Circuit Court for Baltimore City
Case No. 116015025

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2307

September Term, 2016

JACK JOHNSON

v.

STATE OF MARYLAND

Woodward, C.J.,
Meredith,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: November 9, 2017

Appellant, Jack Johnson, was tried and convicted by a jury in the Circuit Court for Baltimore City (Heard, J.) of first-degree assault, two counts of second-degree assault, attempted second-degree sexual offense, third-degree sexual offense, fourth-degree sexual offense and false imprisonment. On January 3, 2017, Appellant was sentenced to thirty years' imprisonment. Appellant filed the instant appeal in which he posits the following questions for our review:

1. Was it error to instruct the jury that voluntary intoxication is not a defense to either a charge of attempted sexual offense in the second degree or a charge of second-degree assault?

2. Was it error to refuse to instruct the jury that partial self-defense is a defense to a charge of first-degree assault?

3. Was it error not to merge, for sentencing purposes, both convictions for second degree assault into the convictions for third and fourth degree sexual offenses?

FACTS AND LEGAL PROCEEDINGS

A trial was held in September and October of 2016. The following events occurred according to the testimony of K.S., the Complainant.

K.S. is a resident of Linthicum, Maryland. On December 5, 2015, she arrived in Baltimore City to meet a male friend and to "hang out." She was waiting for him, "sitting on the corner of Calvert and Howard Street[s][.]"[1] After approximately fifteen to twenty minutes, a woman emerged from her house complaining that K.S. had been "hanging

[1] As noted in Appellant's brief, Calvert and Howard Streets run parallel to one another and do not intersect.

around on that corner" and that she needed to leave. Five to ten minutes later, the woman returned and repeated her demand.

Appellant walked past at approximately 6:00 p.m. and offered to let K.S. wait in his upper-floor apartment, from which she would be able to see her friend when he arrived at that corner. Appellant was unknown to K.S. at that time. She agreed to go with him to his home.

After K.S. and Appellant were in Appellant's apartment and had conversed for "a few minutes" she became concerned. K.S. testified: "[S]ome of the things that were said made me feel very uneasy, so I decided I was going to leave . . . ." However, on cross-examination, she testified that she and Appellant were together for approximately two to three hours and then she testified that they were together for approximately five to six hours "before any incident happened."

At approximately between 8:00 p.m. and 9:00 p.m., K.S. was in Appellant's bathroom, preparing to leave when Appellant entered and said, "You're going to suck my dick." When she refused, Appellant began "punching" her. He then "exposed himself" and repeated his demand that she perform fellatio on him. K.S. testified that she "grabbed his balls and squeezed as hard as she could," admonishing Appellant to let her go. When she reached the door of Appellant's apartment, K.S. released her grip on Appellant, at which time he pulled her back inside. Appellant then placed his arm "around her neck," making it "difficult" for her to breathe.

During the struggle, K.S. and Appellant were "hitting" and "punching" one another

and "pulling" each other's hair in an "all-out brawl." In the meantime, K.S. kept attempting to call 911 on her cell phone. Appellant said "It doesn't matter. It doesn't matter. [W]e're all going to die tonight. You're going to die tonight . . . ." During the continued struggle, Appellant bit her finger so hard that it was almost severed. Eventually, Appellant forced her to the floor on her stomach and pulled down her pants. Appellant then put his "erect penis" "fully" "inside of" her "vagina" and "raped" her. K.S. briefly lost consciousness.

When K.S. heard voices from outside the window, she began screaming "[H]elp, call 911." In response, voices asked her "[A]re you just kidding? Or is this a joke? Are you just kidding?" K.S. replied that it was not a joke. The individuals outside the window called 911.

K.S. acknowledged that she had previously been convicted of theft and forgery. K.S. also testified that she had suffered from "anxiety, depression and post-traumatic stress syndrome" since an unrelated incident in March 2014, during which she had been "pushed from a moving vehicle and run over." After that incident, she began taking the medication Xanax for general anxiety, Posttraumatic Stress Syndrome and severe panic attacks.

According to K.S., she had been taking Paxil, Xanax and Trazodone on the night of December 5th and the morning of December 6, 2015 in the 2500 block of North Calvert Street in Baltimore City. She also acknowledged that, earlier that day, she had taken the opioid, pain medication "Oxycodone which is Percocet," to which she was addicted. She further acknowledged that a subsequent toxicology report also disclosed cocaine in her system. She had initially testified, "I don't recall using cocaine at all" and "I don't use

cocaine." K.S. admitted on cross-examination, however, to recently using cocaine.

Shawn Preston and his brother-in-law, Adam Smith, who lived in the 2500 block of North Calvert Street, were the next witnesses to testify for the State. On the night in question, they had just returned from a bar *en route* to Smith's house, when they stepped outside for a smoke "at around midnight." After ten or fifteen minutes, they heard a woman "yell" from a "high" location. Preston and Smith climbed the fire escape to the third floor and looked in the window and saw a man lying on top of a woman. The woman said "that [the man] was trying to kill her, that he had sexually assaulted her, that he had raped her" and that he had bit her "finger" severely. According to Preston and Smith, the woman was pleading for help. They called 911 and forewarned the man inside. According to Preston and Smith, when the man and woman in the apartment stood up, they could see that both were naked from the waist down.

When the man and woman came out of the apartment building, the fact that the woman was "badly beaten" and one finger was nearly severed was apparent. Appellant emerged "out of the front door, very calm and very casual." Angered by what they had witnessed, Preston and Smith testified that they "stopped him at the bottom of the steps" and "told him that he wasn't going to get away." They then proceeded to "hold him there against the wall of the alley." When Appellant twice tried to flee, the witnesses forcibly stopped him.

The next witness to testify for the State was the SAFE[2] Nurse who conducted a physical examination of K.S.. Although she conducted a physical examination of K.S., finding several external injuries, she was unable to conduct any "internal genital examination" because of the level of pain K.S. suffered. The SAFE Nurse, however, also examined Appellant and found external physical injuries to his body. The testing of the swabs of K.S.'s external genitalia, pubic hair and tampon were all negative for sperm or seminal fluid.

Testifying in his own defense, Appellant provided the following account.

On the afternoon in question, he had taken multiple medications, including Ambien to sleep, Zoloft for depression, Toprol for high blood pressure, Naproxen,[3] Gabapentin,[4] a booster for Zoloft and he also began drinking vodka.

Appellant encountered K.S. waiting on the street corner at 4:30 p.m., when he heard

[2] Sexual Assault Forensic Examiner Nurse or a Forensic Nurse Examiner. *See* MARYLAND COALITION AGAINST SEXUAL ASSAULT, http://www.mcasa.org/for-professionals/nursing-medical-2/ (last visited Aug. 25, 2017).

