Circuit Court for Baltimore County
Case No.: 03-K-17-003440

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2765

September Term, 2018

MICHAEL FOX

v.

STATE OF MARYLAND

Graeff,
Beachley,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: July 9, 2020

A jury sitting in the Circuit Court for Baltimore County found Michael Fox, appellant, guilty of second-degree rape, attempted second-degree sexual offense, second-degree sexual offense, four counts of sexual abuse of a minor, six counts of third-degree sexual offense, two counts of sodomy, and two counts of unnatural and perverted sexual practices. The court sentenced appellant to 25 years of imprisonment for one conviction of sexual abuse of a minor, 20 years, consecutive, for the conviction of second-degree rape, and five years, consecutive, for the second conviction of sexual abuse of a minor. The court imposed concurrent sentences for the remaining convictions.

On appeal, appellant presents us with the following questions, which we have rephrased as follows:

1. Did the circuit court err when it failed to merge appellant's conviction for attempted second-degree sexual offense into his conviction for second-degree sexual offense?

2. Did the circuit court err when it failed to merge appellant's two convictions for sodomy and his two convictions for unnatural and perverted practices into four of his convictions for third-degree sexual offense?

3. Should appellant's conviction of third-degree sexual offense be vacated because the charging document was duplicitous?

4. Did the circuit court err when it failed to merge appellant's conviction for second-degree rape into his conviction for sexual abuse of a minor?

For the reasons set forth below, we shall vacate the sentences for attempted second-degree sexual offense, sodomy, and unnatural and perverted practices, i.e., counts 3, 9, 11, 15, and 17.[1] Otherwise, we shall affirm the judgments of the circuit court.

PROCEDURAL AND FACTUAL BACKGROUND

In the fall of 2015, appellant moved back into his mother's and stepfather's home in Halethorpe, Maryland. Appellant's step-sister, F.B., and his half-brother, Jonathan, also lived at the house at that time. After a few months passed, Jonathan moved out.

Shortly after appellant's 21st birthday in October 2015, he and then 14-year-old F.B. began engaging in various sexual acts, including vaginal and anal intercourse, fellatio, and cunnilingus. They engaged in those sexual acts, sometimes consensually, and sometimes not consensually, every few days for approximately a year and a half. F.B. testified that there were times when she was in pain during sexual activity and times when she did not want to engage in sexual activity. She explained that, as time went on, she was less interested in engaging in sexual activity with appellant, but "[h]e didn't really take no for an answer" unless she "hurt him enough" by "pinch[ing] or bit[ing] or grab[bing] his [testicles]." She said that, eventually, she "gave up because [she] knew that fighting back would just make things worse."

Their sexual relationship ended on June 8, 2017, when F.B.'s father walked into her bedroom and witnessed sexual activity occurring on the floor. F.B. explained that, prior to

[1] In some instances, the count numbers that were sent to the jury vary from the count numbers in the indictment. Unless indicated otherwise, the count numbers herein refer to the counts as sent to the jury on the verdict sheet.

her father entering her bedroom, appellant had pushed her on the bed and tried to have vaginal intercourse with her, but she said no and fought back. She said that "he succeeded at first, then [she] got away a little," and then she jumped in pain when "he tried for anal." Appellant was able, however, to eventually penetrate her anus with his penis. Then, "after a little bit, [she] kind of submitted and gave up and got on the floor."

The following day, F.B. began to open up to her father about the sexual activity, and he immediately notified the police. The police picked up appellant and interviewed him that same day. Although appellant initially denied engaging in any sexual activity with F.B. the previous day, he eventually admitted to having a long-term sexual relationship with her.

The State charged appellant in a 20-count indictment, charging various offenses for conduct that occurred over four separate time periods. The first time period covered the time between the first sexual encounter and F.B.'s 15th birthday, i.e., November 1, 2015, to April 19, 2016. The second time period covered the time after F.B.'s 15th birthday until her 16th birthday, i.e., April 20, 2016, to April 19, 2017. The third time period covered the time between April 20, 2017, to June 7, 2017. And the final group of charges related to the offenses committed on June 8, 2017, prior to when F.B.'s father entered her bedroom.

Appellant went to trial on July 31, 2018. As indicated, the jury found appellant guilty of multiple sexual offenses, and the court sentenced appellant to a total of 50 years' imprisonment.[2]

[2] The following table depicts the specific charges, date ranges, and sentences:

This appeal followed.

