Circuit Court for Montgomery County

Criminal No. 128780C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2634

September Term, 2016

MYLES J. BOWERSOX

v.

STATE OF MARYLAND

Wright,
Kehoe,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: December 18, 2017

Appellant, Myles J. Bowersox, was indicted in the Circuit Court for Montgomery County, Maryland, and charged with rape in the first and second degrees; sexual offenses in the first, second, third, and fourth degrees; and, first degree burglary home invasion. A jury acquitted appellant of both rape counts, but convicted him on the remaining counts. Appellant was sentenced to life for first degree sexual offense, a consecutive 20 years for second degree sexual offense, a concurrent 10 years for third degree sexual offense, a concurrent 1 year for fourth degree sexual offense, and, a concurrent 25 years for first degree burglary home invasion, for an aggregate sentence of life plus 20 years. Appellant timely appealed and presents the following questions for our review:

> 1. Did the lower court err in refusing to allow the defense to introduce evidence of an alleged prior assault against the complaining witness?
>
> 2. Did the lower court err in allowing the State to introduce evidence that Mr. Bowersox "cannot be excluded as a possible contributor" to Y-STR DNA on a towel in the complaining witness's bedroom?
>
> 3. Did the lower court err by instructing jurors that they could find Mr. Bowersox guilty of sexual offense in the first and third degrees if they found that he "threatened or placed [the complaining witness] in reasonable fear that she would be imminently subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping?"
>
> 4. Did the lower court commit plain error by instructing the jurors that they could find Mr. Bowersox guilty of third degree sexual offense if he made non-consensual sexual contact during a burglary?
>
> 5. Did the lower court err in denying a motion for mistrial?
>
> 6. Did the lower court err by not merging several of the convictions for sentencing purposes?

For the following reasons, we hold that appellant's sentences for second degree and fourth degree sexual offense merge with his sentences for first degree and third degree sexual offense, respectively, and we shall vacate those sentences. Otherwise, we affirm.

BACKGROUND

On November 16, 2015, at around 9:00 p.m., Ms. B. went to bed in her ground floor apartment located on Dowgate Court in Montgomery County, Maryland.[1] She awoke at around 4:00 a.m. to find a man on top of her. The man pulled her shirt over her face and then lifted her bra and "groped" her breasts with his hands. He also took off her pants and her underwear and put his fingers and his hand inside her vagina.

The man then attempted intercourse. Ms. B. initially could not remember if he put his penis into her vagina. After her memory was refreshed with a prior statement she gave to police, Ms. B. testified that the man's penis did enter her vagina, "a little bit." When she tried to call out to her roommate for help during the assault, the man struck her in the mouth with a closed fist. Ms. B. did not call out again, because she was afraid the man would hit her again. Ms. B. also testified that the man put his penis into her mouth. After he ejaculated into Ms. B.'s mouth, he grabbed a nearby washcloth and wiped her mouth off.

[1] It is unnecessary to name the sexual assault victim in this case. *See State v. Mayers*, 417 Md. 449, 451 (2010) (identifying an 18-year-old sexual assault victim by her initials); *see also Travis v. State*, 218 Md. App. 410, 416 (2014) (referring to adult sexual assault victim as "the victim"); *Cordovi v. State*, 63 Md. App. 455, 460 (1985) (same).

Ms. B. testified that the man then "put a knife to my belly and told me if I told anybody, he'd come back and kill me." After the assault was over, the man fled through the window. Ms. B. testified that the window had been shut, but not locked, when she went to bed. Ms. B. then called the police and also told one of her two roommates about the assault.[2]

Ms. B. testified that she got a "good look" at her assailant before he lifted her shirt over her face, testifying that she believed he was in his 20's and that she "thought he was Hispanic, but I'm assuming I was wrong because I heard later he was Jewish." Ms. B. concluded her direct examination by testifying that she did not know appellant and that he had never been in her bedroom before November 16, 2015.

Thereafter, during cross-examination, Ms. B. identified appellant as her assailant. Notably, Ms. B. initially agreed with defense counsel's question that she had not seen appellant "before." However, shortly after this question, Ms. B. clarified, in her own words, that she had never seen appellant "before that night." After further questioning concerning whether she originally described her assailant as being Hispanic, Ms. B.

[2] Ms. B's call to 911 was played for the jury. In addition, Ms. B. testified that she lived with two other women, and that they were paired up as roommates by Cornerstone Services, an organization that provides residential assistance to people with mental health disabilities. Ms. B. confirmed that she had been diagnosed with a schizoaffective disorder, and that she took medication, including clozapine and risperidone, and that clozapine generally made her sleepy. On cross-examination, Ms. B. denied that her medication affected her memory. Ms. B. declined to go to the hospital for an examination after the assault.

maintained that she recognized appellant as being the person she saw the night of the assault. She further testified that, although her shirt was over her head for part of the assault, she "got a good look at him." On redirect examination, Ms. B. again made an in-court identification of appellant.

Appellant's fingerprints matched latent prints left on the interior window molding and exterior side ledge molding for the window into Ms. B.'s apartment. Additionally, as will be further discussed, appellant could not be excluded as a possible contributor to a sample of Y-STR DNA found on a washcloth in the victim's bedroom.

Detective Elizabeth Young, of the Montgomery County Police Special Victims Investigations Division, testified that appellant was arrested on December 2, 2015. After appellant waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), Detective Young interviewed him at police headquarters. A video recording of the interview was played for the jury. Appellant initially denied that he had ever been in the victim's apartment building. However, after further questioning, appellant replied that he "can't give you a definite answer." Detective Young then informed appellant that police found his fingerprints inside an apartment. When asked why that would be, appellant replied that he did not know. After appellant gave this answer, the interview ended.

There was further evidence that appellant lived with his girlfriend, Molly Knight, in an adjacent building in the same apartment complex as the victim. Knight testified that, on the day before the assault, she picked up appellant at his job at a restaurant in southeast D.C. and drove back to their apartment, arriving around midnight. Knight and appellant got into an argument in the car, and afterwards, appellant decided to remain in

the car to "calm down." Knight confirmed that appellant usually kept a large pocketknife, larger than a Swiss Army knife, inside the car.

Knight continued that after the argument, she went to her apartment and fell asleep. Approximately two hours later, Knight discovered appellant was still not in the apartment, so she began trying to contact him. Appellant finally returned to the apartment at around 4:00 a.m.

After he was arrested, Knight and appellant spoke over the telephone. The contents of that conversation were played for the jury. In that phone call, appellant told Knight, "I never touched her, but like, I, like, talked to her a few times[.]" Appellant stated that he met the victim while he was walking to work and asked her how she was and noted that she looked "like a lovely young lady." Appellant recounted that Ms. B. told him she was 64 years old, that she "kept, like jerking around, moving," and that he believed she had "dementia." Appellant told Knight "I never fucking touched her." Appellant also told Knight that the police had found a thumbprint on the windowsill. Appellant stated that "that makes sense because, you know, I hoisted myself . . . up her windowsill, wanting to talk to her, you know."

Appellant also suggested an alibi to Knight, telling her that, after she picked him up on the night in question, the two of them heated up some Chinese food, watched "The Office," and then went to bed. After the tape concluded, Knight testified that she and appellant did not reheat Chinese food or watch television after they got home that night.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant first contends that the circuit court erred in preventing him from eliciting evidence concerning a prior, unrelated sexual assault of the victim from 2009. Appellant argues that the evidence was relevant "to prove that the complaining witness's in-court identification of Mr. Bowersox was based not on her observations from the night in question but her paranoia of Hispanic men as [a] result of the alleged 2009 incident." The State responds that the victim's prior sexual assault in an unrelated case was irrelevant and the court properly exercised its discretion in excluding the evidence.

Prior to jury selection, the State moved *in limine* to preclude appellant from referencing the victim's prior sexual history. According to the State's motion, Ms. B. was the victim of a sexual assault in 2009 "which was investigated but not charged as the offender remains unknown." Defense counsel responded that he would not elicit her prior sexual history, but that:

> At some point in time when she is giving a statement, [Ms. B.] talks about having been raped about six years prior to this. She makes reference to being raped by some Mexicans. She talks about being pursued by them and then she identifies the person that she says she cannot really see that night as being Mexican, without any further descriptors.