[3] *See State v. Harding*, 196 Md. App. 384, 423–24 (2010) (citing *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009)) (noting that Naproxen is similar to Advil or Aleve and distinguishable from a narcotic).

[4] *See Baer v. Baer*, 128 Md. App. 469, 476 n. 2 (1999) (describing gabapentin as a "mood stabilizer"). *See also* GABAPENTIN (ORAL ROUTE), http://www.mayoclinic.org/drugs-supplements/gabapentin-oral-route/description/drg-20064011 (last visited September 5, 2017) ("Gabapentin is used to help control partial seizures (convulsions) in the treatment of epilepsy. *** Gabapentin is also used in adults to manage a condition called postherpetic neuralgia, which is pain that occurs after shingles.").

a nearby resident objecting to her loitering. He offered to allow K.S. to wait for her friend in his apartment. K.S. told him that she was sick from "dope."

Soon after the pair entered the apartment, K.S. asked Appellant for "benzos," *i.e.*, benzodiazepine, and Appellant replied that he had "just run out," whereupon K.S. asked Appellant to purchase $60 worth of heroin for her, but he refused. Then Appellant and K.S. each began drinking a mug of straight vodka and made "small talk." Approximately an hour later, at 5:30 p.m., because K.S. "looked tired," Appellant offered to let her "lay down for a while" in his bed.

Appellant later entered the bedroom where K.S. was located and pulled down her "long johns," took off his own clothes and got into bed with her. Appellant touched her vagina and her thighs, but he did not "penetrate her with his fingers." According to Appellant, K.S.'s eyes were closed, but he thought she was awake. K.S. moaned, then awakened and was upset with Appellant for fondling her. Because he felt ashamed, Appellant told K.S. "I'm sorry, it's only because I'm drunk."

When K.S. went to Appellant's bathroom, he finished drinking his mug of vodka and then began drinking from her mug. When K.S. came out of the bathroom at approximately 8:15 p.m., she asked him to buy "dope" for her and that "it would go a long way towards redefining the nature of our relationship" and "helping me to forget that I woke up with your fingers in my pussy." Appellant understood K.S.'s comment to be a "threat," akin to "blackmail." When he replied that he "would like to fuck" her, she gave him "a little smile." They continued drinking vodka and talking for several more hours.

At 12:30 a.m., Appellant told K.S. that "he was going to bed [and] she was welcome to join him or she was welcome to leave." According to Appellant, K.S. became enraged by that comment and she began swearing at him. Appellant testified: "[S]he picked up a knife off my kitchen counter and she started waving it around while she was yelling pretty much incomprehensively . . . ." Appellant stated that he was "feeling kind of trapped" in his kitchen and that he told her to get out of his apartment. Instead, K.S. became more "animated." At the time, Appellant thought "that knife got too damn close to me" and "that there was a clear and present danger in front of me . . . , and I hit her." According to Appellant, he "just wanted to get the knife away from her and make myself safer." However, K.S. kept "swinging" the knife "two or three more times." When K.S. finally dropped the knife, Appellant tried to pick it up but that she began pulling out his hair, punching him, and trying to "gouge out" his eyes. Appellant fought back, "swinging blindly" and biting her on the finger because she was trying to "poke" him in the "eye."

In response to the query as to why he later tried to get away from the other two men, Appellant replied because they were strangers, who grabbed him, threw him down on the ground and yelled at him; he was "already so freaked out," he wanted to get away from them.

DISCUSSION

I.

Appellant initially contends that the court erred in instructing the jury that voluntary intoxication is not a defense to either a charge of attempted sexual offense in the second

degree or a charge of second-degree assault. Appellant asserts that voluntary intoxication is a defense "to any 'specific intent' crime and any 'attempt[]' offense is a 'specific intent' crime." Appellant continues that "[i]t is also well-settled that both 'assault of the attempted battery variety,' and 'assault of the intentional threatening variety' are 'specific intent crimes.'" According to Appellant, "the indictment did not allege that the second-degree assault was other than 'assault of the attempted battery variety' or 'assault of the intentional threatening variety.'" Appellant further asserts that the issue has been preserved, *i.e.*, "[u]nder Maryland Rule 8–131(a), 'it plainly appears by the record' that the issues of which crimes charged were subject to the defense of voluntary intoxication 'have been raised in or decided by the trial court' in this case.'" In sum, Appellant contends that the voluntary intoxication defense "was clearly applicable to both attempted sexual offense in the second degree and two possible varieties of second-degree assault."

The State responds that Appellant has not preserved his challenge to second-degree assault regarding the legal modality. The State maintains that it limited its theory of Appellant's criminal liability at trial to the completed battery form of assault and Appellant did not object during the charging conference or when instructions were read to the jury. According to the State, Appellant has not preserved for our review the applicability of a voluntary intoxication defense to the other two forms of assault, *i.e.*, the intent to frighten or attempted battery. The State asserts, however, that if we review Appellant's claim, it is "at most" harmless error because he did not generate "some evidence" to support the defense of voluntary intoxication and, therefore, Appellant's claim is without merit. The

State maintains that the trial court properly instructed the jury.

Preservation

As a preliminary manner, we address the State's contention that Appellant has failed to preserve his claim for our review. Md. Rule 8–131(a) provides that, "[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[.]"

According to the State, Appellant "never objected to the trial court's voluntary intoxication instruction as it pertained to assault—not during the charge colloquy and not after the instruction was actually given to the jury." Appellant does not refute this in his brief. Our review of the record confirms this as well. We explain.

Md. Rule 4–325 governs jury instructions and subpart (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. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

During the charge conference, on October 5, 2016, the following colloquy occurred:

> THE COURT: No, no, no. In second degree assault as well, as I understand it was assault—oh, I see what you're saying. You're saying, you're considering it as a strict liability that there was the causing of physical injury.
>
> [PROSECUTOR]: That's correct, the battery, Your Honor.
>
> THE COURT: Not an attempt to cause or frighten, but you're taking the position that there actually was.

[PROSECUTOR]: Yes, Your Honor.

***

THE COURT: Understood. So backing up, it's your position that the assault of the likes that's issued is not a specific intent.

[PROSECUTOR]: Correct, Your Honor.

***

[DEFENSE COUNSEL]: And Your Honor, just for purposes of making a record, I think any attempt would be a specific intent crime, so I would ask that [the] Court give it with respect to the attempted second degree sex offense as well.

Later, after the instructions were read to the jury, the following colloquy between Appellant's trial counsel and the trial judge occurred:

[DEFENSE COUNSEL]: Your Honor, we did previously argue the exceptions.

THE COURT: Do you want to incorporate them here and by reference in the record?

