Circuit Court for Cecil County
Case No. C-07-CR-22-000197

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1557

September Term, 2022

SHAUN M. GILBERT

v.

STATE OF MARYLAND

Arthur,
Tang,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: June 14, 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).

Shaun M. Gilbert, the appellant, was charged with various offenses stemming from allegations that he had sexually abused a minor between May 10 and December 31, 2018, once between May 1 and November 30, 2020, and three times in November 2020. The charged offenses were grouped by time frame as follows:

Count	Time Frame	Offense
1	May 10 - December 31, 2018	Sexual abuse of a minor
2	May 1 - November 30, 2020	Sexual abuse of a minor
3	November 1 - 30, 2020	2nd-degree rape
4	November 1 - 30, 2020	Attempted 2nd-degree rape
5	November 1 - 30, 2020	3rd-degree sexual offense
6	November 1 - 30, 2020	2nd-degree rape
7	November 1 - 30, 2020	Attempted 2nd-degree rape
8	November 1 - 30, 2020	3rd-degree sexual offense
9	November 1 - 30, 2020	2nd-degree rape
10	November 1 - 30, 2020	Attempted 2nd-degree rape
11	November 1 - 30, 2020	3rd-degree sexual offense

A jury in the Circuit Court for Cecil County convicted the appellant of all but Counts 6 and 9, and the court sentenced him to an aggregate of 90 years of incarceration. On appeal, the appellant raises two issues, which we have rephrased:[1]

1. Did the trial court err in denying the appellant's motion in limine seeking to prohibit the members of the group Bikers Against Child Abuse from attending trial while wearing vests displaying the group's insignia?

2. Did the trial court properly sentence the appellant on Counts 10 and 11?

[1] The appellant phrases his questions presented as follows:

1. Did the trial court err in denying Appellant's motions to prohibit the motorcycle club, Bikers Against Child Abuse, from attending trial while wearing vests displaying the words, "Bikers Against Child Abuse"?

2. Did the trial court err in failing to merge Appellant's sentences?

For the following reasons, we shall affirm the circuit court's judgments.

BACKGROUND

A.P., who was 13 years old at the time of the trial, testified that the appellant committed acts of sexual abuse against her during 2018 and 2020. A.P. resided in a household with her mother, the appellant, and other family members. The appellant was engaged to A.P.'s mother. A.P. considered the appellant to be her stepfather.

May 10 to December 31, 2018

Before spring 2018, the appellant was away from home. He returned between May and December 2018, when A.P. was about nine years old, and that is when the sexual contact began. When she wanted to be on the phone for a little longer after bedtime, she would ask the appellant for permission to have more screen time. But she "had to do something for him" in exchange. The appellant would "pull down [her] pants and then pull down his pants[.]" As she lay on her stomach, the appellant "would rub his penis in between [her] butt and vagina area." A.P. testified that this would occur the "same way" "maybe three times, every like week or two[.]" Each sexual contact lasted about 10 to 15 minutes.

Later, in 2018, A.P. learned about inappropriate touching at school. Afterward, when the appellant asked if A.P. wanted screen time, A.P. declined, saying she was tired. The sexual contact stopped at that point. But it resumed in 2020 when she was around 11 years old.

May 1 to November 30, 2020

A.P. testified about one incident with the appellant in the summer of 2020. This time, the appellant sat on A.P.'s bed, kissed her goodnight, and placed her on his lap. He then "stuck his hand down [her] pants and started . . . rubbing [her] vagina area." The appellant told her he was preparing her for adulthood as this would happen when she became an adult. A.P. protested, screaming that she had to use the bathroom, to which the appellant responded that she was "just being overdramatic."

November 1 to 30, 2020

A.P. testified about three other incidents in November 2020. One time, the appellant pulled down her pants and underwear, placed A.P. on all fours, and "tr[ied] to stick his penis in [her] butt." The appellant "tried really hard[,]" but A.P. told him that "it hurt too much and that we should stop[.]" The appellant then stopped.

On a second occasion that month, the appellant pulled down A.P.'s pants and underwear and "lick[ed] [her] vagina area" while touching her breasts.

On a third occasion that month, the appellant "tried to stick his penis in [her] butthole[.]" A.P. told him, "[W]e should just stop[,]" and then it was "over."

