UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 670

September Term, 2016

JERRELL RANDLE

v.

STATE OF MARYLAND

Meredith,
Berger,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: July 12, 2017

Appellant, Jerrell Randle, was convicted by a jury in the Circuit Court for Baltimore City, Maryland, of first degree rape, first degree sex offense, robbery and false imprisonment. He was sentenced to life imprisonment for first degree rape, a consecutive forty years for first degree sex offense, a consecutive fifteen years for robbery, and a concurrent fifteen years for false imprisonment. In this timely appeal, he presents the following questions for our review:

> 1. Did the trial court err by refusing to suppress evidence that was found on Mr. Randle during a search incident to arrest without probable cause?
>
> 2. Did the trial court err when it instructed the jury that it did not have to be unanimous on the aggravating element of first-degree rape?
>
> 3. Did the trial court impose an illegal sentence when it did not merge false imprisonment into first-degree rape?

For the following reasons, we shall vacate appellant's sentence for false imprisonment, but otherwise affirm the judgments.

BACKGROUND

Motions hearing

On December 10, 2014, at approximately 5:20 a.m., Sergeant Daniel Salefski, of the Baltimore City Police Department, responded to 1608 West Lexington Street in Baltimore after receiving a dispatch for a robbery. En route, dispatch informed Sergeant Salefski that a female was being sexually assaulted and/or raped behind the dumpsters at that location.

Two to three minutes after receiving the call, Sergeant Salefski arrived at the location and saw the dumpster area in question. Some fencing obscured his view and

Sergeant Salefski exited his vehicle and illuminated the area with his spotlight. As he did so, he "saw a figure coming from behind the dumpster, exiting the back of the fence," and "a female kneeling. She was apparently crying and visibly frightened."

At this point, Sergeant Salefski told the first individual, "Police, show me your hands." That individual ran from the scene. He was a male in his mid-20's, approximately six feet tall, between 200 and 215 pounds, wearing dark clothing and carrying a backpack. The officer pursued him approximately a block and a half to two blocks to the intersection of Fayette Street and Gilmor Street. There, he apprehended the man and took him into custody. Sergeant Salefski never lost sight of this man during the pursuit and identified appellant, in court, as the individual he pursued.

Sergeant Salefski testified that, during the foot pursuit, appellant dropped a backpack as he crossed Lexington Street. After appellant was detained, the officer located the abandoned backpack and instructed another officer to maintain custody of it until it could be processed by the Crime Lab.

Sergeant Salefski confirmed that appellant was searched after he was apprehended. One or two cell phones were recovered from appellant's person, but no weapons were recovered.

The officer then went back to the dumpster site, and, finding the female that he had seen earlier, he called for medical assistance. She was transported to Mercy Medical Center for a sexual assault examination. Sergeant Salefski also spoke to the citizen who called in the original report to 911 and directed him to speak with other responding officers.

On cross-examination, Sergeant Salefski confirmed that the initial robbery call was updated to a rape or sexual assault in progress within "moments" of the original call. When he first arrived, he could only tell that there was an individual standing behind the fence, near the dumpster. The officer agreed that, after he informed this individual that he was a police officer and to show his hands, the individual fled the scene. Sergeant Salefski also clarified that he tackled appellant at the end of the foot pursuit and that appellant, who was handcuffed and then searched, was under arrest.

Following this testimony, defense counsel argued that, absent a sufficient description of the suspect, appellant's flight alone was insufficient to provide Sergeant Salefski with probable cause to place him under arrest. The State responded that there were other circumstances present, other than mere flight, including the citizen's call, the nature of that call, the presence of two individuals near the area specified, and the observation that the female at the scene was in distress.

The court denied the motion to suppress, finding, in pertinent part, as follows:

> This is, an officer comes on what he has reason to believe is the actual scene of the crime; with the victim and the perpetrator still present.
>
> He observes a woman and, although he may have jumped to a conclusion that the – that a female was the victim of the rape, he directed his attention to the only other person there; who, it was ultimately he observed a male.
>
> And, that person, after he said to him – without knowing whether it was a male or female – please show me your hands; that person took off; and that person is identified as your client, who the officer says he never saw. [sic] He never lost sight of and that he ultimately obtained control over him by tackling him.

> And, I think under those circumstances at that time, the officer would have had probable cause to arrest and search him; and he did. He found the phone. The phone will not be suppressed – or phones will not be suppressed.

Trial

In the early morning of December 10, 2014, the victim was sexually assaulted and raped, just outside her apartment in Baltimore, Maryland. She was returning home from her bus stop when a man she identified in court as appellant grabbed her from behind and put her in a chokehold. She began to fight and scream, "Don't kill me," and appellant replied, "Don't scream or I'm going to kill you." Although she did not know how they got there, the victim then found herself with appellant inside the gated dumpster area outside her apartment building.

