Circuit Court for Washington County
Case No. C-21-CR-20-000562

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1000

September Term, 2023

FRANCISCO ALEXANDER SILVA

v.

STATE OF MARYLAND

Berger,
Nazarian,
Reed,

JJ.

Opinion by Berger, J.

Filed: July 30, 2024

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

A jury, in the Circuit Court for Washington County, convicted Francisco Silva, appellant, of one count of false imprisonment and two counts of fourth-degree sexual offense. The court sentenced Silva to a term of 10 years' imprisonment, with all but 18 months suspended, on the conviction of false imprisonment and two consecutive terms of one-year imprisonment, all suspended, on the two convictions of fourth-degree sexual offense.

In this appeal, Silva presents a single question for our review:

> Whether the sentencing court erred in failing to merge, for sentencing purposes, Silva's false imprisonment conviction with his two convictions for fourth-degree sexual offense.

For reasons to follow, we hold that the sentencing court did not err in sentencing Silva separately on each conviction. Accordingly, we affirm the judgments of the circuit court.

BACKGROUND

On September 1, 2020, Silva, a hairdresser, was working at a hair studio he operated out of his home in Hagerstown. At 11:00 a.m. that day, a woman, "O.," came to Silva's home to have her hair straightened. According to O., at the conclusion of the appointment, Silva grabbed her breasts without her consent. Silva then asked O. for a hug, and, when O. agreed, Silva grabbed her buttocks without her consent. At some point after that, Silva took O. into the kitchen of the home, placed her on the counter, pulled up her dress, and began performing oral sex on her. When O. tried to leave, Silva grabbed her and attempted vaginal intercourse. O. eventually got out of Silva's house and walked to a nearby business, where she reported the incident. Silva was ultimately arrested and charged with one count

of second-degree rape (cunnilingus), a second count of second-degree rape (vaginal intercourse), one count of fourth-degree sexual offense (touching of breasts), a second count of fourth-degree sexual offense (touching of buttocks), a third count of fourth-degree sexual offense (genital touching), and one count of false imprisonment.

At trial, O. testified that she went to Silva's home on the day of the incident to have her hair styled for her upcoming wedding. Upon entering the home, O. observed several salon chairs, which were located just inside the front door, and a separate entranceway that led to a kitchen. O. sat in one of the chairs, and Silva proceeded with the styling. At the conclusion of the styling, Silva and O. "started talking about . . . sexual things," and Silva made comments about O.'s body. O. "started to feel very uncomfortable" and decided to ignore Silva's comments. Eventually, O. got out of the chair, at which point Silva grabbed O.'s breasts. O. testified that she tried to turn and "get away from that scenario" because she "didn't want it to progress into something that [she] was not okay with." Silva then asked O. for a hug, and O. agreed because she was "non-confrontational" and "didn't want to upset him." When Silva hugged O., he squeezed her buttocks. O. testified that she did not consent to Silva touching her breasts or buttocks. O. also testified that, because Silva was "a lot bigger than [her]," she was concerned because she "didn't know how [she] was going to get out of it."

O. testified that, at some point after grabbing her buttocks, Silva "swept" her into the kitchen area, picked her up, and placed her on the counter. Silva then spread O.'s legs apart, pulled her underwear to the side, and began performing oral sex on her. O. tried

pushing Silva's head away, but Silva continued performing oral sex on her against her will. O. testified that she eventually got off the counter and tried moving toward the front door, but Silva "had a pretty firm grab on [her] arm." O. stated that Silva's grip on her arm was preventing her from leaving the house. While grabbing O.'s arm, Silva took his penis out and asked O. to perform oral sex on him. When O. refused, Silva pulled up O.'s skirt, rubbed his penis against her vagina, and then inserted his penis into her vagina. O. testified that she did not "believe it to be full penetration but several times in and out." Eventually, O. managed to extricate herself from Silva's grasp and leave the house. O. later discovered that she had a bruise on her right arm that resembled a handprint, and the jury was shown photographs of the bruise.

Silva testified in his own defense. In so doing, Silva claimed that the entire encounter with O. was consensual. Silva testified that O. encouraged the sexual talk and later instigated the initial sexual contact. Silva testified that O. went voluntarily into the kitchen, where she willingly allowed Silva to perform oral sex on her. Silva testified that O. also allowed him to rub his penis against her. Silva denied having vaginal intercourse with O.

