

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1897

September Term, 2015

ULILES TOME

v.

STATE OF MARYLAND

Meredith,
Graeff,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.
Dissent Opinion by Raker, J.

Filed: April 24, 2017

This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Uliles Tome, appellant, was convicted by a jury in the Circuit Court for Prince George's County of second-degree sexual offense arising out of an incident in which he was alleged to have performed cunnilingus on a 12-year-old girl. Tome was acquitted of all other charges, including third-degree sexual offense. Tome contends that the jury's verdict on these two charges was legally inconsistent, and that the circuit court improperly denied his motion to instruct the jury to deliberate further to resolve the alleged inconsistency.

QUESTION PRESENTED

Appellant presents a single question for our review: "Did the trial court err in refusing to instruct the jury to further deliberate in order to resolve legally inconsistent verdicts?"

We answer "no," and affirm the judgment of the Circuit Court for Prince George's County.

FACTUAL & PROCEDURAL BACKGROUND

In March 2013, a 12-year-old girl, whom we shall refer to as "Y.C.," was living in an apartment with her mother, step-father, brother, and aunt. Tome was dating Y.C.'s aunt during that period. Tome was 34 years old at the time.

On March 26, 2013, while Y.C. was alone in the apartment after school, Tome appeared at the door and explained that he needed to retrieve something from Y.C.'s aunt's bedroom. At Tome's trial, Y.C. testified that, once Tome was inside the apartment, he pushed her onto the couch, removed her clothing, and "started putting his mouth in my . .

. [v]agina.” She repeated her assertion that “he put his mouth in my vagina.” Y.C. further testified that Tome covered her mouth and told her not to scream or yell. After the incident concluded, Tome instructed Y.C. “not to say anything because he knew people that sell girls.”

Y.C. testified that, following the incident, Tome sent her text messages requesting that she send him photographs of herself in her underwear. Y.C. testified that she complied with Tome’s requests because he had threatened to hurt her family.

In May 2013, Y.C.’s mother discovered the text messages between Y.C. and Tome. As a result, Y.C.’s mother contacted the Prince George’s County Police Department, and detectives conducted an interview of Y.C. and her mother regarding the incidents with Tome.

Following the interview of Y.C. and her mother, the Prince George’s County Police made contact with Tome at his apartment building and asked him to accompany them to the police station for an interview regarding the allegations against him. During the interview, Tome admitted that he had licked Y.C.’s vagina and had requested that she send him pictures of herself in her underwear. But Tome insisted that he had merely “licked her,” and that he “didn’t touch even a hair of that girl.” Tome was arrested, and charged with, *inter alia*, second-degree sexual offense and third-degree sexual offense.

At trial, when the circuit court reviewed the proposed jury instructions with counsel, the court commented: “I don’t see any discrepancies between what’s been requested by the State and what’s being requested by [the] defense.” Neither party took issue with this

observation, but the lists of requested pattern instructions submitted by the parties reflect some variation with respect to the sex offenses. The State requested that the circuit court give MPJI-Cr 4:29.6, 4:29.8, and 4:29.9, whereas appellant asked the court to give MPJI-Cr 4:29.4, 4:29.7, and 4:29.9. The court gave all five of these requested instructions.

Utilizing the requested pattern instructions, the court gave the jury the following instructions for second-degree sexual offense and third-degree sexual offense based on age of the victim:

The [next] charge that we're going to talk about is second degree sexual offense. And there are two different theories for second degree sexual offense, and so the jury is going to have to consider both of those theories in making your determination.

The first theory that we're going to talk about is by way of force or threat of force. . . .

* * *

Now the second theory of second degree sexual offense is based upon age only. All right. The defendant is charged with the crime of second degree sexual offense.

In order to convict the defendant of second degree sexual offense [based upon age], the State must prove:

Number one, that the defendant committed cunnilingus with [Y.C.]; that [Y.C.] was under 14 years of age at the time of the act, and that the defendant -- and that the defendant was then at least four years older than [Y.C.] at the time.

Cunnilingus means that the defendant applied his mouth to the sexual organ of a female.

Now we're going to talk about third degree sexual offense. And again, there are two different theories of third degree sexual offense, by force, and then the second theory is also by age.

* * *

The second theory of third degree sexual offense is based on age. In order to convict the defendant of third degree sexual offense of this type, the State must prove:

Number one, that the defendant had sexual contact with [Y.C.].

Number two, that [Y.C.] was under 14 years of age at the time of the act.

And number three, that the defendant was least four years older than [Y.C.].