DISCUSSION

I.

Appellant contends that his conviction for attempted second-degree sexual offense, i.e., count three, should have merged into his conviction for the consummated second-degree sexual offense, i.e., count four. The State agrees, and so do we.

Appellant was convicted of both an attempted and a consummated second-degree sexual offense relating to his sexual conduct with F.B. on June 8, 2017. The court

COUNT # IN INDICTMENT	COUNT # AS SENT TO JURY	OFFENSE	DATE OF OFFENSE	SENTENCE
1	1	Sexual abuse of a minor	6/8/17	25
2	2	Second-degree rape	6/8/17	20 consecutive to 1
3	3	Attempted second-degree sexual offense	6/8/17	20 concurrent
4	4	Second-degree sexual offense	6/8/17	20 concurrent
5	n/a	Second-degree assault	6/8/17	*Nolle Prosequi*
6	5	Sexual abuse of a minor	4/20/17 to 6/7/17	5 consecutive to 2 & 1
7	6	Sexual abuse of a minor	4/20/16 to 4/19/17	25 concurrent
8	7	Third-degree sexual offense	4/20/16 to 4/19/17	10 concurrent
9	8	Third-degree sexual offense	4/20/16 to 4/19/17	10 concurrent
10	9	Sodomy	4/20/16 to 4/19/17	10 concurrent
11	10	Third-degree sexual offense	4/20/16 to 4/19/17	10 concurrent
12	11	Unnatural and perverted sexual practice	4/20/16 to 4/19/17	10 concurrent
13	n/a	Third-degree sexual offense	4/20/16 to 4/19/17	*Nolle Prosequi*
14	12	Sexual abuse of a minor	11/1/15 to 4/19/16	25 concurrent
15	13	Third-degree sexual offense	11/1/15 to 4/19/16	10 concurrent
16	14	Third-degree sexual offense	11/1/15 to 4/19/16	10 concurrent
17	15	Sodomy	11/1/15 to 4/19/16	10 concurrent
18	16	Third-degree sexual offense	11/1/15 to 4/19/16	10 concurrent
19	17	Unnatural and perverted sexual practice	11/1/15 to 4/19/16	10 concurrent
20	n/a	Third-degree sexual offense	11/1/15 to 4/19/16	*Nolle Prosequi*

sentenced him to 20 years for each conviction, to be served concurrently to the 25-year sentence imposed on count one, sexual abuse of a minor.

At the time of the offense, second-degree sexual offense was defined in Md. Code Ann. (2012 Repl. Vol.), § 3-306 of the Criminal Law Article ("CR"), which made it a crime for an individual to engage in a "sexual act" with another person by force, or threat of force, without the consent of the other person.[3] "Sexual Act" is defined in CR § 3-301(d) as follows:

> (d)(1) "Sexual act" means any of the following acts, regardless of whether semen is emitted:
>
> (i) analingus;
>
> (ii) cunnilingus;
>
> (iii) fellatio;
>
> (iv) anal intercourse, including penetration, however slight, of the anus; or
>
> (v) an act:
>
> 1. in which an object or part of an individual's body penetrates, however slightly, into another individual's genital opening or anus; and
>
> 2. that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party.
>
> (2) "Sexual act" does not include:
>
> (i) vaginal intercourse; or

[3] CR § 3-306 was repealed by 2017 Md. Laws, Ch. 161, effective October 1, 2017. Second-degree sexual offense is currently included as a part of CR § 3-304(a), addressing second-degree rape ("A person may not engage in vaginal intercourse or a sexual act with another by force, or the threat of force, without the consent of the other[.]").

> (ii) an act in which an object or part of an individual's body penetrates an individual's genital opening or anus for an accepted medical purpose.

Merger of convictions for sentencing purposes is required 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." *Brooks v. State*, 439 Md. 698, 737 (2014). As relevant to this case, "an attempt is a lesser included offense of the consummated crime[.]" *Moore v. State*, 388 Md. 623, 646 (2005). *Accord Lightfoot v. State*, 278 Md. 231, 235 (1976). Because attempted second-degree sexual offense and consummated second-degree sexual offense are the same offense for purposes of merger, the two offenses merge if they are based on the "same act or acts." *Brooks*, 439 Md. at 737. If "the factual basis for a jury's verdict is not readily apparent, the court resolves factual ambiguities in the defendant's favor and merges the convictions if those convictions also satisfy the required evidence test." *Id*. at 739.

