Circuit Court for Baltimore City
Case Nos.: 113238026, 030 & 032

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0651

September Term, 2015

GARY KNIGHT

v.

STATE OF MARYLAND

Meredith,
Leahy,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: October 26, 2017

*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.

At the conclusion of a trial in the Circuit Court for Baltimore City, the jury found Gary Knight, appellant, guilty of second-degree rape, second-degree assault, and false imprisonment. The jury found him "not guilty" of first-degree rape, kidnapping, robbery, conspiracy to commit robbery, and theft, as well as two additional counts of second-degree rape. At sentencing, the court merged appellant's conviction for false imprisonment into the conviction for second-degree rape, but refused appellant's request to also merge the conviction for second-degree assault into the conviction for second-degree rape. For second-degree rape, the court sentenced appellant to a term of imprisonment of 20 years, consecutive to a federal sentence appellant is currently serving. For second-degree assault, the court sentenced appellant to a consecutive sentence of imprisonment of 10 years, with all but five suspended, followed by five years of probation. In this direct appeal, Appellant presents a single issue for our review, which we have rephrased as follows:[1] Did the sentencing court err in failing to merge appellant's conviction for second-degree assault into the conviction for second-degree rape?

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[1] Appellant's question presented was phrased as follows in his brief:

> Was i[t] error for the sentencing court not to merge Mr. Knight's assault conviction into his second degree rape conviction for sentencing purposes and hence was it error for the court to impose upon Mr. Knight a 10 year[] term of incarceration for assault consecutive to the 20 year term it imposed for the rape conviction?

For the reasons that follow, we conclude that the court should have merged appellant's conviction for second-degree assault into the conviction for second-degree rape. Accordingly, we vacate appellant's sentence for second-degree assault and affirm the remaining judgments of the circuit court.

FACTS AND PROCEDURAL HISTORY

On the night of May 7, 2009, a woman whom we shall refer to as "Ms. D." consumed alcoholic beverages with some friends at a lounge on the corner of Rose and McElderry Streets in Baltimore, Maryland. Around 2:00 a.m. on May 8th, Ms. D. left the lounge and walked with a friend to a carry-out restaurant on Monument Street. After her friend left, Ms. D. saw a group of young men standing on Luzerne Street in the block between Monument and McElderry Streets. When she heard one of the men call out to her "ay ay ay ay," she began to walk back to the carry-out restaurant. But some of the men pursued Ms. D. and caught up with her. One of the men said: "I know you heard me calling you." Ms. D. remembered one of the men was African-American and shorter than her, with cornrow braids in his hair and acne on his face. She looked at the young men, and said: "Ya'll babies to me." She continued walking toward the carry-out restaurant.

Suddenly, someone grabbed Ms. D.'s hair and punched her face. Ms. D. remembered that numerous punches "started coming" at that point. She recalled being punched in the eye and seeing "stars," but she could not see what was occurring around

her. In attempting to fight back, she fell to the ground. The young men then carried or dragged Ms. D. to an abandoned house on Monument Street. There were no lights in the house, and Ms. D. could not see anybody. Someone choked her to the point that she lost consciousness.

When Ms. D. awoke, she found herself face down on the floor; she was naked, and someone was raping her vaginally from behind. She could not see her assailants, and every time she looked up, someone kicked her in the face. Her attackers told her that they had her ID and purse, and they threatened: "[W]e know who you are, we know where you are, if you say anything, we'll kill you[.]" At trial, Ms. D. estimated that at least four men raped her, most vaginally, but at least one attempted to rape her anally. She said she was not conscious through the entirety of the attack; at various times someone would choke her to the point of unconsciousness. Ms. D. stated that she eventually went "numb" because she wanted to survive. Ms. D. believed that some of her attackers ejaculated inside of her, and others ejaculated on her face. She also testified that she had bite marks from the attack.

Eventually, Ms. D. was left alone with one man on the lower floor of the abandoned house; the other men were upstairs. The last attacker demanded that Ms. D. perform fellatio on him, but she bit down on his penis when he put it in her mouth. She

then grabbed some of her belongings and ran out the door. Once she escaped, she encountered a man who gave her his shirt and called 911.