Defense counsel continued that Ms. B. described her assailant simply as being "Mexican," and that "she is paranoid of Mexicans from this prior event. So, I am talking about her state of mind that night, waking up from a deep sleep, having this experience in the past." Defense counsel then argued that he should be able to make a limited inquiry, "not about any of the events before, but that before she had described someone as

Mexican and continues to this day to be a paranoid effect of hers. And then she describes the person that night as being Mexican."

The State agreed that Ms. B. only described her assailant in this case as a Hispanic male in his early 30's, wearing dark pants, but that it was "not offering her testimony for the purpose of identification in this case." Maintaining that it did not intend to ask Ms. B. to identify her assailant, the State continued: "[t]he part about this prior rape is that in 2009 [Ms. B.] was raped by a man who assaulted her, who broke into the home and assaulted her and during that rape she also reported that it was a Hispanic male. However, no one was apprehended." The State argued that "[a]ny mention of that prior rape is irrelevant to this rape and it would just serve to confuse the jury in this case."

The circuit court agreed, stating:

> Okay. I agree. What happened in 2009 has nothing to do with what happened in 2015. Especially since the issue of the defendant's identification is not being pursued by the State or by the victim. It is not being pursued by the State. I think it would confuse the jury and be unduly prejudicial. So the State's motion *in limine* is granted.

Defense counsel continued to argue that the prior rape was relevant on the grounds that Ms. B. was described as having "some schizoid effective disorder that would affect her perception," and that "her memory of the other event, her description of the person in the other event that leads her to describe this person that night and all the details that night as relates to the prior incident." Based on this, defense counsel maintained that he should be permitted to ask some limited questions about the prior rape, and the court responded, "[b]ased on what you have said, I am not changing my decision on that." But,

the court informed defense counsel that he could "revisit the issue" prior to Ms. B.'s cross-examination.

This Court has explained the standard of review of a trial court's decision regarding the admission of evidence as follows:

> "Determinations regarding the admissibility of evidence are generally left to the sound discretion of the trial court. *Hajireen v. State*, 203 Md. App. 537, 552, *cert. denied*, 429 Md. 306 (2012). This Court reviews a trial court's evidentiary rulings for abuse of discretion. *State v. Simms*, 420 Md. 705, 724-25 (2011). A trial court abuses its discretion only when 'no reasonable person would take the view adopted by the [trial] court,' or 'when the court acts "without reference to any guiding rules or principles."' *King v. State*, 407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1, 13 (1994))."

Baker v. State, 223 Md. App. 750, 759 (2015) (quoting *Donati v. State,* 215 Md. App. 686, 708-09 (2014)).

The abuse of discretion standard applies "with respect to the admissibility of evidence concerning a victim's past sexual conduct[.]@ *Bell v. State*, 118 Md. App. 64, 89 (1997), *rev'd on other grounds*, 351 Md. 709 (1998); *see* Md. Code Ann. (2002, 2012 Repl. Vol.) § 3-319 (a) of the Criminal Law Article ("Crim. Law") ("Evidence relating to a victim's reputation for chastity or abstinence and opinion evidence relating to a victim's chastity or abstinence may not be admitted" in rape and sexual offense cases); *see also Johnson v. State*, 332 Md. 456, 464 (1993) (a "trial court's ruling on the admissibility of specific instances of a victim's past sexual conduct is subject to review for an abuse of discretion standard") (citing *White v. State*, 324 Md. 626, 637 (1991)). Further, the rape shield law provides an exception only under the following circumstances:

> (b) Evidence of a specific instance of a victim's prior sexual conduct may be admitted in a prosecution described in subsection (a) of this section only if the judge finds that:
>
> (1) the evidence is relevant;
>
> (2) the evidence is material to a fact in issue in the case;
>
> (3) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and
>
> (4) the evidence:
>
> (i) is of the victim's past sexual conduct with the defendant;
>
> (ii) is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma;
>
> (iii) supports a claim that the victim has an ulterior motive to accuse the defendant of the crime; or
>
> (iv) is offered for impeachment after the prosecutor has put the victim's prior sexual conduct in issue.

Crim. Law § 3-319(b).

Initially, even if the evidence of the victim's prior sexual assault was relevant to her identification, none of the enumerated factors in Crim. Law § 3-319(b)(4) applies in this case. Moreover, we are not persuaded that the victim's prior identification of her assailant in an unrelated case as Hispanic was relevant to her identification here. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Furthermore, considering that appellant's reasons for the inquiry was to show the victim's paranoia about members of the Hispanic race, *see* Brief of Appellant at 11, we are unable to

conclude that the circuit court abused its considerable discretion on an issue such as this in determining that the proffered evidence was unduly prejudicial and likely to confuse the jury. *See* Md. Rule 5-403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"); *see also Thomas v. State*, 301 Md. 294, 318 (1984) ("Since the trial court ruled correctly that the evidence was irrelevant, its exclusion did not violate appellant's constitutional rights").

And, even if we were to conclude that the circuit court erred by excluding evidence of the victim's prior sexual assault, we would hold any error was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) ("[A]n error will be considered harmless if the appellate court is 'satisfied that there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded C may have contributed to the rendition of the guilty verdict'") (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

Appellant's reason for admission of the prior sex crime was to undermine the victim's identification. We note that, when the circuit court made its ruling on the motion *in limine*, the State had proffered that an identification would not be made during direct examination. The State did not ask Ms. B. to identify appellant during direct. However, for reasons not raised on appeal, the victim did identify appellant during cross-examination.

Thereafter, defense counsel "revisit[ed] the issue" by renewing his request to have the victim's prior sex assault admitted after this identification, counsel challenged this belated identification as follows:

> Q. Oh, but do you remember telling them at that point in time that you don't remember because your shirt was pulled over your face?
>
> A. I got a good look at him.
>
> Q. Do you remember telling them when they asked you that you said you did not get a good look at him?
>
> A. Well, I was mistaken.
>
> Q. So when it first happened and you were calling the police – I guess you wanted them to help you find somebody, right?
>
> A. Yeah.
>
> Q. And so the first thing they asked you was did you get a good look at him, and you told them no, right?
>
> A. I was mistaken.
>
> Q. So somewhere between when this happened and you called them, you decided that night you did get a good look at him, right?
>
> A. Yes.
>
> Q. What's making you say that, meeting with the prosecutor, talking with other people, *et cetera*?
>
> A. I don't know.
>
> Q. Did they talk to you about how important your testimony is today?
>
> A. Yes.
>
> Q. They told you, when I say they, the prosecutor, you've [had] some meetings with them and they discussed your testimony?

A. Yes.

Q. How important it was to be sure today about some things?

A. Yes.

Q. Including maybe that that's him, correct?

A. I'm pretty sure I got a good look at him.

Q. Did they ask you why you said the first night that you didn't get a good look?

A. That I didn't? I can't remember.

Cross-examination continued:

Q. I'm sure when you talked to the prosecutors, they told you it was important to tell the truth, correct?

A. Yes.

Q. Now sometimes, though, the truth is you don't remember, correct?

A. Yeah.

Q. And sometimes the truth is you don't know, correct?

A. Yes.

Q. And sometimes the truth changes depending upon what other people have told you in this case, correct?

A. Yes.

Q. So the truth is not absolute, solid, in place, correct?

A. Yes.

[PROSECUTOR]: Objection.

THE COURT: Overruled.

BY [DEFENSE COUNSEL]:

Q. Right?

A. Yes.

Q. Okay. I know, and I apologize, but it's important for the jury to know that – you want to tell them what happened that night, right?

A. Yes.

Q. You want to catch the person, right?

A. Yes.

Q. They told you that the person who's accused of doing this would be in court with his lawyer, correct?

A. Yes.

Q. And while you want to tell the truth, you have to admit the truth is hard to come by sometimes, correct?

A. Yeah.

Q. Through memory, right?

A. Yeah.

Q. Just not knowing?

A. Right.

Q. Just not being sure, correct?

A. Right.

Q. So some of the things you may have told them earlier, while you may want them to be the truth, aren't necessarily so, correct?