There, appellant told her to get on her knees. He then put his penis in her mouth, without her consent. As this occurred, the victim testified that appellant "kept reaching into his jacket pocket, like he had a weapon." Appellant then ordered her to pull her pants down. He bent her over and placed his penis inside her vagina. She kept telling appellant to stop, testifying that he had her "pinned down[.]" She further testified that "there was nothing [she] could really do" because she believed he had a weapon and she was "scared for [her] life." The victim did not know appellant, did not consent to sexual intercourse or forced fellatio with appellant, did not give him consent to take her phone or her money, and did not know if appellant was wearing a condom.

According to the victim, when the police arrived, appellant "hid behind the gate." When the officer told appellant to "stop, freeze," appellant "took off running." Appellant took her bookbag, some money and her cellphone.

At some point during the sexual assault, the victim somehow managed to connect with her sister's cellphone. The victim's sister testified that she was asleep at the time, but the call was left on her voice mail, which was played for the jury. Two voices are heard on the recording, and the victim confirmed that, in addition to her voice, the male voice belonged to appellant. The recording, included with the record on appeal, begins with a woman screaming. The woman is also heard to cry "please don't, please." At another point, the woman states, "you say you won't kill me if I do it? You swear?" and the male voice responds, "I swear."

The victim's neighbor, Charles Graham, was inside his apartment, located on the bottom floor in the same building where she resided. Graham testified that he heard "a female yelling for help; screaming she was getting raped." He looked outside his window and saw a male and a female near the dumpster area who were apparently engaged in sexual intercourse. According to Graham, the female was "screaming and yelling help; she was getting raped." Graham called 911 to report a rape in progress. Graham also had heard the woman say she was getting robbed, and conveyed that information to the police as well. The police responded "right away," arriving while the male "was actually still raping her[.]" Graham testified that he saw the male flee the scene after the police arrived.

When Sergeant Salefski responded to the location at around 5:22 a.m., following a call for a robbery and rape in progress, he observed two individuals. The first individual was coming out of a fenced-in area near the dumpster; the second individual was a female kneeling on the ground and crying. After identifying himself and asking the first individual, who was standing and who could now be identified as a male, to show his hands, Sergeant Salefski testified that that individual ran from the scene. Sergeant Salefski chased this man, never losing sight of him, and tackled him a few streets away. Sergeant Salefski identified appellant in court as that same man.

The officer also testified that, after appellant was arrested, one or two cellphones were recovered from his person. The officer then retrieved the dropped backpack, and returned to the original scene and spoke with the victim and Mr. Graham. The victim, however, was "very closed, upset, and unresponsive" to his questioning at the scene, so she eventually was transported to Mercy Medical Center for a sexual assault examination.

Glynis D'Silva, accepted as an expert in sexual assault forensic examinations, examined the victim and testified that the victim informed her that she was manually strangled, vaginally penetrated from behind, and was forced to engage in fellatio with her assailant. Following a physical examination, Nurse D'Silva concluded that her injuries were consistent with non-consensual sexual intercourse.

The forensic evidence in this case included seminal fluid found on several swabs obtained from the victim's vaginal areas. Additionally, DNA swabs from both her and appellant were submitted for DNA analysis. These included penile swabs and fingernail

swabs obtained from appellant. Those swabs yielded DNA mixtures consistent with both appellant and the victim.

We shall include additional details in the following discussion.

DISCUSSION

I.

Appellant first contends the circuit court erred in denying his motion to suppress on the grounds that there was no probable cause to arrest and search him. Appellant's primary argument is that, while there may have been reasonable articulable suspicion to detain him, absent some sort of physical description by the citizen-informer, or further corroboration by the victim herself, probable cause to arrest was lacking. The State responds that the facts support the motion court's determination that there was probable cause to arrest appellant. We agree.

Our standard of review is well-established:

> In reviewing a trial court's ruling on a motion to suppress, we defer to that court's findings of fact unless we determine them to be clearly erroneous, and, in making that determination, we view the evidence in a light most favorable to the party who prevailed on that issue, in this case the State. We review the trial court's conclusions of law, however, and its application of the law to the facts, without deference.

Taylor v. State, 448 Md. 242, 244 (2016) (citations omitted), *cert. denied, Taylor v. Maryland*, __ U.S. __, No. 16-467, 2017 WL 1114968 (Mar. 27, 2017).

There is no dispute in this case that, after receiving the call for a robbery and rape in progress, Sergeant Salefski had, at minimum, reasonable articulable suspicion to believe that criminal activity was afoot when he arrived at the scene, at around 5:00 in the

morning, and found two people near the dumpsters behind the apartment building, and one of those individuals was an obviously, distraught female kneeling on the ground. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that police may stop and briefly detain a person for purposes of investigation if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot); *see also Illinois v. Wardlow*, 528 U.S. 119, 128 (2000) (explaining that the officer must articulate "a particularized and objective basis for suspecting the particular person stopped of criminal activity" and that judicial review requires "neutral scrutiny 'based on all of the circumstances,' including reliance on 'certain commonsense conclusions about human behavior'") (quoting *United States v. Cortez*, 449 U.S. 411, 417-418 (1981)). And, although the State argues the seizure of items from appellant's person was alternatively a proper stop and frisk under *Terry*, the State's primary argument accepts that appellant was arrested at the end of the foot pursuit, and not merely detained. The issue presented, then, is whether there was probable cause to arrest appellant.

