Circuit Court for Prince George's County
Case No. CT180105X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 785

September Term, 2019

HENRY ALEXANDER REYES

v.

STATE OF MARYLAND

Friedman,
Shaw Geter,
Wright, Alexander Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: August 20, 2021

Appellant, Henry Alexander Reyes, was convicted by a jury in the Circuit Court for Prince George's County of second-degree rape and second-degree assault. The trial court sentenced Reyes to a total of 20 years in prison, suspending all but six years, after which Reyes filed a timely notice of appeal. Reyes now presents three issues on appeal: (1) that the trial court erred by requiring the defense to choose between accepting the verdict and declaring a mistrial without first permitting *voir dire* of the jury; (2) that improper closing argument by the state required reversal; and (3) that the trial court erred by imposing separate sentences for second-degree assault and second-degree rape. Because the State concedes, and we agree, that Reyes's conviction for second-degree assault should have merged into the conviction for second-degree rape for sentencing purposes, we will vacate the sentence for second-degree assault. We otherwise affirm the trial court's judgments.

FACTS AND LEGAL PROCEEDINGS

On the morning of December 17, 2017, 18-year-old M.T. traveled from Frederick, Maryland, to Washington, D.C., by an Uber that her friend Mike had ordered for her. Instead of paying for a return ride that evening, Mike connected M.T. with two of his cousins who were driving back to Frederick; one of the cousins was Reyes. Although M.T. had not previously met the cousins, she accepted the ride.

On the way back to Frederick, the trio stopped at a car wash in Washington, D.C. While the car was being washed, Reyes drank some alcohol, after which he kissed M.T., tried to hug her, and grabbed her buttocks. He input his Snapchat username—"Reyy_damann"—into her iPad so they could communicate after that night.

As they left the car wash, Reyes told M.T. that he had to pick up some clothes at his home in Hyattsville. Once there, he invited her inside, but she declined. He insisted, "playfully pulling" her arm, until she agreed to accompany him into the house.

Reyes took M.T. into his room and locked the door. He kissed her, said "it will be a quickie," and "kind of pushed" her onto the bed. Despite her struggles and assertion that she "don't want to," Reyes removed or partially removed M.T.'s boots and pants and penetrated her vagina with his penis. Hearing noisy argument or conversation, Reyes's father and the father's girlfriend unlocked the bedroom door and told Reyes to leave because they did not want "any problems."

During the remainder of the ride to Frederick, M.T. cried, and Reyes apologized. When she arrived home, M.T. was "visibly upset" and told her housemate that her friend's cousin "Henry" had raped her. The next day, "very upset and tearful and anxious," she underwent a sexual assault forensic examination at Frederick Memorial Hospital. The day after that, she initiated a conversation on the "Reyy_damann" Snapchat account Reyes had entered into her iPad:

M.T.:	Dude I thought you were a good guy.
Reyy_damann:	I am I'm sorry [M].
M.T.:	But why would you do that. Like you put your dick in and I still said no.
Reyy_damann:	My bad.
M.T.:	My bad?
Reyy_damann:	Yeah I was lit my bad I'm good now like I'm sorrry I did fwked up.

M.T.: For sure.

Reyy_damann: You good?

M.T.: Nah.

Reyes did not deny having sexual intercourse with M.T. but asserted a defense that it was consensual.

DISCUSSION

I. ALTERNATE JUROR'S PRESENCE DURING DELIBERATIONS

After closing arguments, the trial court excused the alternate juror and instructed the bailiff to show him the way out of the jury room so the jury could begin deliberating.[1] Approximately three hours later, when the jury announced it had reached a verdict, the court advised counsel that the alternate had remained in the jury room:

THE COURT: First, I excused the alternate but he did not leave.

[DEFENSE COUNSEL]: I'm sorry?

THE COURT: He did not go. He sat there. So 13 people are going to walk out here. I clearly excused him on the record.

[DEFENSE COUNSEL]: Yes.

THE COURT: That point I am pretty sure about.

[DEFENSE COUNSEL]: So they deliberated. Thirteen people deliberated?

[1] The second alternate had become part of the jury when a juror was no longer able to attend trial and was excused.