A. I don't know. I don't know.

On this first question presented, where appellant sought to undermine the victim's identification with a prior unrelated sexual assault case, we conclude that any error in excluding that evidence from *another* case was harmless considering that defense counsel effectively challenged the victim's identification in *this* case. Moreover, there was stronger evidence of appellant's criminal agency, other than the victim's belated in-court identification, namely, his fingerprints on the windowsill, evidence suggesting that his Y-STR DNA profile was on a washcloth in the victim's bedroom, as well as his phone conversation with his girlfriend. Any error was therefore harmless.

II.

Appellant next contends that it was error for the circuit court to admit opinion evidence that he could not be excluded as a possible contributor to the Y-STR profile found om a washcloth in the victim's bedroom. Relying solely on Md. Rules 5-402[3] and 5-403[4], appellant states that this evidence "confirms nothing more than the mere

[3] **Md. Rule 5-402. Relevant evidence generally admissible; irrelevant evidence inadmissible.**

> Except as otherwise provided by constitutions, statute, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible.

[4] **Md. Rule 5-403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.**

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation f cumulative evidence.

possibility that Mr. Bowersox *may* have contributed to the sample, not that he actually *did*." (Emphasis in original). The State responds that admission of this evidence was within the court's discretion. We agree.

The circuit court heard argument on this issue at a hearing prior to jury selection. The State proffered that the evidence would show that, after Ms. B. was sexually assaulted, her assailant used a washcloth/towel to wipe off her mouth. Samples were collected from that towel, as well as two other towels, and submitted for DNA analysis. The State's expert, Erin Farr, a forensic biologist, determined that two towels included DNA from Ms. B, and the third towel contained a mixed DNA profile, with the major contributor being Ms. B., and the minor contributor being an unknown male.

Following this, Ms. Farr sent the sample containing the minor male contributor to Catherine Roller, at Bode Technologies ("Bode") in Lorton, Virginia, for further analysis. Ms. Roller then performed a type of analysis referred to as Y-STR testing, focusing on the male Y chromosome profile contained in the sample. According to the State's proffer during the motions hearing, the "YTSR, is consistent, for lack of a better word, with the defendant and his paternal line." The State proffered that there would be testimony at trial that appellant could not be excluded from the YSTR test results, and that the results also showed the sample could have come from appellant's paternal line, *i.e.*, "father; identical twin; brother; son; something along those lines." The State agreed that there was no DNA evidence that specifically matched appellant.

Defense counsel responded that the reason he moved to exclude this testimony is because it was prejudicial and potentially confusing to the jury. Counsel used the

following example, "if I were to say to a juror that we cannot exclude [the trial judge] from being a possible bad jurist, what is the take away? It is confusing, isn't it?" Defense counsel argued the testimony that appellant could not be excluded was a "double negative."

The circuit court responded that it understood the analogy defense counsel was trying to make, but that "I do not think it is unduly prejudicial or confusing. I think that you will probably have fun cross-examining her. But I am going to deny that portion of the motion."[5]

At trial, Ms. Farr was accepted as an expert in forensic biology and DNA testing. Ms. Farr testified that she examined samples obtained from Ms. B. and appellant, as well as swabs obtained from three white towels recovered from Ms. B.'s apartment. She determined that two of the towels included DNA from Ms. B. and none from appellant.

As to the third towel, Ms. Farr found a mixture on one of those towels, containing both female and male DNA. That test further revealed a major contributor and a minor contributor to the mixture. Although Ms. B. was included as the major contributor, Ms. Farr testified that the minor contributor was not suitable for standard DNA comparison.

However, because Ms. Farr could determine that this sample from the third towel contained male DNA, she submitted it to Bode for Y-STR DNA testing. That testing, Ms. Farr explained, considers "the DNA types of the Y chromosome, so it's specific to

[5] At trial, defense counsel was granted a continuing objection to both Ms. Farr's and Ms. Roller's opinions on this subject.

the male." The sample from the towel was then sent to Bode, along with the sample collected from appellant for comparison. On cross-examination, Ms. Farr agreed that, when she sent the sample from this towel, it was her conclusion that the minor contribution could have included more than one possible male contributor.

Catherine Roller, who was and accepted as an expert in forensic biology and DNA testing and analysis, explained Y-STR testing as follows:

> . . . [w]e receive half of our DNA from our biological mother and half of our DNA from our biological father. You may remember from genetics class if you receive an X and an X, you are biologically female. If you receive an X and Y, you would be biologically male. That means that only biologically males have that Y chromosome, so the Y-STR testing is testing only DNA specific to that Y chromosome, so it's essentially male-specific DNA.

Ms. Roller processed the towel sample sent from Ms. Farr in this case and determined that the Y-STR profile from the towel indicated a "single source male." Appellant could not be excluded as a possible contributor to the profile obtained from the towel. Ms. Roller then compared the profile to a database containing 5,259 Y-STR profiles of different races and determined that the profile obtained from the towel was not observed in any of those individual profiles. Ms. Roller then opined that "Myles Bowersox, cannot be excluded as a possible contributor" and provided statistical analysis that "one in every 1,757 individuals might share that profile[.]" Ms. Roller concluded her direct examination as follows:

> So Y-STR testing again is male specific. You're only going to find it in biologically male individuals. Additionally, because you are receiving – all males are receiving that Y DNA from their father, they're going to have the same Y profile as their father. Additionally, as their brother if

> their brother has the same father. So all paternal related individuals will have the same Y-STR profile. So it's not necessarily unique to that individual within that family.

Here, appellant does not claim that the Y-STR evidence was inadmissible because it was not generally accepted or because there was some flaw in the expert's opinion. *See generally, People v. Zapata*, 8 N.E.3d 1188, 1193 (Ill. App. Ct. 2014) ("Y-STR testing has gained general acceptance") (collecting cases); *see also Jackson v. State*, 448 Md. 387, 393 n.10 (2016) ("Y-STR testing is a variation of STR testing that 'can enable an analyst to identify the DNA of a male contributor to a mixed DNA sample' by testing 'the polymorphic areas of the Y-chromosome possessed only by males'") (quoting Giannelli et al., *Scientific Evidence*, § 18.03[d], (5th ed. 2012)). Instead, appellant's contention is that the evidence that he may have contributed to the sample from the washcloth was minimally probative and unduly prejudicial.

We conclude that this argument ultimately goes to the weight of the evidence, not its admissibility. As this Court has stated, "[e]vidence need not be positively connected with the accused or the crime in order to render it admissible where there is a probability of its connection with the accused or the crime[.]" *Richardson v. State*, 63 Md. App. 324, 334-35 (1985) (quoting *Farley v. State*, 3 Md. App. 584, 587 (1968)); *see also Commonwealth v. Jacoby*, 170 A.3d. 1065, 1093 (Pa. 2017) (affirming trial court's decision not to hold hearing under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), because the defendant "could not overcome the trial court's conclusion that his argument was predicated upon the weight that should be assigned to the Y-STR DNA evidence,

and not upon the novelty of the database process itself"). The circuit court properly exercised its discretion in admitting the evidence at issue.

III.

Appellant next asserts that the circuit court erred in instructing the jurors that they could find him guilty of first and third-degree sexual offense, if they found that the victim was in reasonable fear that she would be "imminently subjected" to different varieties of harm, on the grounds that there was no evidence that any such harm was "imminent." The State counters that there was sufficient evidence to support the instruction.

During the discussion about the pattern instruction for first degree rape, the parties discussed whether the following aggravating factors were applicable:

> (1) the defendant used or displayed a dangerous weapon or an object that (name) reasonably concluded was a dangerous weapon;
>
> (2) the defendant suffocated, strangled, disfigured, or caused serious physical injury to [(name)] [another] in the course of committing the offense;
>
> (3) the defendant threatened or placed (name) in reasonable fear that [(name)] [any person known to (name)] would be imminently subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping;
>
> (4) the defendant committed the offense aided and abetted by [another] [others]; or
>
> (5) the defendant committed the offense in connection with a burglary in the first, second, or third degree.

Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 4:29.1, at 782 (2d. ed. 2016) ("MPJI-Cr").

Defense counsel agreed that the first and fifth factors applied, but he disagreed that the third factor applied in this case. Counsel argued "the reason I don't agree with three, it talks about imminent." After the State responded that Ms. B. was threatened with a knife, defense counsel argued:

> Well, I believe her statement was, on his way out, he pulled out a knife and threatened her. So, and that's why the word – if you tell anybody, I'll come back and kill you, was her testimony about him exhibiting the knife. So that's not, that's not imminent.

The circuit court responded that defense counsel could "argue that, but I mean, it says one or more. So they only have to find one. So I'm going to leave in three." Subsequently, appellant made the same argument, and the court made the same ruling, as to the charges of first and third-degree sexual offense. The pattern instructions for those offenses mirror the language in the first-degree rape pattern instruction. *See* MPJI-Cr 4:29.5, at 797; MPJI-Cr 4:29.7, at 807. Thereafter, when the court gave the pertinent instructions, the jury was told to consider whether "the defendant threatened or placed [Ms. B.] in reasonable fear that she would be imminently subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping . . . .[6]

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 and the extent to which the instructions are binding." Under this rule, trial courts are required "to give jury instructions requested by a party when a three-part test is met." *Preston v. State*, 444 Md. 67, 81 (2015). "The

[6] At the conclusion of jury instructions, appellant preserved an objection to the inclusion of this language.

instruction must correctly state the law, the instruction must apply to the facts of the case (*e.g.*, be generated by some evidence), and the content of the jury instruction must not be covered fairly in a given instruction." *Id*. at 81-82 (footnote omitted). The court's decision to give a requested jury instruction is reviewed for abuse of discretion. *See Hall v. State*, 437 Md. 534, 539 (2014).

For an instruction to be applicable, there needs to be "'some evidence' support[ing] the giving of the instruction." *Preston*, 444 Md. at 81 n.16 (quoting *McMillan v. State*, 428 Md. 333, 355 (2012)). This threshold is not a high one: "'Some evidence is not structured 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.'" *Jarrett v. State*, 220 Md. App. 571, 586 (2014) (quoting *Malaska v. State*, 216 Md. App. 492, 517 (2014)). In reviewing whether there was some evidence to generate the instruction, "we view the facts in the light most favorable to the requesting party," and "we must determine whether the requesting party '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.'" *Page v. State*, 222 Md. App. 648, 668 (2015) (quoting *Bazzle v. State*, 426 Md. 541, 550 (2012)), *cert. denied*, 445 Md. 6 (2015).

Here, there was evidence that, during the sexual assault, appellant punched the victim in the mouth with a closed fist. The victim testified that she "was afraid he was going to hit me again." Further, the victim testified that her assailant "placed a knife to my belly and told me if I told anybody, he would come back and kill me." There is no

dispute that these threats constituted threat of disfigurement or serious physical injury. Instead, appellant focuses on his alleged threat to come back, after the assault was over, and kill the victim if she told anyone.

A similar issue was raised in *Hill v. State*, 134 Md. App. 327 (2000). There, the defendant, Stephen Hill, threatened one of his instructors, Alvaro Alvarez-Parrilla ("Alvarez"), at the University of Maryland with a handgun, telling him that he was either going to give him an "A" on his math test or else Hill would kill him. *Id*. at 337. This threat occurred in the instructor's office, with the instructor testifying at trial that he "feared for my life immediately." *Id*. After hearing this threat, the instructor and Hill agreed that Hill would retake the test and the instructor would give him an "A." *Id*. Hill left the instructor's office, and the instructor later contacted the police. *Id*. at 338.

On appeal to this Court, Hill challenged the sufficiency of the evidence in support his second-degree assault conviction on the following grounds:

> because nothing that he did or said indicated an intent to harm Alvarez, then and there. Rather, appellant argues, to the extent that the evidence showed he had any intent to harm Alvarez, the intent was to harm him in the future, and only if Alvarez failed to give him an "A" grade or told anyone about the incident. Appellant maintains that Alvarez's testimony that he was afraid at the time of the incident did not establish the threat of imminent bodily harm.

Id. at 354-55.

We disagreed, noting that one variety of assault included "placing of another in apprehension of receiving an immediate battery," *see Dixon v. State*, 302 Md. 447, 457 (1985), and that this may be accomplished by placing the victim "in reasonable apprehension of an imminent battery." *Lamb v. State*, 93 Md. App. 422, 442 (1992), *cert.*

denied, 329 Md. 110 (1993). We concluded that "a rational trier of fact could conclude that, when appellant displayed the gun and threatened Alvarez, Alvarez was placed in reasonable apprehension of an imminent battery, even though the words that appellant used constituted a threat of harm to occur conditionally and in the future." *Hill*, 134 Md. App. at 356; *see also Montgomery v. State*, 206 Md. App. 357, 394 (2012) ("[A]lthough appellant did not display a weapon, [the victim] could reasonably have inferred that appellant possessed an unseen weapon, or that appellant and his two companions had the ability to cause [the victim] an immediate battery with their bare hands") (citing *Hill*, 134 Md. App. at 356).

We conclude that the same reasoning applies to the instruction here. During the sexual assault, appellant punched the victim in the mouth with a closed fist. Towards the end of the incident, but before he left her bedroom, he also pulled out a knife and placed it against her stomach and threatened to kill her if she told anyone. This was sufficient to meet the "some evidence" test.

Furthermore, appellant's insistence that this was only a threat of future harm fails to account for the definition of "imminent." Recently, the Court of Appeals considered the meaning of "imminent or immediate danger" as used in the imperfect self-defense jury instruction. *Porter v. State*, 455 Md. 220, 240-41 (2017). The majority opinion considered out-of-state authority in resolving the distinction, observing:

> The Washington Supreme Court has similarly explained that "imminent" has less to do with proximity in time than "immediate." *State v. Janes*, 121 Wash.2d 220, 850 P.2d 495, 506 (1993). The court explained that "imminent" is defined, in part, as "hanging threateningly over one's head" or "menacingly near." *Id*. (quoting *Webster's Third New*

> *International Dictionary* 1130 (1976)). Accordingly, it reasoned, even a threat that "occurred days before the homicide" could support a defendant's claim that she feared "imminent" harm "when the evidence shows that such a comment inevitably signaled the beginning of an abusive episode." *Id*.

Porter, 455 Md. at 241-42.

The Court of Appeals concluded that "an imminent threat is not dependent on its temporal proximity to the defensive act. Rather, it is one that places the defendant in imminent fear for her life." *Porter*, 455 Md. at 245. Analogizing to these cases, we are persuaded that there was some evidence that the harm to the victim was imminent and that the instruction, therefore, was generated by the evidence at trial. The circuit court properly exercised its discretion in giving the instruction.

IV.

Appellant next asks this Court to recognize plain error because the pattern instruction for third degree sexual offense includes an additional aggravating factor not found in the statute for the offense. The State responds that we should not exercise plain error because appellant has failed to demonstrate that the error affected the outcome of the proceedings.

In this case, the circuit court instructed on third degree sexual offense as follows:

> Sexual offenses, Third-Degree Sexual Offense. The defendant is charged with the crime of third-degree sexual offense. In order to convict the defendant of third-degree sexual offense, the State must prove, one, that the defendant had sexual contact with [Ms. B.]; two, that the sexual contact was made against the will and without the consent of [Ms. B.]; and, three, that the defendant (a) used or displayed a dangerous weapon or an object that [Ms. B.] reasonably concluded was a dangerous weapon; two, I'm sorry, (b) threatened or placed [Ms. B.] in reasonable fear that she would be imminently subjected to death, suffocation, strangulation, disfigurement,

serious physical injury, or kidnapping; or (c) committed the offense in connection with a burglary in the first, second, or third degree.

