Circuit Court for Garrett County
Case No. 11-K-15-5223

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1852

September Term, 2016

PATRICK MICHAEL GARY

v.

STATE OF MARYLAND

Beachley,
Shaw Geter,
Thieme, Raymond, G., Jr.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Shaw Geter, J.
Concurring & Dissenting Opinion by Beachley, J.

Filed: October 10, 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.

Appellant, Patrick Michael Gary, was charged in the Circuit Court for Garrett County with sexual abuse of a minor, attempted second degree rape, second degree sexual offense, perverted sexual practice, fourth degree sexual offense, and second degree assault. Appellant waived his right to a jury trial and was tried by the court, and the court found him guilty on all charges. Appellant received the following sentence: twelve years for sexual abuse of a minor, with the charge of attempted second degree rape merged; ten years consecutive for second degree sexual offense; five years consecutive for perverted practices; one year concurrent for fourth degree sexual offense, and five years, all suspended, for second degree assault. He was ordered to serve five years supervised probation and to register as a sex offender upon release. Appellant timely appealed and presents the following questions for our review:

> 1. Must the period of probation be stricken in the absence of the imposition of a suspended portion of any sentence?
>
> 2. Did the trial court err in denying Appellant's motion to suppress the fruits of two unlawful wiretaps?
>
> 3. Did the trial court err in imposing separate sentences for second degree sexual offense, fourth degree sexual offense, and perverted practice?

We shall remand this case for resentencing so that the court may correct the illegal sentence as alleged in appellant's first question presented, and to vacate appellant's sentence for unnatural and perverted practice. Otherwise, the judgments are affirmed.

BACKGROUND

In view of the issues presented, and because appellant does not challenge the sufficiency of the evidence, "[i]t is unnecessary to recite the underlying facts in any but a

summary fashion because for the most part they [otherwise] do not bear on the issues we are asked to consider." *Teixeira v. State*, 213 Md. App. 664, 666 (2013) (citations and internal quotation marks omitted); *see also Hill v. State*, 418 Md. 62, 66-67 (2011) (recognizing that, when the issue concerns a pre-trial motion to suppress, "it is unnecessary to discuss in detail the evidence that was developed at trial").

Here, S.G., 18-years-old at the time of trial, testified that her father, appellant, had been sexually abusing her since she was 12-years-old. The first incident she remembered occurred when she was sleeping in her parent's bed, and she woke to see appellant masturbating beside her. She also remembered other occasions where appellant would "rub his foot against my crotch," "rub down at my vaginal area with his hand," "be licking my vagina," and would "take my foot and move it" to his crotch area. She testified that he rubbed his foot on her crotch area approximately ten or more times, and that "[t]he oral was around four or five." S.G. also recounted that appellant placed his fingers inside her vagina approximately two to three times.

One time, after appellant told her that "I want your mouth around my head or around my cock," she testified that she "started to put my mouth on his penis" and then "freak[ed] out, and I left the room, and I was crying and everything." There was another incident when S.G. was in the kitchen and appellant hugged her from behind, pressing up against her so that she "could feel his penis pressing against my back." S.G. did not report any of these incidents, which she indicated occurred between the ages of 12 and 14, until approximately June 18, 2015, when she reported the abuse to the Garrett County Sheriff's Office.

S.G. also testified to one specific assault when she was 14-years-old. On that occasion, and because her back was hurting, appellant directed her to lay down to give her a massage. As S.G. was on her stomach and appellant was sitting on her back, "he shifted my waist and pulled my shorts and underwear aside and was trying to insert his penis, and if he were a little – a little bit harder, he would have been able to." S.G. yelled at appellant and told him to leave her room.

In addition to these incidents of direct physical contact, S.G. testified that appellant drilled holes in the walls in their home, including one from the hallway leading into the bathroom. The hole was positioned such that, if she was seated on the toilet, a person could see in and "see between someone's legs." Other holes let someone see her "either going to the bathroom or taking a shower, even changing in my room." And, S.G. testified that she had seen appellant looking through the holes at her.

She further testified that, from the time she was 14-years-old until she was 17-years-old, appellant would sometimes come into her room and expose his erect penis to her. On another occasion, approximately sometime in April 2015, S.G. found a note in the car that suggested appellant had "incestual feelings" for her. Thereafter, on or around June 17, 2015, S.G. reported these incidents to her mother, and they both went to the Sheriff's Office the next day and reported the abuse to the police.

S.G. agreed that she consented when the police sought to monitor and record a telephone conversation between herself and appellant. S.G.'s mother, Kimberly G., confirmed that she also consented to the pretext call between S.G. and appellant. Following this consent, S.G. called appellant on her cellphone, and a tape recording and transcript

were prepared from that call and admitted into evidence at trial. During that phone call, appellant admitted that he knew "there were things that happened in the past." He also stated: "It isn't all your fault [S.G.] but I don't, I honestly do not, I mean I recall things that happened when you were younger or it was a few years ago. I can't remember when it was."

Appellant also claimed he was dreaming when some of these events occurred, including when S.G. walked in on him. When S.G. reminded appellant that he had "been erect" around her, and that, she would "wake up and during the night, and your head would have been between my legs and doing stuff," appellant initially replied that he did not remember, but also stated "[o]bviously it's [sic] happened, but I don't know why it happened and I don't know, you know, what even caused it to happen." The two also engaged in the following exchange during this phone call:

> [S.G.]: Do you think I'm imagining this like it didn't happen?
>
> [APPELLANT]: Well I'm not saying you're imagining this. Obviously it did happen. And again it was something that happened in the past for whatever reason, and I just as soon not even talk about it. Like I did bring it up because I just want to find out exactly (unintelligible) in that direction but after you said that stuff ended right then and there. That was it. That ended it. Until now and now it's all coming back up again.

Appellant further acknowledged that, not only "things did happen," but that he could be arrested and charged with "rape and assault of a minor." When asked whether S.G. should discuss appellant's attempt to have sex with her, apparently with a mental health professional, appellant replied that "I wouldn't only because it can really escalate into

something" and that, if she did, "they'll walk right here in the store at Lowes and they'll arrest me and take me right out of here. That will be the last time you'll see me."

