Circuit Court for Montgomery County
Case No. 136745C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2101

September Term, 2022

JOSE G. GUZMAN-FUENTES

v.

STATE OF MARYLAND

Wells, C.J.
Ripken,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: December 22, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

A jury in the Circuit Court for Montgomery County convicted appellant Jose Guadalupe Guzman-Fuentes of sexual child abuse, attempted second-degree rape, second-degree sexual offense of a minor and multiple counts of third-degree sexual offense. The court sentenced Guzman-Fuentes to twenty-five years' imprisonment for sexual child abuse and concurrent sentences on the remaining counts. He now challenges his convictions on two grounds. *First*, he asserts comments made during the prosecutor's closing argument merit plain error review and, *second*, that the court should have merged one of his third-degree sexual assault convictions into his conviction for attempted second degree rape. We disagree with each contention and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because a detailed recitation of the facts is not necessary to our analysis of his two claimed errors, we will summarize the pertinent facts. The State alleged that Guzman-Fuentes sexually abused A[1] from 2008 to 2013. Guzman-Fuentes is married to W, A's older sister. The abuse allegedly occurred while Guzman-Fuentes was living in a home with W, A, W and A's mother, and several other family members.

At the time of the alleged abuse, A was in elementary school. She testified she would frequently find herself at home alone with Guzman-Fuentes after school. A described for the jury numerous times when Guzman-Fuentes inappropriately touched her:

- Once he put his hand down A's pants while she was pretending to sleep and rubbed A's vagina over her underwear.

[1] To shield the victim's identity, we randomly assign letters to denote her and her older sister, Guzman-Fuentes' wife, rather than use their actual initials.

- On another occasion he reached into A's shirt and touched her breasts and touched her vagina.

- On at least one occasion Guzman-Fuentes attempted to digitally penetrate A, but according to her, his finger "wouldn't really fit."

- A described another occasion when Guzman-Fuentes tried to penetrate her with his penis but was unable to do so. She told him to stop. He did, pulled up her pants, and left the room.

- On at least two occasions, Guzman-Fuentes "dry humped" A, meaning that while they were both clothed, he rubbed his penis against her vagina.

A testified that these events took place either in the basement of the home, her mother's bedroom, or in the living room.

A eventually told W about these events because she "just wanted it to stop." But W's reaction was that she wanted to call Guzman-Fuentes and confront him about the allegations. A testified she immediately feared what Guzman-Fuentes would do to her, so she told W that she'd only been joking.

Later, after the abuse ended and when she was in middle school, A texted her best friend Enoch about the inappropriate touching. Messages between A and Enoch were also on A's laptop. A family member discovered these messages and told W about them. This led to a family discussion that ultimately led to W, Guzman-Fuentes, and their children leaving the home.

One day, while A was in a high school English class, her writing assignment was to describe her childhood. A started crying and told two teachers about the abuse. The teachers immediately reported the allegations to the child protective services, and ultimately, the police. The police did an investigation, which included a detailed forensic

interview with A. The police also extracted data from A's phone and tablet but were unable to obtain any messages in which A described the abuse to Enoch or anyone else.

Additional facts will be included as they bear on specific issues.

DISCUSSION

1. THE COURT DID NOT COMMIT PLAIN ERROR IN NOT SPONTANEOUSLY CORRECTING COMMENTS THE PROSECUTOR MADE DURING CLOSING ARGUMENT.

A. Parties' Contentions

In his first assignment of error, Guzman-Fuentes argues the trial judge should have spontaneously corrected the prosecutor during her closing argument after she made what he asserts were misstatements of the law, misstatements of facts, and denigrating comments about defense counsel.[2] Because his trial counsel lodged no objections to these alleged errors, Guzman-Fuentes urges us to find plain error and reverse his convictions. The State maintains plain error review is not warranted. It argues the court did not err when it did not correct the prosecutor's definition of reasonable doubt. Further, the State posits that the prosecutor's comments were all proper rebuttal to defense counsel's arguments.

B. Standard of Review

We review whether a trial court erred in allowing an allegedly improper remark by a prosecutor under an abuse of discretion standard. *See Whack v. State*, 433 Md. 728, 742 (2013). We summarized the principles governing appellate review of closing arguments in

[2] Guzman-Fuentes' verbatim question read:

> Did the trial court err in allowing the prosecutor to make improper and prejudicial statements at closing argument?

