Circuit Court for Baltimore City
Case No. 118108009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2413

September Term, 2019

TRAVIS BURROUGHS

v.

STATE OF MARYLAND

Beachley,
Shaw Geter,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: November 19, 2021

A jury, in the Circuit Court for Baltimore City, convicted Travis Burroughs, appellant, of fourth-degree sexual offense, sodomy, and false imprisonment. The court sentenced him to a term of one year imprisonment on the conviction of fourth-degree sexual offense, a concurrent term of ten years imprisonment on the conviction of sodomy, and a concurrent term of life, with all but 60 years suspended, on the conviction of false imprisonment. In this appeal, appellant presents four questions for our review:

1. Did the trial court err in admitting into evidence three recorded statements given by the victim to the police prior to trial?

2. Did the suppression court err in denying appellant's motion *in limine* to exclude DNA evidence pursuant to § 2-511 of the Public Safety Article of the Maryland Code?

3. Did the trial court err in submitting to the jury the uncharged offense of fourth-degree sexual offense?

4. Was appellant's sentence for the conviction of false imprisonment constitutionally disproportionate and/or fundamentally unfair?

For reasons to follow, we hold that the trial court did not err in admitting the recorded statements. We also hold that the suppression court did not err in denying appellant's motion to suppress. As to the third question, we hold that the trial court erred in instructing the jury on the uncharged offense of fourth-degree sexual offense. We therefore vacate that conviction. Finally, we hold that appellant's sentence for the conviction of false imprisonment was neither constitutionally disproportionate nor fundamentally unfair.

BACKGROUND

In June 2017, a woman, T.P., was at a bus stop on North Avenue in Baltimore when she was approached by two men who asked her if she wanted "to go have some fun." T.P. agreed, and the three traveled to a vacant house on Homer Avenue. Upon arriving at the house, one of the men walked up behind T.P., put a knife to her throat, and forced her into the basement of the vacant house. Once there, the two men forced T.P. to take off her clothes and had her lay on a bed. Both men then proceeded to have anal sex with T.P. against her will. Sometime later, the men left T.P. alone, and she escaped. T.P. ran to a nearby bus stop, where she borrowed someone's cell phone and called 911.

After the police arrived on the scene, T.P. was taken to a local hospital, where she was examined. During the examination, a forensic nurse obtained anal and perianal swabs from T.P. Those swabs were later analyzed and found to contain "many spermatozoa." A DNA sample of the sperm was compiled and was later matched to a known sample taken from appellant. T.P. was eventually shown a photographic array, and she identified him as one of her attackers.

Appellant was arrested and charged with various crimes related to the sexual assault on T.P. Following a trial at which T.P. testified, the jury failed to return a verdict on several charges. Appellant was later retried on those charges, which included first-degree sexual offense, second-degree sexual offense, sodomy, and false imprisonment.

At the second trial, T.P. testified and identified appellant as one of her attackers. On cross-examination, defense counsel attempted to impeach T.P. with her testimony from the

first trial, during which T.P. had stated that her attackers had penetrated her vagina and not her anus.

The forensic nurse who examined T.P. following the attack also testified. During her testimony, the nurse reported that T.P. had made the following statement while she was at the hospital after the attack: "We walked down past the house. The one suspect grabbed me by the neck and forced me into the basement, and that's when it all began, the sexual assault. I was forced to do anal sex, and I had to take off all my clothes. One spit in my face." The nurse testified T.P. had also reported that both of her assailants' penises had made contact with her anus. Those statements were admitted without objection.

The State also played for the jury a recording of T.P.'s photographic identification of appellant following the attack. In the recording, T.P. stated that appellant was one of the men she met on the night of the attack; that he had forced her into the vacant house, where he penetrated her anally; that he spit on her; and that she had not consented to the sexual act.

In addition, the State played for the jury three other recorded statements given by T.P. to the police following the attack. The first statement was captured by the body-worn camera of Sergeant Charles Smith, one of the officers who arrived at the scene following the attack. The second statement was captured by the body-worn camera of Officer Rondelle Johnson, who had also arrived on the scene following the attack. The third statement was made during a recorded interview T.P. had with Detective Thomas Wolfe, who was responsible for investigating the attack. In each of the statements, T.P. provided

a detailed account of how she met the assailants and how the subsequent sexual assault transpired. Over objection, the trial court admitted the three statements into evidence. Each statement was played during the testimony of the respective officer.