The circuit court's instruction substantially mirrors the pattern instruction. *See* MPJI-Cr 4:29.7, at 807. To reiterate, that instruction includes the following potential aggravators:

> (a) used or displayed a dangerous weapon or an object that (name) reasonably concluded was a dangerous weapon;
>
> * * *
>
> (c) threatened or placed (name) in reasonable fear that (name) [any person known to the (name)] would be imminently subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; . . . [or]
>
> * * *
>
> (e) committed the offense in connection with a burglary in the first, second, or third degree.

MPJI-Cr 4:29.7.[7]

As appellant correctly notes, the last aggravator, *i.e.*, committing the offense in connection with a burglary, is not an element of third degree sexual offense. *See* Crim. Law § 3-307(a)(1)(ii).[8] We are persuaded that there is a flaw in the pattern instruction

[7] This language is similar to the five aggravators listed for this offense in the first edition of the pattern instructions. *See* MPJI-Cr 4:29.7, at 385-86 (1st ed. 1995). *Cf.* Aaronson, *Maryland Criminal Jury Instructions and Commentary*, § 5.84 (E), p. 1083 (2016) (listing only four aggravating circumstances consistent with those provided in Crim. Law § 3-307(a)(1)(ii)).

[8] The prior statute also only listed four aggravating factors for third degree sexual offense. *See* Art. 27 § 464B (a)(1)(i)-(iv) (1957, 1996 Repl. Vol.) (superseded).

and that, although there was no objection to the instruction as given, the circuit court erred in informing the jury that they could convict appellant if they found that he committed the offense in connection with a burglary.[9]

Nonetheless, error alone is not grounds for reversal. Because appellant's trial counsel did not object to the instruction, appellant seeks plain error review. Md. Rule 4-325(e) specifically provides:

> No 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.

"Plain error is error that is so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Steward v. State*, 218 Md. App. 550, 565 (citation and internal quotation marks omitted), *cert. denied*, 441 Md. 63 (2014); *Malaska v. State*, 216 Md. App. 492, 524-25 (explaining that plain error review can

[9] The State argues that the court did not err because the extra factor amounted to an overinstruction. We agree that, although not all superfluous instructions are harmless, *Brogden v. State*, 384 Md. 631, 645 n.6 (2005) (recognizing that a superfluous jury instruction may amount to error), over-informing the jury with such instructions is frequently not prejudicial, *Perry v. State*, 150 Md. App. 403, 426-27 (2002) ("A rule requiring a necessary instruction does not forbid an unnecessary instruction. It is under-inclusion that runs the risk of error. Over-inclusion only runs the risk of boredom"). However, considering that the aggravating factors at issue are listed in the disjunctive, we do not agree that giving the jury the option of convicting appellant if they only found he committed the offense in connection with a burglary was a mere overinstruction.

remedy defects that denied "a defendant's right to a fair and impartial trial"), *cert. denied*, 439 Md. 696 (2014), and *cert. denied*, 135 S. Ct. 1162 (2015). Review for plain error is reserved for error that is "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy v. State*, 420 Md. 232, 243 (2011).

Moreover, as is well-established, our discretion to recognize plain error is plenary. *Austin v. State*, 90 Md. App. 254, 262-64, 268 (1992); *see also Morris v. State*, 153 Md. App. 480, 507 (2003) (appellate invocation of plain error doctrine is a "rare, rare phenomenon"), *cert. denied*, 380 Md. 618 (2004). And, "[i]t is the extraordinary error and not the routine error that will cause us to exercise the extraordinary prerogative [of reviewing plain error]." *Martin v. State*, 165 Md. App. 189, 195 (2005) (quoting *Williams v. State*, 34 Md. App. 206, 212 (1976) (Moylan, J., concurring), *cert. denied*, 391 Md. 115 (2006). In deciding whether to review an instruction absent an objection, this Court typically considers the egregiousness of the error, the impact upon the defendant, the lawyerly diligence, and the potential of the case to serve as a vehicle for interpreting and molding the law. *Austin*, 90 Md. App. at 268-72.

Here, the appellate claim is that the pattern instruction incorrectly states the law. While we agree with appellant on that point, this Court has explained that, in reviewing alleged errors in jury instructions, we "have been rigorous in adhering steadfastly to the preservation requirement." *Peterson v. State*, 196 Md. App. 563, 589 (2010); *see Yates v. State*, 202 Md. App. 700, 724 (2011) (recognizing that, where the law did not change during the pendency of appeal, the "use of a pattern jury instruction, without objection, weighs heavily against plain error review of the instructions given"), *aff'd*, 429 Md. 112

(2012) (citation and internal quotations omitted). Indeed, surmounting the high hurdle of plain error "nowhere looms larger than in the context of alleged instructional errors." *Martin*, 165 Md. App. at 198; *see Peterson*, 196 Md. App. at 589 (noting that plain error has been "noticed sparingly" in the context of erroneous jury instructions); *see also United States v. Gomez*, 255 F.3d 31, 37 (1st Cir. 2001) (stating that "the plain-error exception is cold comfort to most defendants pursuing claims of instructional error").

In this case, even though reversal would serve as a vehicle for developing the law, given the lack of lawyerly diligence in raising the issue, we are not persuaded that the error was so egregious as to require reversal for a new trial. We note that the circuit court also listed the same aggravating factor for the charges of first degree rape and first degree sexual offense. We are also unable to conclude that the impact on the defendant denied him a fair trial under the facts of this case. There was no dispute that appellant punched the victim in the mouth with a closed fist during the sexual assault and, at some point, displayed a knife. The jury could easily have considered these facts in applying the remaining two aggravating factors not at issue on this question. Accordingly, under the circumstances presented, we decline to exercise plain error review of the jury instruction for third degree sexual offense.

V.

Appellant next asserts that the circuit court erred in not declaring a mistrial following allegedly improper remarks by the prosecutor during closing argument. The State responds that the trial court properly exercised its discretion. We agree.

"A trial court is in the best position to evaluate the propriety of a closing argument." *Ingram v. State*, 427 Md. 717, 726 (2012) (citing *Mitchell v. State*, 408 Md. 368, 380-81 (2009)). Therefore, we shall not disturb the ruling at trial "unless there has been an abuse of discretion likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 243 (1995) (citing *Henry v. State*, 342 Md. 204, 231 (1991), *cert. denied*, 503 U.S. 192 (1992)). Trial courts have broad discretion in determining the propriety of closing arguments. *See State v. Shelton*, 207 Md. App. 363, 386 (2012).

Counsel is generally given "wide range" in closing argument. *Wilhelm v. State*, 272 Md. 404, 412 (1974). Both the defense and prosecution are free to "state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence." *Id.* Even when a prosecutor's remark is improper, it will typically merit reversal only "'where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to prejudice the accused.'" *Lawson v. State*, 389 Md. 570, 592 (2005) (quoting *Spain v. State*, 386 Md. 145, 158-59 (2005)).

Appellant first cites the following portion of the State's closing argument:

> [PROSECUTOR]: So we can cross out this argument that you shouldn't rely upon the Y-STR testing because it could have been a brother, it could have been a father's uncle or a father's brother because of that Y chromosome. That's not present in this case. That, members of the jury, is a tactic to distract you from the truth. And what we want you to focus on is the fact that this Y-STR testing that Catherine Roller did, when she tested, when she tested it, she used the statistical database to give you some level of points to compare, bless you, and that Mr. Bowersox's profile, the known profile, up here, was seen zero times out of over 5,000 profiles in the database and that the known profile was also compared to Towel A extract that she did and her result is that he cannot be excluded.

The prosecutor continued:

> And what does that mean? Well, she told you what that means. She said, although I can't say it's him, because I didn't have both, both chromosomes, I didn't have the X and the Y, I only had the Y, I only had half the DNA profile. I can tell you that at every one of the 23 locations we test for, the DNA from the known sample was consistent with the evidentiary sample, consistent at every one of the 23 locations, and she opined that it was – that Myles Bowersox's Y-STR DNA was consistent with what was found on the towel.