Ms. D. and the man flagged down Officer Gina Pugliano in a marked police cruiser.[2] Ms. D. described the attack to Officer Pugliano and said three men raped her. Officer Pugliano transported Ms. D. to the hospital for treatment, while other officers secured the abandoned house on Monument Street. Kristy Sybal, a crime lab technician, took photographs of the scene and collected evidence at the abandoned house. Among the items recovered from the abandoned house were a condom wrapper, a bank statement with Ms. D.'s name on it, and a soiled pair of blue women's underwear later identified as Ms. D's.

After Ms. D. arrived at the hospital, Nurse Larissa Harrison conducted a SAFE exam and collected evidence using a rape kit. At trial, the court accepted Nurse Harrison as an expert in forensic nursing and SAFE nursing. Nurse Harrison noted several areas of redness and swelling on Ms. D.'s body. Nurse Harrison reported that Ms. D.'s left eye was bruised, her right eye was black, and both eyes exhibited "TPI." Nurse Harrison explained that TPI is a medical term for tiny bruises in the eye that denote blockages in blood flow. Nurse Harrison also observed that Ms. D. had bruises on her neck that were tender to touch, as well as scratches and/or lesions on her right wrist, right knee, right

thigh, torso, right buttocks, left thigh, left elbow, and right forearm, among other injuries. Nurse Harrison noted some injuries and bruising, but no tears, to Ms. D.'s vagina; an anal exam was "normal." Nurse Harrison also reported that Ms. D. had a blood alcohol level of 0.29, and she tested positive for marijuana. Among the evidence that Nurse Harrison collected for the rape kit were vaginal and anal swabs, as well as swabs of apparent seminal fluid from Ms. D.'s face.

Kevin Bearsley, a serologist with the Baltimore crime laboratory, was accepted at trial as an expert in serology. He testified that he determined that sperm was present on some of the items recovered from the SAFE kit and the scene of the attack.

Jocelyn Carlson, who at the time of the initial investigation worked as an analyst with the Baltimore crime laboratory, was accepted by the court as an expert in DNA analysis. She tested the recovered evidence for DNA. She determined that Ms. D.'s DNA, as well as that of at least two unknown male contributors, was on the evidence. Without comparison samples, Ms. Carlson was unable to identify the two male contributors, and she entered her findings into the CODIS ("Combined DNA Indexing System") database.

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[2] All law enforcement officers mentioned in this case are members of the Baltimore City Police Department.

The lead detective investigating the attack passed away, and the case remained dormant until 2012. At that time, Detective Justin Stinnett developed appellant as a suspect. Detective Stinnett interviewed Ms. D. and also conducted a photo array – which included appellant's picture – but Ms. D. could not identify anyone as an assailant. Detective Stinnett interviewed appellant, who denied raping Ms. D. The detective also took DNA samples from appellant.

Kenneth Jones, a Baltimore crime laboratory criminologist, was accepted by the court as an expert in DNA analysis. He testified that he compared appellant's DNA to the samples recovered from the SAFE kit and from evidence recovered from the vacant house. Mr. Jones compared appellant's DNA with Ms. Carlson's test results and determined that appellant's DNA matched one of the previously unknown male contributors. Specifically, the DNA evidence left on the pair of blue underwear was a mix of Ms. D.'s, appellant's, and an unknown male; appellant's DNA was the "major male profile" of the sperm portion of a stain on the underwear; and the seminal fluid recovered from Ms. D.'s face matched appellant's DNA. The DNA evidence on the vaginal swabs and anal swab, however, did not match appellant.

The State charged appellant with three counts of first-degree rape, three counts of second-degree rape, reckless endangerment, robbery, conspiracy to commit robbery, theft, second-degree assault, kidnapping, and false imprisonment. At the close of the

State's case in chief, the court granted appellant's motion for a judgment of acquittal as to reckless endangerment.