Pietruszewski v. State, 245 Md. App. 292, 319 (2020):

> A trial court is in the best position to evaluate the propriety of a closing argument[.] Therefore, we shall not disturb the ruling at trial "unless there has been an abuse of discretion likely to have injured the complaining party." Trial courts have broad discretion in determining the propriety of closing arguments. (Cleaned up).

It has been often repeated that "attorneys are afforded great leeway in presenting closing arguments." *Degren v. State*, 352 Md. 400, 429 (1999). Our Supreme Court has stated:

> Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is [the] accused's counsel to comment on the nature of the evidence and the character of witnesses which the (prosecution) produces.

Wilhelm v. State, 272 Md. 404, 412 (1974) (*abrogated on other grounds* as stated in *Simpson v. State*, 442 Md. 446 (2015)); *accord Degren*, 352 Md. at 430.

C. Analysis

Guzman-Fuentes's claim of error focuses on two comments the prosecutor made during closing argument. In the *first*, the prosecutor said the following which included comments about the reasonable doubt standard:

> [D]on't let the repeating of the same facts over and over by counsel confuse you. And so going back to what you have to determine, whether the defendant had the opportunity, he had the access to [A] to commit these crimes, and whether you believe beyond a reasonable doubt—not all doubt—a reasonable doubt, a doubt founded on reason. It's probably the worst definition of a phrase ever, but that's what we have to go with.
>
> But a doubt, I like to equate it to a doubt based on common sense and reality and the actual facts that we have.

Guzman-Fuentes claims it was error for the court not to have taken the initiative and corrected what he argues was an inaccurate and misleading misstatement of the law.

The *second* comment that Guzman-Fuentes takes issue with is the following:

> And what's been shown through the evidence is that [A] doesn't have a motive not to tell the truth. [Defense counsel] desperately wants to create a situation where [A's] mom doesn't like that she's dating black guys and that she is mad at her because she caught her with he[r] boyfriend, with Enoch. And that's just not been shown in the evidence. It's offensive, really to the . . . family that [defense counsel] is trying to create this alternate reality where they're racist and they're mad at [A] for dating a black guy. And now she's making up sexual abuse allegations against the defendant.
>
> That's preposterous and offensive and just not true.

Guzman-Fuentes asserts that the evidence adduced on cross-examination showed A admitted that her mother, in fact, disapproved of A's relationship with Enoch because he is Black. He cites as proof the following excerpt from A's cross-examination:

> [DEFENSE COUNSEL]: Okay. So, you were having issues in 2000 and . . . You were having problems because you were—your parents did not approve of the gentleman you said you were friends with. They said dating, Enoch, correct?
>
> [A]: Correct.
>
> [DEFENSE COUNSEL]: And that's why you were in trouble because as you said, instead of being in class you skipped with Enoch, correct?
>
> [A]: Instead of being at an after-school club, yes.
>
> * * *
>
> [DEFENSE COUNSEL]: So, your parents did not like Enoch because he was a person of color, correct?
>
> [A]: Correct.

He also cites Enoch's testimony in support of his position as well:

> [DEFENSE COUNSEL]: All right. Enoch, isn't it true that her parents didn't like the fact that she was dating you?
>
> [WITNESS]: Yes.

What all of this means, Guzman-Fuentes argues, is that the prosecutor misstated these facts and called his trial counsel a liar, unfairly denigrating her. He maintains it was incumbent on the court to correct these "baseless and misleading" comments without prompting.

Guzman-Fuentes urges we find plain error on appeal because his attorney did not lodge an objection to any of the prosecutor's comments during the trial. Maryland Rule 4-323 requires a party who objects to evidence, or in this case, to argument, to make an objection so that the court may rule on the objection, and if required, take corrective action. That did not happen here. Generally, an appellate court will not review a claim of error unless it is preserved. *See* Md. Rule 8-131(a) ("Ordinarily, an 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, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.").

