. And then if I could then, essentially, transfer your DNA somewhere else, right?
>
> [Ms. Christenson]: Yes, that would be tertiary transfer.
>
> [Defense Counsel]: Okay. What's secondary? Where, how --
>
> [Ms. Christenson]: Secondary would be if I swabbed your hand, so, the direct transfer is onto the railing; secondary would be on your hand; and then tertiary would be testing the other object that you touched with your hand and looking for my DNA on it, something that I never touched.

Ms. Christenson testified that she attempted to guard against secondary or tertiary transfers in the lab by taking measures such as bleaching the workspace between testing samples and using cleaning materials.

Christina Nash, whom the court accepted as an expert in DNA analysis and identifications, testified that she used a different type of DNA technology that specifically targets male chromosomes to identify the male contributors in the samples. She concluded from her analysis of the neck and underwear samples that Mr. Rogers "could not be excluded as a possible contributor" of DNA in those samples. Ms. Nash opined that, to a

95% degree of certainty, over 99.9% of males "would be excluded as [] possible contributor[s]" in those samples.

Defense Evidence

In his defense, Mr. Rogers called Detective Teresa Durham of the Montgomery County Police Department, who had conducted the recorded interview of E. at the hospital. The detective confirmed that during the interview, E. had recounted that the perpetrator was "100 to 200" feet away when he was walking ahead of her. E. also told Det. Durham that during the attack, the perpetrator "wrestled [her] to the ground repeatedly." According to the detective, E. gave a description of the assailant, which included that he had "sandy color" hair and was wearing a "workout jersey," "black shorts," and trainers. The detective also noticed that other officers had brought "a plastic bag a phone and the earbuds" to the hospital "to see if they belonged to [E.]"

The Jury Instructions and Verdict

Following the close of all the evidence, the court and counsel discussed the charges and instructions that would be submitted to the jury. The indictment charged Mr. Rogers with three offenses: (1) first-degree rape by digital penetration of the vagina; (2) first-degree rape by digital penetration of the anus; and (3) third-degree sexual offense by vaginal fondling. When discussing the verdict sheet, the prosecutor decided to enter a *nolle prosequi* on the third-degree sexual offense count, on the understanding that the court would submit to the jury, as lesser-included offenses of the first-degree rape counts, two charges each of second-degree rape by digital penetration and third-degree sexual offense by touching.

Mr. Rogers did not object to submitting the lesser-included sexual offense charges to the jury but argued that the court should also submit to the jury the lesser-included offense of second-degree assault. He argued that the jury could conclude from the evidence that "just a physical assault, non-sexual assault" had occurred if it discounted the portions of E.'s testimony describing "sexual contact and sexual acts." Defense counsel argued further that not giving the jury the option of convicting Mr. Rogers of second-degree assault would be an improper usurpation of the jury's role to make credibility determinations. The State objected. The prosecutor argued that the cross-examination of E. had been focused on identification, without addressing "the sexual offense aspect of the crime," and that there was no evidence that would permit "a jury [to] conclude that this defendant is guilty of a physical assault; however, he is not guilty of any kind of sexual touching. I don't think that is possible."

The court agreed with the State and stated, "I don't think the assault instruction makes any sense. You're not precluded from arguing there was an assault, and only a second-degree assault, but he hasn't been charged with that, and therefore, your verdict must be not guilty. This is clearly, in substance, an identity case." As a result, the court neither instructed the jury concerning second-degree assault nor submitted that charge to the jury. The jury acquitted Mr. Rogers of both first- and second-degree rape by anal penetration but convicted him of third-degree sexual offense by anal touching and first-degree rape by vaginal penetration.[5]

[5] Following the court's instructions, after finding Mr. Rogers guilty of first-degree rape by vaginal penetration, the jury did not enter a verdict on the lesser-included offenses

Mr. Rogers filed this timely appeal.

DISCUSSION

I. MR. ROGERS DID NOT WAIVE HIS CLAIM THAT THE TRIAL COURT WAS REQUIRED TO SUBMIT THE OFFENSE OF SECOND-DEGREE ASSAULT TO THE JURY.

Before turning to the merits, we must first address the State's contention that Mr. Rogers waived the argument he now presents. The State asserts that Mr. Rogers waived his challenge to the trial court's failure to instruct the jury on second-degree assault because he did not make a timely objection after the court instructed the jury. Mr. Rogers responds that his claim of error was not waived and that even if an objection following jury instructions had been required, he substantially complied with the requirement. Critical to our waiver analysis is that Mr. Rogers's claim on appeal is not limited to the court's failure to propound a jury instruction on second-degree assault; he also asked that the court submit that lesser-included offense to the jury. By doing so, he preserved the issue for appeal.