Appellant's objection to this latter remark was sustained and the comment was stricken from the record. Apparently unclear about the reason for the circuit court's ruling, the prosecutor asked for a bench conference and the following ensued:

> [PROSECUTOR]: She absolutely testified to that.
>
> THE COURT: Wait until he comes up.
>
> [PROSECUTOR]: Oh, I'm sorry.
>
> [DEFENSE COUNSEL]: Yes, Judge, I mean, her opinion in her report and her testimony is that cannot be excluded from a possible contributor. Her opinion did not include is consistent with.
>
> [PROSECUTOR]: Yes, she said yesterday, she did say yesterday that, that his profile was consistent with that of the sample. When she came down and she used that exhibit, that's exactly what she said.
>
> THE COURT: If it's not in her report, I'm not going to allow it, because I don't have that in my notes. So let me see the report. Are you talking about Ms. Roller reported that?
>
> [PROSECUTOR]: It's, it was Ms. Roller, but no, her –
>
> [DEFENSE COUNSEL]: (Unintelligible.)
>
> [PROSECUTOR]: -- her report says, her report says the – cannot be excluded from the possible contributor, but she also explained that when

she used the diagram, that it was – she said it was consistent, that all 23 locations were consistent with each other, and that's –

[DEFENSE COUNSEL]: Consistent with the Y chromosome is not the same as consistent with the DNA.

[PROSECUTOR]: I said the Y-STR. I didn't even say DNA.

THE COURT: That's, that's the impression that you gave, that it was the DNA.

[DEFENSE COUNSEL]: You said consistent with the DNA, Y.

[PROSECUTOR]: I thought I said Y, with the, with – I thought I said that it was the Y-STR testing that was consistent from the towel and the – if I misspoke on DNA, I didn't mean to do that.

THE COURT: I think you misspoke on that.

[PROSECUTOR]: Okay. I will.

THE COURT: You can clear it up then.

[PROSECUTOR]: I will. Right. Thank you.

[DEFENSE COUNSEL]: Thank you, Your Honor.

After this, the prosecutor corrected her remarks, as follows:

[PROSECUTOR]: Okay. I'm sorry. Members of the jury, I may have misspoke, so I want to make sure I clear it up. The Y-STR testing is consistent. I'm not trying to confuse that with DNA, but it's Y-STR testing, just the Y chromosome that was consistent, but it was consistent amongst all 23 locations. That was the point of what I was trying to say. So if I misspoke and said DNA, I apologize. It was the Y-STR that I'm talking about.

To the extent that the prosecutor's initial comments misstated the facts in evidence, defense counsel's objection was sustained, and the comments were stricken by court. Further, the critical inquiry is whether the jury was actually misled or was likely to

have been misled by the remarks to the prejudice of the accused. *See Evans v. State*, 333 Md. 660, 678-81 ("[I]t is not enough that the prosecutor's remarks were undesirable or even universally condemned. The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process" (citation omitted)), *cert. denied,* 513 U.S. 833 (1994); *see also Walker v. State*, 121 Md. App. 364, 376-77 (observing that every improper remark in argument will not serve as ground for reversal, since in ardor of advocacy and excitement of trial, even most experienced counsel are occasionally carried away), *cert. denied*, 351 Md. 5 (1998); *Booze v. State*, 111 Md. App. 208, 222 (1996) (stating that reversal is necessary only if the jury was actually misled or likely to have been misled or influenced by argument), *rev'd on other grounds*, 347 Md. 51 (1997); *Couser v. State*, 36 Md. App. 485, 501 (1977) (concluding that, in a case where the trial court gave a curative instruction, while the prosecutor's remark was improper, it was not likely that the jury was misled or likely to have been misled to the prejudice of the accused). Given that the prosecutor, herself, corrected her misstatement, we are not persuaded that there was any abuse of discretion on the part of the circuit court.

Next, appellant takes issue with the prosecutor's remarks during rebuttal concerning the fingerprint evidence. By way of background, the prosecutor reminded the jury that, after he was arrested, appellant attempted to explain to his girlfriend, Molly Knight, why his fingerprints were on the victim's windowsill:

> [L]isten to what he says to Ms. Knight. Listen to what he said: I hoisted myself up – hoisted, not I leaned in to talk to her. That's chest height. What the hell was he doing hoisting himself up? We need to use common

sense. He's lying to his girlfriend, and at that point in time, he only knew about the one thumbprint, exterior building. You saw where it is. There's a utility door. There's a pathway. He doesn't work for the building. What is he doing over there? What is he doing over there? Nothing, because he didn't do it. He was never there before that night, but that night he left contact with Molly at midnight and didn't return to their apartment until after 4:00 a.m. Molly is texting him, Molly is calling him, and he does not come back to the apartment until after 4:00 a.m.

The prosecutor continued:

> These are his fingerprints. He stated he was never ever in that apartment ever. He stated that he had walked her to the front door, escorted her back, and ladies and gentlemen, I would put forth to you that that's just making up stories to tell his girlfriend, to try to explain how he's sitting in prison, charged with rape.

Immediately after these remarks, the following ensued:

> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: Move to strike, have a –
>
> THE COURT: It's stricken.
>
> [DEFENSE COUNSEL]: -- motion later, Judge.
>
> THE COURT: I'm sorry.
>
> [DEFENSE COUNSEL]: I'll reserve, I'll reserve on my motion.

Another ground raised by appellant concerns the prosecutor's continued remarks, stating:

> Ladies and gentlemen, the State has presented you with [Ms. B.], the victim in this case, who has every right to refuse to give us, to give prosecutors, police her clothing, but she invited the authorities into her home to report what happened to her. She has the right to refuse to get a sexual assault examination. You have to rely on what you have, not on what you don't have . . . .

After the prosecutor concluded argument, a bench conference ensued, as follows:

[PROSECUTOR]: I have no idea what I said. I'll just be frank with you, it –

[DEFENSE COUNSEL]: Well, I'm going to –

THE COURT: You don't have any idea what you said –

[PROSECUTOR]: I was –

THE COURT: -- or you didn't mean to say it?

[PROSECUTOR]: I did not mean to say it, but at the second he objected, I said, what did I just say? So I'm telling you, quite honestly, it was, I would – I understand where [Defense Counsel] is coming from. I think that we would instruct the jury not to consider it. I think they know that it's a recorded phone call –

[DEFENSE COUNSEL]: Well – I'm sorry. I, I shouldn't – apologize.

[PROSECUTOR]: Go ahead. I'm –

[DEFENSE COUNSEL]: No.

THE COURT: Do you want to say anything?

[DEFENSE COUNSEL]: Yes. I want to move for a mistrial, Judge. We started out the beginning of this case, I asked for motions *in limine*, you granted them. Whether she knew what she was saying or she didn't know what she was saying, she's been a lawyer for a long time, she said it. It violated your motion *in limine*. Now I'm asking you for a mistrial.

[PROSECUTOR]: And I think a curative instruction would very appropriately deal with it. We have had –

[DEFENSE COUNSEL]: As in what?

[PROSECUTOR]: That you're not to consider what [the Prosecutor] said right before – right at the time of the objection.

[DEFENSE COUNSEL]: I don't think it will, and Judge, besides that –

[PROSECUTOR]: I think we should have done it right then.

[DEFENSE COUNSEL]: Well – I didn't mean to talk over her, Judge.

THE COURT: No. Go ahead.

[DEFENSE COUNSEL]: There's also several references to – well, skip the Y-STR, but that's also part of it, and I also think it's not a correct statement of the law that the jury can't consider evidence, possible evidence not presented. So on that ground and what she said now, I'm going to move for a mistrial, Judge.

THE COURT: But, I mean, it's not like they presented it as the law. I mean, that's just argument.

[DEFENSE COUNSEL]: Well, she says, you cannot consider that we didn't do these. That's what she said.

THE COURT: But I think that's argument, not –

[DEFENSE COUNSEL]: Okay. Well, I understand.
THE COURT: -- I don't think she was arguing the law.

[DEFENSE COUNSEL]: I understand, but out of an abundance of caution, I'm throwing that in. On another ground, I'd ask for a mistrial.