Probable cause is a "practical, nontechnical conception" that concerns "the actual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (citations omitted). In other words, probable cause "is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). And, "'[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt,' and that

the belief of guilt must be particularized with respect to the person to be searched or seized." *Pringle*, 540 U.S. at 371 (internal citations omitted).

Moreover, "innocent behavior frequently will provide the basis for a showing of probable cause[.]" *Gates*, 462 U.S. at 244 n.13. As the Court of Appeals has stated "context matters: actions that may appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances." *Crosby v. State*, 408 Md. 490, 508 (2009) (citation omitted). Therefore, in considering probable cause, the appellate court examines "the events leading up to the arrest," and decides "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to" probable cause. *Pringle*, 540 U.S. at 371.

Both parties direct our attention to *Collins v. State*, 376 Md. 359 (2003). In *Collins*, the police responded to an armed robbery of a convenience store. The first officer on the scene met with the victim and obtained a description of the suspect. *Id*. at 362-63. The clerk described the suspect as an "African-American male, approximately 5 feet 8 inches tall, weighing about 160 pounds, and wearing a black 'nubbie' hat and a long-sleeved gray shirt or sweatshirt with a black stripe or stripes." *Id*. at 363. The clerk reported that the robber was armed and that he just left on foot. *Id*. The description was broadcast to other members of the police department. *Id*.

A patrol officer, hearing the broadcast and responding to the area near the convenience store, observed Collins approximately 200 yards from the store walking away from the store. *Collins*, 376 Md. at 363. Collins was somewhat larger than the person described in the broadcast, but was similarly dressed. *Id*. When Collins saw the

patrol car, he "quickly walked to a payphone to get on the phone as if he was going to make a call." *Id*. The officer detained Collins and conducted a "field interview." *Id*. at 363. When the officer requested permission to "check" Collins to see how much money he possessed, Collins fled. *Id*. at 364. The officer, as well as two other officers who just arrived on the scene, pursued Collins and subsequently arrested him after a lengthy foot chase. *Id*. The Court ultimately concluded that the arrest was supported by probable cause. *Id.* at 374. The Court, recognizing that Collins' flight was a factor in that conclusion, stated "flight from a lawful *Terry* encounter may sufficiently enhance an officer's existing suspicion to warrant an arrest." *Id.* at 373.

This Court in *Moore v. State*, 71 Md. App. 317, *cert. denied*, 310 Md. 491 (1987), also found probable cause sufficient to support a warrantless arrest based on information transmitted on police radio. There, the dispatch related to a robbery indicated that the suspect was:

> [A] black male. In his 20's. Five-foot eight. One hundred and eighty pounds. Wearing a dark leather jacket. The complainant believes it might have been black. She states he also wore she believes blue jeans.

Moore, 71 Md. App. at 321.

Police officers came across an individual matching the description only a short distance from where the robbery had occurred minutes earlier. *Moore*, 71 Md. App. at 321, 325-26. We considered several factors in concluding that the arrest was supported by probable cause. These factors included the proximity to the robbery, the sufficiency of the complainant's description, the observation of perspiration as it related to flight, and whether other factors should have been considered before Moore was arrested. *Id.* at

325-334. Notably, the Court considered the argument that, whereas the complainant believed her assailant was wearing blue jeans, Moore was apparently either attired in gray or dark pants:

> Probable cause, as we stated, is grounded in probabilities. When dealing with descriptions and identifications made in the context of a criminal episode, the probabilities necessarily turn on perceptions of the various actors. What is perceived as gray to one person may be perceived as blue to another individual (based on lighting conditions, ability to observe, reason for observations, innate ability to identify colors, purity of color, degree of attentiveness, texture, memory ability), and merely because there is a difference in perception does not mean the difference is fatal. It is an element that goes to the probability of a certain fact being true.

Id. at 332-33.

We concluded that there was probable cause to arrest Moore:

> In conclusion, recognizing the fact that we are dealing with "probabilities deduced from a set of circumstances taken in combination, not singly," *Heard v. United States*, 197 A.2d 850, 851 (D.C. 1964), we think the observations of the officers, coupled with the information they possessed, rose to the level of probable cause to support appellant's arrest. To borrow from our own Court, we quote Judge Moylan:
>
> > "[E]ach observation, standing alone, may well have been innocuous. That, of course, is beside the point. That each fragment of a mosaic, viewed alone, is meaningless by no means implies that the mosaic itself is without meaning. This is one of those instances where the whole is, indeed, greater than the sum of its parts."

Moore, 71 Md. App. at 338 (citation omitted).