At the conclusion of the evidence, the trial court instructed the jury on the elements of the charged crimes:

> . . . The Defendant is charged with the crime of second-degree rape. Rape is engaging in vaginal intercourse or a sexual act by force or threat of force and without consent. In order to convict the Defendant of second-degree rape, the State must prove that the Defendant, Francisco Silva, had vaginal intercourse for one of the counts with [O.] or had cunnilingus

> with [O.] for the second count. That the act was committed by force or threat of force and that the act was committed without the consent of [O.]
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> . . . [T]he Defendant is charged with the crime of fourth-degree sexual offense. In order to convict the Defendant of fourth-degree sexual offense, the State must prove that the Defendant, Francisco Silva, had sexual contact with [O.] and that the sexual contact was made against the will and without consent of [O.] Sexual contact means the intentional touching of [O.'s] genital or anal area or intimate parts for the purpose of sexual . . . arousal or gratification or for the abuse of either party.
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> The final charge is false imprisonment. . . . False imprisonment is the confinement or detention of a person against that person's will accomplished by threat, force or threat of force. In order to convict the Defendant of false imprisonment, the State must prove that the Defendant, Francisco Silva, confined or detained [O.] That [O.] was confined or detained against her will and that the confinement or detention was accomplished by either force of threat of force.

The jury ultimately convicted Silva on one count of fourth-degree sexual offense (touching of O.'s breasts), a second count of fourth-degree sexual offense (touching of O.'s buttocks), and one count of false imprisonment. The jury acquitted Silva on one count of second-degree rape (cunnilingus), a second count of second-degree rape (vaginal intercourse), and one count of fourth-degree sexual offense (genital touching).

The sentencing court later sentenced Silva to a term of 10 years' imprisonment, with all but 18 months suspended, on the conviction of false imprisonment and two consecutive terms of one-year imprisonment, all suspended, on the two convictions of fourth-degree

sexual offense. This timely appeal followed. Additional facts will be supplied as needed herein.

DISCUSSION

Silva argues that the sentencing court erred in imposing separate sentences on his convictions of false imprisonment and fourth-degree sexual offense. He argues that, because it is unclear whether the jury convicted him of those offenses based on the same or different acts, his convictions must be merged for sentencing purposes. The State disagrees, arguing that the convictions should not be merged.

I. Analysis

"The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law." *Brooks v. State*, 439 Md. 698, 737 (2014). "Merger protects a convicted defendant from multiple punishments for the same offense." *Id.*

For two or more convictions to be merged for sentencing purposes, the convictions must be based on the same act or acts. *State v. Frazier*, 469 Md. 627, 641 (2020). If so, we then look at whether the offenses meet one of the three principles of merger recognized in Maryland: (1) the required evidence test; (2) the rule of lenity; and (3) the principle of fundamental fairness. *Koushall v. State*, 479 Md. 124, 156 (2022). We review *de novo* a court's decision whether to merge a defendant's convictions for sentencing purposes. *Butler v. State*, 255 Md. App. 477, 488 (2022).

As discussed in greater detail herein, we hold that Silva's convictions for fourth-degree sexual offense and false imprisonment were not based on the same act; therefore, the convictions should not be merged. We further hold that, even if the convictions were based on the same act, merger would be inappropriate because none of the three principles of merger applies.

A. Same Act or Acts

In determining whether two or more convictions are based on the same act or separately distinguishable acts, we look to the facts and circumstances of the case as set forth in the record. *Frazier*, 469 Md. at 642; *see also Pair v. State*, 202 Md. App. 617, 625-28 (2011). The Supreme Court of Maryland has held that, "in situations where there is a factual ambiguity regarding whether the convictions arose out of the same act or transaction, 'that ambiguity is resolved in favor of the defendant.'" *Frazier*, 469 Md. at 642 (quoting *Nicholas v. State*, 426 Md. 385, 400 (2012)). The Court has noted, however, that a reviewing court may also "look to the record for other indications that might resolve the ambiguity in favor of non-merger." *Id.* (citations and quotations omitted).