The trial court instructed the jury on the charged crimes of first-degree sexual offense, second-degree sexual offense, sodomy, and false imprisonment. At the behest of the State, the court also instructed the jury on two uncharged crimes: third-degree sexual offense and fourth-degree sexual offense. The court determined that the additional instructions were appropriate because the uncharged crimes constituted "lesser included offenses" of the charged crimes of first and second-degree sexual offense. The jury subsequently convicted appellant of fourth-degree sexual offense, sodomy, and false imprisonment, but acquitted him of first, second, and third-degree sexual offense.

At sentencing, the court took note of appellant's criminal record, which indicated that appellant had recently been convicted of sexually assaulting and falsely imprisoning two 14-year-old females and that appellant was serving an 80-year sentence as a result of those convictions. The court also noted that appellant's DNA had been linked to at least four other cases in which the victims had claimed that they had been forcefully raped or sodomized or otherwise sexually assaulted. The court took note of the fact that, in the case in which he had been convicted of sexually assaulting two juveniles, appellant had been ordered to have no contact with the victims but had nevertheless "harassed" one or both of the juvenile victims following his convictions. Regarding the present case, the court found that appellant had "preyed on a drug-addicted homeless woman," whom the court believed

was telling the truth when she claimed that appellant had lured her to an abandoned basement and sodomized her against her will. The court found that appellant was a "sexual predator" who preyed on people who were not likely to identify him. Given those circumstances, the court concluded that it "must protect the community" in fashioning appellant's sentence. The court thereafter sentenced appellant to a term of one year imprisonment on the conviction of fourth-degree sexual offense, a concurrent term of ten years imprisonment on the conviction of sodomy, and a concurrent term of life, with all but 60 years suspended, on the conviction of false imprisonment.

This timely appeal followed. Additional facts will be supplied below.

DISCUSSION

I.

Appellant first contends that the trial court erred in admitting T.P.'s recorded statements to Sergeant Smith, Officer Johnson, and Detective Wolf. Appellant argues the statements constituted hearsay and were not admissible for any of the reasons provided by the trial court.

The State argues that appellant's claims are unpreserved because the grounds raised by appellant in the instant appeal were not raised at trial. The State argues further that, even if preserved, appellant's claims are without merit. Finally, the State contends that any error the trial court may have made in admitting the statements was harmless.

We first address the State's preservation argument. When the recorded statement made to Sergeant Smith was first introduced, defense counsel objected because he did not

"think it's necessary to play the body-worn camera footage" given that Sergeant Smith had already testified "as to what his interaction with [T.P.] was." The trial court asked the prosecutor why he wanted to play the recording, and the prosecutor responded that it was "a statement by a prompt report witness." The court then stated to defense counsel: "Let the record reflect, over your objection, for that purpose, I will admit it."

A similar exchange occurred prior to the playing of the second recorded statement, which had been made to Officer Johnson. Defense counsel objected to the admission of the recording and the trial court asked the prosecutor to provide a justification for its admission. The prosecutor responded that he was offering the recording pursuant to Maryland Rule 5-802.1(b), which permits hearsay to rebut a charge of fabrication, and Rule 5-802.1(d), which permits hearsay that is a prompt complaint of sexually assaultive behavior. The trial court asked defense counsel the basis for the objection, and defense counsel argued that Rule 5-802(b) was inapplicable. The court disagreed and found that that the rule was applicable. Then, without hearing argument from counsel, the court stated that Rule 5-802.1(d) was "clearly" applicable. The court concluded: "So this [c]ourt would note that [the recording] is within 5-802.1. And, over [defense counsel's] objection, it'll be admitted."

When the prosecutor introduced the third recorded statement, which had been made to Detective Wolf, defense counsel objected on the grounds that the statement did not constitute a prompt report of sexual assault. In response, the prosecutor noted that defense counsel had previously cross-examined T.P. regarding her testimony at the first trial, during

which she failed to report that her assailants had engaged in anal sex with her. The prosecutor explained that the recorded statement was relevant to that issue. The trial court ultimately ruled that the recorded statement was admissible pursuant to Maryland Rule 5-616, which permits the admission of certain prior consistent statements by a witness. The court stated: "So, over [defense counsel's] objection, and pursuant to 5-616, I'll allow [the prosecutor] to play it."