As will be discussed in more detail, Sergeant Robert Zimmerman, of the Garrett County Sheriff's Office, spoke to S.G. and helped arrange this pretext call. Immediately afterwards, Sergeant Zimmerman went to the Lowe's store in Oakland, Maryland, and arrested appellant. After appellant was read his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), the officer confronted appellant with some of S.G.'s allegations. According to the officer, appellant responded that "he did not do it intentionally" or "purposefully." Appellant also denied watching S.G. through the holes looking into the bathroom.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant first contends that his supervised probation must be stricken because he did not receive a suspended sentence on any count. The State responds that the appellant misreads his own disposition because appellant was given a suspended sentence on his conviction for second degree assault. The State further suggests we ignore the fact that, after imposing a suspended sentence, the sentencing court then generally merged the second-degree assault sentence with the rest of appellant's sentence. We agree with appellant that the court imposed an illegal sentence, under these circumstances, and that,

in accord with Maryland Rule 8-604 (d) and *Twigg v. State*, 447 Md. 1 (2016), this case should be remanded for resentencing.[1]

Here, at disposition, the court imposed the following sentence:

> The sentence of the Court is as follows. On Count 1 in this case, which is the sex abuse of a minor, the sentence of the Court is 12 years to the Department of Corrections.
>
> On Count 2, attempted second-degree rape, I am going to merge that into Count 1 in this matter.
>
> With respect to Count 3, second-degree sex offense, the sentence of the Court is ten years to the Department of Corrections. That sentence will be consecutive to any and all other sentences imposed by this or any other court.
>
> Count 4, perverted practices, the sentence of the Court for that charge is five years to the Department of Corrections, consecutive to any and all other sentences imposed by this Court.
>
> Count 5, fourth-degree sex offense, one year, concurrent to Count 4 and all other charges.
>
> Count 6, second-degree assault, the sentence of this Court is five years. That will all be suspended. There will be a period of five years supervised probation upon release. You will register as a sex offender upon your release in this matter.

This suspended sentence on the second-degree assault conviction, as well as the 5 years supervised probation, is reflected on the commitment record, the probation/supervision order, and the docket entries. However, despite the fact that these documents clearly reflect the court's intention to impose a suspended sentence and a period

[1] Although appellant failed to raise this issue at sentencing, a claim that a period of probation is illegal, like a claim of an illegal sentence, may be raised at any time, with an exception inapplicable in this case. *See Goff v. State*, 387 Md. 327, 340 (2005) ("'[A]n illegal condition of probation can be challenged as an illegal sentence.'") (quoting *Walczak v. State*, 302 Md. 422, 427 (1985)).

of probation, the court apparently modified its sentencing on the second-degree assault conviction, moments after the aforementioned disposition, as follows:

> THE DEFENDANT: Um, Your Honor, if I'm reading this correctly, did you say that all the sentences are suspended?
>
> THE COURT: No.
>
> [DEFENSE COUNSEL]: No.
>
> THE COURT: No, they are not suspended.
>
> THE DEFENDANT: Oh –
>
> [DEFENSE COUNSEL]: Your Honor, if I could ask one question?
>
> THE COURT: [Prosecutor], you –
>
> [PROSECUTOR]: No, go ahead.
>
> [DEFENSE COUNSEL]: Your Honor, I have one question. As far as the – you have five years suspended as far as second-degree assault?
>
> THE COURT: Assault.
>
> [DEFENSE COUNSEL]: Assault.
>
> THE COURT: Yes.
>
> [DEFENSE COUNSEL]: Would you consider merging that generally?
>
> THE COURT: You wish to be heard on that, [Prosecutor]?
>
> [PROSECUTOR]: Um, I'll defer to the Court.
>
> THE COURT: Okay.
>
> [PROSECUTOR]: Actually, I think – I think it has to be, factually.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: I believe it – I believe it should.

> [PROSECUTOR]: I don't know that we have – any assaults – I don't know that we factually have any assaults that are not part and parcel–
>
> THE COURT: All right.
>
> [PROSECUTOR]: -- of the other events –
>
> THE COURT: I will generally merge Count 6, second-degree assault.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor.
>
> THE COURT: All right. Anything else? Anything further?
>
> [PROSECUTOR]: Not in this case, Your Honor. Thank you.
>
> [DEFENSE COUNSEL]: No, Your Honor.
>
> THE COURT: Okay. All right. Okay. You're excused.

Criminal Procedure Section 6-222 imposes limits on probation after judgment. Pertinent to this issue, the statute provides that "[a] circuit court or the District Court may: (1) impose a sentence for a specified time and provide that a lesser time be served in confinement; (2) suspend the remainder of the sentence;" and, (3) order probation for a time longer than the sentence, so long as probation does not exceed 5 years if ordered by the circuit court, 3 years if ordered by the District Court, and for certain sex offenses against minors, 10 years if ordered by the circuit court and 6 years if ordered by the District Court. Md. Code (2001, 2008 Repl. Vol., 2016 Supp.) § 6-222 (a) of the Criminal Procedure ("Crim. Proc.") Article.

This statute was discussed in *Cathcart v. State*, 397 Md. 320 (2007). There, the Court of Appeals considered whether Cathcart's sentence of life, suspended all but ten years, on his conviction of false imprisonment was illegal where the court failed to impose any successive period of probation. *Cathcart*, 397 Md. at 322-23. The Court explained

that a court may impose a split sentence with a life sentence. But, if a court elects to impose a suspended sentence, the court must comply with the requirements of Crim. Proc. § 6-222 and impose a period of probation. *Cathcart*, 397 Md. at 327; *accord State v. Crawley*, __ Md. __, No. 65, Sept. Term 2016 (decided August 2, 2017) (slip op. at 6). Because there was no period of probation imposed on the suspended part of the sentence on Cathcart's conviction for false imprisonment, the Court held that the unsuspended part of the sentence, *i.e.*, ten years for false imprisonment, was all that remained. *Id*. at 330-31. *Cf. Greco v. State*, 427 Md. 477, 513 (2012) (holding that a limited remand was required in a case where the petitioner was convicted of first degree murder and then given an illegal sentence of life with all but 50 years suspended, but no period of probation).

Appellant argues this case presents the "mirror image" of *Cathcart* in that a period of probation remains ordered but that probation was not attached to any suspended sentence. This argument is based on the resulting sentence actually reflected in the sentencing transcript. As noted, after imposing a five-year sentence, all suspended, on the second-degree assault conviction, the court merged that sentence generally. *See, e.g., Cortez v. State*, 104 Md. App. 358, 366-68 (1995) (merging and vacating sentence on battery with sentence for fourth-degree sexual offense where there was an ambiguity in the record concerning whether the battery and the sex offense were based on separate and distinct acts); *see also Turner v. State*, 181 Md. App. 477, 491 (2008) ("When there is . . . a discrepancy between the transcript and the docket entries, absent any evidence that there is error in the transcript, the transcript controls.") (citing *Carey v. Chessie Computer Servs., Inc*., 369 Md. 741, 748 (2002)). Because the court only imposed a suspended sentence on

the second-degree assault conviction, we agree with appellant that his term of probation was not connected to any suspended sentence and was illegal under *Cathcart, supra*.