Appellant testified in his defense. He stated that, in the early morning hours of May 8, 2009, he was "mingling" with "[a] couple home boys" on Minor Street. He testified that he met Ms. D. at a bar around the area of Rose and Miami Streets. He and his group of friends walked with Ms. D. and her male friend, and appellant flirted with her. Appellant testified that he and Ms. D. went into an abandoned house on Miami Street and had consensual sexual intercourse, and he used a condom that she provided. He stated that, after they had intercourse, he ejaculated onto her face. Then, they got dressed. Ms. D. said she was "cool," and left in a "hack" (*i.e.*, an unlicensed taxi).

The jury found appellant guilty of one count of second-degree rape, second-degree assault, and false imprisonment, but not guilty of all other counts. At the sentencing hearing, the court sentenced appellant as noted above, after rejecting appellant's argument that second-degree assault merged with second-degree rape. Appellant noted this appeal, and challenges only the sentence for second-degree assault.

MERGER OF SENTENCES

This Court has observed that "[t]he failure to merge a sentence when it is required is considered an inherently illegal sentence as a matter of law[,]" which "a court 'may

correct . . . at any time.'" *Latray v. State*, 221 Md. App. 544, 555 (2015) (quoting Rule 4-345(a)). The Court of Appeals noted in *Brooks v. State*, 439 Md. 698, 737 (2014):

> Merger protects a convicted defendant from multiple punishments for the same offense. [*Nicolas v. State*, 426 Md. 385, 400 (2012).] Sentences for two convictions must be merged when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other. *Id*. at 400–02, 44 A.3d 396; *State v. Lancaster*, 332 Md. 385, 391, 631 A.2d 453 (1993).

Relying primarily upon *Dyson v. State*, 89 Md. App. 651 (1991), *rev'd on other grounds*, 328 Md. 490 (1992), appellant contends that the sentencing court was required to merge his conviction for second-degree assault into the conviction for second-degree rape. Appellant argues that, under the court's instructions, the elements of second-degree assault were all required elements of second-degree rape, and there is no way of knowing whether the jury's verdict was based on a finding of an independent assault. Because principles of double jeopardy provide that he cannot be punished twice for the same criminal conduct, he argues that the court was required to merge the two convictions.

The State replies that the trial court properly rejected appellant's argument that the court was required to merge second-degree assault into second-degree rape for sentencing purposes. The State attempts to distinguish this case from *Dyson* by virtue of the fact that here, the sentencing judge theorized that the jury's conviction for second-degree assault might have been based upon the evidence that appellant ejaculated upon Ms. D.'s face

after engaging in the act of intercourse, which could have constituted a criminal assault subsequent to, and independent of, the rape.

The problem with this hypothesis is that the jury instructions said nothing about this distinction, and consequently, we have no way of knowing that the jury found appellant guilty of an assault that was independent of the conduct that the jury found he committed in order to find him guilty of second-degree rape. Under such circumstances, we are obligated to give the benefit of the doubt to the defendant. *See, e.g., Nicolas, supra*, 426 Md. at 414 ("[W]e resolve this factual ambiguity in Petitioner's favor"). The *Nicolas* Court explained, *id*. at 408 n.6:

> As Maryland case law indicates, the appropriate standard to apply when addressing a question of factual ambiguity in the context of merging convictions is to resolve the ambiguity in the defendant's favor in a situation where it is impossible to know for certain the rationale of the trier of fact for finding the convictions entered against the defendant. *See Snowden* [*v. State*], 321 Md. [612] at 619, 583 A.2d [1056] at 1059–60 [(1991)]; *Nightingale* [*v. State*], 312 Md. [699] at 708, 542 A.2d [373] at 377 [(1988)]; *State v. Frye*, 283 Md. 709, 723–25, 393 A.2d 1372, 1379–80 (1978); *Cortez v. State*, 104 Md. App. 358, 361, 656 A.2d 360, 361 (1995).