[DEFENSE COUNSEL]: I would.

THE COURT: During the charging conference they are so noted and all of them are absorbed and argued into this case by adoption into the record.

It is clear from the record that the State specifically availed itself to the completed battery modality of assault and that Appellant did not object to that modality either during the charging conference or after the recitation of instructions to the jury. Therefore, Appellant has not preserved for our review, the two other forms of assault, *i.e.*, intent to frighten and attempted battery.

Analysis

Standard of Review

"Maryland Rule 4–325(c) provides: 'The court may, and at the request of any party shall, instruct the jury as to the applicable law[.]' We review 'a trial court's refusal or giving of a jury instruction under the abuse of discretion standard.'" *Bazzle v. State*, 426 Md. 541, 548 (2012) (quoting *Stabb v. State*, 423 Md. 454, 465 (2011)).

In reviewing a trial court's grant or denial of a jury instruction,

> [w]e consider the following factors when deciding whether a trial court abused its discretion in deciding whether to grant or deny a request for a particular jury instruction: (1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given.

Id. at 549 (citation omitted).

Furthermore, "[a] requested jury instruction is applicable if the evidence is sufficient to permit a jury to find its factual predicate." *Id.* at 550.

> The task of this Court on review is to determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired.

Id. at 550 (quoting *Dishman v. State*, 352 Md. 279, 292–93 (1998)). This is a low threshold, "as a defendant needs only to produce 'some evidence' that supports the requested instruction." *Id.* at 551.

> *Some evidence* is not strictured by the test of a specific standard. It calls for no more than what it says—"some," as that word is understood in common, everyday usage. It need not rise to the level of "beyond reasonable doubt" or "clear and convincing" or "preponderance." The source of the evidence is immaterial; it may emanate solely

> from the defendant. It is of no matter that the self-defense claim is overwhelmed by evidence to the contrary. If there is any evidence relied on by the defendant which, if believed, would support his claim that he acted in self-defense, the defendant has met his burden. Then the baton is passed to the State.

Dykes v. State, 319 Md. 206, 216–17 (1990) (second emphasis supplied). "In evaluating whether competent evidence exists to generate the requested instruction, we view the evidence in the light most favorable to the accused." *Bazzle*, 426 Md. at 551.

Defense of Voluntary Intoxication

> Generally, voluntary drunkenness is no defense to a criminal charge. The only exception to this occurs when a defendant, charged with a crime requiring a specific intent, is so drunk that he is unable to formulate that *mens rea.* His intoxication then will excuse his actions and serve as a defense.

State v. Gover, 267 Md. 602, 606 (1973) (citations omitted). *See also Wieland v. State,* 101 Md. App. 1, 32 (1994) ("Voluntary intoxication, although it will never be allowed to negate a general criminal intent, may, if sufficient, be found to have eroded a specific intent.").

"'Every man is presumed to be in possession of his mental faculties until the contrary is shown. As a defense to intent . . . the accused must show that he was so intoxicated that he was robbed of his mental faculties. He is criminally responsible as long as he retains control of his mental faculties sufficiently to appreciate what he is doing.'" *Gover*, 267 Md. at 607 (quoting *Beall v. State*, 203 Md. 380, 385-386 (1953)).

Furthermore, "the degree of intoxication which must be demonstrated to exonerate a defendant is great." *Id.*

> Evidence of drunkenness which falls short of a proven incapacity in the accused to form the intent necessary to constitute the crime merely establishes that the mind was affected by drink so that he more readily gave way to some violent passion and

> does not rebut the presumption that a man intends the natural consequence of his act.

Id. at 607–08.

Attempt Crimes and Mens Rea

"[T]he crime of attempt consists of a specific intent to commit a particular offense coupled with some overt act in furtherance of the intent that goes beyond mere preparation." *Spencer v. State*, 450 Md. 530, 567 (2016) (quoting *State v. Earp*, 319 Md. 156, 162 (1990)). *See also Bruce v. State,* 317 Md. 642, 646 (1989) ("Recognizing that criminal attempt is a specific intent crime[.]").

However, "[a]ttempt 'is an adjunct crime; it cannot exist by itself, but only in connection with another crime;' and it thus 'expands and contracts and is redefined commensurately with the substantive offense.'" *Dabney v. State*, 159 Md. App. 225, 233 (2004) (quoting *Lane v. State*, 348 Md. 272, 284 (1997)).

This Court, in *Wieland v. State*, 101 Md. App. 1 (1994), distinguished this type of specific intent to commit an underlying offense in attempt crimes from the *mens rea* requirement of specific intent.

> In discussions of attempt law generally, it is sometimes, albeit carelessly, said that an attempt is a specific intent crime. There is, to be sure, an intent requirement—one must intend to commit a very particular and precise crime—but such statements fail to distinguish between general intent and specific intent. A particular intent or a precise intent in this sense is not what the law contemplates by the phrase "specific intent." Perhaps a better distinction than that between general intent and specific intent would be a distinction between a direct intent and an indirect intent or a distinction between an immediate consequence and some further purpose to be brought about thereby.

Wieland, 101 Md. App. at 39.

> It is a mistake to speak of attempts generally as having a single monolithic intent element. Some attempts, to be sure, require a specific intent. Other attempts, however, require only a general intent. An attempt to commit a specific intent crime requires the same ultimate specific intent as would the consummated crime. An attempt to commit a general intent crime, on the other hand, requires nothing more than that general intent.

Wieland, 101 Md. App. at 40.

In *Wieland, supra,* this Court noted that, "[s]ince an intended battery is a general intent crime, the antecedent attempt to commit such a battery—one of the forms of assault—is also a general intent crime. *** An assault of the attempted-battery variety, we might also conclude, involves no specific intent at all." We further explained that

> [a] consummated intentional battery requires a general intent on the part of the perpetrator to hit the victim. An attempted battery (assault) requires the same general intent to hit the victim and, therefore, to perpetrate the battery. It is an immediate result that is generally intended and not some more remote end or purpose that might flow from that immediate act.

Id.

> [S]pecific intent "is not simply the intent to do the immediate act but embraces the requirement that the mind be conscious of a more remote purpose or design which shall eventuate from the doing of the immediate act . . . . [Specific intent crimes] require[ ] not simply the general intent to do the immediate act with no particular, clear or undifferentiated end in mind, but the additional deliberate and conscious purpose or design of accomplishing a very specific and more remote result."

Bible v. State, 411 Md. 138, 158 (2009) (quoting *Thornton v. State*, 397 Md. 704, 714 (2007)).

Attempted Second-Degree Sexual Offense and Second-Degree Assault

Md. Code Ann., Crim. Law ("C.L.") § 3–306(a)(1)[5] governs the crime of second-degree sexual offense and provides that,

> [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[.]