THE COURT: All right. I'm not going to grant the mistrial based on what she said, although, you know, it was clear throughout the whole trial that there wasn't supposed to be any mention with him being in jail. You all painstakingly looked through the transcript, agreed, you know, what wasn't going to come in; you had the tech person, you know, modify the CD so there was no indication that he was in jail, and then you go and blurt that out in closing. I mean, I don't know whether it was deliberate or not, but –

[PROSECUTOR]: Of course not, Your Honor. I would hope you would believe that.

> THE COURT: I'm not going to grant the mistrial on that basis. I don't find that the defendant would be unduly prejudiced by them thinking he's in prison now. So I'm not going to grant the mistrial. Motion is denied.

"We review a court's ruling on a mistrial motion under the abuse of discretion standard." *Nash v. State*, 439 Md. 53, 66-67 (2014); *see also Walls v. State*, 228 Md. App. 646, 668 (2016) ("A mistrial is an extreme remedy and it is well established that the decision whether to grant it is within the sound discretion of the trial court.") (Citation omitted). "Ordinarily, the exercise of that discretion will not be disturbed upon appeal absent a showing of prejudice to the accused, and [i]n order to warrant a mistrial, the prejudice to the accused must be real and substantial." *Wagner v. State*, 213 Md. App. 419, 462 (2013) (citation omitted). "The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594-95 (1989)).

The Court of Appeals has identified five factors relevant to the determination of whether a mistrial is required. The factors include "whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists." *Rainville v. State*, 328 Md. 398, 408 (1992) (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984); *see also McIntyre v. State*, 168 Md. App. 504, 524 (2006) ("[N]o single factor is determinative in any case, nor are the factors

themselves the test . . . Rather, the factors merely help to evaluate whether the defendant was prejudiced").

Here, the prosecutor's remark informing the jury that appellant was in prison when he made the phone call to his girlfriend was a single, isolated reference that was not thereafter repeated. Moreover, the circuit court sustained defense counsel's objection and struck it from the record. Based on this, we agree with the Court of Appeals that, '"[i]n the environment of the trial the trial court is peculiarly in a superior position to judge the effect of any . . . alleged improper remarks.'" *Simmons v. State*, 436 Md. 202, 212 (2013) (quoting *Wilhelm v. State*, 272 Md. 404, 429 (1974)).

Moreover, this Court has not reversed cases under similar circumstances. *See, e.g., Wagner*, 213 Md. App. at 463 (The "bald statement" that defendant was "locked up" was "isolated, unsolicited and unlikely to cause significant prejudice." *Mitchell v. State*, 132 Md. App. 312, 323-29 (2000) (court did not abuse its discretion in denying defendant's motion for a mistrial where a witness made an isolated, unresponsive statement that defendant had been "locked up"), *rev'd on other grounds*, 363 Md. 130 (2001); *Turner v. State*, 48 Md. App. 370, 377 (1981) (court did not err in denying defendant's motion for mistrial where a witness, on cross-examination by the State, testified that defendant had been "locked up"), *rev'd on other grounds*, 294 Md. 640 (1982); *see also Burral v. State*, 118 Md. App. 288, 297-98 (1997) (concluding that an "inadvertent reference to prison" did not amount to inadmissible "other crimes" evidence).

And, while it is true that the State agreed, prior to trial, not to reference appellant's prior criminal record or that he was "currently incarcerated or has been in the past," and also redacted his phone call with his girlfriend, there was other evidence that appellant had been arrested in connection with this case. Under the circumstances, we conclude that the jury was not likely misled by the remarks, and that appellant was not prejudiced. Thus, we discern no abuse of discretion in the circuit court's decision to deny the mistrial.

VI.

As his last question presented, appellant asks this Court to vacate the following sentences due to merger: second degree sexual offense into first degree sexual offense; fourth degree sexual offense into third degree sexual offense; and, first degree burglary into first degree sexual offense. The State responds that, to the extent that appellant is relying on fundamental fairness, that claim is unpreserved. The State also asserts that "separate sentences for separate insults were warranted."[10]

"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

[10] 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)).

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*. Additionally, "[u]nder Maryland law, the doctrine of merger is examined under three distinct tests: (1) the required evidence test; (2) the rule of lenity; and (3) the principle of fundamental fairness." *Alexis v. State*, 437 Md. 457, 484 (2014).

"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). 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:

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

Morris v. State, 192 Md. App. 1, 39 (2010) (citations omitted); *see also Gerald v. State*, 137 Md. App. 295, 312 ("[A]ny ambiguity in the indictment or as to how the jury understood the charges must be resolved in [appellant's] favor."), *cert. denied*, 364 Md. 462 (2001); *Thompson v. State*, 119 Md. App. 606, 621-22 (1998) (concluding, in a multi-count indictment, the court considers the charging document to resolve ambiguous

merger issues); *Cortez v. State*, 104 Md. App. 358, 369 (1995) (applying same principle to jury instructions).

A. Appellant's sentence for second degree sexual offense merges into his sentence for first degree sexual offense.

Pertinent to our discussion, and at the time of the offense, sexual offense in the first degree provided that "[a] person may not: (1) engage in a sexual act with another by force, or the threat of force, without the consent of the other;" and commit one or more of the five aggravating factors, discussed *supra*. Crim. Law § 3-305(a)(1). Similarly, sexual offense in the second degree provided 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[.]" Crim. Law § 3-306 (a) (1). A "sexual act" includes fellatio. *See* Crim. Law § 3-301(d)(1)(iii).[11] Under the required evidence test, the only difference between the two offenses is that sexual offense in the first degree requires proof of one or more of the additional aggravating factors. We are persuaded that the offenses merge under the required evidence test.

The State alleges that merger is not required because there were "separate insults," further suggesting that the two offenses do not merge because they were based on separate acts. We shall examine the record to answer that question. Here, the charge for sex offense in the first degree in the indictment alleged that, on the date and place

[11] Crim. Law §§ 3-305 and 3-306 have since been repealed, effective October 1, 2017. *See* 2017 Md. Laws, chs. 161-62 (effective Oct. 1, 2017). The prohibition against "sexual acts" is now codified as part of the first and second-degree rape offenses, respectively. *See* Crim. Law §§ 3-303, 3-304.

provided, that appellant committed "fellatio" on the victim in violation of Crim. Law § 3-305. The charge for sex offense in the second degree similarly alleged that appellant committed "fellatio" on the victim in violation of Crim. Law § 3-306. The verdict sheet reflected simply that appellant committed fellatio, on both of these two counts.

The jury instructions defined sexual offense in the second degree first, in pertinent part, as follows:

> The defendant is charged with the crime of second-degree sexual offense. In order to convict the defendant of second-degree sexual offense, the State must prove, one, that the defendant committed fellatio with [Ms. B.]; two, that the act was committed by force or threat of force; and, three, that the act was committed without the consent of [Ms. B.].

After defining fellatio, force, and consent, the instructions continued by defining sexual offense in the first degree as follows:

> The defendant also is charged with the crime of first-degree sexual offense. In order to convict the defendant, the State must prove all of the elements of forcible second-degree sexual offense and also must prove one or more of the following circumstances: one, the defendant used or displayed a dangerous weapon or an object that [Ms. B.] reasonably concluded was a dangerous weapon; two, the defendant threatened or placed [Ms. B.] in reasonable fear that she would be imminently subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or, three, the defendant committed the offense in connection with a burglary in the first, second, or third degree.

To the extent that the State claims that the charges for first degree and second degree sexual offense were based on separate acts, there is a clear ambiguity in the record as to that argument. We are not persuaded that the offenses were based on separate acts. Accordingly, we agree that the sentences merge.

B. Appellant's sentence for fourth degree sexual offense merges into his sentence for third degree sexual offense.

Pertinent to our discussion, sexual offense in the third degree provides that "[a] person may not: engage in sexual contact with another without the consent of the other;" and one or more of four aggravating factors, discussed *supra*. Crim. Law § 3-307(a). Sexual offense in the fourth degree provides that "[a] person may not engage in: sexual contact with another without the consent of the other . . . ." Crim. Law § 3-308(b). "Sexual contact" is defined 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." Crim. Law § 3-301(e)(1). Under the required evidence test, the only difference between the two offenses is that sexual offense in the third degree requires proof of one or more of the additional aggravating factors. We are persuaded that the offenses merge under the required evidence test.