Other Evidence Adduced at Trial

Detective John Lines of the Cecil County Sheriff's Office was assigned to investigate the case with an investigator at Child Protective Services, who conducted a forensic interview of A.P. Later, the detective interviewed the appellant. When asked about the allegations of his sexual contact with A.P., the appellant said he believed "something did happen to her in the house, but it wasn't him."

The appellant had an adult daughter who was called to testify.[2] The adult daughter testified that the appellant had touched her vaginal area in 2008 when she was eight years old. The parties stipulated that the appellant was found guilty of sex abuse of a minor related to her.

The defense presented the testimony of certain household family members. They generally stated that they did not know that the appellant had touched A.P. inappropriately.

The appellant testified in his defense and denied ever having any inappropriate contact with A.P. He explained that he took an *Alford* plea[3] in the previous case involving the adult daughter because he lacked sufficient money to pay his attorney and believed he was not admitting guilt in doing so.

Jury Instructions, Verdict, and Sentencing

The court instructed the jury about the different offenses grouped by "time frame[.]" The court instructed the jury that the appellant was charged with one count of sexual abuse of a minor "for acts between May 10, 2018 and December 31, 2018" and a second count "for acts between May 1, 2020 and November 30, 2020." To convict the appellant of sexual abuse of a minor, the State had to prove that the appellant sexually abused A.P. by acts or

[2] This testimony was admitted under Md. Code, Ann. Cts. & Jud. Proc. ("CJP") § 10-923(b), which permits the admission of "evidence of other sexually assaultive behavior by the defendant occurring before or after the offense for which the defendant is on trial" under certain circumstances in sexual abuse cases.

[3] *See North Carolina v. Alford*, 400 U.S. 25 (1970). An *Alford* plea is a "guilty plea containing a protestation of innocence[,]" which "lies somewhere between a plea of guilty and a plea of *nolo contendere*[,]" where "the defendant does not contest or admit guilt." *Bishop v. State*, 417 Md. 1, 18-19 (2010).

attempted acts, including rape, sodomy, or other sexual offenses or sexual molestation; that at the time of the abuse, A.P. was under the age of 18; and that at the time of the abuse, the appellant was a member of the household.

For the three incidents in November 2020, the State had charged the appellant with second-degree rape, attempted second-degree rape, and third-degree sexual offense for each incident. The court told counsel that it had structured the instructions to avoid reading the same instruction for each offense multiple times. The court instructed the jury that the appellant was charged with three counts of second-degree rape "for the period between November 1, 2020 and November 3[0], 2020." To convict the appellant of second-degree rape, the State had to prove that the appellant had vaginal intercourse, cunnilingus, anal intercourse, or unlawful penetration with A.P.; that A.P. was under 14 years of age at the time; and that the appellant was at least four years older than A.P.

The court instructed the jury that the appellant was charged with three counts of attempted second-degree rape "for acts between November 1, 2020 and November 30, 2020." To convict the appellant of attempted second-degree rape, the State had to prove that the appellant took a substantial step beyond mere preparation toward the commission of second-degree rape and that he intended to commit second-degree rape.

Finally, the court instructed the jury that the appellant was charged with three counts of third-degree sexual offense "for acts between November 1, 2020 to November 30, 2020." To convict the appellant of a third-degree sexual offense, the State had to prove that the appellant engaged in a sexual act with A.P.; that at the time of the act, A.P. was 14, 15, or younger; and that the appellant was at least 21 years old.

The jury found the appellant guilty on all counts except two counts of second-degree rape (Counts 6 and 9). The verdict sheet read as follows:

1. Sexual Child Abuse – Household/Family (May 10, 2018 – December 31, 2018)
   ___ Not Guilty ✓ Guilty
2. Sexual Child Abuse – Household/Family (May 1, 2020 – November 30, 2020)
   ___ Not Guilty ✓ Guilty
3. Rape Second Degree (November 1, 2020 – November 30, 2020)
   ___ Not Guilty ✓ Guilty
4. Attempted Rape Second Degree (November 1, 2020 – November 30, 2020)
   ___ Not Guilty ✓ Guilty
5. Third Degree Sex Offense (November 1, 2020 – November 30, 2020)
   ___ Not Guilty ✓ Guilty
6. Rape Second Degree (November 1, 2020 – November 30, 2020)
   ✓ Not Guilty ___ Guilty
7. Attempted Second Degree Rape (November 1, 2020 – November 30, 2020)
   ___ Not Guilty ✓ Guilty
8. Third Degree Sex Offense (November 1, 2020 – November 30, 2020)
   ___ Not Guilty ✓ Guilty
9. Rape Second Degree (November 1, 2020 – November 30, 2020)
   ✓ Not Guilty ___ Guilty
10. Attempted Second Degree Rape (November 1, 2020 – November 30, 2020)
    ___ Not Guilty ✓ Guilty
11. Sex Offense Third Degree (November 1, 2020 – November 30, 2020)
    ___ Not Guilty ✓ Guilty