Here, although there was no particularized description of the perpetrator in this case, the police received a citizen tip around 5:20 a.m. that a robbery and a rape were in progress "behind the dumpsters" located at 1608 West Lexington Street. When Sergeant Salefski arrived, only two to three minutes after the dispatch, he saw two figures in that

exact location. Upon illuminating the area, he observed that one of those individuals was standing and the other was a "female kneeling" who was "apparently crying and visibly frightened." When Sergeant Salefski identified himself as a police officer and asked the second individual to "show me your hands," this person, later identified as appellant, immediately fled the scene rather than complying with the officer's order. And, in doing so, appellant abandoned a backpack and did not stop until Sergeant Salefski tackled him a short distance away.

We are persuaded that the totality of the circumstances gave Sergeant Salefski probable cause to believe that a crime was occurring or had just recently occurred. *See* Md. Code (2001, 2008 Repl. Vol.), § 2-202 of the Criminal Procedure Article (authorizing warrantless arrest when an officer has probable cause to believe a felony was committed, whether or not in his presence). These facts include the citizen tip via the 911 call, the location and hour of the apparent crime, the fact that two individuals were involved, and that one of those individuals was a female that appeared in obvious distress, as well as appellant's evasive conduct. *See Crosby*, 408 Md. at 509 (" '[H]eadlong flight – wherever it occurs – is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive.'") (quoting *Illinois v. Wardlow*, 528 U.S. at 124).

We are also not persuaded otherwise by appellant's reliance on *Cleveland v. State*, 8 Md. App. 204 (1969) (*Cleveland* I), and its later case following a retrial, *Cleveland v. State*, 12 Md. App. 712 (1971) (*Cleveland* II). That case concerned the robbery of a liquor store in Rock Hall, and the adequacy of the description of the assailant. *Cleveland*

I, 8 Md. App. at 214. On appeal from the initial trial, we held that the description of the suspect provided to a police officer – that he was a six-foot-tall African American male – was not sufficiently particularized to support probable cause, despite the fact that the officer testified that when he found the suspect, he was walking in a furtive manner. *Cleveland* I, 8 Md. App. at 220-22. But, at the second trial, the officer testified at the motion to suppress that he was told to look for an African American male, approximately six feet tall, 175 to 180 pounds, dressed in a dark jacket, dark pants, and a tan colored cap. *Cleveland* II, 12 Md. App. at 720. We held that the State "supplied the missing ingredients" as to probable cause and affirmed. *Id*. at 720-21.

Pertinent to the issue in this case, we explained the reason for our reversal in *Cleveland* I as follows:

> We cannot say that the information shown to have been within the knowledge of the arresting officer established probable cause to believe that the appellant was the robber. Nor is the deficiency in the evidence supplied by facts and circumstances within the personal knowledge of the officer. The time which elapsed between the commission of the robbery and the observation of the appellant by the arresting officer was not established, although it apparently was of relatively short duration. The distance from the scene of the crime and the place where the arresting officer observed the appellant was not stated in the testimony, although apparently it was somewhere within the proximate vicinity. But even so all the arresting officer saw was 'a colored male walking briskly' across a parking lot in what he considered a 'furtive manner.' The actions of the man observed were not further described so as to permit a determination whether a reasonably cautious person would so characterize the appellant's manner. And there was no indication from the testimony of the officer that the appellant was attempting to flee or evade apprehension. *See Gardner and Maple v. State*, 6 Md. App. 483, 251 A.2d 901. If the evidence here was sufficient for the officer to have probable cause to believe that the appellant was the robber, it would be sufficient for him to have probable cause to believe that *any* man he observed about that time in that vicinity walking briskly in what he thought was a furtive manner was the robber. We think

> that the evidence before the trial court showed at the most that the officer may have had no more than a mere suspicion that the appellant was the robber and this was not enough.

Cleveland I, 8 Md. App. at 221 (emphasis added).

The facts in this case are easily distinguishable from *Cleveland* I in that appellant was observed by the arresting officer, within two to three minutes, at the scene reported by an early morning 911 call, with a woman that was apparently crying and frightened. Further, when the officer identified himself, appellant fled the scene, discarding a backpack along the way. Under the circumstances, we are persuaded that appellant's conduct was sufficient to provide probable cause for his arrest. This conclusion is consistent with Supreme Court precedent explaining probable cause:

> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.

Brinegar v. United States, 338 U.S. 160, 176 (1949).[1]

[1] Based on our conclusion that there was probable cause to support the arrest and subsequent search of appellant, we do not need to address the State's harmless error argument. *See Decker v. State*, 408 Md. 631, 649 n. 4 (2009). We do note, however that, although there was testimony from the victim that appellant took her cellphone, as well as evidence from Sergeant Salefski that cellphones were recovered from appellant following his arrest, the victim's cellphone was never admitted into evidence at trial.

II.

Appellant next argues the trial court's instruction on first degree rape violated his fundamental constitutional right to a unanimous verdict. The State responds that this issue is not preserved because appellant never raised this issue in the trial court and acquiesced to the instruction that was given. The State also asserts the instruction was a correct statement of the law concerning the crime of first degree rape. Appellant replies that he did not acquiesce to the instruction and that the grounds were raised, apparently by implication, because "the only purpose for objecting to any reading of the instruction was because it did not require unanimity for the aggravating element[.]"