C.L. § 3–312(a)[6] defines a statutory crime for attempted sexual offense in the second degree. C.L. § 3–301(d)(1) defines the term "sexual act" to mean an act that occurs "regardless of whether semen is emitted" and includes: (iii) fellatio. Subpart (d)(1)(v) provides that a sexual act can also mean "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."

C.L. § 3–203 provides a statutory crime for second-degree assault. C.L. § 3–201(b) defines "assault" to "mean[] the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings." Second-degree assault encompasses all other assaults not contemplated by first-degree assault, *i.e.*, "the most serious assaults, including

[5] Repealed by 2017 Maryland Laws Ch. 161 (S.B. 944).

[6] Repealed by 2017 Maryland Laws Ch. 161 (S.B. 944).

those former aggravated assaults, whose commission ordinarily, although certainly not always, involved the commission of a battery, *e.g*., assaults with intent to murder, maim and disfigure." *Christian v. State,* 405 Md. 306, 320 (2008). Second-degree assault also includes "those former aggravated assaults that ordinarily did not involve completed batteries[.]" *Id.*

> The statutory offense of second-degree assault encompasses three modalities: (1) intent to frighten, (2) attempted battery, and (3) battery. The intent to frighten variety requires that the defendant commit an act with the intent to place another in fear of immediate physical harm, and the defendant had the apparent ability, at that time, to bring about the physical harm. The victim must be aware of the impending battery, and there must be an apparent present ability to commit the battery. The attempted battery variety of assault requires that the accused had a specific intent to cause physical injury to the victim, and to take a substantial step towards that injury. But, there is no need for the victim to be aware of the impending battery.

Snyder v. State, 210 Md. App. 370, 382 (2013).

Appellant's Case

In the instant case, when confronted with a request by Appellant's counsel to give the Maryland Criminal Pattern Jury Instruction, MPJI-Cr 5:08, the trial judge opined that "voluntary intoxication is not a defense to . . . attempted sexual offense in the second degree…, and second-degree assault." In response thereto, Appellant's counsel posited: "Your Honor just for purposes of making a record, I think any intent would be a specific intent crime, so I would ask that the court give it with respect to the second-degree sexual offense as well."

The Court responded: "You have to look at the underlying crime for which the defendant is charged, and if it is an attempt at that underlying crime it could be a specific

intent crime."

The Court then instructed the jury as follows: "Voluntary intoxication is not a defense to . . . attempted sexual offense in the second degree, . . . or assault in the second degree."

First, we must determine whether the trial court abused its discretion by not permitting an instruction of voluntary intoxication for attempted second-degree sexual offense and second-degree assault. The first hurdle is to determine whether either offense is a general intent crime, to which voluntary intoxication can never be a defense, or whether either offense is a specific intent crime, to which voluntary intoxication may be a defense. *Wieland, supra.*

Appellant incorrectly states that all attempt crimes are specific intent crimes. Our analysis in *Wieland*, *supra*, contradicts Appellant's assertion. Although the accused, in the commission of an attempt to commit a crime, must specifically intend to commit the underlying substantive crime, that does not correlate to the *mens rea* of the attempt crime, *i.e.*, whether the attempted crime is a specific or general intent crime. "An attempt to commit a specific intent crime requires the *same ultimate specific intent as would the consummated crime*." *Wieland, supra.* (Emphasis supplied). Accordingly, the trial court did not err when it stated that the underlying crime must be analyzed.

In the instant case, one of the offenses Appellant was charged with was attempted second-degree sexual offense. In *Bible, supra*, the accused was convicted of third-degree sexual offense for touching the buttocks of a child, in violation of C.L. § 3–307(a)(3),

which provides that the offense "is committed when an individual 'engage[s] in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim[.]'" 411 Md. at 143. As discussed in the opinion, C.L. § 3–301(f)(1)[7] defined "sexual contact" "as 'an intentional touching of the victim's or actor's genital, anal or other intimate area *for sexual arousal or gratification*, *or for the abuse of either party*.'" *Id.* (Emphasis supplied). The Court further explained that, "[t]he phrase in [C.L.] § 3–301(f)(1) that prohibits contact 'for sexual arousal or gratification, or for the abuse of either party' establishes a specific intent requirement." *Id.* at 157. In other words, the specific intent "for sexual arousal or gratification, or for the abuse of either party," went beyond the immediate act of sexual contact and "embrace[d] the requirement that the mind be conscious of a more remote purpose or design which shall eventuate from the doing of the immediate act." *Id.* at 158 (quoting *Thornton v. State*, 397 Md. 704, 714 (2007)).

In the instant case, the offense at issue is second-degree sexual offense which involves a "sexual act," not "sexual contact." As stated, *supra*, C.L. § 3–301(d)(1)(iii) provides that fellatio, by itself, constitutes a sexual act. Subpart (d)(1)(v) provides that a sexual act can also include any "act" "in which an object or part of an individual's body penetrates, however slightly, into another individual's genital opening or anus; *and* [] *that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of*

[7] Now Md. Code Ann., Crim. Law § 3–301(e)(1).

either party." (Emphasis supplied). The sexual act of fellatio, as legally defined pursuant to C.L. § 3–301(d)(1)(iii), does not require "the additional deliberate and conscious purpose or design of accomplishing a very specific and more remote result," *e.g.*, sexual arousal or gratification or abuse of the other party. Therefore, second-degree sexual offense based on C.L. § 3–301(d)(1)(iii), *i.e.*, fellatio, does not require a specific intent *mens rea*. Accordingly, *attempted* second-degree sexual offense predicated on the sexual act of fellatio is not a specific intent crime and the defense of voluntary intoxication would be legally inapplicable.

Even if attempted second-degree sexual offense, based on the sexual act of fellatio, was a specific intent crime, Appellant has failed explicitly to argue before this Court that there is "some evidence" that supports his request for the jury instruction on the voluntary intoxication defense. Appellant does take pains to list the medications and alcohol he consumed. Beyond this, there is no evidence of the effect of the medications and alcohol on Appellant or his state of mind. Accordingly we are unpersuaded that he provided "some evidence" that he was legally entitled to the jury instruction for the second-degree sexual offense. We explain.

"Mere intoxication is insufficient to negate a specific intent[.]" *Bazzle,* 426 Md. at 553. "The degree of intoxication which must be demonstrated to exonerate a defendant is great." *Gover,* 267 Md. at 607. The State highlights, in its brief, that Appellant's

> argument thus appears to be that, because he had ingested medications (including aspirin) and consumed a few vodka drinks within a near 12-hour space of time, leaving him feeling "drunk" at one point, a jury question arose [as to] whether he

was so intoxicated as to be incapable of forming the specific intent to commit second-degree sexual offense.