It is the last clause of the quoted section of Rule 8-131 that Guzman-Fuentes focuses on, arguing we should undertake plain error review. "Plain error is 'error which vitally affects a defendant's right to a fair and impartial trial.'" *Richmond v. State*, 330 Md. 223, 236 (1993) (citation and quotation marks omitted). Although "[t]here is no fixed formula for the determination of whether discretion should be exercised" to consider an unpreserved argument, we reserve plain error relief "for errors that are 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Yates v.*

State, 429 Md. 112, 130–31 (2012) (citation omitted). An appellate court's "exercise of discretion to engage in plain error review is 'rare.'" *Id*. at 131; *accord Morris v. State*, 153 Md. App. 480, 507 (2003) (Granting plain error review "1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.").

In *Puckett v. United States*, 556 U.S. 129, 135 (2009), the United States Supreme Court announced a four-prong test for determining the applicability of plain-error review:

> *First*, there must be an error or defect—some sort of [d]eviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. *Second*, the legal error must be clear or obvious, rather than subject to reasonable dispute. *Third*, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings. *Fourth and finally*, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be.

The Maryland Supreme Court adopted this test in *State v. Rich*, 415 Md. 567, 578–79 (2010). We conclude that the court did not commit plain error in taking it upon itself to address either of the prosecutor's comments. We explain.

As for Guzman-Fuentes' claim that the court should have corrected what he perceives as a misstatement of the reasonable doubt standard, we observe that the court properly instructed the jury on Guzman-Fuentes' presumption of innocence and reasonable doubt, stating:

> The Defendant is presumed innocent of the charges. This presumption remains throughout every stage of the trial, and is not overcome unless you are convinced beyond reasonable doubt that the Defendant is guilty. The State has the burden of proving the guilt of the Defendant beyond a reasonable doubt. This means that the State has the burden of proving,

> beyond a reasonable doubt, each and every element of the crimes charged. The elements of the crimes are the component parts of the crime, about which I will instruct you shortly. This burden remains on the State throughout the trial. The Defendant is not required to prove his innocence. However, the State is not required to prove guilt beyond all possible doubt, or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence.
>
> A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief, without reservation, in an important matter in your own business or personal affairs. If you are not satisfied of the Defendant's guilt to that extent for each and every element of a crime charged, then reasonable doubt exists and the Defendant must be found not guilty of that crime.

We see no meaningful difference in the prosecutor's statement that reasonable doubt is "based on common sense and reality and the actual facts that we have," and the instruction that any doubt must be "founded upon reason." Further, the trial transcript shows that the jurors had a copy of the instruction with them in the jury room, so that they could consult them should the need arise. We presume that the jurors follow the court's instructions unless something appears in the record to suggest that they have not. *See Donaldson v. State*, 200 Md. App. 581, 595 (2011) ("In the absence of evidence to the contrary . . . jurors are generally presumed to follow the court's instructions." (citing *Dillard v. State*, 415 Md. 445, 465 (2010))). Finally, the court made clear that counsel's arguments were not evidence and could not be considered as anything other than counsels' advocacy at trial. The court stated:

> Opening statement and closing arguments of the lawyers are not evidence. They are intended only to help you understand the evidence and to apply the law. Therefore, if your memory of the evidence differs from anything the lawyers or I may say, you must rely on your own memory of the evidence.

The court's statement is a verbatim recitation of the last section of Criminal Maryland Pattern Jury Instruction 3:00. Plain error review is not warranted under these circumstances.

Turning next to the prosecutor's second comment, Guzman-Fuentes alleges the prosecutor made factual inaccuracies and denigrated opposing counsel. We decline to exercise our discretion to find plain error in this instance either. The comments arose from a disputed bit of testimony in which A's mother, when cross-examined by defense counsel, seemed reluctant to admit that she disliked A dating Enoch because he is Black.[3]

The testimony cuts two ways, and we have no way of assessing who was more truthful. A's mother testified she was not prejudiced against Enoch. It seems clear from A's and Enoch's testimony, previously quoted, that they thought A's mother disapproved

[3] The relevant testimony was:

> [DEFENSE COUNSEL]: Now you started having problems with [A]?
> [MOTHER]: No.
> [DEFENSE COUNSEL]: So you weren't upset that she was dating a man of color, Enoch?
> [MOTHER]: No. There was no dating. They were schoolmates.
> * * *
> [DEFENSE COUNSEL]: Did you ever catch [A] when she was at like a store or something on the—with Enoch—that you saw them together?
> [MOTHER]: Yes. I saw them coming off the bus.
> [DEFENSE COUNSEL]: Okay. And then what did you do?
> [MOTHER]: I took her to the house.
> [DEFENSE COUNSEL]: Would you pick her up all time when she would get off the bus?
> [MOTHER]: No.
> [DEFENSE COUNSEL]: And Enoch was not allowed to visit the house, correct?
> [MOTHER]: I never forbid him anything.