Here, the record is ambiguous as to whether the second-degree sexual offense and the attempt to commit it were based on the same act or acts. The "sexual act," as defined by CR § 3-301, that was alleged to occur on June 8, 2017, was anal intercourse, but it is not clear from the jury instructions, the closing arguments, or the testimony that the attempted second-degree sexual offense was based on acts separate from the acts forming the basis for the consummated second-degree sexual offense.

Accordingly, the attempted second-degree sexual offense conviction should have merged into the consummated second-degree sexual offense conviction for sentencing purposes. Therefore, we vacate the sentence imposed on count three, attempted second-

degree sexual offense. *See Twigg v. State*, 447 Md. 1, 19 n.10 (2016) ("[F]or purposes of resentencing, the remedy is to vacate only the sentence imposed upon the lesser included offense, not the conviction itself.").

II.

Appellant contends that his two convictions for sodomy, i.e., counts 9 and 15, and his two convictions for unnatural and perverted practices, i.e., counts 11 and 17, should have merged into four of his convictions for third-degree sexual offense. Again, the State agrees, and so do we.

As indicated, the State grouped the charges against appellant, in part, by the time period in which they occurred. For the time period between November 1, 2015, and April 19, 2016, when the victim was 14 years old, appellant was charged with, among other things, one count of sodomy, one count of unnatural and perverted sexual practice, and three counts of third-degree sexual offense. These same offenses were alleged to have occurred between April 20, 2016, and April 19, 2017, when the victim was 15 years old. The jury convicted appellant of all of these offenses, a total of two counts of sodomy, two counts of unnatural and perverted sexual practice, and six counts of third-degree sexual offense.

Although a third-degree sexual offense can be based on a variety of sexual conduct, the jury in this case was instructed regarding a person who is at least 21 years old engaging in a "sexual act" with a victim who is 14 or 15 years old. *See* CR § 3-307(a)(4). As discussed *supra*, pursuant to CR § 3-301(d), "sexual act" does not involve vaginal

intercourse, but can involve, among other things, analingus, cunnilingus, fellatio, and anal intercourse.

At the time of the offense, sodomy was a common law offense that prohibited "anal intercourse by a man with another person, fellatio, cunnilingus, and analingus." *DiBartolomeo v. State*, 61 Md. App. 302, 307 (1985).[4] The jury here was instructed only on the anal intercourse modality of sodomy.

Unnatural and perverted sexual practices are criminalized under CR § 3-322, as follows:

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

As discussed *supra*, two offenses merge for sentencing purposes when they are based on the same acts, and when they are deemed the same offense under the "required evidence test." *Brooks*, 439 Md. at 737. The "required evidence test" provides that, "if only one offense requires proof of a fact which the other does not, the offenses are the same

[4] The General Assembly amended the criminal code during the 2020 legislative session to repeal the criminalization of sodomy statute (CR § 3-321) and to remove sodomy from the definition of sexual abuses of a minor (CR § 3-602). 2020 Md. Laws, Ch. 45, effective October 1, 2020. Maryland's general savings statute, Md. Code Ann. (2014 Repl. Vol.), § 1-205 of the General Provisions Article, provides that, unless otherwise expressly provided, "the repeal …or amendment of a statute does not release, extinguish, or alter a criminal or civil penalty, forfeiture, or liability imposed or incurred under the statute." *Accord State v. Johnson*, 285 Md. 339, 344 (1979). Accordingly, this change in the law has no effect on our analysis here.

and are deemed the same, and separate sentences for each offense are prohibited." *Britton v. State*, 201 Md. App. 589, 599 (2011) (quoting *Dixon v. State*, 364 Md. 209, 237 (2001)).

Third-degree sexual offense contains all of the elements of both sodomy and unnatural and perverted sexual practices. Only third-degree sexual offense contains an extra element, concerning the ages of the victim and perpetrator. As a result, the offenses of sodomy and unnatural and perverted sexual practices merge into third-degree sexual offense if they are based on the "same act or acts." *Brooks*, 439 Md. at 737. If "the factual basis for a jury's verdict is not readily apparent, the court resolves factual ambiguities in the defendant's favor and merges the convictions if those convictions also satisfy the required evidence test." *Id*. at 739.