On this record, we conclude that appellant's objections were preserved. Although defense counsel did object on grounds that ultimately differed from those relied upon by the trial court in admitting each of the recordings, the court nevertheless made clear that defense counsel's objections were being overruled on the grounds provided by the trial court. Importantly, the record makes plain that the issues now raised by appellant were clearly decided by the court. *See* Md. Rule 8-131(a).

Turning to the merits, it appears that the trial court may have erred in admitting the recordings. The court relied on Rule 5-802.1(d) in admitting the statement to Sergeant Smith, Rule 5-802.1(b) and (d) in admitting the statement to Officer Johnson, and Rule 5-616 in admitting the statement to Detective Wolf.[1] Rule 5-802.1(d) permits the admission of prompt complaints of sexually assaultive behavior, but the content of the complaint must be limited to "the fact that the complaint was made, the circumstances under which it was made, and the identification of the culprit, rather than recounting the substance of the

[1] Both appellant and the State claim that the trial court also admitted the statement to Detective Wolf pursuant to other Maryland Rules. We disagree, as the court expressly stated that it was admitting the statement pursuant to Rule 5-616.

complaint in full detail." *Muhammad v. State*, 223 Md. App. 255, 269 (2015). Maryland Rule 5-802.1(b) permits the admission of a witness's prior consistent statement to rebut a claim against the witness of fabrication, but such prior statements are admissible only if they are made before the alleged fabrication existed. *Holmes v. State*, 350 Md. 412, 416-17 (1998).

Lastly, Maryland Rule 5-616 allows a witness to be rehabilitated by "evidence of the witness's prior statements that are consistent with the witness's present testimony, when their having been made detracts from the impeachment[.]" Md. Rule 5-616(c)(2). To be admissible, however, such prior statements "must meet at least the standard of having some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony." *Thomas v. State*, 429 Md. 85, 107 (2012) (citations and quotations omitted). In other words, a witness's prior consistent statements "are relevant not for their truth since they are repetitions of the witness's trial testimony," but rather "are relevant because the circumstances under which they are made rebut an attack on the witness's credibility." *Id.* at 108 (citations and quotations omitted).

Here, we are not persuaded that the above rules were applicable to the statements at issue. The statement to Sergeant Smith and the statement to Officer Johnson exceeded the scope of Rule 5-802.1(d), as each statement provided details that went well beyond the limitations noted above. Rule 5-802.1(b) is likewise inapplicable to the statement to Officer Johnson, as the "motive to fabricate" seems to have existed prior to the statement

having been made.[2] Lastly, we cannot conclude that the statement to Detective Wolf fell within the ambit of Rule 5-616(c)(2), as there is no indication that the statement contained any "rebutting force" beyond the mere fact that the statement was consistent with T.P.'s trial testimony.

Regardless, any error the trial court may have made in admitting the recordings was harmless because the content of the recordings was cumulative to other evidence properly admitted, namely, the statements T.P. made to the forensic nurse and the recorded statements T.P. made during the photographic identification. *See Dove v. State*, 415 Md. 727, 743 (2010) ("In considering whether an error was harmless, we [] consider whether the evidence presented in error was cumulative evidence."). *Dove v. State*, 415 Md. 727, 743 (2010). Although each of the statements at issue may have contained some details that the others did not, the essential contents of the statements were the same. That is, all five statements tended to prove the same point: that two individuals forced T.P. into an abandoned home, where they engaged in anal intercourse with her against her will. *See id.* at 744 ("[C]umulative evidence tends to prove the same point as other evidence presented during the trial or sentencing hearing."). *Id.* Thus, we are convinced beyond a reasonable doubt that the cumulative effect of the properly admitted statements outweighed the prejudicial nature of the three statements erroneously admitted. *Id.* As a result, any error was harmless.

II.

[2] The State concedes this point.

Appellant's second claim of error concerns a pretrial motion he filed regarding the DNA evidence. In that motion, appellant noted that the police initially obtained his name as a possible suspect in the attack on T.P. after the DNA evidence taken from T.P. was matched to a DNA sample the police had obtained in a different criminal case in which he had been charged but never convicted.[3] Appellant noted the "DNA hit" linking the two cases led to the photographic array in which T.P. identified him as one of her attackers. Appellant argued the police should not have been permitted to rely on the DNA evidence from the other case because that evidence should have been expunged pursuant to § 2-511 of the Public Safety Article of the Maryland Code. According to appellant, the State should have been precluded from presenting his DNA evidence, T.P.'s photographic identification, and any identification testimony in the instant case.