THE COURT:	That is my understanding. When they come out, I will know for sure but I think that is what has happened. You want to go and take the verdict anyway or do you want to think about it?
[PROSECUTOR]:	I think my proposal would be to voir dire them on the record.
THE COURT:	To say what?
[DEFENSE COUNSEL]:	I guess voir dire the foreman.
THE COURT:	To say what?
[DEFENSE COUNSEL]:	How many people deliberated.
THE COURT:	Well, he comes out. He has been in there.
[DEFENSE COUNSEL]:	I see what you are saying, yes. True.
[PROSECUTOR]:	Just did their deliberations have any—
THE COURT:	I don't think you can ask that.
[DEFENSE COUNSEL]:	This is a new one.
[PROSECUTOR]:	This is a new one.
THE COURT:	I have had it happen.
[PROSECUTOR]:	How did the Court resolve it?
THE COURT:	That happened both which we ran up short one and had one through (inaudible) and basically everybody was unanimous or it really did not make any difference.

My question is do you want to do it all over again?

[DEFENSE COUNSEL]: Not particularly.

THE COURT: Well, that is the way I look at it. Since it is unanimous, you want to talk to your client a minute?

[DEFENSE COUNSEL]: Yes.

(Long pause.)

[DEFENSE COUNSEL]: We can proceed, Your Honor.

(Whereupon, the Bench Conference was concluded.)

[DEFENSE COUNSEL]: We can proceed.

THE COURT: All right. Let me lay on the record what happened as near as I can so this is clear.

I had earlier excused the alternate. We had excused an alternate yesterday. There was another alternate we brought back. I clearly on the record excused him and told him to leave and apparently he did not so he stayed in the jury room and he just did not leave. He is still there.

I understand the jury has reached a verdict. It is a unanimous verdict and we are all agreed we are going to take this unanimous verdict and waive any consequences of the alternate sitting in. Is that correct?

[DEFENSE COUNSEL]: I am agreeing to take the verdict, yeah.

THE COURT:	Tell me what that means.
[DEFENSE COUNSEL]:	I mean I am agreeing to take the verdict.
THE COURT:	Okay. You do not want to waive any appellate issues?
[DEFENSE COUNSEL]:	No.
THE COURT:	Do you want a mistrial?
[DEFENSE COUNSEL]:	I am not asking for a mistrial, no.
THE COURT:	You are okay either way.
[PROSECUTOR]:	I am fine with taking the verdict.

The court then received the jury's unanimous guilty verdict. All 13 deliberating jurors were polled, and the verdict was hearkened.

On appeal, Reyes contends that the trial court erred in declining defense counsel's request to *voir dire* the jury after it became apparent that the alternate juror had been present during deliberations. In Reyes's view, he should have been permitted to *voir dire* the jury about whether the alternate juror's presence may have prejudiced the jury against him before "being forced" to choose between accepting the verdict or agreeing to the declaration of a mistrial.

First, we note that the argument Reyes advances on appeal is unpreserved. In his brief, Reyes argues that the trial court should have *voir dired* the entire jury about the alternate juror's influence on the jury so he could make an informed decision about whether to accept the verdict. He claims that the trial court erred in declining to *voir dire* the jury because the verdict had not yet been returned, and thus the court was still permitted to *voir*

dire the jurors under Maryland Rule 5-606, which prohibits *voir dire* after a verdict has been returned.[2]

During the trial, however, when the court explained that 13 jurors had likely deliberated and asked if the parties wanted to "go and take the verdict anyway or do you want to think about it," it was the *prosecutor* who proposed the *voir dire* of the jury on the record. When the court asked, "To say what?" defense counsel spoke for the first time: "I guess to *voir dire* the foreman" to find out "[h]ow many people deliberated." The court pointed out that it seemed evident that all 13 people in the jury room had deliberated, and defense counsel agreed. Then, the prosecutor began to add, "Just did their deliberations have any—" before the court cut him off with, "I don't think you can ask that." Agreeing that he did "[n]ot particularly" want "to do it all over again," but adding no further argument, defense counsel then conferred with Reyes and agreed to take the verdict in lieu of requesting a mistrial.