However, we are not persuaded that the remedy is simply striking the period of probation. Maryland Rule 8-604(d)(2) states that, "[i]n a criminal case, if the appellate court reverses the judgment for error in the sentence or sentencing proceeding, the Court shall remand the case for resentencing." In *Twigg, supra*, 447 Md. at 20-21, a case decided under the doctrine of merger, the Court of Appeals approved the propriety of remanding a case for resentencing on a greater offense after the merger of a lesser-included offense. Recognizing that sentencing in a case involving multiple counts is akin to sentencing on a "package" that "takes into account each of the individual crimes of which the defendant was found guilty," *id*. at 26-27, the Court concluded that a remand for resentencing was a preferred remedy because "'the sentencing judge, herself, is in the best position to assess the effect of the withdrawal [of the assault conviction from the sentencing package] and to redefine the package's size and shape (if, indeed, redefinition seems appropriate).'" *Twigg*, 447 Md. at 28 (quoting *United States v. Pimienta-Redondo*, 874 F.2d 9, 14 (1st Cir. 1989)). Accordingly, because, like *Twigg*, we are ultimately concerned with the imposition of an illegal sentence, *see, e.g., McClurkin v. State*, 222 Md. App. 461, 489 n.8 (2015) (observing that the "failure to merge a sentence is considered to be an 'illegal sentence'") (citation omitted), we shall remand this case to the circuit court for resentencing. We note that, upon remand, the court ordinarily may not impose a sentence greater than the sentence that it originally imposed. *Twigg*, 447 Md. at 30 n.14 ("The only caveat, aside from the exception set forth in [Md. Code (1988, 2013 Repl. Vol.), § 12-702(b)(1)–(3) of the Courts

and Judicial Proceedings Article], is that any new sentence, in the aggregate, cannot exceed the aggregate sentence imposed originally.”).

II.

Appellant next asserts the court erred in denying his motion to suppress the fruits of two wiretaps: the “pretext call” between the appellant and S.G., and the interrogation of appellant by Sergeant Robert Zimmerman.[2] First, with respect to the call between appellant and S.G., appellant makes two specific arguments on appeal: (1) that S.G.’s mother could not consent to the call because she was not “one of the parties to the communication;” and, (2) that the State failed to prove that S.G. “knowingly and voluntarily consented to participate” as S.G. did not testify at the suppression hearing. Second, with respect to the recorded interview between appellant and Sergeant Zimmerman, appellant argues that, absent a showing that the officer’s safety was in jeopardy, the use of the recording device, which appellant asserts was a “body wire,” recording of the interview was prohibited by Section 10-402 (c)(6) of the Courts and Judicial Proceedings article. See Md. Code (1973, 2013 Repl. Vol., 2016 Supp.), § 10-402 (c)(6)(i) of the Courts and Judicial Proceedings (“C.J.P.”) Article.

The State responds that appellant’s arguments concerning the “pretext call” between appellant and S.G. are not preserved because the specific grounds raised on appeal were never raised in the trial court. The State further responds on the merits by indicating that

[2] At the time of trial, Robert Zimmerman was referred to as “Lieutenant Zimmerman.” For ease of discussion, we shall use the rank the officer held at the time of the suppression hearing.

both S.G. and her mother could, and did, consent to the recording at issue. With respect to the recording of the interview between appellant and Sergeant Zimmerman, the State contends that, assuming that the recording device was a "body wire," the recording was otherwise lawful under Section 10-402(c)(2). Further, because the recording was not admitted at trial, the State continues, any error in not suppressing the recording of the interview was harmless beyond a reasonable doubt.

At the start of the motions hearing, appellant's defense counsel argued, as to the pretext call between appellant and S.G., that "we did not have a consenting party" because S.G. was under the age of 18. Defense counsel also suggested that the lack of consent could not be cured by the presence of S.G.'s mother. As to the recorded interview with Sergeant Zimmerman, defense counsel asserted in opening that the recording device was a "body wire" and that such a device could only be used if officer safety was implicated.

During the evidentiary portion of the hearing, Sergeant Zimmerman testified that he first spoke with the victim, S.G., at the Garrett County Sheriff's Office on June 18, 2015. S.G. was accompanied by her mother, Kimberly G., at the time. S.G. informed the officer that her father, appellant, had inappropriately touched her, and had attempted to have oral sex with her.

Hearing the detailed allegations from S.G., Sergeant Zimmerman elected to employ a consensually monitored telephone call known as a "pretext call." The officer explained the procedures involved in the call to S.G., including that she should sign a consensual monitoring form that would permit the police to monitor and record the phone call. The officer explained the form to S.G. and S.G., who was 17-years-old at the time, signed the

form as the consenting party. The consensual monitoring form was received into evidence at the motions hearing, without objection.

Sergeant Zimmerman also testified that, as part of explaining the pretext call, he explained the consensual monitoring to the victim's mother, Kimberly G. Sergeant Zimmerman explained that "we would place a phone call, monitor the phone call, and record the phone call." According to the officer, the victim's mother, "understood, and she agreed along the same as she agreed to allow the interview to happen with her." The officer explained that he also obtained verbal consent from S.G.'s mother to conduct the initial recorded interview with S.G.

After S.G. signed the consensual monitoring form, S.G. called appellant on her own phone. At the conclusion of the call, Sergeant Zimmerman believed there was enough evidence to place appellant under arrest.[3] Upon learning that appellant was located at a Lowe's hardware store in Oakland, Maryland, Sergeant Zimmerman travelled to that location, found appellant, and then escorted him out to his police car. There, appellant was handcuffed, arrested, and then seated in the front passenger seat of Sergeant Zimmerman's police car. At that time, appellant was advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), responding that he understood those rights.

[3] The officer also obtained consent from Kimberly G. to search the residence she shared with appellant. A subsequent search warrant authorized forensic evaluation of the electronic devices seized from the residence. Although the recovered evidence tended to corroborate S.G.'s allegations, it is not relevant to any issues raised on appeal and need not be discussed further.

Prior to appellant's arrest, Sergeant Zimmerman testified that he had filled out a consensual monitoring form, listing himself as the consenting party to the interception and recording of wire, oral, or electronic communications. The officer then placed a digital recording device inside his pocket, prior to meeting and arresting appellant. The entire conversation between Sergeant Zimmerman and appellant, from his police car, to the courthouse, to the jail, was recorded on that device.

On cross-examination, Sergeant Zimmerman agreed Kimberly G. was not in the room when S.G. called appellant, and that only himself, S.G., Detective William Winters, assigned to the Garrett County State's Attorney's Office were present. And, Kimberly G. did not sign a separate consent form.

Sergeant Zimmerman then clarified that he went to Lowe's after this phone call between S.G. and appellant. A small recording device was concealed in his pocket at the time. Sergeant Zimmerman agreed that the appellant was not informed that the conversation was being recorded, stating, "[h]e did not know." Part of the conversation was recorded before appellant received the *Miranda* warnings. And, Sergeant Zimmerman added that, after appellant was brought to the jail and given the charging documents, appellant told the officer he did not want to speak to him anymore.