Again, **sexual contact** means the intentional touching of [Y.C.'s] genital or anal area or other intimate parts for the purpose of sexual arousal or gratification, or for the abuse of either party, and **includes the penetration**, however slight, **by any part** of a person's body **other than the penis, mouth or tongue, into the genital or anal opening of another person's body** if that penetration can be reasonably construed as being for the purpose of sexual arousal or gratification or for the abuse of either party.

It does not include, again, acts commonly expressive of familiar or friendly affection or acts for accepted medical purposes.

(Emphasis added.)

This instruction regarding the elements of age-based third-degree sexual offense was, in essence, MPJI-Cr 4:29.8 (2d ed. 2012, 2013 supp.). As noted above, appellant did not request an instruction on age-based third-degree sexual offense. He did, however, request that the court use MPJI-Cr 4:29.7 as the instruction defining third-degree sexual offense committed by force or threat of force. The definition of "sexual contact" in both of the pattern instructions on third degree sexual offense --- *i.e.*, MPJI-Cr 4:29.7 and MPJI-Cr 4:29.8 (2d ed. 2012, 2013 supp.) --- is identical, and tells the jury that sexual contact

“includes the penetration, however slight, by any part of a person’s body other than the penis, mouth, or tongue, into the genital or anal opening of another person’s body.”

The circuit court’s instructions were essentially identical to the Maryland Pattern Jury Instructions for age-based second-degree and third-degree sexual offense. *See* MPJI-Cr 4:29.6; MPJI-Cr 4:29.8 (2d ed. 2012, 2013 supp.).¹ The court provided the jury with a written copy of all of its instructions, including MPJI-Cr 4:29.4, 4:29.6, 4:29.7, 4:29.8, and 4:29.9.

The jury returned a verdict finding Tome guilty of age-based second-degree sexual offense. But the jury found Tome not guilty of all other charges, including age-based third-degree sexual offense. After the jury announced its verdict, and prior to the jury being excused, Tome approached the bench and told the circuit court: “We believe that that is an inconsistent verdict.” The State disagreed, and responded:

The State would argue, that is not inconsistent. When you look at the definition of sexual contact they [the jury] received, if they believe that he did, in fact, perform cunnilingus, **it says in the sexual contact [definition of the instructions on third degree sexual offense] that a tongue in the sexual organ of the victim is not sexual contact.**

So therefore, if they felt there was cunnilingus, we would have a situation where if he just put his mouth on her vagina and didn’t put his tongue inside of her vagina, and that would be a separate act, but if they believe that the act was putting his tongue inside of her vagina, that would be cunnilingus. That’s not [“]sexual contact.[”]

(Emphasis added.)

¹ As we will discuss later in this opinion, the version of MPJI-Cr 4:29.8 in the 2016 Supplement is worded differently.

Defense counsel again argued that the verdicts were inconsistent “because in order to do the cunnilingus, you must commit assault [sic, presumably “sexual offense”] in the third.” But the State disagreed with defense counsel’s argument that a third-degree sexual offense was a necessary component of the statutory crime of second-degree sexual offense, and argued that the instructions given to the jury expressly carve out an exception from third-degree sexual offense for sexual acts involving penetration by the mouth or tongue:

[PROSECUTOR]: Your Honor, the State is arguing the exact opposite. Sexual *acts* and sexual *contact* are different. The sexual *act* is the cunnilingus. In the jury instructions, for third degree sex offense, when it says “sexual *contact*,” it does exclude cunnilingus. It says --

THE COURT: How so?

[PROSECUTOR]: It says, [“]and includes penetration, however slight, by any part of a person’s body *other than* the penis, mouth or tongue.[”]

So when it says [“]other than[”] the tongue going inside of the vagina, the cunnilingus, it does exclude that act.

(Emphasis added.)

The circuit court rejected Tome’s contention that the verdict of guilty of second-degree sexual offense was fatally inconsistent with an acquittal of third-degree sexual offense:

THE COURT: All right. I understand perfectly your point, [counsel for Tome]. And I think this really boils down to the clarifying language within the jury instruction for third degree sex offense based upon age. The language is inartful and awkward.

And I think a reasonable juror could read that language and conclude that the act of cunnilingus does not fall within the definition of a third degree sex offense based upon age; but upon their reading of the

second degree sex offense based upon age, obviously, cunnilingus could be included.

And so I don't think it automatically means that this was a legally inconsistent verdict. As such, I'm assuming you had a motion. **What was your motion?**

[COUNSEL FOR TOME]: **My motion would be to instruct the jury to the inconsistency and to have them continue to deliberate.**

THE COURT: **Request denied.**

(Emphasis added.)