Rule 4-325(e), which governs objections to jury instructions in criminal trials, states that "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." The Court of Appeals "has consistently repeated that the failure to object to an instructional error prevents a party on appeal from raising the issue under Rule 4-325(e)." *Watts v. State*, 457 Md. 419, 426 (2018). "The purpose of the rule is to give the trial court an opportunity to

of second-degree rape by vaginal penetration and third-degree sexual offense by vaginal touching.

correct its charge to the jury if it believes a correction is necessary in light of the objection." *Taylor v. State*, 473 Md. 205, ___, 249 A. 3d 810, 823 (2021).

Here, Mr. Rogers did not object "promptly after the court instruct[ed] the jury" and, therefore, he did not strictly comply with Rule 4-325(e).[6] However, that does not dispose of Mr. Rogers's challenge to the court's refusal to present the jury with a charge of second-degree assault. This Court recently explained that "Rule 4-325 does not govern verdict sheets and there is no separate rule in criminal cases that requires a party to renew an objection to a verdict sheet before it is submitted to the jury." *Sequeira v. State*, 250 Md. App. 161, 199-200 (2021).[7] Here, defense counsel requested that the court adopt his proposed verdict sheet, which included a charge of second-degree assault. The court refused. Mr. Rogers's failure to object following jury instructions is thus "no bar to our review of the court's refusal to amend the verdict sheet" to add a second-degree assault charge. *Id.* We will therefore address the merits of that challenge.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO SUBMIT THE OFFENSE OF SECOND-DEGREE ASSAULT TO THE JURY.

Mr. Rogers contends that the circuit court abused its discretion in refusing to submit the uncharged offense of second-degree assault to the jury. This Court reviews a trial

[6] Mr. Rogers argues that he substantially complied with Rule 4-325(e). *See Watts*, 457 Md. at 427-28 (stating that an issue may be preserved if a party "substantially complies with Rule 4-325(e)"). Because we find that Mr. Rogers's challenge to the court's refusal to present the jury with a charge of second-degree assault is properly before us and that that claim is sufficient to reach the issue he raises on appeal, we need not decide whether he substantially complied with Rule 4-325(e).

[7] By contrast, in civil jury trials, "an objection to the verdict sheet is required for preservation." *Sequeira*, 250 Md. App. at 200 n.19 (citing Md. Rule 2-522(b)(5)).

court's "refus[al] to submit [a] lesser offense to the jury" for an abuse of discretion. *Bass v. State*, 206 Md. App. 1, 7, 11 (2012). A court abuses its discretion when its decision "is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable[.]" *State v. Robertson*, 463 Md. 342, 364-65 (2019) (emphasis omitted) (quoting *Nash v. State*, 439 Md. 53, 67 (2014)). However, because the court's "discretion is always tempered by the requirement that the court correctly apply the law applicable to the case," a decision that "is premised upon legal error . . . is necessarily an abuse of discretion[.]" *Bass*, 206 Md. App. at 11 (quoting *Arrington v. State*, 411 Md. 524, 552 (2009)).

A. The Evidence Did Not Provide a Rational Basis upon Which the Jury Could Conclude that Mr. Rogers Was Guilty of Second-Degree Assault but Not Guilty of a Sexual Offense.

Mr. Rogers argues that the court's refusal to submit the offense of second-degree assault to the jury was legal error because the jury could have "rationally convict[ed] [him] only of second-degree assault" and found him not guilty of rape and third-degree sexual offense. The State contends that the court properly declined to submit the assault offense to the jury because the evidence did not support a plausible finding that E. "was assaulted but not raped." We agree with the State.

1. Hook v. State *and Its Progeny*

The framework for our analysis is provided by the Court of Appeals' decision in *Hook v. State*, 315 Md. 25 (1989), and its progeny. In *Hook*, the State charged the defendant with, among other offenses, first-degree premeditated murder, first-degree felony murder, and second-degree murder for the killing of two people. *Id.* at 32, 35. The

defendant confessed to killing and robbing the victims but adduced evidence at trial that he was intoxicated when he committed those acts. *Id.* at 34. At the close of all the evidence, the State entered a *nolle prosequi* to all counts except first-degree murder. *Id.* at 35. The trial court overruled the defendant's objection to the *nolle pros* and noted that if the jury concluded that the defendant had committed only second-degree murder, it would have to acquit him. *Id.* The jury convicted and the defendant appealed.