Kimberly G. then testified at the suppression hearing, confirming that she and her daughter, S.G., went to the sheriff's office on June 18, 2015. Kimberly G. was aware that her daughter was "providing some information" to the police. She also agreed that Sergeant Zimmerman explained that he wanted to record a telephone conversation between

appellant and their daughter. Kimberly G. testified she was asked if that "was okay with you," and she replied that it was.

On cross-examination, Kimberly G. confirmed that the telephone was listed as being on her mother's, *i.e.*, S.G.'s grandmother's, phone account. Kimberly G. also agreed she was not in the room when S.G.'s phone call with appellant was recorded. She further agreed that she did not sign a consensual monitoring form.

After the presentation of evidence, the State argued that the content of the phone calls was admissible under C.J.P. § 10-402. The State asserted that "[n]owhere within 10-402 does it say anything about forms, who has to consent, who signs, what you sign, if anything needs to be signed." Contending that one or more of the enumerated offenses were alleged in this case, the State argued that "I think since it's her conversation that's being intercepted, that the officers were totally justified in having a 17, almost 18-year-old sign the document herself and having the mother provide the verbal authorization."

As for the recording of the conversation between Sergeant Zimmerman and appellant after he was arrested, the State argued the electronic interception of that conversation was also lawful under C.J.P. § 10-402. Considering that appellant was read his *Miranda* rights and, absent evidence to the contrary, agreed to speak with the officer, the State contended that the recording was a lawful part of the overall investigation.

In response, appellant's defense counsel first addressed the pretext call between S.G. and appellant, arguing that the statute had to be "strictly construed[.]" To that end, consent was "a legal term of art," and that S.G. was not of "the age of consent." Further, defense counsel argued that "you can't cure an issue of consent when you're contending

with a minor." Defense counsel also suggested that Kimberly G.'s verbal consent was insufficient and the State should have proof of that consent in writing.

Turning to the recording of the conversation between appellant and Sergeant Zimmerman, defense counsel asserted that the recording device Sergeant Zimmerman placed in his pocket was akin to a "body wire." Relying on *Pryor v. State*, 195 Md. App. 311 (2010), he argues there was no indication that Sergeant Zimmerman's safety was in jeopardy when he used the device. Therefore, counsel concluded, any evidence obtained as a result of this unlawful recording should be suppressed.

After hearing this argument, the court first addressed the pretext call between S.G. and appellant, as follows:

> I believe the testimony of Sergeant Zimmerman indicated that he explained the process to [S.G.], and she signed a written consent to allow the pretext call to be made. The officer did concede that [S.G.] was under the age of consent. She was 17 years of age at the time, but also present at the police station was [S.G.'s] mother, her guardian, and the testimony of [Kimberly G.] indicates that she gave verbal consent to the pretext calls to be made. I think that the pretext calls that were made fall squarely within the exception of Courts and Judicials 10-402 (c) (2), and I deny the motion to suppress with respect to the first item.

As for the recording of the conversations between appellant and Sergeant Zimmerman, the motions court focused on whether there was a *Miranda* violation. The court suppressed the conversation at the Lowe's before appellant was read his *Miranda* rights. [Id.] The court then continued:

> Sergeant Zimmerman then actually read from his agency card the Miranda rights that were given to the [appellant], in this case, and from that moment on, after [appellant] is properly *Mirandized*, he is on notice, at that point, that anything he says can be and will be used against him. I think that at that point, anything within the conversation that is recorded can be used in court.

> So with respect to the tape recording of [the appellant], at the Lowe's location until he goes back to the police station, I am going to grant the motion to suppress from the initial contact with [appellant] up until the moment that he is *Mirandized*. I am going to deny the motion to suppress after [appellant] is *Mirandized*. I believe that can be used. Likewise, the tape recording that was done at the detention facility, I'm going to deny the motion to suppress with respect to that recording.

A. Standard of review

> In reviewing a trial court's denial of a motion to suppress evidence, "we view the evidence presented at the [suppression] hearing, along with any reasonable inferences drawable therefrom, in a light most favorable to the prevailing party." *Davis v. State*, 426 Md. 211, 219 (2012). We accord deference to the fact-finding of the trial court unless the findings are clearly erroneous. *Bailey v. State*, 412 Md. 349, 362 (2010). We give no deference, however, to the question of whether, based on the facts, the trial court's decision was in accordance with the law. *Crosby v. State*, 408 Md. 490, 505 (2009).

Seal v. State, 447 Md. 64, 70 (2016).

B. To the extent preserved, S.G. and her mother consented to the interception of a pretext phone call between appellant and S.G.

The State initially contends that, at the suppression hearing, appellant did not argue that S.G. was the only person who could consent to the interception of the phone call or that, absent S.G.'s testimony, her consent was not knowing and voluntary. *See* Md. Rule 8-131 (a) ("[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . ."); *State v. Bell*, 334 Md. 178, 187-91 (1994) (discussing waiver of claim at suppression hearing based on failure to argue ground below); *Moulden v. State*, 212 Md. App. 331, 345-46 (2013) (finding appellate issue is not preserved when the argument was not raised in the motions court). We agree that appellant did not challenge S.G.'s consent on the grounds that it was

not knowing and voluntary, or on the appellate grounds that her consent was not valid absent her testimony at the motions hearing, therefore, that claim is unpreserved.

However, as for appellant's remaining challenge to S.G.'s consent, appellant maintained that S.G.'s consent was not valid and could not be "cured." Although this precise wording is different than the appellate argument before us that neither S.G. nor her mother could consent to the interception, the Court of Appeals has recognized that "an appellant/petitioner is entitled to present the appellate court with 'a more detailed version of the [argument] advanced'" below. *See Starr v. State*, 405 Md. 293, 304 (2008) (internal quotations omitted); *see also State v. Greco*, 199 Md. App. 646, 658 (2011) (concluding that an issue was not waived where the State generally made the argument at trial, and where the trial court clearly decided the issue on the grounds raised on appeal), *aff'd*, 427 Md. 477 (2012). We are persuaded that the issue whether S.G. could consent and/or whether her mother could vicariously consent is properly presented for our review.

On the merits, then, as provided by statute, the Maryland Wiretapping and Electronic Surveillance Act ("Maryland Wiretap Act" or "Act") makes it unlawful to willfully intercept, knowingly disclose, or knowingly use any wire, oral, or electronic communication. C.J.P. § 10-402 (a).

However, law enforcement officers may intercept phone calls with the consent of only one of the parties, provided that the law enforcement officer either is a party to the communication or obtains consent from one party to the communication. *See* C.J.P. § 10-

402(c)(2).[4] Further, the Maryland wiretap statute enables law enforcement officers to use wiretap communications to "'provide evidence' of the commission of one of eighteen offenses,"[5] including sexual abuse of a minor." *Hill v. State*, 418 Md. 62, 68 n.6 (2011).