On appeal, Tome contends that the jury's verdict was inconsistent because, "in order to perform the act of cunnilingus, one necessarily and incidentally makes 'sexual contact.' Thus, in effect, the 'sexual contact' element of third-degree sex offense is a required element of the cunnilingus element of second-degree sex offense." Tome contends that the circuit court erred in denying his motion to instruct the jury to deliberate further to resolve the alleged legal inconsistency in the verdict.

We conclude that the Circuit Court for Prince George's County did not err in accepting the jury's verdict.

DISCUSSION

Legally inconsistent verdicts are no longer permitted in Maryland. *Price v. State*, 405 Md. 10, 28–29 (2008). As the Court of Appeals explained in *McNeal v. State*, 426 Md. 455, 458 (2012): "A legally inconsistent verdict is one where the jury acts contrary to the instructions of the trial judge with regard to the proper application of the law. [*Price, supra*, 405 Md. at 35 (Harrell, J., concurring)]. **Verdicts where a defendant is convicted of one**

charge, but acquitted of another charge that is an essential element of the first charge, are inconsistent as a matter of law.” (Emphasis added.) On the other hand, “[m]ere logical inconsistency is only factual inconsistency and will not condemn a jury’s verdicts as fatally inconsistent.” *Travis v. State*, 218 Md. App. 410, 450 (2014).

“We review *de novo* the question of whether verdicts are legally inconsistent. This is so because **we review the elements of the offense at issue in light of the jury instructions.**” *Teixeira v. State*, 213 Md. App. 664, 668 (2013) (emphasis added).

Tome correctly notes on appeal that the definitions of “sexual contact” and “sexual act” were amended by the General Assembly in 2011, *i.e.*, prior to Tome’s trial in June 2015. “Sexual contact” currently is – and was at the time of Tome’s trial – defined by statute as:

Sexual contact

(e)(1) “Sexual contact”, as used in §§ 3-307, 3-308, and 3-314 of this subtitle, means 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.

(2) “Sexual contact” does not include:

- (i) a common expression of familial or friendly affection; or
- (ii) an act for an accepted medical purpose.

Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article (“CL”) § 3-301(e).

Pursuant to CL § 3-301(d), “sexual act” is defined as:

Sexual act

(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
- (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.

Notwithstanding the 2011 amendments, however, Tome did not raise any issue at trial (or in post-verdict motions) regarding variances between the amended statutes and the instructions given by the court. He never objected to the instructions that were given by the court regarding the legal definitions of “sexual contact” and “cunnilingus.” Even after the jury announced the verdicts he contends were inconsistent, he did not ask the court to

alter the definitional instructions it had previously given. He only asked the court to “instruct the jury [about] the inconsistency and have them continue to deliberate.”

Because he affirmatively requested an instruction (namely, MPJI-Cr 4:29.7) that defined “sexual contact” --- with respect to the crime of sexual offense in the third degree --- to exclude penetration by the mouth or tongue into the genital opening of a person, he is foreclosed from arguing on appeal that the court’s definition of “sexual contact” was incorrect. Accordingly, when we review his claim of inconsistency in the verdict in light of the instructions given by the trial court, we conclude that he failed to preserve any appellate argument based upon the fact that the instructions did not reflect the 2011 amendments to the statutory definition of sexual contact. *See Teixeira, supra*, 213 Md. App. at 668.

The circuit court’s instruction on second-degree sexual offense did not even use the term “sexual contact,” but instead told the jury that “the State must prove . . . that the defendant committed cunnilingus with [Y.C.],” and also told the jury that “[c]unnilingus means that the defendant applied his mouth to the sexual organ of a female.” The circuit court’s instructions regarding the two counts of third-degree sexual offense (one based on force, and the second based on age) followed nearly verbatim the then-current Maryland Pattern Jury Instructions for that offense. *See* MPJI-CR 4:29.7 and 4:29.8 (2d ed. 2012, 2013 supp.). The circuit court instructed the jury not once, but *twice*, that “sexual contact” includes

. . . penetration, however slight, by any part of a person’s body *other than the penis, mouth or tongue*, into the genital or anal opening of another person’s

body if that penetration can be reasonably construed as being for the purpose of sexual arousal or gratification or for the abuse of either party.

(Emphasis added.)

At no time did Tome bring to the circuit court's attention any claim that the instructions given were in error or no longer consistent with the statutory definition of "sexual contact." *See* Maryland Rule 2-520(e) ("No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection.").