In reversing, the Court of Appeals grounded its decision in fundamental fairness. The Court first observed the general rule that the State is permitted, in its discretion, to *nolle pros* any charge, including as to "a degree of an offense." *Id.* at 34-35. The Court observed, however, that a prosecutor's power of *nolle pros* is not absolute. *Id.* at 35-36. The Court discussed United States Supreme Court cases holding that a *nolle pros* entered in a capital murder case that leaves the jury with only the "all-or-nothing choice between capital murder and innocence" creates a "distortion of the factfinding process" that can result in an improper conviction. *Id.* at 40-41 (quoting *Spaziano v. Florida*, 468 U.S. 447, 455 (1984)). In such a circumstance, there is a "risk that the jury will convict, not because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free." *Hook*, 315 Md. at 40 (quoting *Spaziano*, 468 U.S. at 455). Putting the jury in such a position "fail[s] to observe that fundamental fairness essential to the very concept of justice" and is "inconsistent with the rudimentary demands of fair procedure." *Hook*, 315 Md. at 41-42. Thus,

> [w]hen the defendant is plainly guilty of some offense, and the evidence is legally sufficient for the trier of fact to convict him of either the greater offense or a lesser included offense . . . it is simply offensive to

> fundamental fairness . . . to deprive the trier of fact, over the defendant's objection, of the third option of convicting the defendant of a lesser included offense. And if the trial is before a jury, the defendant is entitled, if he so desires, to have the jury instructed as to the lesser included offense.

Id. at 43-44.

Applying that rule to the case before it, the Court reversed. The Court held that because evidence of the defendant's intoxication "fairly supported" a finding that he was guilty of only second-degree murder, it was fundamentally unfair to submit only the capital murder charge to the jury. *Id.* at 44.

In *Hook*, the Court declared that its holding was not limited to capital cases. *Id.* at 43. In *Fairbanks v. State*, 318 Md. 22 (1989), the Court had the opportunity to consider the issue in a noncapital case. There, in a prosecution for burglary and related charges, the State, over objection, *nolle prossed* a lesser-included charge of breaking and entering. *Id.* at 24. The jury convicted the defendant of burglary. *Id.* On appeal, the State conceded that the evidence at trial could have supported a conviction for only breaking and entering. *Id.* at 26. Observing that the jury had been left with "the singular choice of convicting Fairbanks of burglary . . . or finding him not guilty of any crime," the Court concluded that based on "the fundamental fairness concepts delineated in *Hook*," the absence of the lesser-included charge had denied Fairbanks a fair trial. *Id.* at 26-27; *see also Burch v. State*, 346 Md. 253, 279-80 (1997) ("[T]he jurors' presumed emotional response to want to convict a defendant who is 'plainly guilty' of something is tempered by having an array of plausible verdicts from which to choose, including the verdict which the evidence most clearly supports." (quoting *Burrell v. State*, 340 Md. 426, 432 (1995))).

A defendant, however, is not always entitled to have a jury presented with the option of convicting on a lesser-included offense. As particularly relevant here, there is no such right when it is not "realistically plausible," based on the evidence presented, for the jury to find that the defendant is guilty of the lesser offense but not the greater one. *See Jackson v. State*, 322 Md. 117, 126 (1991). In *Jackson*, the defendant faced charges for both the possession and distribution of drugs. *Id.* at 123. The evidence included eyewitness testimony and video surveillance of Jackson engaging in drug transactions. *Id.* at 125. After the State *nolle prossed* the possession charges, Jackson was convicted of the distribution charges. *Id.* Jackson argued on appeal that because there was evidence of possession, he had a right to have the jury consider convicting him of only that offense. *Id.* at 127. The Court of Appeals disagreed on the ground that the evidence did not support a conviction of possession alone; thus, "it would have been an affirmative nuisance 'to muddy the waters' with unnecessary complications involving intermediate offenses that were only theoretically possible but not realistically plausible." *Id.* at 126 (quotation omitted). Accordingly, the Court held that "[e]ven when there is evidence that would support a finding of guilt of the lesser included offense, the State is not precluded from entering a nolle prosequi of that offense if, under the particular facts of the case, there exists no rational basis by which the jury could conclude that the defendant is guilty of the lesser included offense but not guilty of the greater offense." *Id*. at 127-28.