At the hearing on appellant's motion, Andrew Van Pelt, a forensic analyst with the Baltimore City Police Department, testified that, on November 29, 2017, a "CODIS hit letter" was created regarding appellant. He explained that a CODIS hit letter is "generated when a routine search of the local database is conducted and returns any matches between known samples and/or forensic evidentiary samples." According to the November 29, 2017 CODIS hit letter, DNA evidence from the anal swabs taken from T.P. following the attack had "a potential forensic link" to DNA samples from three other cases, including a 2014 rape. The letter stated the DNA sample from the 2014 rape case was an evidentiary sample that had been taken from the victim's external genital area. Mr. Van Pelt testified

[3] The charges were *nol prossed.*

that an "evidentiary sample" was "any profile that is generated in the lab from a piece of evidence that is submitted as part of a case." The letter also indicated that the evidentiary sample from the 2014 rape case had "been previously attributed to Travis Burroughs" by way of a comparison between the evidentiary sample and a "convicted offender" sample that had been taken from appellant in 2005.

Ultimately, the suppression court found that no violation of the Maryland Public Safety Act Article 2-511 had occurred, and the court denied appellant's motion to suppress. Appellant claims the suppression court erred in finding that no violation of the statute occurred. We disagree and hold that the suppression court did not err.

"Our review of a circuit court's denial of a motion to suppress evidence is limited to the record developed at the suppression hearing." *Pacheco v. State*, 465 Md. 311, 319 (2019) (citations and quotations omitted). "[W]e view the evidence presented at the [suppression] hearing, along with any reasonable inferences drawable therefrom, in a light most favorable to the prevailing party." *Davis v. State*, 426 Md. 211, 219 (2012). Moreover, "[w]e extend great deference to the findings of the hearing court with respect to first-level findings of fact and the credibility of witnesses unless it is shown that the court's findings are clearly erroneous." *Daniels v. State*, 172 Md. App. 75, 87 (2006). "We give no deference, however, to the question of whether, based on the facts, the trial court's decision was in accordance with the law." *Seal v. State*, 447 Md. 64, 70 (2016).

Section 2-511 of the Public Safety Article of the Maryland Code provides, in pertinent part, that "any DNA samples and records generated as a part of a criminal

investigation or prosecution shall be destroyed or expunged automatically from the State DNA database if … a criminal action begun against the individual relating to the crime does not result in a conviction of the individual[.]" Md. Code, Pub. Safety § 2-511(a)(1)(i). The statute states that the expungement or destruction "shall occur within 60 days of an event listed in subsection (a) of this section." Md. Code, Pub. Safety § 2-511(d). The statute states further that:

> (f) A record or sample that qualifies for expungement or destruction under this section and is matched concurrent with or subsequent to the date of qualification for expungement:
>
> > (1) may not be utilized for a determination of probable cause regardless of whether it is expunged or destroyed timely; and
> >
> > (2) is not admissible in any proceeding for any purpose.

Md. Code, Pub. Safety § 2-511(f).

This Court discussed the applicability of § 2-511 in *Varriale v. State*, 218 Md. App. 47 (2014). There, the defendant voluntarily provided a DNA sample to the police in order to eliminate himself as a suspect in an alleged rape. *Id.* at 50. Although the defendant's DNA sample cleared him of suspicion in the rape, the sample was later used to connect him to a burglary that had occurred several years earlier. *Id.* After being charged with burglary, the defendant moved to have the DNA evidence suppressed. *Id.* at 52. That motion was denied, and the defendant subsequently entered a conditional plea of guilty to second-degree burglary. *Id.* at 52.

On appeal, the defendant argued that the DNA evidence should have been suppressed because § 2-511 "does not permit the retention of a person's DNA if he or she

has been cleared of suspicion in the investigation in which the sample was obtained." *Id.* at 55. We disagreed and held that § 2-511 was inapplicable in the defendant's case. *Id.* at 55-60. We explained that, under the plain language of the statute, "two requirements must be met to trigger the expungement of the DNA records: 1) a 'criminal action' must have begun against a person, and (2) the person must not have been convicted of the crime with which he or she was charged." *Id.* at 56. We held that, in the defendant's case, the first prong had not been triggered because the defendant was never charged or arrested in the rape case in which the DNA sample had been collected. *Id.* at 57.