In *Brooks, supra*, 439 Md. at 739, the Court of Appeals held that merger of a false imprisonment conviction into a conviction for rape was required because, in the absence of clear jury instructions, it was not possible to know whether the jury based the convictions on the same or different conduct. The *Brooks* Court stated, *id.*:

> While the false imprisonment conviction could have reasonably been based on Mr. Brooks' actions separate from the rape itself, it is not readily

> apparent whether the jury actually came to that conclusion. In such circumstances, we are constrained by precedent from assuming that the two convictions were not based on the same act or acts. In particular, when the factual basis for a jury's verdict is not readily apparent, the court resolves factual ambiguities in the defendant's favor and merges the convictions if those convictions also satisfy the required evidence test. *Nicolas, supra*, 426 Md. at 410–413, 44 A.3d 396; *Snowden v. State*, 321 Md. 612, 618–619, 583 A.2d 1056 (1991); *Nightingale v. State*, 312 Md. 699, 708–709, 542 A.2d 373 (1988).

In this case, the trial court's instructions relative to rape and second-degree assault did not address whether the jury found that appellant committed an assault that was independent of the alleged rape. The court's instructions relative to second-degree rape were as follows:

> Rape in the second degree is unlawful, vaginal intercourse with a female **by force or threat of force and without her consent**. In order to convict the Defendant of second-degree rape, the State must prove that the Defendant had vaginal intercourse with [Ms. D.], that **the act was committed by force or threat of force, and that the act was, was committed without the consent** of Ms. D[.]. Three elements, there must be vaginal intercourse, **the act must be committed by force or threat of force, and the act must be committed without the consent of the victim.**
>
> Vaginal intercourse means the penetration of the penis into the vagina. The slightest penetration is sufficient and admission of semen is not required. The amount of force necessary depends upon the circumstances. **No particular amount of force is required**, but it must be sufficient to overcome resistance or the will to resist. You must be satisfied that she resisted and that her resistance was overcome by force or threat of force, and that her, or that her will to resist was overcome by the Defendant's actions under the circumstances.
>
> If [Ms. D.] submitted to sexual intercourse and if her submission was induced by force or threat of force that put her in reasonable fear of bodily

> harm to herself, then her submission was without consent. Her fear was reasonable if you find that under the circumstances a reasonable woman would fear for her safety. Finally, consent means actually agreeing to the act of intercourse rather than merely submitting as a result of force or threat of force.

(Emphasis added.)

With respect to the single charge of second-degree assault (which alleged generically that "Knight . . . unlawfully did ASSAULT [Ms. D.] in the SECOND DEGREE . . . ."), the court instructed the jury:

> Assault – in this case we're actually talking about what the law used to refer to as battery. You've heard the term many times, assault and battery. Battery is the actual touching part of the assault. Let me explain that.
>
> In this case, assault is causing offensive physical contact to another person. **In order to convict the Defendant of assault, the State must prove that the Defendant caused offensive physical contact to the victim, that the contact was a result of an intentional or reckless act, and it was not accidental, and that the contact was not consented to by the victim, nor was it legally justified**.
>
> For an assault, **the State has to prove** that the Defendant caused **offensive physical contact**, that the contact was a result of an intentional or reckless act by the Defendant, it was **not accidental**, **and** the contact was **not consented to by the victim**, nor legally justified. That's assault.

(Emphasis added.)

There was no other instruction advising the jury that it could return a verdict of guilty of both rape and second-degree assault only if it found that there was conduct that satisfied the elements of assault separate and apart from the elements of rape. Similarly,

the verdict sheet made no distinction between the assaultive conduct committed in the course of the rape and the jury's verdict on the charge of second-degree assault. Nor did the prosecutor's closing argument clarify the need for separate conduct to support the assault conviction.