Similarly, in *Burrell v. State*, after the defendant was convicted as an accomplice to an armed robbery, he challenged the trial court's decision not to submit a simple robbery charge to the jury. 340 Md. 426, 429-31 (1995). Citing the "uncontroverted evidence"

that a gun was used to commit the robbery, and finding no "contravening evidence tending to disprove" that a weapon was used, the Court held that Burrell was not entitled to submission of the lesser-included offense because no "rational jury could infer that Burrell was guilty of . . . a simple robbery only." *Id.* at 436; *see also Ball v. State*, 347 Md. 156, 189-90, 192 (1997) (holding that trial court did not err in submitting to the jury a charge of robbery with a deadly weapon without also submitting a charge for theft where "there was no evidence at trial from which a rational jury could conclude that [the defendant] committed theft, but not robbery").

From these and related cases, the Court has developed a two-step inquiry for determining whether a trial court is required to submit a lesser-included offense for the jury's consideration. First, the uncharged offense must "qualif[y] as a lesser included offense of the greater offense." *Malik v. State*, 152 Md. App. 305, 332 (2003). Second, the court must decide "whether there exists, in light of the evidence presented at trial, a rational basis upon which the jury could have concluded that the defendant was guilty of the lesser offense, but not guilty of the greater offense." *State v. Bowers*, 349 Md. 710, 722 (1998) (quoting *Ball*, 347 Md. at 191). In undertaking this inquiry, we are mindful "that the jury should be given the option of convicting on the lesser crime only when 'it constitutes a valid alternative to the charged offense,' thereby 'preserv[ing] the integrity of the jury's role as a fact-finding body.'" *Bowers*, 349 Md. at 723 (alteration in original) (quoting Janis L. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 Brook. L. Rev. 191, 210 (1984)).

2. The Court Did Not Abuse Its Discretion in Declining to Submit a Charge of Second-Degree Assault to the Jury.

The fundamental fairness rationale underlying the *Hook* rule demands that we consider whether it was fundamentally unfair to present the jury with an all-or-nothing choice between a particular offense and acquittal. *Hook*, 315 Md. at 40. Here, where multiple offenses of different levels were presented to the jury, we must first identify which of those should be the comparator(s) in our analysis. The two lead offenses presented to the jury were first-degree rape. However, the jury was not presented with an all-or-nothing choice between those charges and acquittal. Instead, the jury was given the option in each case to choose either of two lesser-included offenses: second-degree rape and third-degree sexual offense. The correct comparator offense for our analysis is thus third-degree sexual offense. The insult to fundamental fairness that requires instruction on a lesser-included offense in certain circumstances is the risk that the jury will find a defendant guilty of a more serious crime than the one the jury thinks the defendant actually committed because it lacks the option to convict on the less serious offense. Here, the greatest offense on which a jury might conceivably have felt compelled to convict for want of a lesser option was third-degree sexual offense. We will therefore analyze whether it was fundamentally unfair under *Hook* and its progeny to present the jury with the option of convicting Mr. Rogers of third-degree sexual offense but not second-degree assault.

The first prong of that inquiry is whether second-degree assault is a lesser-included offense of third-degree sexual offense. *See Malik*, 152 Md. App. at 332. It is. *See Travis v. State*, 218 Md. App. 410, 421 (2014) (stating that third-degree sexual offense

"necessarily include[s] a second-degree or simple assault"). As relevant here, third-degree sexual offense involves engaging in "sexual contact" without consent,[8] combined with one or more of four additional elements: (1) use or display of a dangerous weapon; (2) suffocation, strangulation, disfigurement, or infliction of serious physical injury; (3) threat of suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or (4) being aided and abetted by another. Md. Code Ann., Crim. Law § 3-307(a) (2021 Repl.). Second-degree assault of the battery type "is an offensive or harmful contact with another person." *State v. Frazier*, 469 Md. 627, 644 (2020). Third-degree sexual offense thus involves the same elements as a battery-type second-degree assault, plus the additional elements that the offensive contact must be sexual in nature and involve one of the four additional elements identified in the statute.