The State asserts that the evidence "did not generate a question about whether he was so inebriated at the time of attempting to force his penis into the victim's mouth that he was 'robbed of his mental faculties.'" Indeed, as the State notes, Appellant testified that, at one point, when the victim awoke to find him fondling her, he felt "ashamed" and stated: "I'm sorry, it's only because I'm drunk." As the State characterizes it: "Contemporaneous moral self-disapprobation is inconsistent with a loss of mental faculties." We agree.

We next turn to the second offense at issue which is Appellant's conviction for second-degree assault. As we discussed, *supra,* the only modality of assault preserved in the instant case is the completed form of battery, which is a general intent crime and, therefore, an instruction for the defense of voluntary intoxication would be inapplicable.

Even if Appellant had preserved the intent to frighten and attempted battery modalities of assault for review, his argument would fail. Appellant's argument focuses primarily on attempt crimes, although he briefly addresses why he was legally entitled to a jury instruction on the defense of voluntary intoxication for the offense of second-degree assault. Appellant argues that "the indictment did not allege that the second-degree assault was other than 'assault of the attempted battery variety' or 'assault of the intentional threatening variety[,]'" which Appellant asserts are both specific intent crimes.

Appellant's indictment, from January 15, 2016, lists two counts of second-degree assault under Count 5 and Count 9. They are worded identically and state the following:

> The Jurors of the State of Maryland for the body of the City of Baltimore, do on their oath present that the aforesaid DEFENDANT, JACK R. JOHNSON, late of said City, heretofore on or about the date of offense set forth above, at the location set forth above, in the City of Baltimore, State of Maryland, unlawfully did ASSAULT [K.S.] in the SECOND DEGREE in violation of Criminal Law Article, Section 3–203 of the Annotated Code of Maryland; against the peace, government and dignity of the State.

Clearly, Appellant's indictment does not delineate the modality of assault. It merely references Section 3–203 of the Criminal Law Article without specifying which modality. Therefore, Appellant is incorrect in his assertion.

Furthermore, Appellant cites this Court's opinion, *Lamb v. State*, 93 Md. App. 422, 444 (1992). However, in *Wieland*, *supra*, we noted:

> As we observed in *Lamb* []: "An assault of the intentional frightening variety . . . requires a specific intent to place the victim in reasonable apprehension of an imminent battery."
>
> By way of contrast, we assert that an assault of the attempted battery variety *does not require any specific intent.* The appellant reminds us of our statement, in *Lamb* [], that "[b]oth varieties of assault are specific intent crimes." We hereby repudiate that brief *dictum* as having been overly broad and overly simplistic.

101 Md. App. at 38–39 (emphasis supplied). *Wieland* directly contradicts Appellant's assertion that both attempted battery assault and intentionally threatening assault modalities are specific intent crimes.

Accordingly, under the theory espoused by Appellant, the only modality of assault for which Appellant would be legally entitled to a jury instruction of voluntary intoxication as a defense would be assault of the intentionally frightening variety and then, only if he could produce "some evidence" to support the requested instruction. *Bazzle, supra.* In his

brief, Appellant merely asserts, without any evidence, that the trial court erred and that the jury instruction was warranted. However, the low threshold of "some evidence" to warrant the jury instruction is not satisfied.

In sum, we hold that the only modality preserved for review was the completed battery form of assault for the offense of attempted second-degree assault. Furthermore, we hold that the trial court did not err in denying Appellant's request for jury instruction on the defense of voluntary intoxication for second-degree sexual offense and second-degree assault.

II.

Appellant's second claim of error is that the trial court erred in denying him "Special Requested Instruction, Perfect/Imperfect Self-Defense" regarding his first-degree assault conviction. Appellant asserts that the trial court was "[m]isled by the prosecutor's misunderstanding of *Christian* [*v. State*, 405 Md. 306 (2008)], in that the trial Court agreed with the State that the jury should be instructed only on 'complete' self-defense, not 'partial' self-defense." Appellant maintains that he was entitled to an instruction on partial self-defense.

The State responds that a change in law between Appellant's trial and this appeal indicates that the trial court properly refused to instruct the jury that imperfect self-defense applied to first-degree assault. The State asserts that the recent Court of Appeals ruling in *State v. Jones*, 451 Md. 680 (2017), "sapped the one and only rationale of *Christian*, and effectively returned the law to its starting place [*i.e.,*] *Richmond* [*v. State*, 330 Md. 223

(1993)].[8]"

"Unlike its 'perfect' cousin, 'imperfect' self-defense, if credited, does not result in an acquittal, but merely serves to negate the element of malice required for a conviction of murder and thus reduces the offense to manslaughter." *State v. Marr*, 362 Md. 467, 474 (2001).

> Imperfect self-defense . . . does not require the defendant to demonstrate that he had reasonable grounds to believe that he was in imminent danger. Rather, he must only show that he actually believed that he was in danger, even if that belief was unreasonable.

Porter v. State, 455 Md. 220, 166 A.3d 1044, 1053 (2017) (citing *State v. Smullen*, 380 Md. 233, 252 (2004)). This is a subjective belief on the part of the defendant. *Id.* (citations omitted).

Initially, imperfect self-defense was permitted to mitigate only murder to manslaughter. *Christian*, 405 Md. at 325. Prior to the enactment of the 1996 statutory assault framework, the expansion of mitigating defenses occurred in *Webb v. State*, 201 Md. 158 (1952), where the Court of Appeals held that a "hot-blooded response to adequate provocation" was recognized as a mitigating force in assault with intent to murder. *Christian*, 405 Md. at 325.

This expansion was then extended to imperfect self-defense in *State v. Faulkner,* 301 Md. 482 (1984), where the Court of Appeals explained that

[w]here the essence of an assault is aligned with the essence of a murder, [the] Court

[8] Abrogated by *Christian v. State*, 405 Md. 306 (2008).

> has further recognized imperfect self-defense as a proper defense to the statutory crime of assault with intent to murder. We did so because we considered imperfect self-defense to be a shadow form of self-defense.

Christian, 405 Md. at 325.

In *Richmond*, *supra,* the Court upheld the requirement that, in order to invoke an imperfect self-defense, there must be an underlying element of malice, explaining that "imperfect self-defense as a mitigating factor . . . is limited to criminal homicide and its shadow forms, such as . . . attempted murder . . . ." 330 Md. at 233. The Court declined to expand "the mitigation defenses beyond assault with intent to murder" stating that the reason "hinged also upon the requirement of malice." *Christian*, 405 Md. at 329.