The court sentenced the appellant as follows:

Count	Sentence
1	25 years of incarceration;
2	25 years of incarceration, consecutive to Count 1;
3	20 years of incarceration, consecutive to Count 2;
4	Merged with Count 3;
5	Merged with Count 3;
7	20 years of incarceration, suspend all but 10 years, consecutive to Count 3;
8	Merged with Count 7;
10	20 years of incarceration, suspend all but 10 years, consecutive to Count 7;
11	Merged.

Additional facts will be included as they become relevant in the following discussion.

DISCUSSION

I.

Bikers Against Child Abuse

The parties appeared for a pre-trial conference the day before the trial commenced. Defense counsel noticed several people in the gallery wearing jackets with the inscription "Bikers Against Child Abuse" on the back. The appellant, through counsel, then filed a motion in limine to exclude spectators from wearing or displaying any special interest insignia or propagandistic material.

The next day, before jury selection, the court heard arguments on the motion. The defense argued that the spectators' attire conveyed a statement and, if worn during the trial,

would be prejudicial and infringe on the appellant's right to a fair trial. Defense counsel expressed concern that the spectators' attire would draw attention and cause jurors to wonder about their presence.

The prosecutor explained that "Bikers Against Child Abuse" or "BACA" is an organization that supports child abuse victims. He said that BACA members would only be present when the child testified and would not interact with the jurors.

The prosecutor confirmed that the back of the BACA jackets had the words "Bikers Against Child Abuse" on them. But he disagreed about whether the attire conveyed a message: "I don't think on the front there is anything that talks about child abuse. Maybe, like, a little logo or something above what is like a jean jacket vest[,] I guess we would characterize it[.]"

After hearing the arguments, the court denied the motion to prohibit the BACA spectators from wearing their jackets. The court noted that the clothing was "a jean jacket with an insignia on the back that says Bikers Against Child Abuse."

The court denied the motion for two main reasons. First, the court emphasized that there is a difference between attire worn by "witnesses or representatives" and that worn by spectators. It was significant for the court that the issue involved spectators. Second, the court explained that there was nothing specific about the statement on the jacket concerning the case. The words "Bikers Against Child Abuse" did not relate to the appellant or the facts of the case. Accordingly, the court concluded that the BACA spectators' presence in

the courtroom during the trial, wearing the attire, would not violate the appellant's right to a fair trial.

There was no further mention of the BACA spectators during trial. Only after trial did the appellant raise the issue again in a motion for a new trial. In that motion, the appellant claimed that when A.P. was called to testify, she entered the courtroom surrounded by her "fellow vest-clad BACA supporters." The defense did not count the number of supporters in attendance, but all sat in the gallery behind the State's table. All BACA members sat quietly during A.P.'s testimony and departed together when A.P. left the courtroom.

At the appellant's sentencing, the court addressed the motion.[4] Defense counsel proffered that "a parade of people" entered the courtroom "wearing the same BACA jacket[,]" and they left together. Defense counsel claimed this "was prejudicial as far as the jury situation went."

The court denied the appellant's motion for a new trial. It explained:

> I note nothing specifically in the record, but I believe there were approximately four to five individuals who came in. They were not in any way disruptive or intimidating. They came into the courtroom. They sat in the courtroom while the victim testified. They left when the victim left.
>
> Their insignias, again, said Bikers Against Child Abuse. There was no reference to this victim, no reference to this case, no reference to this [appellant]. The [c]ourt carefully considered federal and state law with regard to these issues. The [c]ourt believed that there was nothing that was violative of [the appellant]'s right to a fair trial with regard to their conduct, their attire.

[4] According to the motion, after the case was given to the jury, an alternate juror who remained in the courtroom to hear the verdict advised defense counsel that she felt intimidated by the group's presence. The defense did not provide further details about this claim, nor did it submit an affidavit or offer any testimony at sentencing to support it.