We went on to explain that our conclusion was also supported by the statute's legislative history and the statutory scheme as a whole. *Id.* at 57-59. We observed that the legislature specifically limited the statute to persons who had been charged with or convicted of a crime and that, in 2013, "the General Assembly considered, but failed to pass, a bill that would have effectively prohibited a governmental unit from storing DNA samples from persons who, like [the defendant], had voluntarily given a sample." *Id.* at 58. We noted that the relevant statutory scheme expressly dictated the places where DNA samples must be collected, and that all of those were places where a person would be found only if he had been charged with or convicted of a crime. *Id.* at 58-59. We concluded, therefore, that § 2-511 "applies only to persons who have given DNA samples after being charged with or convicted of certain enumerated crimes[.]" *Id.* at 59.

Finally, we noted that "the Maryland Department of State Police, in promulgating regulations under the statute, made them applicable only to persons who have been

'arrested and charged or convicted, or both,' of various specified crimes." *Id.* at 59 (citing COMAR 29.05.01.02.A(a)). We explained that, because "we must give 'considerable weight' to an administrative agency's interpretation and application of the statute that the agency administers," we must "defer to the agency's deliberate and well-publicized interpretation that the statutory protections do not extend to persons in [the defendant's] position." *Id.* at 59.

Against that backdrop, we hold that § 2-511 does not apply in appellant's case. The DNA sample at issue – the evidentiary sample taken from the 2014 rape case – was not given by appellant after he was charged in that case. The sample was taken from the victim during the course of the police's investigation into the 2014 rape. That sample was then linked to appellant after it was compared to a known sample that appellant had lawfully surrendered in a different case. Appellant is not entitled to the benefits of § 2-511 simply because a forensic DNA sample was preserved in a case in which appellant was ultimately charged but never convicted. The Code of Maryland Regulations expressly states that the regulations concerning the expungement of DNA evidence govern "only the collection, submission, receipt, identification, testing, storage, and disposal of DNA samples *from individuals* arrested and charged or convicted, or both, for various specified crimes[.]" COMAR 29.05.01.02.A(1) (emphasis added). Those regulations do not, however, "govern *evidentiary, suspect, and forensic samples* otherwise legally obtained, whether by search warrant, court order, consent, or other method except as specifically provided in … this chapter." COMAR 29.05.01.02.A(2) (emphasis added). Because the DNA sample at issue

was an evidentiary sample and was not derived from appellant after he was charged with a crime, § 2-511 does not apply. As such, the suppression court did not err in denying appellant's motion to suppress.

III.

Appellant's next claim of error concerns the trial court's decision to instruct the jury on the uncharged crime of fourth-degree sexual offense. Appellant argues that the court erred in finding that the crime of fourth-degree sexual offense constituted a "lesser included offense" of the charged crimes of first and second-degree sexual offense. The State concedes that the court should not have given the instruction but argues that appellant's claim was waived because defense counsel failed to object to the instruction at trial.

We disagree with the State's preservation argument. The record makes plain that defense counsel objected to the inclusion of the instruction at issue and that the parties had an extensive discussion of the instruction with the trial court. At the conclusion of that discussion, the court stated to defense counsel: "The record will reflect that you were in opposition to the lesser includeds, but I felt that they were fairly generated by the evidence in this case. And I will acquiesce to the State's request to give them, and – but your objection is duly noted." It is clear, therefore, that defense counsel properly preserved his objection. *See* Md. Rule 4-323(c) ("For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court.").

Turning to the merits, we hold that the trial court erred in instructing the jury on the uncharged offense of fourth-degree sexual offense. In a jury trial, "'a defendant may only be convicted of an uncharged lesser included offense if it meets the elements [*i.e.* required evidence] test[.]'" *Middleton v. State*, 238 Md. App. 295, 305 (2018) (citing *Hagans v. State*, 316 Md. 429, 450 (1989)). Under that test, "Crime A is a lesser-included offense of Crime B where all of the elements of Crime A are included in Crime B, so that only Crime B contains a distinct element." *State v. Wilson*, 471 Md. 136, 178-79 (2020) (citations omitted).