According to Silva, there are two primary acts for which the jury could have found him guilty of false imprisonment. The first, "and the most obvious," was the grabbing of O.'s arm as she attempted to leave the house after Silva had performed oral sex on her in the kitchen of his home. The second was the grabbing of O.'s breasts and buttocks, which occurred prior to the act of oral sex. Silva argues that, not only was it "equally possible" for the jury to convict him of false imprisonment based on the grabbing of O.'s breasts and

buttocks, it was "more plausible" because the jury found him not guilty of both rape charges. Silva contends that, because there is an ambiguity as to which act formed the basis for the jury's verdict on the false imprisonment charge, and because the grabbing of O.'s breasts and buttocks was the undisputable basis for the jury's finding of guilt as to the two charges of fourth-degree sexual offense, that ambiguity should be resolved in favor of merger.

We disagree with Silva's interpretation of the record. In order to find Silva guilty of false imprisonment based on his touching of O.'s breasts and buttocks, the jury would have had to find that those acts were committed by force or threat of force and that they resulted in some confinement or detainment. Notably, while O. did testify that Silva touched her breasts and buttocks against her will, she never testified, or even suggested, that either touching was committed by force or threat of force or resulted in some confinement or detainment. Rather, O. testified that, after Silva touched her breasts and buttocks and escorted her into the kitchen to perform oral sex on her, she tried to leave, at which point Silva grabbed her arm and prevented her from leaving the house, which left a bruise on her arm in the shape of a handprint. It was that testimony, and not the testimony regarding the touching of O.'s breasts and buttocks, from which the jury could reasonably infer that Silva had confined or detained O. against her will using force or threat of force. The prosecutor later hammered this point home during closing:

> Let's start with force or threat of force. This element is required for the two crimes of rape, not for the fourth-degree sex offenses. In this case, you have both force and threat of force. Force, and we'll start with the vaginal intercourse, is

> him putting his hands on her, putting his hands on her, holding her side and bending her over. ... [O.] tells you she's leaving. She's walking out when he grabs her by the arm, by the right arm she said, bends her over and then attempts to penetrate her rubbing his penis against her vagina until he is – has enough of an erection that he can penetrate her. That is the force in the case.
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> So let's move on to consent. Lack of consent is required for all five of the charged sex offenses in this case. Consent is actual agreement, not submission. He grabs her and he fondles her breasts while she is in his presence. She doesn't see this coming. This is shocking. She doesn't have an opportunity to say no. She didn't agree to that. He asks for a hug. She agrees to the hug, but she doesn't agree to him fondling her buttocks. She only consented to the hug. ... And all of these are fourth-degree sex offenses because they are sexual contacts without her consent.
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> . . . Did he commit these sex offenses on her? Yes, all of them, rape in the second degree twice, all the sexual contact when he was touching her without her consent and finally, as she tells you she's trying to leave, he grabs her on the right side, bends her over and penetrates her. Before he even penetrates her, he's committed the crime of false imprisonment because she can't go.

Based on the record, and in particular the prosecutor's argument, we find no ambiguity as to the basis of the jury's verdict. *C.f. Frazier*, 469 Md. at 642-44 (holding that there was an ambiguity as to whether the defendant's convictions should have merged, in part because "the prosecutor did not focus the attention of the jury on which acts formed the basis for [each conviction]"). The record clearly establishes that the touching of O.'s breasts and buttocks served as the basis for the fourth-degree sexual offense convictions

and that the subsequent grabbing of O.'s arm -- which was separate and distinct from the grabbing of her breasts and buttocks -- served as the basis for the false imprisonment conviction. That it was theoretically possible that the jury convicted Silva on all charges based on the same act (the touching of O.'s breasts and buttocks) does not mean that the record is ambiguous, as no reasonable interpretation of the record would lead to such a conclusion. *See Deville v. State*, 383 Md. 217, 223 (2004) (noting that, in the context of statutory interpretation, "[a] statute is ambiguous when there are two or more *reasonable* alternative interpretations of the statute.") (emphasis added). Moreover, the jury's acquittal of the rape charges does not create an ambiguity, either, as the jury could easily have concluded that the State failed to establish the other elements of those crimes. Accordingly, we hold that, because Silva's false imprisonment conviction and his fourth-degree sexual offense convictions were based on separately distinguishable acts, those convictions should not be merged for sentencing purposes.