A.

Analysis

"The right to a fair trial is guaranteed by the Sixth Amendment to the United States Constitution, as incorporated against the States by the Fourteenth Amendment." *Smith v. State*, 481 Md. 368, 392 (2022). "A fair criminal trial requires that the jurors 'be without bias or prejudice for or against the defendant and that their minds be free to hear and impartially consider the evidence and render a fair verdict thereon.'" *Id.* (citation omitted).

Sufficiently prejudicial events or practices that "inject outside influences into the courtroom . . . can violate a defendant's right to a fair trial." *Id*. at 392–93. Indeed, "[a] finding either of actual prejudice or inherent prejudice is sufficient to demonstrate a violation of the Sixth Amendment." *Id*. at 393. "To prove actual prejudice, the defendant must show some actual prejudicial effect on the jurors based on what transpired in the courtroom." *Id*.

By contrast, "[a] showing of inherent prejudice does not require proof that the complained-of practice actually affected the jurors' decision-making process." *Id*. This is because the actual impact of a particular practice on the judgment cannot always be fully determined. *Id*. (citation omitted). A defendant establishes inherent prejudice if the defendant shows that the challenged practice presents "an unacceptable risk . . . of impermissible factors coming into play." *Id*. (quoting *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)). "This is a difficult showing to make." *Id.* at 393.

The appellant argues that the circuit court erred in denying his motion in limine seeking to prohibit BACA members from attending trial wearing attire that displayed

"Bikers Against Child Abuse." He does not claim actual prejudice; he argues that the presence of these members wearing such clothing was inherently prejudicial to the appellant and deprived him of his constitutional right to a fair trial by an impartial jury.

Whether displaying the BACA insignia was inherently prejudicial presents a question of law, which we review *de novo*. *See id.* at 390. In *Smith v. State*, the Supreme Court of Maryland formulated a test to assess a defendant's claim of inherent prejudice. *See id*. at 400. There, courtroom bailiffs displayed a thin blue line flag (a pro-law enforcement message) on their face masks during jury trial proceedings. *Id*. at 374. The Court surveyed several cases across the country that addressed inherent prejudice in situations involving courtroom staff on the one hand and non-courtroom staff (courtroom spectators) on the other. *See id.* at 393–400. The Court noted that although the United States Supreme Court has never held courtroom spectators' conduct to be inherently prejudicial, some state courts have reached that conclusion based on the facts of the cases before them. *Id*. at 398 (citing *Carey v. Musladin*, 549 U.S. 70, 76–77 (2006)).[5]

Based on its survey of cases, the *Smith* Court stated that "claims of inherent prejudice are properly decided based on the unique facts and circumstances of each case." *Id*. at 400. To prevail on a claim of inherent prejudice, the defendant must:

> (1) have objected to the challenged practice in the trial court[;] (2) demonstrate, based on the record of the proceeding in the trial court, that the

[5] In *Musladin*, the United States Supreme Court observed that in contrast to state-sponsored courtroom practices, the effect on a defendant's fair-trial rights of spectator conduct is an open question. 549 U.S. at 76. The "Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial." *Id*. (footnote omitted). While some state courts have applied the

> challenged practice was observable by the jury; and (3) establish that the challenged practice created an unacceptable risk that impermissible factors would come into play in the jury's determination of the case. If the defendant meets all of these requirements, the State may attempt to show that the challenged practice was necessary to further a compelling governmental interest.

Id.

In applying this case-by-case approach to the display of the thin blue line flag on the bailiffs' face masks, the Court concluded that the display was inherently prejudicial. Regarding the first requirement, the defense objected, before jury selection, to the courtroom bailiffs' display of the thin blue line flag on their face masks. *Id*. at 382.

Regarding the second requirement, the Court concluded that the bailiffs' face masks were observable by the jury. *Id.* at 412–13. Although defense counsel could have taken certain steps to document the jury's ability to view the bailiffs' masks, the Court was satisfied that the jury had ample opportunity to view the symbols on the bailiffs' masks

inherent prejudice standard to spectator conduct, the Court has "never applied that test to spectators' conduct." *Id*.