[2] Rule 5-606 states, in pertinent part:

> **(b) Inquiry Into Validity of Verdict.** (1) In any inquiry into the validity of a verdict, a sworn juror may not testify as to (A) any matter or statement occurring during the course of the jury's deliberations, (B) the effect of anything upon that or any other sworn juror's mind or emotions as influencing the sworn juror to assent or dissent from the verdict, or (C) the sworn juror's mental processes in connection with the verdict.
>
> * * *
>
> **(c) "Verdict" Defined.** For purposes of this Rule, "verdict" means a verdict returned by a trial jury.

Defense counsel never requested, nor joined in the prosecutor's likely but unfinished request, that the entire jury be *voir dired* about the influence, if any, the alternate juror's presence had on the other jurors.[3] Neither did defense counsel suggest to the trial court that, in his view, *voir dire* was permissible under Maryland Rule 5-606 because the jury had not yet officially returned its verdict.

Because these arguments were not advanced below, they are not preserved for our review.[4] *McDonald v. State,* 141 Md. App. 371, 376 (2001); *see also* MD. R. 4-323(c)("For purposes of review … on appeal of any other ruling or order [not relating to the admission of evidence], 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."); MD. R. 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court").

[3] It is unclear what practical purpose a *voir dire* of the jury would have served. There is an almost irrebuttable presumption of prejudice in the mere presence of an alternate juror during deliberations, resulting in reversible error so long as defense counsel objects. *Stokes v. State*, 379 Md. 618, 622, 642 (2004); *Ramirez v. State*, 178 Md. App. 257, 286 (2008). In failing to accept the mistrial the court offered, knowing that the 13 jurors were unanimous in their verdict, it would appear that defense counsel was making a tactical decision, either to gamble on the possibility of an acquittal or to accept the more likely outcome of a conviction, given the sufficient evidence, while obviating the need for a retrial.

[4] Reyes's general statement that he did "not want to waive any appellate issues" is insufficient to preserve issues he never articulated during trial. As this Court recently said, "[m]erely alluding to a complicated subject that may call for further exploration is not the express lodging of a loud and clear objection necessary to preserve an objection for appellate review." *Gantt v. State*, 241 Md. App. 276, 302 (2019).

Second, we note that Reyes affirmatively waived his appellate claim. Defense counsel did ask the trial court to *voir dire* the foreman about how many jurors deliberated, but when the court pointed out that 13 jurors had been in the jury room and had presumably deliberated, counsel agreed that was true and made no further request. Then, although entitled to—and offered—the option of a mistrial, defense counsel, with no appearance of coercion by the trial court, declined and chose to accept the verdict.

The doctrine of invited error is therefore applicable to Reyes's argument that he now is entitled to reversal and a new trial. The "invited error" doctrine is a "'shorthand term for the concept that a defendant who himself invites or creates error cannot obtain a benefit—mistrial or reversal—from that error.'" *State v. Rich*, 415 Md. 567, 575 (2010) (quoting *Klauenberg v. State,* 355 Md. 528, 544 (1999)). "'The doctrine stems from the common sense view that where a party invites the trial court to commit error, he cannot later cry foul on appeal.'" *Id*. (quoting *United States v. Brannan,* 562 F.3d 1300, 1306 (11th Cir.2009)). To the extent that an invited error amounts to an abandonment of a known right, it is a waiver and unreviewable on appeal. *Id.* at 580.

"Generally, a waiver is the intentional relinquishment of a known right, or conduct that warrants such an inference." *Brockington v. Grimstead,* 176 Md. App. 327, 355 (2007). Waiver "extinguishes the waiving party's ability to raise any claim of error based upon that right." *Id.* "Thus, a party who validly waives a right may not complain on appeal that the court erred in denying him the right he waived, in part because, in that situation, the court's denial of the right was not error." *Id.* Reyes invited error by declining the trial court's offer of a mistrial, and he has therefore waived any right to seek reversal on appeal.

II. CLOSING ARGUMENT

Reyes next asserts that the trial court erred in permitting the prosecutor, during rebuttal closing argument, to shift the burden of proof to the defense by commenting on his decision not to testify. Reyes argues that the court's "generic" curative instruction, was insufficient to alleviate the prejudice he suffered from the prosecutor's comment.