B. The Required Evidence Test

Assuming, *arguendo*, that Silva's convictions were somehow based on the same act, we hold that merger would not be required pursuant to the required evidence test. Under that test, we look at the elements of each offense and determine if each offense contains an element that the other does not. *Potts v. State*, 231 Md. App. 398, 413 (2016) (citations omitted). "'If each offense requires proof of a fact which the other does not, then offenses are not the same and do not merge.'" *Koushall*, 479 Md. at 157 (quoting *Newton v. State*, 280 Md. 260, 264 (1977)). If, however, "only one offense requires proof of a fact which

the other does not, the offenses are deemed the same, and separate sentences for each offense are prohibited." *Id.* (citations and quotations omitted).

To prove fourth-degree sexual offense, the State needed to show that Silva engaged in sexual contact with O. without her consent. Md. Code, Crim. Law § 3-308(b)(1) (effective March 27, 2019 to September 30, 2023). Sexual contact 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(c)(1). To prove false imprisonment, the State needed to show that Silva confined or detained O. against her will and that he did so using force, threat of force, or deception. *Howard v. State*, 232 Md. App. 125, 168 (2017).

Clearly, the two offenses do not meet the required evidence test. The elements of fourth-degree sexual offense include "sexual contact," which is not an element of false imprisonment. False imprisonment, on the other hand, requires confining or detaining someone by force, threat of force, or deception, which are not included in the elements of fourth-degree sexual offense. Because each offense contains an element that the other does not, the offenses would not be merged for sentencing purposes under the required evidence test.

Silva insists that, because it was conceivable that the jury convicted him of false imprisonment and both fourth-degree sexual offenses based solely on his touching of O.'s breasts and buttocks, merger is required. In support, Silva relies on *Brooks v. State*, 439

Md. 698 (2014), *Nightingale v. State*, 312 Md. 699 (1988),[1] and *Hawkins v. State*, 34 Md. App. 82 (1976).

Silva is incorrect, and his reliance on the above cases is misplaced. In those cases, the offenses at issue met the required evidence test. *E.g. Brooks*, 439 Md. at 737-42; *Nightingale*, 312 Md. at 702-09; *Hawkins*, 34 Md. App. at 92. Consequently, merger was appropriate in those cases if there was ambiguity as to the factual basis for the jury's verdict. Here, the offenses do not meet the required evidence. We, therefore, have no need to resolve any factual ambiguities in the jury's verdict with respect to the required evidence test. *See Brooks*, 439 Md. at 739 ("[W]hen 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*.") (emphasis added); *see also Dillsworth v. State*, 308 Md 354, 357 (1987) (noting that the required evidence test "'focuses upon the *elements* of the two crimes rather than upon the actual evidence adduced at trial'") (quoting *Thomas v. State*, 277 Md. 257, 267 (1976)) (emphasis in original); *Moore v. State*, 198 Md. App. 655, 699-700 (rejecting the "actual evidence test" as the standard for determining merger).

C. The Rule of Lenity

We likewise hold that, even if Silva's convictions were based on the same act, merger pursuant to the "rule of lenity" would be inappropriate. "The rule of lenity, applicable only where a defendant is convicted of at least one statutory offense, requires

[1] *Superseded on other grounds by statute*, *as stated in Twigg v. State*, 447 Md. 1 (2016).

merger when there is no indication that the legislature intended multiple punishments for the same act." *Potts*, 231 Md. App. at 413-14. "The rule of lenity is a common law doctrine that directs courts to construe ambiguous criminal statutes in favor of criminal defendants." *Alexis v. State,* 437 Md. 457, 484 (2014). "'If we are unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, we, in effect, give the defendant the benefit of the doubt and hold that the crimes do merge.'" *Koushall*, 479 Md. at 161 (quoting *Monoker v. State*, 321 Md. 214, 222 (1990)). "The relevant inquiry is whether the two offenses are 'of necessity closely intertwined' or whether one offense is 'necessarily the overt act of the other.'" *Pineta v. State*, 98 Md. App. 614, 620-21 (1993) (quoting *Dillsworth*, 308 Md. at 366-67). That said, "the rule of lenity 'serves only as an aid for resolving an ambiguity; it is not used to beget one.'" *Wimbish v. State*, 201 Md. App. 239, 274 (2011) (quoting *Dillsworth*, 308 Md. at 365). "If there is no ambiguity, 'the rule of lenity simply has no application.'" *Fenwick v. State*, 135 Md. App. 167, 174 (2000) (quoting *Jones v. State*, 336 Md. 255, 262 (1994)).