The State interprets this to mean that the inherent prejudice test does not apply to spectator conduct and that the appellant must demonstrate actual prejudice, a standard he cannot meet. But *Musladin* does not hold as much. In *Musladin*, members of the victim's family sat in the front row of the spectator's gallery wearing buttons displaying the victim's image in the defendant's murder trial. *Id*. at 72. The state court upheld the conviction, stating that the defendant failed to satisfy the inherent prejudice test. *Id*. at 72–73. The Supreme Court considered the question of whether the state court's holding was contrary to or an unreasonable application of clearly established federal law. *Id.* at 72. It answered in the negative because federal law on the question was not clearly established. *Id*. at 72, 77.

throughout the trial. *Id*. This was because the record reflected that the trial court often directed the jurors' attention to the bailiffs during the trial. *Id*.

Regarding the third requirement, the Court concluded that displaying the thin blue line flag on the bailiffs' masks created an unacceptable risk that the jury would decide the case based on impermissible factors. *Id*. at 414. It explained that the thin blue line flag injected a pro-law enforcement variable into what should be a neutral environment, particularly in the contemporary climate after the murder of George Floyd and the nationwide unrest that followed.[6] *Id*. at 402, 411. Despite recognizing that the jurors might give benign meaning to the display of the symbol, the Court held that the pro-law enforcement message conveyed on the bailiffs' face masks risked suggesting to the jury that they should side with law enforcement. *Id*. at 403.

In evaluating a claim of inherent prejudice on the unique facts and circumstances, the Court remarked on the continuum of possible messaging in courtroom displays by courtroom staff and spectators. *See id.* at 402–03. It acknowledged that not every pro-law enforcement message in the courtroom would rise to the level of inherent prejudice. *Id*. at 402. For instance, one or two courtroom spectators wearing pro-law enforcement attire would presumably cause less concern than 50 spectators simultaneously displaying a recognizable pro-law enforcement message. *Id*. The bailiffs' display of the symbol was

[6] On May 25, 2020, a white Minneapolis police officer killed George Floyd, an unarmed African American man. *Id*. at 373. "Floyd's murder, which followed multiple killings of African Americans around the country over the previous decade, galvanized the Black Lives Matter movement, leading to enormous protests and counter-protests around the nation throughout the summer of 2020." *Id*.

particularly problematic because their status as an officer and an agent of the court heightened the potential for prejudice. *Id*. at 405. Thus, such display by at least two bailiffs carried a much greater potential for prejudice than, for example, if two spectators seated separately in the gallery of the courtroom had worn the same face masks. *Id*. at 406. Because the display of the thin blue line flag on the bailiffs' masks created an unacceptable risk that the jury would decide the case based on impermissible factors, the Court concluded that the display was inherently prejudicial to the defendant's right to a fair trial. *Id*. at 414.

In applying the case-by-case analysis, we conclude that the appellant fails to meet the inherent prejudice test under *Smith*. As for the first requirement, there is no dispute that the defense objected, before trial, to BACA members wearing the jacket with the insignia "Bikers Against Child Abuse" while in the courtroom.

Regarding the second requirement, the record does not demonstrate that the jury could see the insignia on the back of the spectators' jackets. In *Smith*, the symbol was on the facemasks of the bailiffs, who were prominently positioned in the courtroom, and the trial court had repeatedly directed the jury's attention to the bailiffs throughout the trial. In contrast, the insignia was on the back of the jackets of BACA members seated in the gallery. Unlike in *Smith*, we cannot determine whether the insignia was visible to the jury from this record.

As for the third requirement, the appellant fails to establish that the challenged practice created an unacceptable risk that impermissible factors would come into play in the jury's determination of the case. Unlike in *Smith*, where the bailiffs' status as officers

and agents of the court posed significant concerns and heightened the potential for prejudice, the BACA members were spectators; only four or five of them were present for part of the trial during A.P.'s testimony. Given the circumstances, the potential for prejudice was minimal.

The appellant argues that we should focus on the message conveyed by the insignia, asserting that it conveys that the appellant was a sexual abuser and that sexual abuse should be condemned through a guilty verdict. The appellant cites *Long v. State*, 151 So. 3d 498 (Fla. Dist. Ct. App. 2014), to suggest that displaying the insignia "Bikers Against Child Abuse" conveys such a message and is inherently prejudicial in all circumstances.