In his opening statement, defense counsel began:

> Ladies and gentlemen, I will be honest with you. This is a tough case. I'm not going to sugarcoat that with you. But the reason that it's a tough case isn't because it's going to be difficult to figure out what happened. It's not that at all. That will be very, very, very clear throughout this case, what happened. But the reason this is a difficult case is because no one here, none of you all, not me, not the State, were in that room on December 17, 2017. None of us were there to know exactly what happened inside of that room.
>
> * * *
>
> Everything which occurred after leaving out of the room makes it crystal clear that there is absolutely no rape, no assault, no anything of that matter. Nothing beyond two adults who went in a room consensually together and hung out together in that room and did whatever they did inside of that room. Whatever they did in that room was completely consensual. All the facts that we'll look at before and after will most clearly, most clearly show that.

Reyes did not testify, but M.T., the only other person in the room with Reyes on the night in question, testified that he raped her.

In his initial closing argument, the prosecutor referred directly to defense counsel's opening statement:

> When [defense counsel] spoke to you a couple of days ago, he told you that this was a tough case and that everything that

> happened, whatever they did in that room was consensual. We now know that is not true. Nothing that happened in that room was consensual.
>
> The Court gave instructions that you are to consider evidence that you either see or hear but [defense counsel] told you in opening that it was consensual. Well, where is the evidence of that?

Defense counsel argued in closing that "the case that [the State] presented against Henry does not make sense" because M.T.'s details of the alleged events of the evening changed over time and because Reyes's father and the father's girlfriend had testified "amazingly credibl[y]" that when they knocked on Reyes's door, he opened the door immediately and he and M.T. were clothed. Counsel added that many things "do not add up and do not make any kind of sense," including why M.T. got back into a car with her alleged rapist after she had been assaulted.

In rebuttal, the prosecutor replied to defense counsel's comments:

> [PROSECUTOR]: She is confused. She is in shock. She is trying to process how am I going to deal with this? What am I going to do? Should I go to the police? What do I do? I don't know what to do.
>
> She texted [her housemate], hey, something bad happened. When she sees [her housemate] the first thing she says "I need a hug." The Defense in their opening told you whatever happened in that room was consensual.
>
> Well, what did happen in that room? Because we still have not heard it.

[DEFENSE COUNSEL]:	Objection.
THE COURT:	Free to comment on the law, free to comment on the facts. My instructions on the law will govern. The jury's recollection of the facts will govern. Go ahead.
[PROSECUTOR]:	The Defense told you what happened was consensual. So I still do not know what the Defense is. The Defense said it was consensual and she is making this all up or is it, well, she did not do enough to him. So which is it?

Although the trial court did not expressly sustain defense counsel's objection to the prosecutor's comment, it did so implicitly by giving limiting instructions. If the court had overruled the objection, it would have been unnecessary to instruct the jury following the prosecutor's remarks.

Thereafter, defense counsel did not request any additional instruction, move to strike the prosecutor's comment, or request a mistrial.[5] The record, therefore, reflects that the trial court immediately provided all of the relief that defense counsel requested, and Reyes's contention that the prosecutor's rebuttal closing argument was improper is waived. *Lamb v. State*, 141 Md. App. 610, 644-45 (2001) (holding that in the absence of a request

[5] Specifically, defense counsel made no argument to the trial court, as he does in his brief, that its limiting instruction "failed to cure the prejudice caused by the prosecutor's comments." Because Reyes did not make that argument below, we will not consider it on appeal.

for further relief when the prosecutor made an inflammatory remark during closing argument, "appellant did not properly preserve this issue for appellate review").

Even if considered, Reyes's claim of impermissible rebuttal closing argument would fail. In general, "attorneys are afforded great leeway in presenting closing arguments to the jury" and may make "any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Degren v. State*, 352 Md. 400, 429-30 (1999) (cleaned up). We will not overrule a trial court's decision on how to best regulate closing arguments "unless there is a clear abuse of discretion that likely injured a party." *Ingram v. State*, 427 Md. 717, 726 (2012). It is the trial court that "is in the best position to gauge the propriety of closing argument in light of [the facts of the case]." *Mitchell v. State,* 408 Md. 368, 380-81 (2009).