Moreover, because appellant requested that the court give an instruction that defined "sexual contact" as *excluding* penetration by the mouth or tongue --- even though that language was no longer in the statutory definition --- he *invited* any error in that instruction and is therefore precluded from obtaining "plain error" review. *Rich v. State*, 415 Md. 567, 575 (2010).

Therefore, our review is limited to whether Tome was "convicted of one charge, but acquitted of *another charge that is an essential element of the first charge*," *McNeal, supra*, 426 Md. at 458 (emphasis added), as those offenses were defined in the instructions that were given by the circuit court at his trial. *Teixeira, supra*, 213 Md. App. at 668. Viewed in that light, the verdicts were not fatally inconsistent.

At trial, Y.C. described the specific contact Tome made with her when he performed cunnilingus during the incident:

Q [PROSECUTOR]: Okay. And what happened next?

A [Y.C.]: He came back and pushed me to the couch, into the couch.

Q: Then what happened.

A: He pushed me to the couch. And I was laying down, and he started taking my clothes off.

Q: And then what happened next?

A: He started putting his mouth in the interior part.

Q: In your interior part, which part of your body are you referring to?

A: Vagina.

Q: And then what happened next?

A: Then he put his mouth in my vagina, and then he covered my mouth.

Although the crime of cunnilingus does not *require* proof of penetration of the victim's vagina, *Partain v. State*, 63 Md. App. 260, 266 (1985), the converse is not true, and cunnilingus *may include* penetration of the vaginal opening by the mouth or tongue. If the jury believed Y.C.'s testimony at trial, a reasonable jury could have found, based on the court's instructions, that Tome committed the second-degree sexual offense of cunnilingus by penetrating her vagina with his mouth or tongue, but did not commit a separate third-degree sexual offense because the instruction on that degree of sexual offense expressly excluded penetration by the defendant's mouth or tongue. *See* CL § 3-306(a)(3). Y.C. testified that Tome placed his mouth *in* her vagina during the sexual encounter. The jury appears to have credited the testimony of Y.C., and determined that Tome placed his mouth in Y.C.'s vagina when performing cunnilingus, which satisfies all

the elements of an age-based second-degree sexual offense pursuant to the instructions given by the circuit court.

Moreover, the jury's verdict of "not guilty" of third-degree sexual offense was logically consistent with the evidence. At trial, Y.C. did not testify that there was any sexual touching by appellant other than putting his mouth in her vagina. Because that was the only sexual touching described by the victim, and the instructions on third-degree sexual offense *excluded* penetration of the genital opening by the mouth or tongue, it was logical for the jury to acquit the appellant of third degree sexual offense even though they believed that he had put his mouth in Y.C.'s vagina.

Viewing the evidence in a light most favorable to the prevailing party, we are satisfied that the jury could have concluded, based on the court's instructions and the victim's testimony at trial, that Tome's mouth or tongue penetrated Y.C's vagina when he performed cunnilingus. Such penetration was excluded from the definition of "sexual contact" in the court's instructions regarding third-degree sexual offense, and therefore, the acquittal as to third-degree sexual offense was not legally inconsistent with the conviction for second-degree sexual offense.

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**

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Meredith,
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(Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion
by Raker, J.

Filed: April 24, 2017

Raker J., dissenting:

I respectfully dissent. I would reverse the judgment of conviction and would hold that here, where there was a single act of cunnilingus constituting the offense, third degree sexual offense is a lesser included offense of second degree sexual offense, and that the acquittal on third degree but conviction on second degree is an inconsistent verdict.

The majority holds that the verdicts in this case are not inconsistent because, based upon the actual jury instructions to the jury by the circuit court, the verdicts are not legally inconsistent. The majority reasons that the jury verdicts were not inconsistent because appellant was not acquitted of one charge that is an essential element of the first charge. Maj. op. at 8 (stating that “we review the elements of the offense at issue in light of the jury instruction.”).¹

Appellant argues that second degree sexual offense and third degree sexual offense, when based upon the act of cunnilingus, share that common element of the defendant’s

¹ The jury instruction in the case, as all parties concede, was legally incorrect. I believe that all parties have a constitutional right to a correct jury instruction as to the elements of the offense and as to the law applicable to the crime charged. Additionally, an appellate court should review the legal elements of the offense as applied to the facts and not through the prism of an incorrect jury instruction. *See State v. Beamon*, 804 N.W. 2d 706, 712 (Wisc. Ct. App. 2011) (noting “[w]e conclude that the evidence is measured against the actual elements of the charged offense, and not the incorrect jury instruction which required an unnecessary factual finding.”). If the instruction given to the jury was wrong, and a defendant is prejudiced, a court may notice the error as plain error, on its own initiative, or as some other courts have observed, as “fundamental error.” Although my preference here would have been to note plain error, reverse and remand for a new trial, I think that even if the trial court had instructed the jury correctly under the statute as revised in 2011, the jury verdict most likely would have been the same.