In *Long*, the defendant was charged with various counts stemming from the sexual abuse of a minor. *Id*. at 499. The morning that trial was scheduled to start, men wearing jackets with the "Bikers Against Child Abuse" insignia were observed sitting in a hallway with the jury, despite the prosecutor's instruction to them not to wear their "paraphernalia" in the courtroom. *Id*. at 499–500. Before the trial, the defense informed the court about the jury's encounter with the bikers and requested a mistrial. *Id*. at 500.

After interviewing jurors exposed to the bikers and dismissing one of the prospective jurors, the trial court was satisfied that the remaining jurors would be impartial. *Id.* Outside of the jury's presence, the trial court instructed the bikers not to wear their "insignia" in the courtroom. *Id.* A mistrial was thus denied. *Id*.

About 11 or 12 bikers were in the courtroom during the trial, dressed appropriately. *Id*. In addition, the people sitting closest to the jury were part of the BACA group. *Id*. The jury later convicted the defendant, and he requested a new trial. *Id*. The defendant argued

that the presence of the bikers near the jury during the trial exacerbated the prejudice. *Id*. at 501.

On appeal, the appellate court acknowledged that the presence of courtroom observers wearing insignia or other indicia of support for the victim of a crime does not automatically constitute a denial of the accused's right to a fair trial. *Id*. (citing *Shootes v. State*, 20 So. 3d 434, 438 (Fla. Dist. Ct. App. 2009)). But under these circumstances, it held that inherent prejudice was shown. *Id.* The court explained that

> an unacceptable risk was created that the verdict reached was, at least in part, a result of the pre-trial encounter with the insignia-laden bikers. Although the trial court appropriately questioned the jurors, at that point in the proceedings, by which time the jury members had been selected but not sworn, the trial court should have selected a new jury panel. That error was aggravated by the continued presence of the bikers in the courtroom in close proximity of the jury.

Id. at 501. The court also explained that by displaying their insignia pre-trial, the bikers intended to do more than be present as support for the victim. *Id*. The bikers engaged in "reckless advocacy"; "in apparent contravention of the prosecutor's instruction, the bikers chose to appear, as the morning trial was set to commence, in clothing which was intended to communicate a message to the jury" that the defendant "was a sexual abuser and that sexual abuse was to be condemned by a guilty verdict." *Id*. at 501–02 (internal quotations and citation omitted).

Long and the instant case both involve the BACA insignia, but that is where the similarities end. Unlike in *Long*, where the record showed that some jurors had seen the BACA members, nothing in this record indicates that the jurors saw or read the insignia on the back of the spectators' jackets. Furthermore, nothing in the record suggests that the

BACA members intended to do more than provide support for the victim or that they engaged in "reckless advocacy" by wearing the BACA insignia against instructions not to do so.

We are also unpersuaded by the appellant's reliance on *State v. Franklin*, 327 S.E.2d 449 (W. Va. 1985), which involved another case where spectators' display of a message was found prejudicial. *Id.* at 454. There, the defendant was tried for driving under the influence of alcohol, resulting in death. *Id.* at 451. During the three-day jury trial, between 10 and 30 people, including a sheriff in uniform, prominently displayed Mothers Against Drunk Drivers ("MADD") buttons as they sat directly in front of the jury in the courtroom. *Id.* at 454. Unlike the 10 to 30 MADD spectators in *Franklin*, the four to five BACA members here did not have a uniformed law enforcement official accompany them, nor did the BACA members remain in the courtroom throughout the trial.

Likewise, the appellant cites two other cases that differ from the facts here: *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), and *Woods v. Dugger*, 923 F.2d 1454 (11th Cir. 1991). In *Norris*, a defendant on trial for rape alleged that women wearing "large and boldly highlighted buttons" that said "Women Against Rape" appeared in public courthouse elevators and in the courtroom during the trial. 918 F.2d at 829. Various jurors testified in a subsequent evidentiary hearing to seeing the buttons. *Id.* at 831. The Ninth Circuit held that the defendant did not receive a fair trial because the buttons were visible to the jury throughout the trial and found "the risk unconstitutionally great" that these buttons tainted the defendant's right to a fair trial. *Id.* at 834.

In *Woods*, the Eleventh Circuit found inherent prejudice where approximately half of the spectators at a trial for a man accused of killing a corrections officer were corrections officers themselves. 923 F.2d at 1455, 1458, 1460. The Court concluded that based on the small community and the pre-trial publicity of the case, the officers were there to show solidarity with the killed correctional officer and appeared to want to send a message to the jury. *Id*. at 1459–60.