In *Harriston v. State*, this Court explained that "Maryland appellate courts have not been quick to label as burden-shifting prosecutorial closing comments on a shortage of defense evidence. In the one instance our search revealed where our courts held the comments impermissible, the prosecutor spoke directly to the *defendant's* failure to provide evidence. We have little trouble concluding the prosecutor's comments here do not fit that category." 246 Md. App. 367, 379-80, *cert. denied*, 471 Md. 77 (2020) (emphasis in original).

Similarly here, reviewing the prosecutor's brief statement in the context of the entire rebuttal closing argument, it appears that he was merely responding to defense counsel's opening statement that any sexual contact between Reyes and M.T. was consensual, by pointing out that the defense had presented no evidence of what happened in Reyes's

bedroom behind closed doors, and certainly no evidence of M.T.'s consent, even in defense counsel's own closing argument. The statement that the *defense* did not offer evidence to prove its claim of consent does not, alone, lead to an inference that the prosecutor was referring specifically to the *defendant's* failure to testify. For these reasons, we are not persuaded that there is any fault in the prosecutor's comments, nor do we conclude that the prosecutor's closing comments amounted to impermissible burden-shifting.

Moreover, in his initial closing argument, the prosecutor, without objection, made a statement that was almost identical to the one about which Reyes claims error: "The Court gave instructions that you are to consider evidence that you either see or hear but [defense counsel] told you in opening that it was consensual. Well, where is the evidence of that?" Given that the un-objected to closing argument put before the jury the same statement about which Reyes now complains, we are persuaded that the prosecutor's brief remark during rebuttal closing argument did not unfairly prejudice Reyes or influence the jury's verdict. Therefore, even were we to find error in the State's rebuttal closing argument, any such error would be harmless and would not require reversal of Reyes's convictions. *See Yates v. State*, 429 Md. 112, 120-21 (2012) (holding that error is harmless when other competent evidence is introduced on the point it tended to prove).

III. MERGER OF SENTENCES

Finally, Reyes argues that his conviction of second-degree assault should have merged into his conviction of second-degree rape for sentencing purposes because a second-degree rape based on use of force necessarily includes a second-degree assault. The

State concedes that Reyes's convictions stemmed from the same act or acts and that the sentence for second-degree assault should be vacated. We agree.

The trial court imposed the following prison sentence upon Reyes: for second-degree rape, 20 years, all but six years suspended; for second-degree assault, a consecutive ten years, all suspended.

The merger of multiple convictions for sentencing purposes is required by the protection against double jeopardy afforded by the Fifth and Fourteenth Amendments to the United States Constitution and by Maryland common law, and it protects criminal defendants from incurring multiple punishments for the same offense. *Brooks v. State,* 439 Md. 698, 737 (2014). Sentences for two or more convictions must be merged when "(1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other." *Id*. Failure to merge a sentence when it is required is an illegal sentence as a matter of law. *Latray v. State*, 221 Md. App. 544, 555 (2015). We review without deference a trial court's failure to merge offenses for sentencing purposes. *Blickenstaff v. State,* 393 Md. 680, 683 (2006).

Second-degree assault consists of: "(1) intent to frighten; (2) attempted battery, [or] (3) battery." *Snyder v. State*, 210 Md. App. 370, 382 (2013). Battery consists of a harmful "offensive or unlawful touching." *Marlin v. State*, 192 Md. App. 134, 166 (2010). A conviction for second-degree rape requires proof of vaginal intercourse or a sexual act with another by force, or the threat of force, without that person's consent. MD. CODE, CRIM. LAW ("CR") § 3-304(a)(1). As the Court of Appeals explained in *Biggus v. State*,

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

323 Md. 339, 351 (1991).

Here, there is no dispute that the assault and the rape for which Reyes was convicted were both based on the same act. The vaginal intercourse by force, or without consent, required to convict him of second-degree rape was the same offensive or unlawful touching upon which his second-degree assault was predicated. Accordingly, the conviction of second degree-assault was required to merge with the conviction of second-degree rape for sentencing purposes, as a lesser-included offense based on the same act. Therefore, we shall vacate the sentence for second-degree assault.

SENTENCE FOR SECOND-DEGREE ASSAULT VACATED; JUDGMENTS OTHERWISE AFFIRMED; COSTS ASSESSED 2/3 TO APPELLANT AND 1/3 TO PRINCE GEORGE'S COUNTY.