On the question of whether a minor child can consent to interception under C.J.P. § 10-402(c)(2)(i)(2), appellant's primary argument is that S.G. did not have the legal capacity to consent to the interception because "the age of consent in Maryland is 18."[6]

In turn, the State relies on *Anderson v. State*, where an underage victim and her mother consented to an electronic recording. 372 Md. 285 (2002). But, in that case, involving allegations of child abuse by a teacher with a student off school grounds, *see id*. at 288-91, the issue of whether a minor could consent to an interception of an electronic communication was not one of the issues presented. The issue concerned whether law enforcement reasonably believed that the teacher, who normally did not supervise the student, could be guilty of child abuse, so as to authorize the interception under the wiretap statute. *Id*. at 290-91, 297-98. In its discussion of that issue, the Court of Appeals simply observed that "[i]t is undisputed that the victim and her mother consented to the electronic

[4] C.J.P. § 10-402 (c)(2)(i), permits interception of communications when: "1. The investigative or law enforcement officer or other person is a party to the communication; or 2. One of the parties to the communication has given prior consent to the interception."

[5] In the 2016 Supplement, there are 22 enumerated crimes triggering protection under the wiretap statute.

[6] In support of this assertion, appellant misquotes *Stebbing v. State*, 299 Md. 331, *cert. denied*, 469 U.S. 900 (1984). That case actually states that "[i]n Maryland, the age of *majority* is 18." *Id*. at 368 (emphasis added).

monitoring of the telephone call between petitioner and the victim." *Id*. at 298. We do not agree with the State that "*Anderson* controls this case."

Instead, we conclude that *Whack v. State*, 94 Md. App. 107 (1992), *cert. denied*, 330 Md. 155 (1993), is more instructive. There, Keith Watkins and Joey Sampson were arrested following a traffic stop on Interstate 95 ("I-95"). *Whack*, 94 Md. App. at 110. The two men admitted that they were travelling from New York to Maryland and transporting cocaine to be delivered to Larry Whack. *Id*. at 111. After his arrest, at the police station, Sampson consented to making a monitored phone call to Whack to have Whack meet him on a pretext that the vehicle he was driving was in need of repair at the Texaco station located at the Chesapeake House rest stop on I-95. *Id*. Sampson also agreed to wear a body wire during that meeting. *Id*. Subsequently, as the police conducted surveillance, Whack met Sampson at the rest stop, then proceeded to attempt to retrieve cocaine from the vehicle. *Id*. at 111-12. Whack was arrested and ultimately convicted of possession with intent to distribute cocaine and other drug-related crimes. *Id*. at 109-10.

On appeal, Whack challenged the interception of his conversations with Sampson on the grounds that Sampson did not voluntarily consent to the recordings. *Whack*, 94 Md. App. at 119. This Court began its analysis by noting there are two different standards of voluntariness associated with "consents" under Maryland law. *Id*. The first standard, applicable to criminal confessions, is that "a defendant's confession, in order to be used as evidence against him (i.e., the defendant who made the statement), must be free from promises and inducements." *Id*. at 120. The second standard, applicable to consent searches, such as a wiretap, *see id.,* at 126 n. 8, is as follows:

> The State bears the burden of proving that the consent [to search] was freely and voluntarily given, and not the result of duress or coercion. Whether the consent was voluntary 'is to be decided in light of the totality of all the circumstances.' Moreover, the State must prove voluntariness by a preponderance of the evidence. This determination 'ordinarily involves [a] determination of a question of fact.' Although we are required to make an independent constitutional appraisal of the record, the trial court's factual finding of voluntariness is not to be set aside unless clearly erroneous.

Whack, 94 Md. App. at 121 (quoting *McMillian v. State*, 325 Md. 272, 284-85 (1992)); *see also State v. Turner*, 854 N.W.2d 865, 868 (Wis. Ct. App. 2014) ("[C]ourts should consider the totality of the circumstances, including, but not limited to, a minor's age, intelligence, knowledge, and maturity. Fundamentally, a minor's consent must be the product of an 'essentially free and unconstrained choice.'"), *review denied*, 857 N.W.2d 618 (Wis. 2014).

Because the determination whether Sampson's consent was given freely and voluntarily was a question of fact, we concluded that the trial court's finding was not clearly erroneous under the facts of the case. *Whack*, 94 Md. App. at 122. We reach a similar conclusion in this case. Sergeant Zimmerman testified that he explained the consensual monitoring form to S.G., indicating that the process was that "we would place a phone call, monitor the phone call, and record the phone call." And, S.G. signed the form as the consenting party. These facts support a finding that S.G. consented to the interception.

Moreover, even to the extent that appellant is correct that a minor could not consent, the facts here also establish that the victim's mother, Kimberly G., verbally consented to the interception of the phone call between S.G. and appellant. Notably, the Supreme Court has observed that "the Due Process Clause of the Fourteenth Amendment protects the

fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). In Maryland, that principle is embodied in Section 5-203 of the Family Law Article, which states that parents of a child are "are jointly and severally responsible for the child's support, care, nurture, welfare, and education." Md. Code (1984, 2012 Repl. Vol., 2016 Supp.), § 5-203 (b) of the Family Law ("Family Law") Article.

Although it does not appear that any Maryland case has addressed whether a parent can vicariously consent to interception of communications under the wiretap statute, parental consent to contracts involving minors was at issue in *BJ's Wholesale Club, Inc. v. Rosen*, 435 Md. 714 (2013). There, the issue concerned the enforceability of an exculpatory agreement and indemnification contract by a parent on behalf of his minor child that permitted the son to use a free supervised play area at a commercial establishment. *BJ's Wholesale*, 435 Md. at 716. In considering that question, the Court cited Family Law § 5-203 (b), and recognized that there are "clear societal expectations set forth in the law that parents should make decisions pertaining to their children's welfare, and that those decisions are generally in the child's best interest." *Id*. at 728. The Court observed, for example, that "[p]arents are empowered, on behalf of their children to: consent to medical treatment; consent to having their children give blood; consent to the use of a tanning device by their child; and to authorize another family member to consent to the immunization of a minor child." *Id*. at 728-29 (internal citations omitted). After considering these, and other examples, the Court concluded that a parent had the "right to prospectively waive a minor child's tort claim" as occurred in that case. *Id*. at 738.

The reasoning from *BJ's Wholesale* weighs in favor of a conclusion that a parent has the authority to enter into certain contracts, and also, to vicariously consent on behalf of their minor children. Indeed, other jurisdictions have upheld the right of a parent to vicariously consent to interception in similar circumstances. For instance, some courts have held that:

> [A]s long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording.