Our analysis therefore turns on the second step of the inquiry: whether the evidence at trial was such that the jury could rationally have convicted Mr. Rogers of second-degree assault alone. During trial, E. gave detailed testimony about how the attack unfolded, including that her assailant used a chokehold to keep her on her hands and knees while positioning himself behind her; fondled her breast; attempted to unbuckle her belt; and, when unsuccessful at that, maneuvered his hand under her pants, then digitally penetrated her anus and "touched [her] genitals . . . between [her] inner and outer labia." E. provided

[8] "Sexual contact" as used in § 3-307 of the Criminal Law Article "means 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." *Id.* § 3-301(e)(1).

a similar account to Ms. Carlin shortly after the attack. As there were no witnesses to the attack, no one else provided a contrary account.

The State also provided evidence that corroborated various aspects of E.'s account. The forensic nurses identified injuries to E.'s head, face, shoulders, breast, forearm, finger, wrist, and leg, and testified that her injuries were consistent with strangulation. Although the nurses did not identify any physical injury to E.'s anus or vagina, there was no evidence presented that injuries would ordinarily have been expected based on Ms. E.'s account of the attack. The State also offered evidence that analysis of DNA found in samples taken from E.'s neck and underwear could not exclude Mr. Rogers as a contributor but, to a 95% confidence interval, could exclude 99.9% of other males.

E.'s account of the attack was the only account presented to the jury. Mr. Rogers contends that the jury nonetheless could rationally have concluded that a physical attack had occurred but that a sexual assault had not. His argument is based on two contentions: (1) that the jury, as the factfinder, can choose to believe some or all of the testimony of any witness, and so could have chosen to believe E.'s account about a physical assault but not about a sexual assault; and (2) that although Mr. Rogers did not dispute at trial that E. had been attacked (by someone), he raised doubts about her credibility generally and argued that the State did not prove a sexual assault had occurred.

On the first point, Mr. Rogers is correct that a jury is "entitled to accept – or reject – all, part, or none of the testimony of any witness, whether that testimony was or was not contradicted or corroborated by any other evidence." *Nicholson v. State*, 239 Md. App. 228, 242 (2018) (emphasis removed) (quoting *Omayaka v. Omayaka*, 417 Md. 643, 659

(2011)). But that point does not advance his cause because the issue is not whether it was "theoretically possible" that the jury could have found that he committed only the lesser offense, but whether that was "realistically plausible" based on the evidence presented. *See Jackson*, 322 Md. at 126. Indeed, it would have been theoretically possible for the jury in *Burrell* to have disbelieved the testimony of the gas station attendant that the defendant's accomplice had a gun during the robbery, or for the jury in *Jackson* to have believed that the defendant had only possessed drugs. However, the evidence to the contrary in both cases was uncontroverted and, therefore, the Court concluded that a rational jury could not have reached those conclusions. *See Burrell*, 340 Md. at 436; *Jackson*, 322 Md. at 127-28. Similarly, Mr. Rogers must provide more than mere speculation that the jury could have accepted as true the parts of E.'s testimony concerning a physical assault and rejected her allegations of a sexual assault. He must identify how it was realistically plausible for the jury to have reached that conclusion based on the evidence.[9]

[9] Mr. Rogers contends that the jury "must have disbelieved" a portion of E.'s testimony because she testified that he digitally penetrated her anus, but the jury did not find him guilty of rape for that act. That, he contends, demonstrates that the jury could also have disbelieved her testimony that there was any sexual contact at all and concluded that only a non-sexual assault occurred. Although a jury can reach its verdict for any number of reasons not apparent from the trial record, it is not our function to look behind the curtain at the decisions the jury makes. *See Sherman v. State*, 288 Md. 636, 641-42 (1980) (discussing "the secret character of jury deliberations"); *see also Barksdale v. Wilkowsky*, 419 Md. 649, 665 (2011) ("[A] court cannot 'unbake' the jury verdict and examine the impact of any one ingredient."). Our focus is on whether, in light of the evidence presented, a conviction on only the lesser offense was realistically plausible. If the mere possibility that a jury might disbelieve uncontroverted evidence were sufficient to entitle a defendant to present a lesser-included offense to the jury, the "realistic plausibility" standard would be rendered wholly illusory.