Here, the crimes at issue – first and second-degree sexual offense and fourth-degree sexual offense – do not meet the "required evidence test" because first and second-degree sexual offense, on the one hand, and fourth-degree sexual offense, on the other hand, have distinct elements that the other does not. Specifically, the statutes governing first and second-degree sexual offense require proof of a "sexual act," which is defined to include "analingus; cunnilingus; fellatio; anal intercourse, including penetration, however slight, of the anus; or an act in which an object or part of an individual's body penetrates, however slightly, into another individual's genital opening or anus[.]" Md. Code, Crim. Law § 3-301(d)(1); *see also* Md. Code, Crim. Law §§ 3-305 (proscribing first-degree sexual offense) and 3-306 (proscribing second-degree sexual offense) (2012 Repl. Vol., 2016 Supp.). The statute governing fourth-degree sexual offense, on the other hand, requires proof of "sexual contact," which 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." Md. Code, Crim. Law § 3-301(e)(1); *see also* Md. Code, Crim. Law § 3-308(b) (2012 Repl. Vol., 2016 Supp.). As we explained in *Travis v. State*, 218 Md. App. 410 (2014), the evidentiary proof of a "sexual act" is quite different from the evidentiary proof of "sexual contact:"

> What is involved in sexual contact is purposeful tactile contact and tactile sensation, not incidental touching. It is the sexually-oriented act of groping, caressing, feeling or touching of the genital area or the anus or the breasts of the [] victim. It is something other than the necessarily involved contact that is merely incidental to the … sexual act itself.

Id. at 465.

From that, it is clear that a "sexual act" is distinct from "sexual contact" and that, as a result, fourth-degree sexual offense is not a "lesser included offense" of first or second-degree sexual offense. Consequently, the trial court erred in instructing the jury on the uncharged offense. We therefore vacate that conviction.

IV.

Appellant's final claim is that his sentence on the false imprisonment conviction was unconstitutional and/or fundamentally unfair. Before addressing the merits of that claim, we must first address an apparent disparity between appellant's commitment record and the sentence announced by the trial court during the sentencing hearing.

A.

According to appellant's commitment record, the trial court sentenced appellant to life, suspend all but 60 years, with five years' supervised probation, for the conviction of

false imprisonment. That sentence does not match the sentence announced by the court at the sentencing hearing:

> THE COURT: And the sentence is one year to the Department of Corrections on fourth degree sex offense, 10 years on the sodomy. Those two sentences are running concurrent to each other and consecutive to [the 80-year sentence appellant is currently serving in another case].
>
> **On the charge of false imprisonment … the sentence of the court is life suspend all but 60 years** and that sentence is consecutive to the sentence [that appellant is currently serving].
>
> * * *
>
> THE COURT: Anything further?
>
> (Off microphone comment.)
>
> THE COURT: **The life suspend all but 60 years has a five year penalty and if he is considered to be a Tier 3 offender he will register as required by State law**, and I said if, all right, that he is to be he will be doing that according to State law.
>
> CLERK: Okay.
>
> THE COURT: All right. And you may note if he ever is paroled or probated he will be supervised by the COMET Unit, C-O-M-E-T, which is a unit that specializes in supervising sex offenders.

In light of that colloquy, it is evident that the trial court did not include a five-year period of probation when it sentenced appellant to a term of "life suspend all but 60 years" for the conviction of false imprisonment. Because there is nothing in the record to indicate that the transcript is in error, the transcript prevails, and appellant's commitment record must be changed to reflect the sentence announced by the court. *See Douglas v. State*, 130 Md. App. 666, 673 (2000). That sentence was "life suspend all but 60 years." And,

because the court did not include a period of probation in the announced sentence, the sentence was automatically converted to a flat 60-year sentence. *See Cathcart v. State*, 397 Md. 320, 330 (2007). Thus, appellant was actually sentenced to a term of 60 years imprisonment on the conviction of false imprisonment, and appellant's commitment record must be amended to reflect that sentence.

B.

We now turn to the merits of appellant's claim. As noted, appellant contends that his 60-year sentence was constitutionally disproportionate and/or fundamentally unfair. He argues that, because he was acquitted of all charges alleging sexually assaultive conduct, and because the jury should not have considered the charge of fourth-degree sexual offense, his 60-year sentence for false imprisonment was unconstitutional. Appellant contends, in other words, that "a 60-year sentence for false imprisonment that is not associated with any other assaultive behavior or physical injury crosses the grossly disproportionate sentence threshold." Appellant argues further that, even if the sentence was constitutional, fundamental fairness requires resentencing in light of the fact that the uncharged offense of fourth-degree sexual offense should not have been submitted to the jury. He asserts that, without that guilty verdict, the court "likely would have given a less severe sentence for false imprisonment."