Pollock v. Pollock, 154 F.3d 601, 610 (6th Cir. 1998); *accord Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah 1993); *Kroh v. Kroh*, 567 S.E.2d 760, 764 (N.C. Ct. App. 2002), *review denied*, 567 S.E.2d 760 (N.C. 2003); *see Apter v. Ross*, 781 N.E.2d 744, 756 (Ind. Ct. App. 2003) ("[W]e conclude that a parent has the power to consent on behalf of his or her minor child to the recording of that child's phone conversations unless otherwise curtailed in some legal proceeding"); *State v. Whitner*, 732 S.E.2d 861, 865 (S.C. 2012) (citing cases and observing that "[t]he law recognizes different kinds of consent, including express, implied, informed, voluntary, and parental. Parental consent is defined as '[c]onsent given on a minor's behalf by at least one parent, or a legal guardian, or by another person properly authorized to act for the minor, for the minor to engage in or submit to a specific activity'").

In this case of alleged sexual abuse by a child's biological father, Sergeant Zimmerman explained the process of consensual monitoring to the victim's mother, Kimberly G. He testified that she "understood, and she agreed along the same as she agreed

to allow the interview to happen with her." Kimberly G. confirmed, via her testimony at the motions hearing, that the procedures were explained to her. When asked if that "was okay with you," the victim's mother unequivocally responded in the affirmative. We are persuaded that under the totality of the circumstances, the victim's consent, along with her mother's consent, was voluntary and satisfied C.J.P. § 10-402(c)(2). The court properly denied the motion to suppress the recording of the conversation between appellant and S.G.

C. Sergeant Zimmerman did not use a "body wire" to intercept a communication with appellant, and even if so, any error in not suppressing that communication was harmless beyond a reasonable doubt.

Appellant also contends that the court erred in denying his motion to suppress on the grounds that Sergeant Zimmerman unlawfully used a "body wire" to record their conversation. Relying on C.J.P. § 10-402 (c)(6)(i) and *Pryor v. State*, 195 Md. App. 311 (2010), appellant asserts that the body wire recording was unlawful because it was made without any showing of danger to officer safety.

In response, the State suggests that Section 10-402(c)(6) is overridden by the investigative purpose of Section 10-402(c)(2) in this case involving allegations of sexual child abuse. The State also avers that any error by the court in denying the motion to suppress was entirely harmless because the State never used the recording of the conversation between Sergeant Zimmerman and appellant at trial and that appellant's statements in that conversation were exculpatory. Although we disagree with the State's characterization of appellant's remarks admitting to drilling holes in the bathroom wall and to unintentional sexual contact with his daughter as being "exculpatory," we conclude that

the recording did not violate the wiretap statute and that, in any event, any error in denying the motion was harmless.

C.J.P § 10-402(c)(6) provides as follows:

> (i) It is lawful under this subtitle for law enforcement personnel to utilize body wires to intercept oral communications in the course of a criminal investigation if there is reasonable cause to believe that a law enforcement officer's safety may be in jeopardy.
>
> (ii) Communications intercepted under this paragraph may not be recorded, and may not be used against the defendant in a criminal proceeding.

In *Pryor, supra*, two police detectives interviewed Pryor at his home. One of the detectives concealed a handheld digital audio recorder in his pocket. *Pryor*, 195 Md. App. at 319. We observed that "[b]oth detectives consented to the recording of their voices; appellant did not know that the conversation was being recorded." *Id*. The appellant argued that this recording violated the Maryland Wiretap Act. *Id*. at 321.

On appeal, this Court recognized that "[t]he only time the Maryland Wiretap Act requires a showing of public safety is when a police officer utilizes a 'body wire' to intercept an oral communication." *Pryor*, 195 Md. App. at 322-23. We noted that a "body wire" was "a band that goes around the chest or stomach area[] and a digital recorder[,]" which is placed underneath the clothing." *Id*. at 323 n. 3. In contrast, a "handheld audio recorder" is "a device that is 'similar in look and feel to normal mini-cassette tape recorders, except they can record hundreds of hours of digital audio.'" *Id*. We held that Section 10-402(c)(6) was not implicated because "a hand held recorder was used, not a body wire." *Id*. at 323.

Here, Sergeant Zimmerman testified that, after he signed a consent form to intercept his own conversation with appellant, he placed a "digital recording device" inside his "front pocket." There was no evidence presented to support appellant's allegation that this was a "body wire." Thus, we conclude that this claim is without merit.

Moreover, even if the court erred, we agree with the State that any error was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) (An error is harmless when a reviewing court is "satisfied that there is no reasonable possibility that the evidence complained of - whether erroneously admitted or excluded - may have contributed to the rendition of the guilty verdict.") (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). In *Aud v. State*, 72 Md. App. 508 (1987), *cert. denied*, 311 Md. 557 (1988), a case concerning allegations of income tax evasion, Aud argued that an undercover law enforcement officer unlawfully recorded a conversation between the officer, Aud, and a third person, "Mr. Tinsley," contending that the conversation should not have been admitted at trial, pursuant to C.J.P. § 10-405. *Aud*, 72 Md. App. at 518.[7] This Court disagreed with Aud's premise, noting that the recording itself was not admitted at trial. *Aud*, 72 Md. App. at 518. We further stated:

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[7] C.J.P. § 10-405 (a) provides that:

> [W]henever any wire, oral, or electronic communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of this State, or a political subdivision thereof if the disclosure of that information would be in violation of this subtitle.

> Neither the Fourth Amendment, the Omnibus Crime Control and Safe Streets Act of 1968, nor the Maryland Electronic Surveillance and Wiretap Law protect a person from the possibility that one in whom he or she confides will violate that confidence. *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). Having heard Aud's braggadocio concerning income tax evasion, the State Trooper and Tinsley were free to testify from memory as to the content of those incriminating statements. We hold that the fact that, while he was hearing Aud's inculpatory utterances, the trooper was contemporaneously illegally recording the conversation does not bar admission of the trooper's testimony concerning his auditory reception of the conversation even though it does preclude the admission of the recording of that communication.

Aud, 72 Md. App. at 520 (footnotes omitted).

Likewise, in this case, the recording of the conversation between appellant and Sergeant Zimmerman was not admitted at trial and any statements from that conversation came in exclusively through the officer's testimony. Thus, we conclude that any error in not suppressing the recording was harmless beyond a reasonable doubt.

III.

Finally, appellant contends that his sentence for unnatural and perverted practice merges with his sentence for sex offense in the fourth degree, and that, in turn, his sentence for fourth degree sex offense merges with his sentence for sex offense in the second degree, such that only the sentence on the sex offense in the second degree remains. Appellant's argument is premised on his assertion that the court's verdict was ambiguous because it "did not link any particular act to any particular conviction."