But, when appellant's counsel raised the merger issue at the sentencing hearing, and argued that the convictions should merge because "the assault that was perpetrated on Ms. D[.] was . . . all part and parcel of" the rape, the court focused on the question of whether the jury *might have* based its verdict upon evidence of an assault independent of the rape. The sentencing court rejected appellant's merger argument with respect to the conviction of second-degree assault because, the court concluded, the conviction could have been based upon conduct that occurred after the rape. The court explained:

> Very well. All right. As to the question of merger, I think that [defense counsel is] presenting a very real argument here about that. Rape is a terrible crime, but it is committed in ways that allow someone to be in a situation where a victim is completely vulnerable and the act can be accomplished. But the law is fairly clear that those acts which are not independent of that which is done to accomplish having vaginal intercourse against the will of the victim, the acts which are part in parcel of that are to merge.
>
> Here, I think, [Ms. Defense Counsel], you're correct in your theory about what the jury was actually saying to us with a few exceptions. The victim, Ms. D[.], claimed to have been abducted off the street, dragged into a house by three people, at least three people, and had vaginal intercourse involving three different men and then was left by them[;] the Defendant and only the Defendant's DNA was found. So, in the absence of finding

> DNA, even unknown DNA, the jury had a difficult time concluding that there were multiple parties who actually had vaginal intercourse.
>
> * * *
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> . . . [A]s to the false imprisonment, I am going to rule that that is an attendant circumstance of the rape and order that that charge merge into the rape in the second degree.
>
> The assault in the second degree, that's a little more nebulous a decision because assault in the second degree is such a broad charge that includes anything that involves an impermissible touching. Here, we have two separate impermissible touchings that were specifically addressed to the jury. One, grabbing Ms. D[.] by the neck and pulling her into the building. I guess a second, the choking, which was part of the force used to accomplish the non-consensual vaginal intercourse.
>
> But there was a third allegation of an assault that really was never addressed by the Defendant, and that was the spraying of semen into Ms. D[.]'s face when this was all over, an act that, that the Defendant in his discussion of this ["]consensual["] event never addressed, an act which was never addressed because, under the circumstances, it would be almost impossible to address that. But that was an act that took place after the vaginal intercourse was complete that was not necessary in order to accomplish the means and was an independent act which I think in many respects caused the jury to reject the Defendant's claim of consent, a claim the Court under the circumstances would have found quite far fetched. So I'm not going to merge the assault with the rape based upon the acts after the rape was committed.

In *Dyson*, *supra*, 89 Md. App. 651, we addressed a similar merger issue. In that case, the defendant was convicted of second-degree rape and battery, and was sentenced to two consecutive terms of twenty years' imprisonment. On appeal, Dyson argued that the battery conviction should have merged into the rape conviction for sentencing

purposes. We noted that, although the evidence theoretically could have supported a jury verdict finding a battery separate and apart from the rape, the jury instructions did not advise the jury that it was required to give any consideration to whether there was a separate battery that was independent of the rape. As a consequence, because the jury could have possibly based both convictions on the same conduct, we held that merger was required. We explained:

> Appellant contends the assault and battery conviction should merge into the second degree rape conviction.
>
> We agree. It is clear that there was testimony of a number of assaults and batteries which could serve to support a conviction for assault and battery. For example, there was testimony by the victim of a slap across the face, physical carrying of her from the kitchen to the hallway, a forced consumption of rum, a forced requirement that she douche with baby lotion, anal sex, cunnilingus and fellatio. The trial court instructed the jury on the offenses submitted for its disposition. The jury, however, was not instructed on the particular acts which were alleged to constitute the assault and battery. In addition, the jury was not instructed that it must find that the assault and battery was separate and distinct from the force used to accomplish the rape.
>
> The State argues that the facts necessary to show the battery were not essential ingredients of the rape. The State further contends that where a defendant commits separate criminal acts against a victim, he may be separately charged and punished for each offense. *State v. Boozer*, 304 Md. 98, 497 A.2d 1129 (1985); *Holland v. State*, 77 Md. App. 252, 549 A.2d 1178 (1988). **As noted by appellant, the issue is not whether the jury, after proper instructions, could have found an assault and battery separate and distinct from the rape. Rather, the issue is whether the jury could have found an assault and battery in the absence of specific instructions requiring the jury to determine whether there was an assault and battery apart from that associated with the rape. In the**

> **absence of such instructions, appellant argues the offenses must be merged, because the defendant is entitled to the benefit of the doubt.**
>
> "'[T]he proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.'" *Nightingale v. State*, 312 Md. 699, 709, 542 A.2d 373 (1988) (quoting *Yates v. United States*, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356, 1371 (1957)). This is precisely what occurred in the present case. The jury could have found appellant guilty of assault and battery for conduct which must be merged into the rape or for conduct that is clearly separate and distinct from the rape. **The court's instructions, however, failed to insure that the jury would only find a verdict of guilty of assault and battery for conduct occurring separately from the rape. We must, therefore, vacate the sentence for assault and battery**, as the conviction for assault and battery in the manner obtained here merges with the conviction for second degree rape.