Prior to instructions, the State proposed an additional or supplemental instruction to follow the pattern instruction on first degree rape. *See* Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 4:29.1, at 782 (2012) ("MPJI-Cr"). The parties have stipulated that the proposed addition, in its original form, was as follows:

> The State must prove beyond a reasonable doubt only one of those characteristics of first degree rape. In order to convict the Defendant, you must all unanimously agree that the Defendant committed rape in the second degree and that one or more of those characteristics occurred.
>
> You do not have to agree unanimously that a particular characteristic of first degree rape occurred, as long as each of you individually agree that at least one of the characteristics occurred.
>
> In other words, some of you may believe that the defendant committed first degree rape by strangling or suffocating [the victim], some of you may believe that the defendant committed first degree rape by placing [the victim] in reasonable fear that any person known to her would be imminently subjected to death, and some of you may believe that the evidence proves both forms, as long as all of you find that the defendant committed rape in the first degree.

Appellant responded to this addition with three alternative objections: (1) the court should not give the additional language at all; (2) the court should not give the specific examples in the third paragraph at the end of the addition; or, (3) the court should add the following provision at the end of the proposed addition: "If you have a reasonable doubt that any characteristic occurred, you must acquit Mr. Randle on first degree rape." Defense counsel explained the grounds for the objections as follows:

> [DEFENSE COUNSEL]: Well, I would ask, then, to – this is clearly a State instruction of what was –
>
> THE COURT: This is – this is a supplemental –
>
> [DEFENSE COUNSEL]: Well, I –
>
> THE COURT – (continuing) to the instruction.
>
> [DEFENSE COUNSEL]: It does nothing to help the Defense. We can agree on that. So, I think that –
>
> THE COURT: I'm not sure that any of the instructions is necessarily designed to help or negate; but it does explain what some juries that I've experienced have difficulty with this; because they believe they all have to agree on the characteristic, to use the words of the pattern jury instructions.
>
> [DEFENSE COUNSEL]: I think there needs to be a balance there, where we, again, remind them that reasonable doubt, as to – as to first degree rape requires an acquittal.
>
> And, that's – and the reason why I'm saying the second part of the paragraph needs to come out is, that is – that – *the State can argue that until the cows come home in their – in their closing argument*.
>
> For the Court to instruct that, though, I think it kind of blurs the line between instructions and suggestions as to – as to – as to a verdict. But, I think the first part that we – we still think is skewed towards the State. At least there – it's more instructive on the law.

> The second part takes into account the State's – the State's specific argument in this case.

(Emphasis added).[2]

After hearing from the State, the court agreed to give the State's proposed additional instruction, absent the specific examples contained in the third paragraph. The court then proceeded to instruct the jury, instructing them as to the law of first degree rape as follows:

> The Defendant is also charged with the crime of first degree rape. In order to convict the Defendant, the State must prove all of the elements of forcible second degree rape; and also must prove one or more of the following circumstances.
>
> One, the Defendant used or displayed a dangerous weapon or an object that [the victim] reasonably concluded was a dangerous weapon. Two, that the Defendant suffocated, strangled, disfigured, or caused serious physical injury to [the victim] in the course of committing the offense.
>
> Three, the Defendant threatened or placed [the victim] in reasonable fear that [the victim] would be imminently subjected to death, suffocation, strangulating, disfigurement, serious physical injury or kidnapping.
>
> [A] dangerous weapon is an object that is capable of causing death or serious bodily harm. Kidnapping is the confinement or detention of a person against that person's will, accomplished by force or threat of force; coupled with the movement of that person from one place to another, with the intent to carry or conceal.

[2] Read in context of defense counsel's overall argument, the reference to "the second part of the paragraph" is presumably a reference to the second paragraph of the proposed supplemental instruction which provides, in part, that the jury did not "have to agree unanimously that a particular characteristic of first degree rape occurred." As the statement that "the State can argue that until the cows come home" indicates, defense counsel was not arguing that the supplemental instruction incorrectly stated the law or that it violated appellant's fundamental right to a unanimous verdict on a particular characteristic of first degree rape.

> The State must prove beyond a reasonable doubt only one of those characteristics of first degree rape. In order to convict the Defendant, you must all unanimously agree that the Defendant committed rape in the second degree and that one or more of those characteristics of first degree rape occurred.
>
> You do not have to agree unanimously that a particular characteristic of first degree rape occurred, as long as each of you individually agree that at least one of the characteristics occurred.

At the end of jury instructions, the court asked for objections to the instructions but noted that the appellant had "a continuing objection to the supplement that we discussed previously."