On the second point, Mr. Rogers contends that he identified both general discrepancies in E.'s trial testimony that could have caused the jury to question her credibility and specific reasons to question whether a sexual assault occurred. With respect to E.'s credibility generally, Mr. Rogers contends that he: (1) raised questions about E.'s account of why she was in the area of the attack and what her plans were that evening; and (2) pointed out inconsistencies between her trial testimony and a previous statement, which included her wavering recollection of the initial distance between her and her assailant, her descriptions of her assailant's physical features, and her inability to recall certain statements she made to Det. Durham the evening of the attack. However, none of those inconsistencies has any plausible connection to whether a sexual assault, as opposed to only a physical assault, occurred.

The only challenge Mr. Rogers raises that goes directly to whether the jury could rationally have concluded that only a physical assault occurred is his claim that he raised doubts about the State's evidence of a sexual assault. Specifically, Mr. Rogers points out that: (1) E. declined a speculum exam; (2) in contrast to physical injuries to other parts of her body, there were no injuries identified to E.'s vagina or anus; and (3) there was evidence from which the jury might have concluded that the DNA sample from E.'s underwear that was linked to him could have been transferred from her shoulder or his earphones.

Notably, Mr. Rogers does not identify any evidence in support of a different account of the attack than the one provided by E. Rather, Mr. Rogers contends that uncertainties he raised could have caused the jurors to doubt E.'s testimony that she was sexually

assaulted, even if they did not doubt her testimony concerning the physical assault. However, the points Mr. Rogers raises do not call into question E.'s own testimony about a sexual assault. Neither E. declining a speculum exam nor the absence of injuries to her vagina or anus undermined her testimony in any way. E. testified that her assailant "put his finger first on my outer labia, and then between my inner and outer labia," but did not penetrate further. There is thus no reason to believe that a speculum exam would have uncovered any evidence relevant to her allegations. Similarly, there was no evidence presented to suggest that any detectable injuries to E.'s vagina or anus would necessarily have resulted from the conduct she alleged occurred. The lack of such injury therefore did not undermine her testimony about whether a sexual assault occurred.

Mr. Rogers's contention concerning evidence of DNA transferability is somewhat more complicated. Observing that the evidence of a physical assault was corroborated by evidence of the significant injuries E. sustained to other parts of her body, Mr. Rogers suggests that he poked a hole in the only evidence that corroborated her allegations of sexual assault, which was the DNA found in her underwear. The sole evidentiary support for this transference theory comes from the testimony of Ms. Christenson, who testified that "DNA comes from shed skin cells" that individuals are "constantly dropping . . . everywhere," and which are held more on "something like fabric" than on other material. Ms. Christenson further testified that secondary and tertiary transfers of DNA are possible if an individual touches a surface on which another individual had previously shed DNA. Observing that no male DNA was found on external genital swabs from E.'s sexual assault kit, Mr. Rogers posits that the jury could plausibly have concluded that E. inadvertently

transferred his DNA onto her underwear herself after picking it up from one or two other sources: (1) another part of her body, such as her neck, where Mr. Rogers had shed DNA; or (2) Mr. Rogers's earphones, which had mistakenly been placed in an unsealed bag with E.'s other possessions found at the scene.

Although Ms. Christenson's testimony established a basis for a theoretical possibility that Mr. Rogers's DNA could have ended up on E.'s underwear through transference from another source, we do not think it gave rise to a realistic plausibility that the jury could have found him guilty only of a second-degree assault in this case. First, although Ms. Christenson mentioned that secondary and tertiary transfer of DNA can occur, neither she nor any other witness opined that there was a reasonable possibility that it had occurred in this case. Mr. Rogers's contention that DNA could have transferred from his earphones to E.'s underwear is particularly speculative because there was no evidence that she ever directly touched the earphones. Second, even if the jury had accepted the possibility that transference could have explained the presence of the DNA on E.'s underwear, at most that would have reduced the value of evidence corroborating E.'s account. The possibility of transference did not contradict E.'s account that a sexual assault occurred, which remained uncontroverted. *Cf. Burrell*, 340 Md. at 436 (declining to find error in trial court's decision not to submit to a jury a lesser-included offense that would have required the jury to reject "uncontroverted evidence" in the absence of "contravening evidence tending to disprove it"). Moreover, Mr. Rogers has not identified any evidence suggesting that E. might have testified truthfully that she was physically assaulted but fabricated, or was simply mistaken about, a sexual assault.

In sum, based on the evidence presented at trial, it was not "realistically plausible" for the jury to have found that Mr. Rogers committed a second-degree assault without also finding that he committed a third-degree sexual offense. That result would not have been consistent with any version of the evidence submitted to the jury.