of their relationship because he is Black. So, when Guzman-Fuentes argues the prosecutor was inaccurate on this point, it comes down to a question of perception. It is apparent the prosecutor was making an argument based on how she recalled the evidence. The defense saw it differently. All of this is beside the point because it is the jury's collective determination of what they thought the evidence was that matters.

Further, the point of the prosecutor's comments was to rebut the defense's claim that A was making up the allegations against Guzman-Fuentes, although it is not entirely clear from defense counsel's argument why A would make up the allegations against Guzman-Fuentes even if her mother were a racist. On this point, what defense counsel argued in her closing was the following:

> [DEFENSE COUNSEL]: . . . [H]e [Guzman-Fuentes] went to the house and told [A's mother] and the family, and they became highly upset because she [A] even said herself, I was in trouble and I was getting into trouble. And that's right because the family did not want her dating, probably I would hope, no one but men of color. Although she gets up there, [mother], and pretends and then she says, well, do I need to keep answering? And she's like this because she's avoiding that. And that was a big issue in that house because she liked men of color, and for them that was a taboo in that house.

In rebuttal, the prosecutor argued that the family weren't racists and, more importantly, that A had no reason to lie. The prosecutor forcefully took issue with defense counsel's assertion that A was fabricating allegations of sexual child abuse, supposedly in retaliation against Guzman-Fuentes because he saw her with Enoch, reported that back to the family, and A then got in trouble. In this light, the prosecutor's comments were within the bounds of proper rebuttal. Attorneys are allowed to comment on "the issues in the case on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing

counsel[.]" *Wilhelm*, 272 Md. at 413 (*abrogated on other grounds* as stated in *Simpson v. State*, 442 Md. 446 (2015))

In sum, we conclude that based on the facts in the record, plain error review is not warranted under *Rich*. *Foremost*, as we have discussed, Guzman-Fuentes waived any objection to the prosecutor's comments by not bringing his concerns to the circuit court's attention at trial. *Second*, the errors were not so obvious that the court was required to spontaneously react. As we have discussed, the prosecutor's reasonable doubt comment was not wildly divergent from the pattern instruction on reasonable doubt, the prosecutor's recollection of factual issues was not dispositive, and the prosecutor's comments, overall, constituted appropriate rebuttal. *Finally*, the comments did not affect Guzman-Fuentes' substantial right to a fair trial.

2. THE COURT PROPERLY IMPOSED SEPARATE SENTENCES FOR EACH COUNT OF THIRD-DEGREE SEXUAL OFFENSE, NOT MERGING INTO ATTEMPTED SECOND-DEGREE RAPE.

A. Parties' Contentions

Guzman-Fuentes next claims the circuit court erred in failing to merge one of his convictions for third-degree sexual offense into his conviction for attempted second-degree rape. He claims that both convictions encompass the same conduct and should have merged at sentencing. The State argues the conviction for third-degree sexual offense at issue is for a separate offense that occurred on a date different from the event that underlies the conviction for attempted second-degree rape. After reviewing the record, we agree with the State.

B. Standard of Review

If certain convictions should have merged at sentencing but did not, the trial court has committed reversible error, and, as a matter of law, the sentence is illegal. *Britton v. State*, 201 Md. App. 589, 598–99 (2011). At the sentencing here, Guzman-Fuentes did not argue that any of his sentences should merge. However, "[w]e have held that because of the inherent illegality of the sentence, the normal preservation requirements do not apply in this context." *Latray v. State*, 221 Md. App. 544, 555 (2015) (citing *Pair v. State*, 202 Md. App. 617, 624 (2011)). Under Maryland Rule § 4-345(a), a court "may correct an illegal sentence at any time." We examine whether the trial court's sentence was legally correct under a de novo standard of review. *Blickenstaff v. State*, 393 Md. 680, 683 (2006).