mouth intentionally touching the vagina of the victim. Because there can be no second degree sexual offense of the cunnilingus permutation without an intentional touching of the vagina by the actor's mouth, third degree sexual offense is necessary to accomplish second degree sexual offense, and hence, an acquittal of third degree is inconsistent with a conviction of second degree (when the charges arise out of the same conduct, *i.e.*, a single act of cunnilingus). Appellant's primary argument before this Court is that the jury verdict of not guilty of third degree sexual offense and guilty of second degree sexual offense, based on the single act of cunnilingus, are inconsistent and cannot stand. He argues that "the 'sexual contact' element of third-degree sex offense is a required element of the cunnilingus element of second-degree sex offense."

The State's primary argument is that there is no legal inconsistency here because sexual contact is not an essential element of second degree sexual offense. The State also argues that appellant's "incidental touching" of the victim's vaginal area with his mouth in order to penetrate her with his tongue "was merely incidental to the sexual abuse he inflicted [upon her]."

The majority says that to evaluate whether the two verdicts are inconsistent, we look to the jury instruction, (even if those instructions are not legally correct), not the legal elements of the offenses. Here, the jury was instructed as to the elements of the crime which had been superseded by statutory amendment in 2011. It is of no moment that the verdict was not inconsistent with the Maryland Pattern Jury Instruction if, as is the case

here, the instruction misstated the law.² Hence, the *legal* elements of the offenses are of critical importance.

The majority concludes that the verdict was not inconsistent because, based upon the instruction, appellant could have committed second degree sexual offense without having committed third degree sexual offense. Maj. op. at 12-13. The majority reasons that while the criminal act of cunnilingus does not require proof of penetration of the victim's vagina, cunnilingus may include penetration of the vaginal opening by the mouth or tongue. Thus, the majority concludes, that under the trial court's instructions, the jury could have found reasonably that appellant committed second degree sexual offense of cunnilingus by penetrating the victim's vagina with his mouth or tongue but did not commit a separate third degree sexual offense because the jury instruction for that offense excluded penetration by the defendant's mouth or tongue.

I disagree with the State and agree with appellant. Cunnilingus, under Maryland law³, and most other of our sister states' law, does not require penetration by the actor's

² The State's references to our cases stating that "the wise course of action is to give instructions in the form, where applicable, of our Maryland Pattern Jury Instructions," *Green v. State*, 127 Md. App. 758, 771 (1999), and that "trial judges usually may rely on them," *Bayne v. State*, 98 Md. App. 149, 160 (1993), is inapposite to the situation at bar. Rarely, but occasionally, an instruction, even from that exalted committee, is either wrong or has not been updated quickly enough following revision by the General Assembly. Trial judges and the bar are charged with following statutory revisions.

³ The jury was told, *inter alia*, the definition of cunnilingus as follows: "Cunnilingus means that the defendant applied his mouth to the sexual organ of a female."

tongue into the victims vagina. Cunnilingus is commonly defined as “an act of sex committed with the mouth and the female sexual organ.” BLACKS LAW DICTIONARY 380 (6th ed. 1990); see also *Johnson v. State*, 626 So. 2d 631, 633 (Miss. 1993) (noting “[i]n its true sense, ‘cunnilingus’ means stimulation by tongue or lips of any part of a woman's genitalia and does not require actual penetration”).

A plain reading of § 3-301 supports the conclusion that second degree sexual offense and third degree sexual offense, when based upon the act of cunnilingus, share the common element of the actor’s mouth touching the vagina. As appellant argues, “there can be no second degree sex offense, of the cunnilingus permutation, *without* an intentional touching of the vagina — third degree sex offense is necessary to accomplish the second degree sex offense.” When the third degree sexual offense and the second degree sexual offense arise out of the single act of cunnilingus, third degree sexual offense is the lesser included offense of second degree sexual offense, and an acquittal of third degree sexual offense is inconsistent with a conviction of second degree sexual offense. The offense of second degree sexual offense cannot be committed without committing the third degree sexual offense. I reject the State’s incidental touching argument as a basis to say that third degree here is not a lesser included offense of second degree.

I would reverse the judgment of conviction.