After the enactment of the 1996 assault statutes, the Court, in *Robinson v. State*, 353 Md. 683, 694 (1999), held that the new statutory framework abrogated the prior common law crimes of assault.

> [T]he statutes as adopted represent the entire subject matter of the law of assault and battery in Maryland, and as such, abrogate the common law on the subject. The 1996 statutes are more than mere penalty provisions for the common law offenses of assault and battery. They created degrees of assault unknown to the common law, and, while retaining the common law elements of the offenses of assault and battery and their judicially determined meanings, the statutes repealed the statutory aggravated assaults and created new offenses.

Id.

As such, the Court of Appeals had to revisit whether the mitigating defenses would still be applicable under the new crimes of statutory assault. A significant expansion

occurred in *Roary v. State*, 385 Md. 217, 222 (2005)[9], where the Court held

> that first-degree assault is a proper underlying felony to support a second-degree felony-murder conviction. The assault for which Roary was found to have committed qualifies as a "dangerous to human life" felony pursuant to our holding in *Fisher v. State*, 367 Md. 218 (2001), and, therefore, we decline to modify the common law of this State to adopt the so-called "merger" doctrine.

The Court explained that

> [t]he modern felony-murder rule is "intended to deter dangerous conduct by punishing as murder a homicide resulting from dangerous conduct in the perpetration of a felony, even if the defendant did not intend to kill." The doctrine recognizes that in society's judgment, "an intentionally committed [felony] that causes the death of a human being is qualitatively more serious than an identical [felony] that does not."

385 Md. at 226–27 (quoting *Fisher*, 367 Md. at 262).

The Court also noted a "frequent objection to allowing assault as a predicate for felony-murder" was that it absolved the State from having to prove malice in obtaining a murder conviction. *Christian*, 405 Md. at 330. However, the Court, citing *Fisher*, *supra,* held that the element of malice required for a murder conviction could be supplied by a "dangerous to life felony" during the commission of a criminal homicide. *Christian,* 405 Md. at 330. The Court explained:

> Applying the *Fisher* standard to the case at bar, first-degree assault would support a common law second-degree felony-murder conviction if the nature of the crime itself or the manner in which it was perpetrated was dangerous to human life. We do not hesitate to hold that first-degree assault is dangerous to human life. The nature of the crime committed, a crime which "creates a substantial risk of death," is undoubtedly dangerous to human life. Furthermore, the manner in which the crime was committed in this instance, an assault by four men that included dropping

[9] Overruled by *State v. Jones*, 451 Md. 680 (2017).

> a 20-30 pound boulder repeatedly on the victim's head, is also clearly dangerous to human life. Based on the standard we enunciated in *Fisher* and reaffirmed in *Deese* [*v. State*, 367 Md. 239 (2001)][10], first-degree assault is a proper underlying felony to support a second-degree felony-murder conviction.

Roary, 385 Md. at 230.

In *Christian,* the Court of Appeals abrogated its decision in *Richmond*, holding "that the mitigation defenses of hot-blooded response to adequate provocation and imperfect self-defense *could* apply to mitigate first-degree assault *where those assaults could now supply the malice necessary for felony-murder if the victim dies*." *Christian*, 405 Md. at 333. (Emphasis supplied). The *Christian* Court still restricted mitigating defenses to criminal homicide and its "shadow forms," but explained

> [t]hat the intent to commit first-degree assault may now serve to sustain a murder charge convinces us that statutory first-degree assault should be considered, under certain circumstances, a shadow form of homicide in Maryland. The application of mitigation defenses is still limited to only "criminal homicide and its shadow forms" on the basis that only homicide and its shadow forms require the same proof of malice.

Id. at 332. Although the Court expanded first-degree assault as a "shadow form of homicide in Maryland," it did so only under certain circumstances, *i.e.*, a felony dangerous to life, and where the element of malice can be imputed. The Court reasoned:

> The application of the felony-murder rule relies on the imputation of malice from the underlying predicate felony. In *State v. Allen*, 387 Md. 389 (2005), we limited

[10] *See Roary v. State*, 385 Md. 217, 228 (2005) (using a parenthetical to contextually describe *Deese*: "Affirming second-degree felony-murder conviction based on the felony of child abuse and noting that the Court, in *Fisher* 'held that felony murder in the second degree, predicated on child abuse, or on any other inherently dangerous felony not enumerated in the first degree murder statutes, is a cognizable offense under the common law of this State'").

> the felony-murder rule to situations where the intent to commit the underlying felony existed prior to or concurrent with the act causing the death of the victim, and not afterwards. In so doing, we explained: "the felony-murder rule is a legal fiction in which the intent and the malice to commit the underlying felony is 'transferred' to elevate an unintentional killing to first degree murder . . . ."

Id. at 331–32. Accordingly, *Christian* left intact the requirement that the underlying first-degree assault must possess the element of malice to elevate homicide to murder. *Id.*

Recently, however, in *State v. Jones*, 451 Md. 680, 696 (2017), the Court expressly overruled its holding in *Roary, supra,* focusing on the merger doctrine, *i.e.*, the merger of the underlying felony and the resulting felony-murder conviction. The Court explained:

> We hold that, if the assaultive act causing the injury is the same act that causes the victim's death, the assault is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes. We realize that this view is inconsistent with *Roary v. State*. We therefore overrule that case, *insofar as it holds that the assaultive act constituting willful injury and also causing the victim's death may serve as a predicate felony for felony-murder purposes.* The rule of law we announce today in this case regarding the use of willful injury as a predicate felony for felony-murder purposes shall be prospective only and applicable to this case and those cases not resolved finally on direct appeal.

(Emphasis supplied). The *Jones* Court did not expressly retract the *Roary* expansions, *i.e.*, the Court did not state that first-degree assaults could no longer be used as a predicate felony for felony-murder. Rather, the Court held that the merger doctrine requires that the underlying assaultive act merges with the murder charge when the *same act* that causes the victim's injury also causes the victim's death.

In the instant case, the State urges us to hold that *Jones* has abrogated *Christian*, in addition to *Roary*, because it has "sapped the only rationale for *Christian.*" In citing *Christian*, Appellant asserts that an "imperfect-defense can apply to the crime of first-

degree assault," full stop. As discussed, *supra,* the *Christian* Court held that an imperfect self-defense "could mitigate first-degree assault *where those assaults could now supply the malice necessary for felony-murder if the victim dies*." Clearly, *Christian* does not provide that any first-degree assault, in and of itself, could warrant an imperfect self-defense instruction.