C. Analysis

Merger of offenses is premised largely on the Fifth Amendment's Double Jeopardy Clause which states that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V; *see also Benton v. Maryland*, 395 U.S. 784, 787 (1969). Fundamentally, "[t]he Fifth Amendment guarantee against double jeopardy prohibits both successive prosecutions for the same offense as well as multiple punishment for the offense." *Newton v. State*, 280 Md. 260, 262–63 (1977). Similarly, under Maryland common law, double jeopardy forbids "a defendant [from being] 'put in jeopardy again for the same offense—in jeopardy of being convicted of a crime for which he has been acquitted; in jeopardy of being twice convicted and punished for the same crime.'" *State v. Griffiths*, 338 Md. 485, 489 (1995) (quoting *Gianiny v. State*, 320 Md. 337, 347, (1990)).

In *Blockburger v. United States*, 284 U.S. 299 (1932), the Supreme Court of the United States decide whether two offenses are deemed to be the same for double jeopardy purposes. The "required evidence test," is defined as follows:

> 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.

Id. at 304. The required evidence test "focuses upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." *State v. Jenkins*, 307 Md. 501, 517 (1986) (citations omitted). When merger is mandated under the required evidence test, separate sentences are normally precluded.

If it cannot be determined whether a jury's verdict on separate offenses was based on the same factual conduct, "[t]he fundamental principle of fairness in meting out punishment requires" merger of the two sentences. *Snowden v. State*, 321 Md. 612, 619 (1988). But if the record supports the conclusion that the convictions rested on different conduct, then separate sentences are appropriate. *See, e.g*., *Gerald v. State*, 137 Md. App. 295, 312 (2001) (finding that any ambiguity "as to how the jury understood the charges must be resolved in [the defendant's] favor"); *Nightingale v. State*, 312 Md. 699, 708 (1988) (resolving the ambiguity in favor of the defendant and requiring merger when the Court could not determine whether the jury based its general conviction for child abuse on the lesser included charged sexual offenses or on some other basis) (superseded by statute on other grounds, as stated in *Twigg v. State*, 447 Md. 1 (2016)); *State v. Frye*, 283 Md.

709, 723 (1978) (holding that a verdict must be set aside when it is "supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected").

In this case, Guzman-Fuentes complains that one of the counts for third-degree sexual offense should have merged into the conviction for attempted second-degree rape. In his brief he specifies the third-degree sexual assault convictions for counts eight and nine, but later does not delineate which count should have merged. He argues that the judge didn't instruct the jury that their verdict for each count must rest on separate acts. And he asserts the prosecutor argued that the same conduct underlying third-degree sexual assault could form the basis for attempted second-degree rape.

We conclude that there was no ambiguity about which acts went with which counts and that each act undergirding a specific third-degree assault conviction represented acts different from attempted second-degree rape. The court's instruction for third-degree sexual offense tracked almost verbatim the Criminal Maryland Pattern Jury Instruction (MPJI-Cr) 4:29.8A "Sexual Offense—Third Degree Sexual Offense (Age)."[4] The court's instruction was as follows:

[4] MPJI-Cr) 4:29.8A states:

> 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:
> (1) that the defendant had sexual contact with (name);
> (2) that (name) was under fourteen years of age at the time of the act; and
> (3) that the defendant is at least four years older than (name).
>
> Sexual contact means the intentional touching of [(name's)] [defendant's] genital or anal area or other intimate area for the purpose of sexual arousal or gratification or for abuse of either party. It does not include acts commonly

> THE COURT: And I think I told you there's five or six counts of third-degree—six counts of third-degree sex offense. The Defendant is charged with the crime of third-degree sex offense. In order to convict the Defendant of third-degree sex offense, the State must prove the Defendant had sexual contact with [A], that [A] was 14[5] years of age at the time of the act, and number three: that the Defendant is at least four years older than [A]. Sexual contact means the intentional touching of [A]'s genitals or anal area, or other intimate area, for the purpose of sexual arousal, or gratification, or for the abuse of either party. It does not include acts commonly expressive or familial or friendly affection, or acts for accepted medical purpose.

A testified to numerous acts that could have constituted a third-degree sexual offense. The prosecutor's closing argument summarized these acts, distinguishing between them and the event that the prosecution characterized as an attempted rape: the occasion when Guzman-Fuentes pulled down A's pants and underwear and "he tried to put his penis in [A's] vagina but it wouldn't go in."