Reviewing the sole statutory crime at issue here -- fourth-degree sexual offense -- we find no ambiguity and thus no reason to invoke the rule of lenity.[2] That statute prohibits a person from engaging in "sexual contact with another without the consent of the other," and the statute defines sexual contact 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(c)(1) and 3-308(b)(1). The language of the

[2] False imprisonment is a common-law crime. *Howard*, 232 Md. App. at 168.

statute clearly proscribes a specific act, *i.e.*, nonconsensual contact that is "sexual" in nature, and that act has little, if any, relationship to the crime of false imprisonment.

Moreover, the legislature has historically treated the various degrees of sexual offenses, including fourth-degree sexual offense, as separate and distinct from one another and other like offenses, thereby justifying separate punishments. *Dillsworth*, 308 Md. at 367. In fact, in 2023, the legislature amended the fourth-degree sexual offense statute to include an express anti-merger provision. *See* Md. Code, Crim. Law § 3-308(e)(2) (effective October 1, 2023) ("A sentence imposed under this section may be imposed separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation of this section."). Although that amendment was not effective until after the instant crimes were committed and is therefore not dispositive, the amendment nevertheless evinces the legislature's intent regarding the offenses at issue here. *See Chesek v. Jones*, 406 Md. 446, 462 (2008) ("Although a subsequent legislative amendment of a statute is not controlling as to the meaning of the prior law, … subsequent legislation can be considered helpful to determine legislative intent."). From that, we are convinced that the legislature intended to punish fourth-degree sexual offense as a distinct offense and separately from false imprisonment.

D. Fundamental Fairness

Finally, we hold that, even if Silva's convictions were based on the same act, merger pursuant to the doctrine of "fundamental fairness" is unwarranted. As a preliminary matter,

we note that Silva did not object at the time his sentence was pronounced. Consequently, that issue is not properly before this Court. *Potts*, 231 Md. App. at 414.

Assuming, *arguendo*, that the issue was preserved, we find no error. Fundamental fairness "is a 'fact-driven' inquiry that considers whether a defendant should not receive separate, but otherwise legal, criminal punishments under the circumstances." *Koushall*, 479 Md. at 164. "In deciding whether fundamental fairness requires merger, we have looked to whether the two crimes are part and parcel of one another, such that one crime is an integral component of the other." *Garner v. State*, 442 Md. 226, 248-49 (2015) (citation omitted). We have also noted that, "when a single act is sufficient to result in convictions for both offenses, but the victim suffered only a single harm as a result of that act, then as a matter of fundamental fairness there should be only one punishment because in a real-world sense there was only one crime." *Montgomery v. State*, 206 Md. App. 357, 408 (2012) (citation omitted).

Here, the offenses at issue were not integral components of one another but rather were separate and distinct offenses. Furthermore, by testifying that Silva grabbed her arm and prevented her from leaving his house, O. provided a separate basis, independent of the touching of her breasts and buttocks, upon which the jury could have found Silva guilty of false imprisonment. *See Jones-Harris v. State*, 179 Md. App. 72, 100 (2008) (holding that merger of defendant's convictions for false imprisonment and second-degree sexual offense was unwarranted, where "the charge of false imprisonment was supported by facts independent of the facts supporting the two charges of second-degree sexual offense").

CONCLUSION

In sum, we hold that Silva's convictions for false imprisonment and fourth-degree sexual offense do not merge, as the offenses were based on separately distinguishable acts. We further hold that, even if the offenses were based on the same acts, they would not merge pursuant to the required evidence test, the rule of lenity, or fundamental fairness. As such, the sentencing court did not err in refusing to merge Silva's convictions for sentencing purposes.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.