The State alleges that merger is not required because there were "separate insults," again suggesting that the two offenses do not merge because they were based on separate acts. We again examine the record. The charge for sex offense in the third degree in the indictment alleged that, on the date and place provided, that appellant "touched the victim's vaginal area" in violation of Crim. Law § 3-307. The charge for sex offense in the fourth degree similarly alleged that appellant "touched the victim's vaginal area" in violation of Crim. Law § 3-308. The verdict sheet reflected simply that appellant touched the victim's vaginal area for these two offenses.

The jury instructions on sexual offense in the fourth degree provided:

> The defendant is charged with the crime of fourth-degree sexual offense. In order to convict the defendant of fourth-degree sexual offense, the State must prove one, that the defendant had sexual contact with [Ms. B.] and, two, that the sexual contact was made against the will and without the consent of [Ms. B.]

After defining "sexual contact," the jury was instructed that the crime of sexual offense in the third degree included an additional third element:

> That the defendant (a) used or displayed a dangerous weapon or an object that [Ms. B.] reasonably concluded was a dangerous weapon; two . . . (b) threatened or placed [Ms. B.] in reasonable fear that she would be imminently subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or (c) committed the offense in connection with a burglary in the first, second, or third degree.

To the extent that the State claims that the charges for third degree and fourth degree sexual offense were based on separate acts, there is a clear ambiguity in the record on that argument. We are not persuaded that the offenses were based on separate acts. Accordingly, we agree that the sentences merge.

C. Appellant's sentence for first degree burglary does not merge into his sentence for first degree sexual offense.

Again, pertinent to our discussion, and at the time of the offense, sexual offense in the first degree provided that "[a] person may not: (1) engage in a sexual act with another by force, or the threat of force, without the consent of the other;" and commit one or more of the five aggravating factors, discussed *supra*. Crim. Law § 3-305(a)(1). First degree burglary home invasion provides that "[a] A person may not break and enter the dwelling of another with the intent to commit a crime of violence." Crim. Law § 6-202(b).

Before we discuss merger of these two offenses under the required elements test, we next observe that the charge for first degree burglary home invasion charged in the indictment alleged that appellant entered the subject residence on the date in question "with the intent to commit a crime of violence" in violation of Crim. Law § 6-202. As indicated, the charge of first degree sexual offense alleged that appellant committed "fellatio" on the victim in violation of Crim. Law § 3-305. The verdict sheet described the burglary as "home invasion" and first degree sexual offense as "fellatio."

The jury was instructed on sexual offense in the first degree as already provided. They were also instructed on first degree burglary, as follows:

> The defendant is charged with burglary in the first degree. Burglary in the first degree is the breaking and entering of someone else's dwelling with the intent to commit rape and/or sexual offenses. In order to convict the defendant of burglary in the first degree, the State must prove one, that there was a breaking; two, that there was an entry; three, that the breaking and entry was into someone else's dwelling; four, that the breaking and entry was done with the intent to commit rape and/or sexual offenses inside the dwelling; and, five, that the defendant was the person who broke and entered.

Appellant's argument appears to be that, because one of the aggravating factors to prove first degree sexual offense is a finding that he committed a home invasion burglary, the burglary merges with the sex offense. Although we concur with appellant that burglary is an element of the sex offense crime, we are not persuaded that it is a required element. *See Brooks v. State*, 284 Md. 416, 422 (1979) ("[T]he true test of whether one criminal offense has merged into another is . . . whether one crime necessarily involves the other." (Emphasis added) (internal citations omitted)); *Walker v. State*, 53 Md. App. 171, 204 (1982) ("When two aggravating elements are present, either one of which could

raise the second degree of a crime to the first degree, the 'required elements' test does not treat either one of them as required"), *cert. denied*, 296 Md. 63 (1983).

Although neither party has cited a case directly on point, in *Utter v. State*, 139 Md. App. 43, *cert. denied*, 365 Md. 475 (2001), we considered whether the trial court erred in imposing separate, consecutive sentences for first degree burglary and attempted first degree rape. There, although there was evidence that Utter not only committed a burglary, but also threatened to kill the victim if she did not comply with his attempted forcible vaginal intercourse, *id*. at 46-47, the State's only theory of the case, conveyed in accompanying instructions to the jury, was that the attempted rape was committed in connection with the burglary. *Id*. at 54. Because the burglary was a required element of the attempted rape, we held that the offenses merged and vacated Utter's sentence for first degree burglary. *Id*.

In this case, Ms. B. testified that appellant lifted her bra and groped her breasts with his hands. He then put his fingers and his hand inside her vagina. Ms. B. also testified that appellant "tried to have intercourse," and that his penis went into her vagina, "a little bit." He also put his penis in her mouth. Moreover, appellant punched her in the mouth with a closed fist, placing her in fear of an additional assault. And, appellant "placed a knife to my belly and told me if I told anybody, he would come back and kill me."

During closing argument, the prosecutor argued that the home invasion "serves as one of the, the predicates" for the sexual offenses. When the prosecutor addressed first degree sexual offense, she told the jury that appellant could be convicted based on any of

the three aggravating factors, stating, "either a dangerous weapon was used, the defendant threatened or placed her in reasonable fear of serious physical injury, or in connection with a burglary. And, again, members of the jury, we submit to you that we've established those three factors but you only have to find one."

Here, as the State argued, first-degree burglary home invasion was but one of many possible aggravating factors. Based on this, as well as our conclusion that this crime is not a required element of first degree sexual offense, we conclude that the two offenses do not merge under the required evidence test.

For similar reasons, we also conclude the offenses do not merge under the rule of lenity. Even assuming *arguendo* that the offenses at issue here arose out of the same act, we have explained that lenity:

> [I]s purely a question of reading legislative intent. If the Legislature intended two crimes arising out of a single act to be punished separately, we defer to that legislated choice. If the Legislature intended but a single punishment, we defer to that legislated choice. If we are uncertain as to what the Legislature intended, we turn to the so called "Rule of Lenity," by which we give the defendant the benefit of the doubt.

Wiredu v. State, 222 Md. App. 212, 219-20 (2015) (citing *Walker*, 53 Md. App. at 201); *see also Marquardt v. State*, 164 Md. App. 95, 149-50 ("The relevant inquiry when applying the rule of lenity is "whether the two offenses are 'of necessity closely intertwined' or whether one offense is '*necessarily* the overt act' of the other") (emphasis in original, citation omitted), *cert. denied*, 390 Md. 91 (2005).

We discern nothing in the two statutes at issue that indicates that the Legislature intended merger under these circumstances, especially considering the presence of

additional aggravating factors relevant to the sex offense charge. This is further supported by the Legislature's allowance of a possible penalty of life imprisonment for sexual offense in the first degree, suggesting that the legislative intent was to treat the crime harshly. *See* Crim. Law § 3-305(d). Furthermore, we agree with the State that appellant's fundamental fairness claim is not preserved, *see Potts v. State*, 231 Md. App. 398, 414 (2016) (observing that a claim under fundamental fairness requires a contemporaneous objection) (citing *Pair v. State*, 202 Md. App. 617, 649 (2011)), and that, in any event, fairness does not require merger considering the violative nature of the offenses in this case, as well as the fact that there were multiple aggravating factors at issue. *See Carroll v. State*, 428 Md. 679, 694 (2012) ("In deciding whether fundamental fairness requires merger, we have looked to whether the two crimes are 'part and parcel' of one another, such that one crime is 'an integral component' of the other") (citation omitted). Accordingly, appellant's sentence for first degree burglary does not merge with his sentence for first degree sexual offense.

SENTENCES FOR SECOND-DEGREE SEXUAL OFFENSE AND FOURTH-DEGREE SEXUAL OFFENSE VACATED. JUDGMENTS OTHERWISE AFFIRMED.

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