In response, the State concedes that "it is not evident from the record upon which of the 20 sexual offenses the circuit court relied in finding [appellant] guilty" of the three

charges at issue. The State argues the charges do not merge under required evidence and that appellant's merger argument is without merit.[8]

"The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law." *Brooks v. State*, 439 Md. 698, 737 (2014). "Merger protects a convicted defendant from multiple punishments for the same offense." *Id*. "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*.

The Court of Appeals has stated that the "double jeopardy analysis is a two-step process. We determine first whether the charges arose out of the same act or transaction, and second, whether the crimes charged are the same offense." *Jones v. State*, 357 Md. 141, 157 (1999). "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 this Court has further explained:

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[8] Although this issue did not arise at sentencing, 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 Md. Rule 4-345(a)).

> 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) (other citations omitted); *see also Gerald v. State*, 137 Md. App. 295, 312 (where the court 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," then the offenses merge) *cert. denied*, 364 Md. 462 (2001); *Cortez v. State*, 104 Md. App. 358, 369 (1995) (stating that "[i]n a bench trial, the solution [for resolving merger questions] is simple: the trial judge need only articulate for the record the basis for the dual verdicts, stating the separate acts justifying both convictions").

These cases suggest that, if the record unambiguously shows that the appellant was convicted of distinct and separate acts, then the merger threshold has not been met and our analysis of the issue may end. But, in this case, both parties acknowledge an ambiguity in the record. The charging documents do not clearly distinguish between the separate acts because appellant was charged, generally, in each of the three counts at issue with having unlawfully committed the offense "on or about the 1st day of January, 2010 through the 11th day of January, 2013, in Garrett County, Maryland[.]"

Moreover, the court did not unambiguously link the evidence to these three charges when, after the conclusion of the State's case-in-chief, the court denied the appellant's motion for judgment of acquittal as follows:

> With respect to the actual incidents between the age of 12 and 14, I think that [S.G.] was fairly specific that between the age of 12 and 14, it was more of a physical type of situation. She testified that every night for a while, but at least 10 times or more, her father placed his foot between her crotch and rubbed her crotch. There were at least two to three incidents of digital penetration, four to five incidents of oral copulation. Also, there was at least one time when there was an attempt to initiate intercourse. Then, from the age of 14 to 17, in [S.G's] own words, it was more like implications of sex, and what she meant by that was that her father would expose himself, and he was sexually aroused. He would use – refer to her in sexual terms like hot thighs and sexy. And then, of course, the alleged letter entitled my feelings that was allegedly found.

We also are unable to find a clear distinction linking evidence to the three charges at issue from the State's closing argument. The State did summarize the incidents, stating that "there were ten incidences of a rubbing. That there's two or three incidents of digital penetration. There's four or five incidents of oral events." However, the State did link some events to some charges when it argued as follows:

> "That there is the sexual contact and acts that qualify with the digital penetration, the oral sex that occurred on her, and she says one time an attempt to have her perform oral sex. That these things meet the requirements for the second and – second-degree sex offense, the unnatural and perverted practice. We have the attempted second-degree rape where she felt that there was an attempt to penetrate her, and it was just not successful because she did not believe that the Defendant was sufficiently erect, or unable to go forward with that act."

After hearing argument from defense counsel, which primarily focused on the lack of corroboration of S.G.'s testimony, and after the State's rebuttal, the court found appellant guilty on all counts. Pertinent to this issue, the court found as follows:

> In reviewing the evidence in this case, the alleged victim in this case, [S.G], who is now 18 years old, indicated that between the ages of 12 and 14, a period of, approximately, three years, there were roughly 20 alleged incidents of sexual abuse and contact. She testified that her father used his foot to rub her crotch roughly ten-plus times, at least ten times, and there was digital

> penetration on two to three occasions, and oral sex on four or five occasions. In addition to that, there would be sexual talk and innuendos, and then there were other incidents with respect to the [appellant] being in a robe and underwear in the kitchen in an aroused state. . .

While the evidence clearly was sufficient to show multiple sexual acts and sexual contacts, the court did not articulate which acts and contacts were linked to which of the charges at issue. Thus, we are persuaded that the record is unclear as to whether the three convictions at issue were based on distinct and separate acts. Accordingly, we must consider the extent to which the three charges merge under the "required evidence" test. This test, also referred to as the "*Blockburger* test," *see Blockburger v. United States*, 284 U.S. 299 (1932), has been explained as follows:

> The required evidence 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.'" Stated another way, the "' required evidence is that which is minimally necessary to secure a conviction for each . . . offense. If each offense requires proof of a fact which the other does not, or in other words, if each offense contains an element which the other does not,'" there is no merger under the required evidence test even though both offenses are based upon the same act or acts. "'But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other,'" and where both "offenses are based on the same act or acts, . . . merger follows. . . "

State v. Lancaster, 332 Md. 385, 391-92 (1993) (citations omitted).

At the time of the offense, second degree sexual offense was defined as follows:

> (a) A person may not engage in a sexual act with another:
>
> (1) by force, or the threat of force, without the consent of the other;
>
> (2) if the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the sexual act knows or reasonably should know that the victim

is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual; or

(3) if the victim is under the age of 14 years, and the person performing the sexual act is at least 4 years older than the victim.

Prohibited--Children under age 13

(b) A person 18 years of age or older may not violate subsection (a)(1) or (2) of this section involving a child under the age of 13 years.

Md. Code Ann. (2002, 2012 Repl. Vol., 2016 Supp.) § 3-306 of the Criminal Law ("Crim. Law) Article.[9]

Sexual offense in the fourth degree provides, in pertinent part:

(b) A person may not engage in:

(1) sexual contact with another without the consent of the other;

(2) except as provided in § 3-307(a)(4) of this subtitle, a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 4 years older than the victim; or

(3) except as provided in § 3-307(a)(5) of this subtitle, vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 4 years older than the victim.

Crim. Law § 3-308.

"Sexual act" and "Sexual contact" are further defined by statute as follows:

(d)(1) "Sexual act" means any of the following acts, regardless of whether semen is emitted:

(i) analingus;

(ii) cunnilingus;

[9] Effective October 1, 2017, sexual offense in the first degree and sexual offense in the second degree are repealed and reclassified as rape in the first degree and rape in the second degree, respectively. *See* 2017 Md. Laws, chs. 161, 162.

> (iii) fellatio;
>
> (iv) anal intercourse, including penetration, however slight, of the anus; or
>
> (v) an act:
>
> 1. in which an object or part of an individual's body penetrates, however slightly, into another individual's genital opening or anus; and
>
> 2. that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party.
>
> (2) "Sexual act" does not include:
>
> (i) vaginal intercourse; or
>
> (ii) an act in which an object or part of an individual's body penetrates an individual's genital opening or anus for an accepted medical purpose.
>
> Sexual contact
>
> (e)(1) "Sexual contact", as used in §§ 3-307, 3-308, and 3-314 of this subtitle, 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.
>
> (2) "Sexual contact" does not include:
>
> (i) a common expression of familial or friendly affection; or
>
> (ii) an act for an accepted medical purpose.