Furthermore, we do not need to decide whether *Jones* has overruled *Christian*; we are constrained by the issues before us. The Court of Appeals has never expanded, in its prior decisions, the imperfect self-defense beyond the scope of criminal homicide and all its shadow forms; rather, the Court has narrowly expanded what constitutes a shadow form of criminal homicide by determining that an underlying first-degree assault, with the requisite malice, can elevate homicide to murder and be the predicate felony for a felony-murder conviction, provided that the first-degree assault did not also cause the victim's death. *See Jones, supra.*

In rejecting Appellant's request to instruct the jury that partial self-defense is a defense to a charge of first-degree assault, the lower court opined:

> He's not charged with an elevation to attempted murder or murder. If he were charged with those offense [sic], then your argument might be valid. But there was no deadly force used in this instance that would elevate the case to attempted murder or murder, quite the contrary.

Neither the State's assertion, nor Appellant's arguments, address the express circumstances of the case before us. Although Appellant was convicted of first-degree assault, he was not charged or convicted of felony-murder, murder, criminal homicide or

any of its shadow forms. Accordingly, there is no element of malice to be transferred from the first-degree assault to some non-existent murder conviction. Therefore, imperfect self-defense, a defense that mitigates murder to manslaughter, would be legally inapplicable to Appellant's case. The trial court did not err in denying Appellant's requested jury instruction.

III.

Appellant's final claim of error is that the lower court failed to merge, for sentencing purposes, both convictions of second-degree assault (Counts 5 and 9) into the convictions for third-degree sexual offense (Count 3) and fourth-degree sexual offense (Count 8). Appellant asserts that the jury may have applied various definitions of assault in the second degree and that the trial judge found "separate" assaults is "completely irrelevant" for a jury trial. Appellant also argues that, "[u]nfortunately, neither the State nor the trial court specified for the jury which acts could comprise a 'second degree assault,' separate and apart from the various sexual offenses, despite numerous opportunities to do so[.]" Appellant maintains that the "beating, threatening or offensive touching required for convictions of third or fourth-degree sexual offense were possible, alternative grounds for the jury's verdicts on the second-degree assault counts." Ultimately, Appellant argues that any potential ambiguity in the jury's rationale should be resolved in his favor.

The State responds that the trial court correctly sentenced Appellant. Based on the required evidence test, the State argues that the evidence "shows that the second-degree assaults and the sexual offenses were based on distinct physical acts" and, "[a]ccordingly,

merger does not follow." The State maintains that "[t]he evidence in this case established, and [the] prosecutor asked the jury to find, episodes of battery distinct from the force attendant to each sexual offense" and, therefore, merger does not follow.

An illegal sentence can be corrected at any time, including for the first time on appeal. MD. RULE 4–345(a).[11] "A failure to merge a sentence is considered to be an 'illegal sentence' within the contemplation of the rule." *Pair v. State*, 202 Md. App. 617, 624 (2011). "[W]hen the trial court is required to merge convictions for sentencing purposes but, instead, imposes a separate sentence for each unmerged conviction, it commits reversible error." *Britton v. State*, 201 Md. App. 589, 598–99 (2011).

"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) (citing *Nicolas v. State*, 426 Md. 385, 400 (2012)). "Merger protects a convicted defendant from multiple punishments for the same offense." *Id.* (citing *Nicholas*, 426 Md. at 400).

> 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. (citing *Nicholas*, Md. at 400; *State v. Lancaster*, 332 Md. 385, 391 (1993)).

"[W]hen the factual basis for a jury's verdict is not readily apparent, the court

[11] Amended by 2017 MARYLAND COURT ORDER 0002 (C.O. 0002).

resolves factual ambiguities in the defendant's favor and merges the convictions if those convictions also satisfy the required evidence test." *Id.* at 739 (citing *Nicolas*, 426 Md. at 410–413, *Snowden v. State*, 321 Md. 612, 618–619 (1991); *Nightingale v. State*, 312 Md. 699, 708–709 (1988)).

In *Brooks, supra,* the Court of Appeals examined whether Brooks' rape conviction and false imprisonment conviction were based on the same act or acts and, therefore, required merger of sentences. *Id.* at 738–39. The Court held that

> [w]hile 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.

Id. at 739.

"We look to the record for other indications that might resolve the ambiguity in favor of non-merger." *Id.* at 741. In *Snowden, supra,* the Court suggested examining jury instructions to determine how the jury based its verdict. 321 Md. at 619.

The *Brooks* Court also suggested that verdict sheets could be examined as another method to determine how a jury based its verdict. 439 Md. at 741, n. 23. In that case, the circuit court utilized a general verdict sheet, but the Court suggested that a special verdict sheet could have been used to specify the act or acts for the jury. *Id.* The Court provided the following example:

> Answer the following question if and only if you find the defendant guilty of both first degree rape and false imprisonment. Did the false imprisonment occur before, during, or after the first degree rape? Circle "before," "during," or "after." Again,

> do not answer this question if you find the defendant not guilty of either first degree rape or false imprisonment.

Id.

In the instant case, we are unable to ascertain, with any degree of certainty, upon which act or acts the jury based Appellant's convictions for the two counts of second-degree assault. As the trial judge noted, "[t]here were several assaults[,]" however it is speculation as to which specific assaults the jury based Appellant's second-degree assault convictions. We explain.

During closing argument, although the prosecutor recounted the chronological sequence of events, she did not specifically direct the jury's attention to which act or acts, *separate* from the sexual offenses, could constitute convictions for second-degree assault. The prosecutor specified the act or acts that constituted second-degree sexual offense, first-degree assault and third-degree sexual offense; however, there was no mention of second-degree assault. To be sure, the prosecutor described how Appellant "pushed [K.S.] into the tub, got in on top of her and began to punch her repeatedly[.]" The prosecutor also described how Appellant placed K.S. in a chokehold until she lost consciousness and then repeatedly hit her in the back of the head. Certainly the jury *could have* based Appellant's second-degree assault convictions upon these acts, as the State suggests in its brief, but it is not certain that the jury did.

Furthermore, during the January 3, 2017 Sentencing Hearing, when Appellant raised the issue of merger of the sentences at issue, the court responded:

> Well, that's not the way the Verdict Sheet is worded. You see, I particularly made them skip, if you notice, following question Number 3, they were directed, "If you answer not guilty to Question No. 3, proceed to Question 4. If you answered guilty to Question No. 3, skip Question 4 which was the sexual offense in the fourth degree which would have been related to the sexual conduct.
>
> They proceeded to Question No. 5, which is an assault. There were several assaults, he beat her in the face which is an assault. He put his hands around her throat and strangled her. That's an assault. He also bit her finger which we could arguably say was first-degree assault as it relates to the injury to an organ or member in such a way that it caused this woman disfigurement and the like. That would be Question No. 11, first-degree assault.
>
> If I were to follow your reasoning, [defense counsel] it would mean that the only actions and acts that were perpetrated on the victim were of a sexual nature, but they weren't. He beat her up pretty well, such that when the other people arrived, they saw her face that was swollen and her eyes that were bloody.