The State counters that the trial court's sentence was not constitutionally disproportionate or fundamentally unfair. The State argues that the sentence was appropriate given appellant's criminal history and the circumstances of the charged crimes.

"In the absence of a statutory penalty, the punishment for any common law crime, including false imprisonment, is anything in the discretion of the sentencing judge, provided only that it not be 'cruel and unusual.'" *Howard v. State*, 232 Md. App. 125, 175 (2017) (citations and quotations omitted); *see also Thomas v. State*, 333 Md. 84, 92 (1993) (noting that the Eighth Amendment to the United States Constitution and Article 25 of the Maryland Declaration of Rights prohibit cruel and unusual punishments). "The prohibition against cruel and unusual punishment 'encompasses a narrow proportionality principle prohibiting grossly disproportionate sentences.'" *Howard*, 232 Md. App. at 175 (citing *State v. Stewart*, 368 Md. 26, 31 (2002)). In reviewing the proportionality of a sentence, we employ the following two-step process:

> [A] reviewing court must first determine whether the sentence appears to be grossly disproportionate. In so doing, the court should look to the seriousness of the conduct involved, the seriousness of any relevant past conduct as in the recidivist cases, any articulated purpose supporting the sentence, and the importance of deferring to the legislature and the sentencing court.
>
> If these considerations do not lead to a suggestion of gross disproportionality, the review is at an end. If the sentence does appear to be grossly disproportionate, the court should engage in a more detailed … analysis. It may conduct an intra- and inter-jurisdictional analysis as a vehicle for comparison and as a source of objective standards; it must, however, remember that under principles of federalism, a state legislature may choose to impose a more severe penalty than other states consider appropriate. In order to be unconstitutional, a punishment must be more than very harsh; it must be grossly disproportionate.

Harris v. State, 251 Md. App. 612, 319-20 (2021) (internal citations omitted).

That said, "a sentencing judge is vested with almost boundless discretion." *Anthony v. State*, 117 Md. App. 119, 130 (1997). "Indeed, '[o]nly rarely should a reviewing court

interfere in the sentencing decision at all, especially because the sentencing court is virtually always better informed of the particular circumstances.'" *Howard*, 232 Md. App. at 175 (citing *Thomas*, 333 Md. at 97). Generally, "the defendant's sentence 'should be premised upon both the facts and circumstances of the crime itself and the background of the individual convicted of committing the crime.'" *Anthony*, 117 Md. App. at 130 (citing *Jennings v. State*, 339 Md. 675, 683 (1995)). The sentencing judge is encouraged "'to consider information concerning the convicted person's reputation, past offenses, health, habits, mental and moral propensities, social background and any other matters that a judge ought to have before him in determining the sentence that should be imposed.'" *Id.* (citing *Smith v. State*, 308 Md. 162, 169 (1986)). "A trial court may consider uncharged or untried offenses, or even circumstances surrounding an acquittal." *Id.* at 131.

Against that backdrop, we hold that appellant's 60-year sentence for false imprisonment was neither grossly disproportionate nor fundamentally unfair. First, appellant's conduct in committing the crime was deplorable. He and another assailant targeted the victim, a vulnerable person, and then lured her to an abandoned house under false pretenses. Upon arriving at the house, the two men forced the victim, at knifepoint, into the basement of the house, where, over the course of two hours, they took turns sodomizing her while holding her there against her will. The victim's ordeal ultimately ended, not because of appellant's benevolence, but because the victim managed to escape her confinement. That appellant was later acquitted of certain charged crimes (or improperly convicted of the uncharged crime of fourth-degree sexual offense) is irrelevant

and does not in any way diminish the depravity of the false imprisonment. *See Anthony*, 117 Md. App. at 131.

The gravity of appellant's crime was further amplified by his related conduct. As noted by the trial court, appellant's DNA had been linked to other cases. In two of those cases, both of which involved a fourteen-year-old female victim, appellant was convicted of sexually assaulting and falsely imprisoning the victims and was sentenced to a term of 80 years' imprisonment. After he was convicted of sexually assaulting the two juveniles, appellant proceeded to harass one or both of the juvenile victims despite the fact that he had been ordered to have no contact with the victims. During his allocution in the instant case, appellant took no responsibility for assaulting those victims or for falsely imprisoning the victim in the instant case, showed no remorse for his behavior, and accused several witnesses, including the victim, of lying.