Appellant's argument on appeal is that the instruction at issue violated his constitutional right to a unanimous verdict. *See* Md. Rule 4-327 (a) ("The verdict of a jury shall be unanimous and shall be returned in open court"); *Caldwell v. State*, 164 Md. App. 612, 630-31 (2005) (observing that the right to a unanimous verdict is guaranteed by Article 21 of the Maryland Declaration of Rights) (citations, footnote omitted). However, Maryland Rule 4-325(e) provides 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." As explained by the Court of Appeals, "[a] principal purpose of Rule 4-325(e) 'is to give the trial court an opportunity to correct an inadequate instruction before the jury begins deliberations.'" *Alston v. State*, 414 Md. 92, 112 (2010) (quoting *Bowman v. State*, 337 Md. 65, 69 (1994)); *see also Holmes v. State*, 209 Md. App. 427, 448 (2013) ("[W]hen a defendant fails to meet his or her 'duty of stating

distinctly at the time the specific grounds of objection' for a jury instruction, appellate consideration of such a claim will be forfeited") (citation omitted)).

At trial, appellant argued that the instruction favored the State and that there should be a balancing of sorts that accounted for reasonable doubt. As noted, he did not raise the unanimous verdict argument now being raised on appeal. As the Court of Appeals has stated, "[w]hile an appellant/petitioner is entitled to present the appellate court with 'a more detailed version of the [argument] advanced at trial[, this Court has refused] to require trial courts to imagine all reasonable offshoots of the argument actually presented to them before making a ruling on admissibility.'" *Starr v. State*, 405 Md. 293, 304 (2008) (quoting *Sifrit v. State*, 383 Md. 116, 136 (2004)). In short, this issue has not been preserved for appellate review.[3]

III.

Finally, appellant contends that the trial court erred by not merging his sentence for false imprisonment into his sentence for first degree rape because the two convictions were based on the same acts. The State responds that appellant's claim that the two offenses were based on the same act is not preserved because it was not raised at sentencing. The State also contends that, to the extent that appellant's argument is based

[3] Given our conclusion that the grounds raised on appeal differ from those raised at trial, it is unnecessary for us to address the State's alternative argument suggesting that appellant acquiesced to the proposed instruction. We simply note that appellant was given a continuing objection to the arguments he actually raised during trial. *See* Maryland Rule 4-323 (b) (a court may grant a continuing objection, but that objection "is effective only as to questions clearly within its scope").

on fundamental fairness, such a claim must be preserved by a specific objection at trial on this ground. *See Pair v. State*, 202 Md. App. 617, 645 (2011). Moreover, were we to reach the merits, the State argues that the facts in this case establish a detention apart from the rape, and that the two sentences should stand as imposed. In reply, appellant disputes the State's characterization of his argument, insisting that merger is required because the false imprisonment and the first-degree rape were based on the same act. In his view, any detention in this case was inseparable from the sexual acts and the sentences merge.

The Double Jeopardy Clause provides that no person shall "be subject to the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amend. V. This constitutional guarantee is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *State v. Long*, 405 Md. 527, 535-36 (2008) (citing *Benton v. Maryland*, 395 U.S. 784, 794 (1969). And, "[d]espite the fact that the Maryland Constitution lacks an explicit double jeopardy clause, Maryland common law provides well-established protections for individuals against being twice put in jeopardy." *State v. Long*, 405 Md. at 536 (citing *Taylor v. State*, 381 Md. 602, 610 (2004)). "This protection against being twice put into jeopardy prohibits three distinct abuses: 1) the second prosecution for the same offense after acquittal; 2) the second prosecution for the same offense after conviction for that offense; and 3) the imposition of multiple punishments for the same offense." *Taylor*, 381 Md. at 610.

"In order for two charges to represent the same offense for double jeopardy purposes, they must be the same 'in fact' *and* 'in law.'" *Scriber v. State*, 437 Md. 399,

408 (2014) (emphasis added). In determining whether two offenses are the same "in fact," we consider whether the offenses "arise from the same incident or course of conduct[.]" *Anderson v. State*, 385 Md. 123, 131 (2005). As we have further explained:

> The "same act or transaction" inquiry often turns on whether the defendant's conduct was "one single and continuous course of conduct," without a "break in conduct" or "time between the acts." *Purnell v. State*, 375 Md. 678, 698, 827 A.2d 68 (2003). The burden of proving distinct acts or transactions for purposes of separate units of prosecution falls on the State. *Snowden v. State*, 321 Md. 612, 618, 583 A.2d 1056 (1991). Accordingly, when the indictment or jury's verdict reflects ambiguity as to whether the jury based its convictions on distinct acts, the ambiguity must be resolved in favor of the defendant.

Morris v. State, 192 Md. App. 1, 39 (2010) (citations omitted).

In considering whether the offenses are the same "in law," we apply merger principles. *See Abeokuto v. State*, 391 Md. 289, 352 (2006) ("The doctrine of merger of offenses for sentencing purposes is premised in part on the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution"). "Maryland recognizes three grounds for merging a defendant's convictions: (1) the required evidence test; (2) the rule of lenity; and (3) 'the principle of fundamental fairness.'" *Carroll v. State*, 428 Md. 679, 693-94 (2012) (quoting *Monoker v. State*, 321 Md. 214, 222-23 (1990)).