Crim. Law § 3-301.

Second degree sexual offense requires proof of a sexual "act" whereas fourth degree sexual offense requires proof of a sexual "contact." Clearly, a "sexual act" contemplates different conduct than "sexual contact." *See, e.g., Travis v. State*, 218 Md. App. 410, 465 (2014) (noting that "sexual contact" is "something other than the necessarily involved

contact that is merely incidental to the . . . sexual act itself"). We conclude that these two offenses have different elements and are not lesser-included offenses. Accordingly, appellant's sentences for sexual offense in the second degree and sexual offense in the fourth degree do not merge.

As for appellant's contention that the offense of unnatural and perverted sexual act merges with a sexual offense in the fourth degree, Section 3-322 of the Criminal Law Article prohibits the following:

> (a) A person may not:
>
> (1) take the sexual organ of another or of an animal in the person's mouth;
>
> (2) place the person's sexual organ in the mouth of another or of an animal; or
>
> (3) commit another unnatural or perverted sexual practice with another or with an animal.

Crim. Law § 3-322.

Appellant contends that this merger issue is settled by the Court of Appeals opinion in *Lancaster, supra*, which considered whether the offenses merged under the prior statutory versions of the offenses, under former Article 27:

> The statutory element of § 554 relevant to this case is the defendant's "taking into his ... mouth the sexual organ of any other person...." This element would appear to be fully encompassed by the elements of the § 464C(a)(2) offense, because a forbidden "sexual act" under § 464C(a)(2) is statutorily defined as including fellatio and cunnilingus. The § 554 offense has no additional elements. A person cannot commit a fourth degree sexual offense under § 464C, as charged in this case, without also violating § 554. Consequently, we reject the State's argument that the § 554 offense of which the defendant was convicted contained an element distinct from the elements of the § 464C(a)(2) offense of which he was convicted. The State has not established any error in the Court of Special Appeals' holding that the § 554 offense is

> an included offense and, for sentencing purposes, merges into the § 464C(a)(2) offense.

State v. Lancaster, 332 Md. at 401; *see generally, In re Michael W.*, 367 Md. 181, 187 (2001) ("When applying the required evidence test to multi-purpose offenses . . . a court must examine the alternative elements relevant to the case at issue.").

The State responds that we can no longer rely on *State v. Lancaster*, because, as of 2002, sexual offense in the fourth degree now prohibits "sexual contact" whereas the prior statute was concerned with "sexual acts." Although the State's observation is accurate, we cannot ignore the Revisor's Note from that 2002 amendment, which provides that "[t]his section is new language derived *without substantive change* from former Art. 27, § 464C." 2002 Md. Laws ch. 26 (emphasis added). *See Dean v. Pinder*, 312 Md. 154, 163 (1988) (observing that it is the "well-settled practice of this Court to refer to the Revisor's Notes when searching for legislative intent of an enactment").

Moreover, this Court has previously observed that "without any discussion being necessary, it is undisputed that an act of fellatio would qualify as a sexual contact." *Vogel v. State*, 76 Md. App. 56, 66-67 (1988), *aff'd*, 315 Md. 458 (1989). And, "[t]hat fellatio would qualify for the more strictly defined term 'sexual act' would not preclude it from also qualifying under the more broadly defined term 'sexual contact.'" *Vogel*, 76 Md. App. at 67 n. 4. Accordingly, under *State v. Lancaster*, we agree with appellant that his sentence for unnatural and perverted sexual practice merges with his sentence for sexual offense in the fourth degree. Because we are remanding this case for resentencing on appellant's first question presented, at resentencing, the circuit court shall vacate appellant's sentence for

unnatural and perverted sexual practice. *See Dixon v. State*, 364 Md. 209, 238 (2001) ("[W]here there is a merger of a lesser included offense into a greater offense, we are not concerned with penalties--the lesser included offense generally merges into and is subsumed by the greater offense regardless of penalties") (citation omitted); *see also Moore v. State*, 198 Md. App. 655, 693 n.10 (2011) ("The greater offense under the required evidence test is the one containing the additional element, regardless of the possible penalty."); *Lancaster v. State*, 86 Md. App. 74, 97 (1991), *aff'd*, 332 Md. 385 (1993).

REMANDED FOR RESENTENCING CONSISTENT WITH THIS OPINION. JUDGMENTS OTHERWISE AFFIRMED.

COSTS TO BE PAID ONE HALF BY APPELLANT AND ONE HALF BY GARRETT COUNTY.

Circuit Court for Garrett County
Case No. 11-K-15-5223

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1852

September Term, 2016

PATRICK MICHAEL GARY

v.

STATE OF MARYLAND

Beachley,
Shaw Geter,
Thieme, Raymond, G., Jr.,
(Senior Judge, Specially Assigned)

JJ.

Concurring & Dissenting Opinion by Beachley, J.

Filed: October 10, 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.

Although I agree with Parts II and III of the Majority's opinion and the ultimate conclusion, I disagree with the Majority's determination in Part I that a remand for resentencing is required as related to the merged conviction for second-degree assault. There is no disagreement, however, as to the underlying facts. The trial court initially imposed a five-year suspended sentence with five years' supervised probation for second-degree assault. Shortly after imposing appellant's sentence, trial counsel requested the court to "generally" merge the conviction for second-degree assault with one of the other counts; the State agreed that merger was appropriate. The trial court then stated, "I will generally merge Count 6, second-degree assault." The Majority notes that the trial court properly merged second-degree assault under *Cortez v. State*, 104 Md. App. 358, 368 (1995). I diverge from the Majority on the effect of that merger. In my view, after the trial court agreed to merge the second-degree assault conviction with the sex offenses, the five-year suspended sentence for second-degree assault was effectively eliminated because there could be no separate sentence for the merged count. *See Moore v. State*, 198 Md. App. 655, 692 (2011) ("[A] separate sentence is prohibited on each offense subject to merger under the required evidence test."). The merging of the suspended sentence also rendered meaningless the trial judge's language regarding the five years' supervised probation. *See Costello v. State*, 240 Md. 164, 167 (1965) ("Absent a suspension of sentence, the language as to probation had no meaning and it was beyond the power of the trial judge to resentence the appellant[.]").

I therefore see no reason for a resentencing remand pertaining to second-degree assault. The trial judge did precisely what the law required – he merged the second-degree assault conviction with the other offenses. Because a trial judge is presumed to know the law, *State v. Chaney*, 375 Md. 168, 181-84 (2003), I presume that the sentencing judge here knew that the five-year suspended sentence he had pronounced moments earlier did not survive his decision on merger. To the extent the commitment record or docket entries evidence any sentence or probationary term for second-degree assault, in my view those records should be amended to accurately reflect the vacation of that sentence due to merger.