Given those circumstances, all of which were presented to the trial court during the sentencing hearing, we cannot say that appellant's 60-year sentence was grossly disproportionate or that the court abused its discretion in imposing such a sentence.

Appellant argues that, because false imprisonment is a lesser included offense of kidnapping, and because kidnapping carries a maximum statutory penalty of only 30 years, then his 60-year sentence for false imprisonment was grossly disproportionate. Appellant relies on *Thomas v. State, supra*.

Appellant is mistaken, and his reliance on *Thomas* is misplaced. In *Thomas*, the defendant was convicted of common law assault and sentenced to a term of 20 years'

imprisonment for slapping his wife in the face. *Thomas*, 333 Md. at 97-98. The Court of Appeals later vacated the sentence on the grounds that it was grossly disproportionate to the underlying crime. *Id.* at 105. The Court concluded that the sentence was disproportionate because the assault was "no more than a slap[,] … did not result in any lasting physical injury, and cannot be considered legally 'serious.'" *Id.* at 98. The Court also noted that the sentence was "not the result of a recidivist history" and "was not based on any legislative or judicial decision to impose severe penalties to deter domestic violence because of its societal impact." *Id.* The Court then noted that the imposed 20-year sentence was more than the statutory maximum penalty of ten years for the greater offense of aggravated assault. *Id.* at 99. The Court concluded that, under the circumstances, the defendant's 20-year sentence for the less-serious crime of common law assault suggested gross disproportionality:

> As the State concedes, the conduct for which the defendant was convicted on this occasion is significantly less serious than an assault with intent to maim, disfigure, or disable. As we pointed out in [*Simms v. State*, 288 Md. 712 (1980)], because the defendant was not charged with this type of aggravated assault, the maximum statutory penalty for the aggravated assault does not, by operation of law, become the maximum penalty for the simple assault or battery. When it is clear, however, that the conduct underlying the simple assault or battery is in fact less serious than the assaultive conduct for which the legislature has fixed a maximum penalty, a penalty that exceeds the statutory maximum suggests disproportionality, and we give that fact heavy weight in this case.

Id. at 99-100.

Turning back to the instant case, we conclude that *Thomas* is inapposite. First, unlike in *Thomas*, the "lesser" crime of false imprisonment cannot be considered less

serious than the "greater" crime of kidnapping. To be sure, both kidnapping and false imprisonment require the victim to be confined against his or her will, and kidnapping is generally a greater offense of false imprisonment, and thus may be considered more "serious," because it involves the additional element that the victim be "carried away." *Hunt v. State*, 12 Md. App. 286, 309 (1971); *see also* Md. Code, Crim. Law § 3-502. Nevertheless, that distinction is inconsequential because appellant's conduct in committing the false imprisonment was not "significantly less serious" than a kidnapping. That is, appellant's conduct was made no less severe merely because he did not kidnap the victim. Regardless of whether appellant "carried away" the victim, appellant still lured the victim to an abandoned house, where he held the victim against her will and, with his partner, took turns sodomizing her. It was that conduct, and not simply the false imprisonment, on which the trial court relied in fashioning appellant's sentence.

Moreover, unlike in *Thomas*, the trial court in the instant case did not rely solely on the fact of the conviction. The court also considered appellant's abhorrent conduct in committing the crime, his recent convictions for sexually assaulting and falsely imprisoning two 14-year-old females, his conduct following those convictions and at the sentencing hearing, the fact that he was implicated in four other sexual assault cases, and the court's reasonable concerns that appellant was a "sexual predator" from whom society needed to be protected. None of those factors was present in *Thomas*, and each was significant in the court's determination of appellant's sentence. For those and all other

reasons stated herein, appellant's 60-year sentence for false imprisonment was neither grossly disproportionate nor fundamentally unfair.

APPELLANT'S CONVICTION FOR FOURTH-DEGREE SEXUAL OFFENSE VACATED; CASE REMANDED FOR MODIFICATION OF APPELLANT'S COMMITMENT RECORD TO REFLECT A FLAT 60-YEAR SENTENCE FOR THE CONVICTION OF FALSE IMPRISONMENT; JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY OTHERWISE AFFIRMED; COSTS TO BE PAID 2/3 BY APPELLANT AND 1/3 BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.