None of the other acts A described, which occurred at different times, were like the attempted rape. In her closing the prosecutor explained which acts the State contended constituted third-degree sexual offenses:

> [PROSECUTOR]: So for the counts—and I'll go over them in a little more detail—but for the counts that will be on the Verdict Sheet, for the first act of touching [A's] breast. For the last act of touching [A's] breast. First act of the Defendant rubbing his penis on her vagina. And if you—we'll get into it—but if you recall, her testimony was that the Defendant—and she called it dry humping. Well they had—she had her clothes on, the Defendant had her (sic) clothes on, he would rub his penis on her vagina. And that she could feel his penis on her vagina. And that happened more than one time, which constitutes the first act and the last act. And you don't have to determine

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> expressive of familial or friendly affection, or acts for accepted medical purposes.

[5] We cannot be certain whether the court omitted the word "under" when speaking or the transcriptionist omitted it. Either way, the jurors had a printed copy of the pattern jury instructions during deliberations.

> how many acts occurred. It could be two. It could be, "Well, I believe that it happened more than one time," so that satisfies the first and the last act, for these counts.
>
> And then the last two are for—**I think I mixed it up. The first two are for touching her vagina and not penetrating. And she testified that that happened more than one time. And she told you all the different places that it happened. The next two are for his penis rubbing on her vagina, and the last three are for touching her breasts.** And she also testified that that happened many times in different areas of the house. The second bedroom and the basement. The couch in the living room. Her mother's bedroom. All of those third-degree sexual offenses occurred in different places in the house over and over and over. And so that would satisfy the first act and the last act.

(Emphasis supplied). We conclude from A's testimony, the verdict sheet (reproduced below), and the prosecutor's argument, that for questions 3 and 4 on the verdict sheet, the prosecutor was urging the jury to convict Guzman-Fuentes for the two times when he touched A's vagina with his hand. A described two events of this kind: one in which she feigned sleep and Guzman-Fuentes touched her vagina over her clothes. The other occurred while A was awake. On that occasion he reached under her shirt and touched her breasts and then touched her vagina. Verdict sheet questions five and six referenced the two incidents when Guzman-Fuentes "dry-humped" A and she felt his penis pressed against her vagina. These acts are readily distinguishable from the incident in which Guzman-Fuentes pulled down A's pant and underwear and attempted to put his penis in A's vagina. Because we hold that each conviction rests on separate and distinct acts, merger is not required.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY THE COSTS.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND	:	
v.	:	Case No.: 136745-C
JOSE GUZMAN-FUENTES	:	
DEFENDANT.	:	

JURY VERDICT

1. With respect to Attempted Second Degree Rape of N.S., we the jury find the Defendant:

_____	X
NOT GUILTY	**GUILTY**

2. With respect to Second Degree Sexual Offense (digital penetration of N.S.'s vagina), we the jury find the Defendant:

_____	X
NOT GUILTY	**GUILTY**

3. With respect to Third Degree Sexual Offense (touching of N.S.'s vagina, the first time), we the jury find the Defendant:

_____	X
NOT GUILTY	**GUILTY**

4. With respect to Third Degree Sexual Offense (touching of N.S.'s vagina, the last time), we the jury find the Defendant:

NOT GUILTY	GUILTY
	X

5. With respect to Third Degree Sexual Offense (touching of N.S.'s vagina with defendant's penis, the first time), we the jury find the Defendant:

NOT GUILTY	GUILTY
	X

6. With respect to Third Degree Sexual Offense (touching of N.S.'s vagina with defendant's penis, the last time), we the jury find the Defendant:

NOT GUILTY	GUILTY
	X

7. With respect to Third Degree Sexual Offense (touching of N.S.'s breasts, the first time), we the jury find the Defendant:

NOT GUILTY	GUILTY
	X

8. With respect to Third Degree Sexual Offense (touching of N.S.'s breasts, the last time), we the jury find the Defendant:

NOT GUILTY	GUILTY
	X

9. With respect to Sexual Abuse of a Minor of N.S., we the jury find the Defendant:

_____	X
NOT GUILTY	**GUILTY**

128	8/18/2022
FOREPERSON'S JUROR NUMBER	**DATE**