The verdict sheet also provided a skip-option for the jury regarding the second third-degree sexual offense, Count 7, and the second fourth-degree sexual offense, Count 8.

> Question 7, as to the charge of sexual offense in the third degree of [K.S.] on December 6, 2015, how do you find the Defendant Jack Johnson? Not guilty, there's a line for your response. Guilty, there's a line for your response. If you answered not guilty to question [No.] 7, proceed to question [No.] 8. If you answered guilty to question [No.] 7, skip question 8 and answer question 9.
>
> ***
>
> Question [No.] 9 [is] the charge of assault in the second degree of [K.S.][.]

As the preceding illustrates, the trial court clarified for the jury the lesser included offense of fourth-degree sexual offense in regards to third-degree sexual offense. There was no clarification about the *act or acts* upon which the second-degree assaults, Counts 5 and 9, should be based.

Furthermore, examining the jury instructions given in the instant case does not

resolve the ambiguity of the act or acts the jury based Appellant's second-degree assault convictions. As in *Brooks, supra,* the trial judge "properly defined the charged offenses in accordance with pattern jury instructions," but the instructions did not specify that the jury must find that the assaults occurred separately from the third and fourth-degree sexual offenses in order to convict Appellant of second-degree assault. 439 Md. at 741.

Although we agree with the trial judge that there were numerous assaults upon which the jury could have easily based Appellant's second-degree assault convictions, that is not the inquiry with which we are tasked. Therefore, because the factual basis for the jury's verdict is not readily apparent from the record, those ambiguities must be resolved in Appellant's favor and the convictions at issue must merge if the required evidence test is satisfied. *Brooks,* 439 Md. at 739.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, prohibits multiple, separate punishments for the same offense. *Pair*, 202 Md. App. at 636. "Maryland courts have consistently applied the 'required evidence test' to determine whether two offenses are the 'same' for purposes of common law and constitutional prohibitions against double jeopardy." *Monoker v. State*, 321 Md. 214, 219 (1990) (citations omitted).

> The required evidence test focuses on the elements of each crime in an effort to determine whether all the elements of one crime are necessarily in evidence to support a finding of the other, such that the first is subsumed as a lesser included offense of the second.

Monoker, 321 Md. at 220. *See also Blockburger v. United States*, 284 U.S. 299, 304

(1932).[12]

The jury was instructed as follows:

> [I]n order to convict the Defendant of third-degree sexual offense the State must prove beyond a reasonable doubt, 1) that the Defendant had sexual contact with the victim, 2) that the sexual contact was made against the will and without the consent of the victim and 3) that the Defendant inflicted such bodily injury, serious physical injury, strangulation or other similar act like inflicting serious bodily injury in the course of committing the offense. This could also include threatening or placing the victim in reasonable fear that at any time the victim would be subject to death, strangulation or suffocation. These would all include those types of offenses.
>
> ***
>
> The second type of third-degree sexual offense that the State would have to prove beyond a reasonable doubt is that the Defendant had sexual contact . . . with the victim; 2) that the victim was mentally incapacitated or physically helpless at the time of the act; and that the Defendant knew or reasonably should have known of the condition of the victim.
>
> ***
>
> [F]ourth-degree sexual offense is defined as and the State must prove beyond a reasonable doubt that 1) the Defendant had sexual contact with the victim, and 2) that the sexual contact was made against the will and without the consent of the victim.
>
> ***
>
> Assault in the second degree is an offensive physical contact to another person and in order to convict the Defendant of assault, the State must prove beyond a reasonable doubt that the Defendant caused physical contact or physical harm to the victim, and 2) that the contact was the result of an intentional or reckless act of the Defendant and was not accidental and 3) that the contact was not legally consented

[12] "Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

to by the victim or legally justified.

As discussed, *supra,* second-degree assault is based on three modalities: "(1) intent to frighten, (2) attempted battery, and (3) battery." *Snyder*, 210 Md. App. at 382. Battery constitutes a harmful "offensive or unlawful touching." *Marlin v. State,* 192 Md. App. 134, 166, (2010).

> Maryland cases have consistently taken the position that, where a defendant is convicted of a sexual offense and a common law assault or battery, and the threat of force or force or *sexual contact* involved in the sexual offense is also the basis for the assault or battery conviction, the assault or battery merges into the sexual offense under the required evidence test.

Biggus v. State, 323 Md. 339, 351 (1991) (emphasis supplied). Although *Biggus* was decided before the enactment of the 1996 statutory assault framework in Maryland, "[s]econd-degree assault is a statutory crime that encompasses the common law crimes of assault, battery, and assault and battery." *Quansah v. State*, 207 Md. App. 636, 646 (2012).

Sexual contact was defined in the jury instructions as

> [T]he intentional touching of the victim's genitals or anal area or other intimate parts for the purposes of sexual arousal or gratification or for the abuse of either party, and it includes the penetration however slight by any part of the person's body other than the penis, mouth or tongue into the genitalia or anal opening of another person's body if that penetration can be reasonably construed as being for the purpose of sexual arousal or gratification or for the abuse of either party.

"What is involved in sexual contact is purposeful tactile contact and tactile sensation, not incidental touching." *Travis v. State*, 218 Md. App. 410, 465 (2014).

Accordingly, the sexual contact required to convict Appellant of third and fourth degree sexual offenses *could have also been* the offensive or unlawful touching upon which

Appellant's second-degree assault convictions were based, thereby, satisfying the required evidence test. Certainly, the jury could have based Appellant's second-degree assault convictions on separate offensive or unlawful touching, but "we are constrained by precedent from assuming that the two convictions were not based on the same act or acts." *Snowden*, 321 Md. at 739.

Md. Rule 8-604(d)(2) provides 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 v. State*, 447 Md. 1, 28 (2016), the Court of Appeals noted that

> the original sentencing court is viewed as having imposed individual sentences merely as component parts or building blocks of a larger total punishment for the aggregate convictions, and, thus, to invalidate any part of that package without allowing the court thereafter to review and revise the remaining valid convictions would frustrate the court's sentencing intent.

(quoting *State v. Wade*, 297 Conn. 262, 998 A.2d 1114, 1120 (2010)).

Accordingly, we remand the case to the lower court to address the issue of merger and re-sentencing as discussed in this opinion.

REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR RE-SENTENCING CONSISTENT WITH THIS OPINION; JUDGMENTS OTHERWISE AFFIRMED;
COSTS TO BE PAID TWO THIRDS BY APPELLANT AND ONE THIRD BY MAYOR AND CITY COUNCIL OF BALTIMORE.