Unlike these two cases, only four or five BACA spectators were present for a portion of the trial, and there was nothing to indicate that the insignia was visible to the jury. Accordingly, the circuit court did not err in denying the appellant's motion in limine seeking to prohibit BACA members from attending trial wearing the insignia "Bikers Against Child Abuse."[7]

II.

The Court's Sentence

The appellant argues that the convictions under Count 10 for attempted second-degree rape and Count 11 for third-degree sex offense should be merged or vacated. This is because they are related to the first incident in November 2020, which formed the basis for offenses charged in Counts 3 through 5. The State argues that the record supports

[7] The appellant summarily contends that the court also erred in denying his motion for a new trial, but the claim was not separately briefed. In any event, for the same reasons that the circuit court properly denied the appellant's motion in limine, it neither erred nor abused its discretion in denying his motion for a new trial. *See Williams v. State*, 478 Md. 99, 130–31 (2022) (an appellate court generally reviews for abuse of discretion a trial court's denial of a motion for a new trial and reviews without deference a trial court's interpretation of caselaw).

separate convictions for separate conduct; thus, the convictions should be affirmed. We agree with the State.

A.

Analysis

Maryland common law and the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution prohibit a criminal defendant from being punished twice for the same criminal conduct. *Nicolas v. State*, 426 Md. 385, 400 (2012). "Sentences for two 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." *Brooks v. State*, 439 Md. 698, 737 (2014) (citation omitted). A sentence imposed in violation of the required evidence test and/or the rule of lenity is an illegal sentence that can be corrected at any time under Maryland Rule 4-345(a). *Taylor v. State*, 224 Md. App. 476, 500 (2015).

Moreover, "when 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." *Brooks*, 439 Md. at 739. To determine whether a jury convicted a defendant on separate acts, courts examine the charging document, evidence introduced at trial, jury instructions, closing arguments, and the verdict sheet. *See Johnson v. State*, 228 Md. App. 27, 47 (2016) (citation omitted).

Turning to the three incidents in November 2020, A.P. testified that the first was when the appellant anally penetrated her. The second event occurred when the appellant

"lick[ed A.P.'s] vagina area." The third incident was "the last time when [the appellant] tried to stick his penis in [A.P.'s] butthole."

During closing argument, the prosecutor referred to three incidents in November 2020, each associated with a set of charges: second-degree rape, attempted second-degree rape, and third-degree sex offense. The prosecutor explained, "[Counts 3, 4, and 5], rape and second-degree attempted rape, and sex offense in the third degree are all going to be one set of facts. There's three sets of those charges." The prosecutor argued to the jury that Counts 3, 4, and 5 applied to the one instance of "anal penetration." The prosecutor then discussed the "second set of rape counts" for the "second incident" in November 2020 when the appellant placed "[h]is mouth on her vagina and fondling her breasts while doing it." Finally, the prosecutor discussed the "third set of rape charges" that "relate to the attempted penetration."

The court structured the jury instructions in a similar way, *supra*. For the period between November 1 and November 30, 2020, the court instructed the jury that the appellant was charged with three counts of second-degree rape, three counts of attempted second-degree rape, and three counts of third-degree sexual offense. The three sets of charges were also reflected on the verdict sheet, *supra*.

A.P.'s testimony, along with the prosecutor's closing argument, the jury instructions, and verdict sheet, indicated that Counts 3 through 11 corresponded to the three incidents that occurred in November 2020: Counts 3 through 5 corresponded to the appellant's anal penetration of A.P.; Counts 6 through 8 corresponded to when appellant "lick[ed A.P.'s] vagina area"; and Counts 9 through 11 corresponded to "the last time when

[appellant] tried to stick his penis in [A.P.'s] butthole." Thus, the record is clear that the convictions under Counts 10 and 11 were based on conduct different from those for which the appellant was convicted under Counts 3 through 5. *See Johnson*, 228 Md. App. at 49–50 (upholding a trial court's decision to decline to merge 50 convictions for violating a protective order into nine convictions "because the verdict sheet, coupled with the trial court's instructions regarding the verdict sheet and the prosecutor's closing argument, made clear that each violation of the protective order corresponded to each email sent by" the defendant to the victim). For the stated reasons, the circuit court did not err in declining to merge or vacate Counts 10 and 11.

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