The required evidence test is also called the "*Blockburger* test." *See Blockburger v. United States*, 284 U.S. 299 (1932). That test "focuses upon the elements of each offense; 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." *Abeokuto*, 391 Md. at 353 (citation omitted). Merger may also be compelled under the rule of lenity, "which applies only where at least one of the two offenses

subject to the merger analysis is a statutory offense." *Latray v. State*, 221 Md. App. 544, 555 (2015). The rule of lenity provides that, "if we are unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, we, in effect, give the defendant the benefit of the doubt and hold that the crimes do merge." *Alexis v. State*, 437 Md. 457, 485 (2014) (quoting *Monoker, supra*, 321 Md. at 222)). Merger based on the fundamental fairness is essentially a question of equity and "depends on the circumstances surrounding the convictions, not solely on the elements of the crimes." *Latray*, 221 Md. App. at 558.[4]

Although not expressly referred to by appellant, it is apparent that this issue is raised pursuant to Maryland Rule 4-345(a), which provides that "[t]he court may correct an illegal sentence at any time." And, the " 'failure to merge a sentence is considered to be an "illegal sentence" within the contemplation of the rule.'" *McClurkin v. State*, 222 Md. App. 461, 489 n.8 (quoting *Pair*, 202 Md. App. at 624), *cert. denied*, 443 Md. 736, *cert. denied*, *McClurkin v. Maryland*, 136 S. Ct. 564 (2015). Because merger is rooted in double jeopardy law, we are satisfied that appellant's argument that the sentences merge is properly before us on appeal.

The crimes at issue are false imprisonment and first degree rape. We have already set forth the elements of first degree rape, which, in brief, prohibits "vaginal intercourse

[4] It is the sentence, not the conviction, that is merged under any of these rationales. *See, e.g., In re Montrail M.*, 325 Md. 527, 533 (1992) ("In a criminal prosecution a judgment consists of the conviction and the punishment imposed thereon" and "a merger does not serve to wipe out a conviction of the merged offense. The conviction simply flows into the judgment entered on the conviction into which it was merged").

with another by force, or the threat of force, without the consent of the other" under certain delineated circumstances. Crim. Law § 3-303. False imprisonment, a common law offense, is the "unlawful detention of another person against his [or her] will." *Marquardt v. State*, 164 Md. App. 95, 129 (2005) (quoting *Midgett v. State*, 216 Md. 26, 39 (1958)).

Appellant cites *Brooks v. State*, 439 Md. 698 (2014), as the primary support for his merger contention. In that case, Brooks, a handyman who occasionally worked for the victim, appeared in her bedroom one evening, uninvited, demanding sex. *Brooks*, 439 Md. at 703. A physical struggle ensued between the victim and Brooks in the bedroom, culminating in the victim telling Brooks she would comply if he stopped attacking her. *Id*. at 704. She then walked to the living room, drank some water and smoked a cigarette, and then, following Brooks' instructions, returned to the bedroom where Brooks forced her to engage in intercourse. *Id*. After a while, the victim told Brooks she needed a break and was permitted to return to the living room, accompanied all the while by Brooks. *Id*. She eventually returned to the bedroom and surreptitiously called 911. *Id*. Thereafter, the victim managed to escape by eluding Brooks and fleeing out of the house. Brooks was arrested by police moments later. *Id*. at 704-05. Countering this evidence at trial was Brooks's claim that he and the victim engaged in consensual sex. *Id*. at 706. The jury disagreed and convicted Brooks of first degree rape, false imprisonment, and other related counts. *Id*. at 707.

In considering whether the trial court erred by imposing a separate, consecutive sentence for false imprisonment, in addition to the sentence for first degree rape, the

Court of Appeals stated "[s]entences 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." *Brooks*, 439 Md. at 737. The Court noted that this Court had considered a similar issue in *Hawkins v. State*, 34 Md. App. 82 (1976). *Brooks*, 439 Md. at 737. The Court of Appeals summarized the pertinent facts in *Hawkins* as follows: "the defendant approached the victim in a wooded area, seized her by the throat, held a gun to her side, ordered her to undress and lie on the ground, and raped her. The [trial] court noted that the victim was detained only for the time necessary to complete the rape." *Brooks*, 439 Md. at 737. Based on these facts, the *Hawkins* Court found that false imprisonment merged into rape, stating:

> The true test of merger under the modern doctrine is whether one crime necessarily involves the other, *viz*., when the facts necessary to prove the lesser offense are essential ingredients in establishing the greater offense, the lesser offense is merged into the greater offense.

Hawkins, 34 Md. App. at 92 (citation omitted).

Having concluded that where the victim had only been detained a sufficient time to accomplish the rape, the false imprisonment conviction merged with the rape conviction. *Hawkins*, 34 Md. App. at 92. We explained:

> The facts of the instant case show the victim was detained only a sufficient time to accomplish the rape. False imprisonment does not require a taking away, but simply an unlawful confinement. All of the facts necessary to prove the lesser offense were essential to proving the greater one and, therefore, the two offenses merged. To hold otherwise would be to hold that in every case of rape, a conviction for false imprisonment would also be proper. Of course, confinement after or before the rape is committed would preclude the merger.