B. Even if the Jury Could Plausibly Have Convicted Mr. Rogers of Second-Degree Assault Alone, the Court Did Not Abuse Its Discretion in Not Presenting the Charge to the Jury.

In the alternative, even if it were realistically plausible for the jury to have convicted Mr. Rogers of a second-degree assault alone, we would conclude that fundamental fairness did not require the court to send that charge to the jury because a charge of similar severity was already before it.

"[F]undamental fairness is the driving principle behind the *Hook* rule[.]" *Malik*, 152 Md. App. at 332. A necessary predicate to the rationale underlying the rule is that the greater offense must be more severe than the lesser-included offense because only then could failing to provide a jury with the option of convicting the defendant of a lesser-included offense offend fundamental fairness. *See id.* ("The *Hook* rule is grounded in fairness, and designed 'to prevent jurors from convicting a defendant of the greater offense when they want to convict the defendant of some crime and they have no lesser option.'" (quoting *Bowers*, 349 Md. at 722)). In *Hook* itself, the greater offense was capital murder and the lesser was second-degree murder, *see* 315 Md. at 41, which at that time carried a maximum penalty of 30 years' incarceration, *see* Md. Code, Art. 27 § 412 (1957; 1987 Repl.). But although it is ordinarily the case that the lesser-included offense carries a less severe penalty, it is not always so, especially when it comes to the interplay between

general assault crimes and sexual offenses. For example, based on the required evidence test, second-degree assault is a lesser-included offense of fourth-degree sexual offense. *See Frazier*, 469 Md. at 644. However, although second-degree assault is punishable by up to ten years' incarceration, fourth-degree sexual offense is punishable by only up to one year's incarceration. *Id.* at 649. It would be nonsensical to suggest that it would be fundamentally unfair to a defendant charged only with fourth-degree sexual offense to deprive the jury of the opportunity to also convict the individual of second-degree assault.

In Mr. Rogers's case, the offense he contends the jury should have had the option of choosing (second-degree assault) and one of the offenses the jury did have the option of choosing (third-degree sexual offense) are both subject to a maximum period of incarceration of ten years. *See* Crim. Law §§ 3-203(b) (second-degree assault); 3-307(b) (third-degree sexual offense). Furthermore, although that is the only penalty available for third-degree sexual offense, second-degree assault is also subject to a fine of $2,500. *See id.* § 3-203(b). Viewed from that perspective, there is no affront to fundamental fairness in declining to present the jury with the option of convicting a defendant of one offense that carries a similar penalty to another charge that is before the jury.

At oral argument, Mr. Rogers suggested that although the statutory penalties for the two offenses at issue were essentially equivalent, third-degree sexual offense should nonetheless be considered more severe because conviction carries a requirement to register as a sex offender. *See* Md. Code Ann., Crim. Proc. § 11-701 (2018 Repl.; 2020 Supp.) (defining "Tier II sex offender" to include an individual convicted of committing a violation of Crim. Law § 3-307(a)(1)); *id.* § 11-704(a) (requiring registration of tier III sex

offenders). We disagree. Sex offender registration is a consequence of a conviction, not part of a sentence for an offense. *See Hyman v. State*, 463 Md. 656, 677-78 (2019); *Arias-Rivera v. State*, 246 Md. App. 500, 509 n.6, *cert. granted*, 471 Md. 102 (2020), *case dismissed prior to argument* (Jan. 20, 2021) ("[W]e are aware of no Maryland case holding that registration is anything more than a consequence of a conviction, as opposed to a part of the sentence itself"). The *Hook* rule is an exception—applicable on "rare occasion[s]"—to "the broad authority vested in a State's Attorney to terminate a prosecution by a nolle prosequi," only when mandated by fundamental fairness. *Hook*, 315 Md. at 41. The rule thus remains that the prosecutor has broad authority to determine which offenses to charge and which to submit to a jury. In crafting the fundamental fairness exception to that general rule in *Hook*, the Court of Appeals' concern was the distorting effect on the jury's decision-making, by forcing it to choose between only complete acquittal and a more severe offense than one that is uncharged but supported by the evidence. *Id.* at 40-41. We do not think the same risk of distortion exists here.

In sum, we hold that the circuit court did not abuse its discretion in declining to submit to the jury a charge of second-degree assault. We will therefore affirm Mr. Rogers's convictions.

MOTION TO WITHDRAW AND RE-FILE REPLY BRIEF GRANTED; JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.