Id. at 662-663 (emphasis added).

This Court applied a similar approach in *Cortez v. State*, 104 Md. App. 358 (1995), a case in which the defendant was convicted, at a bench trial, of both second degree assault and sexual offense in the fourth degree. We held that, because the trial judge, as finder of fact, had not made explicit findings describing separate conduct that supported the two convictions, the convictions for battery and fourth degree sexual offense merged for sentencing purposes. We explained, *id.* at 368-69:

> We are confronted with the same problem of ambiguity of verdict that confronted the Court of Appeals in *Snowden*. We may assume, for the sake of argument, that the trial judge could have found appellant guilty of battery on the basis of an act or acts separate and distinct from the act that constituted the fourth degree sexual offense. Nevertheless, the trial judge's rationale for the battery conviction is not readily apparent to us. Therefore,

> we are constrained to hold that the conviction and sentence for battery merges into the conviction and sentence for the fourth degree sexual offense and, therefore, that the sentences for battery must be vacated. *Snowden*, 321 Md. at 619, 583 A.2d 1056; *Nightingale*, 312 Md. at 708-709, 542 A.2d 373.
>
> * * *
>
> This merger problem continues to arise despite *Nightingale*, *Biggus* [*v. State*, 323 Md. 339 (1991)], *Snowden*, and [*State v.*] *Lancaster*[, 332 Md. 385 (1993)]. We believe it can be avoided in a case in which separate convictions and sentences might be sustainable on the evidence. In a bench trial, the solution is simple: the trial judge need only articulate for the record the basis for the dual verdicts, stating the separate acts justifying both convictions. **In a jury trial, the solution, as suggested in *Snowden*, is the giving of an appropriate instruction.** For example, the trial judge might instruct the jury that, if it found the defendant guilty of robbery (or kidnapping, or other compound crimes in which force or the threat of force is an element), it could find the defendant guilty of battery (or assault, or both) only if it found that there was a use of force (or threat of force) separate from and independent of the force (or threat of force) employed to effect the greater offense. If such an instruction were given, a conviction of battery or assault in addition to the conviction of the greater offense would not merge, and the only debatable issue would be the sufficiency of the evidence of a separate battery or assault to sustain the conviction.

(Emphasis added.)

See also Williams v. State 187 Md. App. 470, 477 (2009) (holding that where charging document was ambiguous as to the particular act for which Williams was charged with first degree assault, and trial court did not instruct jury how the assault and robbery charges related to one another, this Court resolved the question of whether the assault and robbery charges were based upon the same conduct in Williams's favor);

Gerald v. State, 137 Md. App. 295, 312 (2001) (Merger was required. We explained: "The court instructed the jury on the elements of each charge, but it did not explain how the assault and robbery charges related to one another, how they differed, and what the jury needed to find to convict under both charges.").

Here, as in *Dyson*, although the jury *may have*, indeed, based its findings of assault on conduct independent of the force used to commit the rape, it is also possible that the jury did not do so. Given that the court did not instruct the jury that it was required to find a separate act of assault independent of the rape in order to also convict appellant of second-degree assault, and the State in closing arguments did not caution the jury that, if it found the appellant guilty of rape, it would need to find separate conduct in order to also return a verdict of guilty of second-degree assault, we are persuaded that the court should have merged appellant's conviction for second-degree assault into the conviction for second-degree rape. Accordingly, we vacate appellant's sentence for second-degree assault, but otherwise affirm the judgments of the circuit court.

SENTENCE FOR SECOND-DEGREE ASSAULT VACATED. ALL OTHER JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY OTHERWISE AFFIRMED. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.