Here, as the State concedes, based on the testimony, the jury instructions, and the arguments of counsel, it is unclear whether the two sodomy and two unnatural and perverted practice convictions were based on the same acts as the four third-degree sexual offense convictions. Therefore, merger was required, and we shall vacate the sentences for count 9, sodomy, count 11, unnatural and perverted sexual practices, count 15, sodomy, and count 17, unnatural and perverted sexual practices.

III.

Appellant next contends that his convictions for third-degree sexual offenses should be vacated because none of those counts specified which of the various statutorily defined "sexual acts," i.e., fellatio, anal intercourse, or vaginal intercourse, appellant was accused of committing. Thus, appellant argues that each count of third-degree sexual offense charged him with committing all three modalities supporting that offense, and as a result,

the charging document was duplicitous because it charged more than one crime in a single count. *See Cooksey v. State*, 359 Md. 1, 7–8 (2000).

The State contends that appellant waived this claim of error because it was not raised in a pre-trial motion. We agree.

Maryland Rule 4-252(a)(2) provides that a claim that a charging document is defective "shall be raised by motion in conformity with this Rule and if not so raised [is] waived unless the court, for good cause shown, orders otherwise[.]" Appellant acknowledges that, prior to trial, he never moved to dismiss the charging document on the basis that it was duplicative, and therefore, defective. Accordingly, his claim is waived, and we decline to address it. *See Robinson v. State*, 353 Md. 683, 703, 708 (1999) ("Petitioner's objections as to lack of specificity, as well as duplicity, raised for the first time after the trial commenced, were therefore waived."); *Morrissey v. State*, 9 Md. App. 470, 474 (1970) ("[A]ppellant's right to challenge the counts of the information on grounds of duplicity was waived by his failure to raise the question prior to or during trial.").

IV.

Appellant contends that his conviction for second-degree rape (count 2) should have merged for sentencing purposes into his conviction for sexual abuse of a minor (count 1) under the required evidence test. He argues that, pursuant to the holdings of *Nightingale v. State*, 312 Md. 699 (1988), and *Twigg v. State*, 447 Md. 1 (2016), second-degree rape was a lesser included offense of sexual abuse of a minor, and therefore, it was required to merge for sentencing.

The State argues that the circuit court properly imposed separate sentences for second-degree rape and sexual abuse of a minor. We agree.

In 1988, the Court of Appeals held in *Nightingale*, 312 Md. at 708–09, "that a conviction for second-degree sexual offense was a lesser included offense of the sexual abuse portion of the child abuse statute," and therefore, the Court "vacated the portion of the defendant's sentence imposed under the sexual offense statute." *Tribbitt v. State*, 403 Md. 638, 652 (2008). In 1990, however, the General Assembly amended the penalty provision of Maryland's child abuse statute, with the express purpose of overruling *Nightingale*, adding the following provision: "A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for . . . any crime based on the act establishing the violation of this section." 1990 Md. Laws, Ch. 604; CR § 3-602(d). *Accord Tribbitt*, 403 Md. at 652; *Fisher v. State*, 367 Md. 218, 242–43 (2001).

Indeed, in *Twigg*, the Court of Appeals stated that "[t]he General Assembly effectively overruled . . . *Nightingale* by amending the child abuse statute in 1990 to permit separate sentences for child abuse and any underlying crime(s) that establish the gravamen of the child abuse conviction." 447 Md. at 11 n.6. *Accord Tribbitt*, 403 Md. at 652–53. Accordingly, appellant's merger argument for counts one and two is meritless.

SENTENCE IMPOSED ON COUNT THREE, ATTEMPTED SECOND-DEGREE SEXUAL OFFENSE, COUNT NINE, SODOMY, COUNT ELEVEN, UNNATURAL AND PERVERTED SEXUAL PRACTICES, COUNT FIFTEEN, SODOMY, AND COUNT SEVENTEEN, UNNATURAL AND PERVERTED SEXUAL

PRACTICES VACATED. ALL CONVICTIONS OTHERWISE AFFIRMED. COSTS TO BE DIVIDED EQUALLY.