Hawkins, 34 Md. App. at 92 (citation omitted).

The *Brooks* Court, after considering *Hawkins*, noted that the jury instructions demonstrated that "the facts necessary to prove a rape also prove false imprisonment for the period of the rape." *Brooks*, 439 Md. at 737-38. In other words, the following elements required to prove false imprisonment were similar to those for first degree rape:

> (1) that the defendant confined or detained the victim; *as Hawkins indicated, confinement or detention of the victim is necessarily part of the proof of a rape*
>
> (2) that the victim was confined or detained against the victim's will; *a rape involves sexual intercourse without the victim's consent -- i.e., against the victim's will*
>
> (3) the confinement or detention was accomplished by force or threat of force; *forcible second degree rape involves the use of force or threat of force*

Brooks, 439 Md. at 738 (emphasis in original).

In addressing "[t]he critical question as to merger in this case is thus whether the rape conviction and the false imprisonment conviction are based on the 'same act or acts,'" *Brooks*, 439 Md. at 738-39, the Court reasoned:

> 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.

Brooks, 439 Md. at 739.

It was unclear in *Brooks* whether the "detention of [the victim] before or after the rape was the basis for the false imprisonment conviction." *Brooks*, 439 Md. at 741. In addition, the jury instructions "did not specify that the jury must find that detention occurred either prior to or after the rape to convict Mr. Brooks of false imprisonment if it also convicted him of rape" and "[t]here was no specific reference to detention before or after the rape in the jury instructions." *Id*. And, the prosecutor in closing argument, "did not suggest that the jury should consider the time before or after the rape separately in considering the false imprisonment count." *Id*. at 742. That was followed by a note from the jury asking "Is false imprisonment time dependent? If the victim was restrained for a brief moment, is that considered false imprisonment?" *Id*. Noting that "it is difficult to infer from this question that the jury was specifically focused on a time period separate from the rape itself," *id*., the Court merged the offenses, stating:

> Because the precise factual basis of the jury's conviction of Mr. Brooks of false imprisonment is not readily apparent and any factual ambiguities must be resolved in favor of the defendant, we must assume that the false imprisonment conviction was based on the same facts as the rape conviction -- that is, the detention of [the victim] during the rape. As indicated above, under the required evidence test, all the elements of the offense of false imprisonment are included in the elements of the offense of first degree rape. Therefore, the two offenses must merge for sentencing purposes.

Brooks, 439 Md. at 742.

The jury instructions in this case were substantially the same as the instructions in *Brooks*. And, just as in *Brooks*, although the jury here might have convicted appellant for the false imprisonment based on acts separate from the rape, the instructions also permitted the jury to convict appellant of false imprisonment for a confinement

coincident with the rape. *Brooks*, 439 Md. at 738-39. Furthermore, although the prosecutor distinguished between the sex offense of fellatio and the first-degree rape, the closing argument in this case did not make any significant distinction, in so far as false imprisonment is concerned, between the offenses. And, we have not been able to find any argument asking the jury to find more than one unlawful detention.

Indeed, the facts could also suggest that the jury found only one period of detention that was incident to the rape and sexual offense, with the former closely following the latter. The victim testified she was standing at her doorstep when appellant grabbed her from behind. She did not remember how she got to the dumpster, where both the sex offense and the rape occurred. In addition, it was not entirely clear at trial just how far the dumpster was located from the victim's doorstep. She testified that it was approximately the same distance from the witness stand to the defense table during her testimony.[5] In any event, it was no more than a short distance from the victim's doorstep to the dumpsters.

In short, as in *Brooks*, any ambiguity that remains must be resolved in favor of the appellant. *See Gerald v. State*, 137 Md. App. 295, 312 (2001) ("Any ambiguity in the indictment or as to how the jury understood the charges must be resolved in [appellant's] favor"). *Cf. Jones-Harris v. State*, 179 Md. App. 72, 97-100 (2008) (declining to merge second-degree sexual offense with false imprisonment where the victim "was not

[5] After this case was appealed to this Court, the parties stipulated that this distance was thirteen feet. In other words, the victim was moved a relatively short distance from her door to a more secluded and private location to accomplish the sexual attack.

detained only for the time sufficient to accomplish the sexual assaults" and where "the charge of false imprisonment was supported by facts independent of the facts supporting the two charges of second-degree sexual offense"); *Paz v. State*, 125 Md. App. 729, 734, 740-41 (1999) (disagreeing that attempted first degree rape and false imprisonment merged in a case where the appellant grabbed a woman and dragged her twenty to twenty-five feet across a street, held a knife to her neck, and admitted that he wanted to force her to have sex with him). Accordingly, we shall vacate appellant's concurrent sentence for false imprisonment.

SENTENCE FOR FALSE IMPRISONMENT VACATED; JUDGMENTS OTHERWISE AFFIRMED.

COSTS TO BE PAID TWO THIRDS BY APPELLANT AND ONE THIRD BY MAYOR AND CITY COUNCIL OF BALTIMORE.