Circuit Court for St. Mary's County
Case No. C-18-CR-22-000092

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1660

September Term, 2023

RANDY THOMAS DINDLEBECK

v.

STATE OF MARYLAND

Graeff,
Tang,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: March 6, 2025

* 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 Maryland Rule 1-104(a)(2)(B).

A jury in the Circuit Court for St. Mary's County found appellant, Randy Thomas Dindlebeck, guilty of sexual abuse of a minor and five counts of sexual offense in the third degree. The court sentenced appellant to terms of active incarceration totaling twenty-four years as well as additional suspended time, to be followed by five years' supervised probation, and it ordered him to register as a Tier III sex offender.[1] He then appealed, raising two questions for our review:

> 1. Did the trial court err by refusing to instruct the jury on the lesser included offense of second-degree assault?
>
> 2. Did the trial court fail to exercise its discretion, and abuse its discretion, in restricting cross-examination of [the victim's] mother?

Because we conclude that the trial court erred in refusing to instruct the jury on the lesser-included offense of second-degree assault, we reverse and remand for further proceedings. It is unnecessary for us to address question 2.

BACKGROUND

The complainant, O, was fourteen years old at the time of the offenses alleged in this case.[2] At that time, appellant was married to O's mother ("Mother"). Mother, two of her three children from another relationship, and appellant lived together in a rented house

[1] A defendant found guilty of the flagship charge in this case, sexual abuse of a minor by a household member (in violation of Md. Code (2002, 2021 Repl. Vol.), Criminal Law Article ("CR"), § 3-602), is required to register as a Tier III sex offender. Md. Code (2001, 2018 Repl. Vol.), Criminal Procedure Article ("CP"), § 11-701(q)(1)(ii). The term of registration for a Tier III sex offender is "the life of the registrant[.]" CP § 11-707(a)(4)(iii).

[2] We adopt the designation of the complainant from Appellant's Brief and henceforth designate her as "O," an initial having no connection to her name. We designate O's mother (appellant's then-wife) as "Mother," and O's aunt as "Aunt." Md. Rule 8-125.

in Mechanicsville, Maryland in St. Mary's County. Mother was a homemaker,[3] and appellant worked and provided financial support for the family.

One evening in September 2021, Mother discovered appellant and O in a shed just outside the family home. Appellant was sitting on a weight bench, across from and "facing" O, who was sitting on a couch. O's jeans "were down, like halfway down, by her thighs[,] [a]nd they were still buttoned." Mother "went off" on appellant and demanded to know "what the fuck is going on?" Both appellant and O denied that anything untoward had happened at that time.[4]

This event was etched indelibly in Mother's mind, and, in late November of that same year, she eventually elicited O's acknowledgement that appellant had been sexually abusing her.[5] When appellant came home from work that day, Mother confronted him, in their car, with O's accusation. In response, appellant "went inside," "packed his bag[,]" and, "within 10 minutes," was "out the door."

Believing that O was likely to confide in her Aunt (Mother's sister), Mother called Aunt and asked her to come to the family home and speak with O. For "the first time," O told Aunt the "details to what was going on[.]"

[3] Mother acknowledged that she "was a recovering addict" and that she depended on appellant's financial support.

[4] Appellant claimed that "he didn't know" that O's pants were down, and O claimed "that she was adjusting her pants and they fell down."

[5] Mother told O a "white lie"—that appellant had "admitted to it already." In response, O "started crying hysterically and looked out the window and put her head down." In Mother's words, O "admitted after I told her that [appellant] said it, even though he didn't say it, that she said that they did have sex."

Mother called the St. Mary's County Sheriff's Office, and she and O went to the Sheriff's Office to be interviewed. Less than a week later, O was interviewed by a social worker at the Child Advocacy Center and described the abuse. Among other things, O said that, on five different occasions in or near their home, appellant had vaginal intercourse with her.

A six-count indictment was filed in the Circuit Court for St. Mary's County, charging appellant with: sexual abuse of a minor by a household member (Count 1); and five counts of sexual offense in the third degree, each based upon discrete instances of vaginal intercourse (Counts 2 through 6). A three-day jury trial was held.

The State called four witnesses: Corporal Trevor Teague of the St. Mary's County Sheriff's Office, the detective assigned to investigate the allegations against appellant; Aunt; Mother; and O. Appellant exercised his right not to testify. The State's witnesses testified consistently with the facts previously summarized.[6] In addition, two one-party consent telephone calls between Mother and appellant, which were recorded by Corporal Teague, were admitted into evidence and broadcast to the jury. Also, text messages between Mother and appellant, during the three-day period immediately after O first disclosed the abuse, and a recorded interview of appellant by Corporal Teague, conducted in February 2022, in which appellant denied any culpability, were admitted into evidence and published to the jury.

[6] Because of the delay in disclosure, no serological or DNA testing was performed. Corporal Teague testified that, "based on [his] training and experience and what [he] know[s] from the Maryland State Police laboratory, about 10 days [from the time of the sexual abuse] is the limit."

After deliberating over parts of two days (approximately three hours altogether), the jury found appellant guilty of all six charges. The court sentenced appellant to twenty-five years' imprisonment, with all but fifteen years suspended for Count 1 (sexual abuse of a minor by a household member); ten years' imprisonment, with all but three years suspended, for Count 2 (third-degree sexual offense), consecutive to Count 1; ten years' imprisonment, with all but three years suspended, for Count 3 (third-degree sexual offense), consecutive to Counts 1 and 2; ten years' imprisonment, with all but three years suspended, for Count 4 (third-degree sexual offense), consecutive to Counts 1, 2, and 3; and consecutive sentences of ten years, all suspended, for Counts 5 and 6 (third-degree sexual offense).[7] In addition, the court imposed a five-year term of supervised probation to begin following the conclusion of the period of active incarceration, and it ordered appellant to register as a Tier III sex offender. This timely appeal ensued.

Additional facts are included where pertinent to the discussion.

DISCUSSION

Parties' Contentions

The trial court instructed the jury with respect to the crimes charged but refused defense counsel's request for an instruction on the uncharged lesser-included offense of second-degree assault. Defense counsel argued that the jury could find "at worst, there was offensive touching and that there was no vaginal intercourse." Relying upon *Hook v. State*, 315 Md. 25 (1989), *Hagans v. State*, 316 Md. 429 (1989), and their progeny, appellant

[7] The total period of active incarceration was twenty-four years.

contends that the court's failure to give the instruction was reversible error. According to appellant, there was "some evidence" that appellant "touched" O on her "butt," and thus, the jury rationally could have found him guilty of the lesser-included offense and acquitted him of the greater offense. The trial court's error, he maintains, presented the jury "with an all-or-nothing choice between finding" him "guilty of the sexual offense charges (and related charge of sexual abuse of a minor) and acquittal[.]"

Moreover, appellant asserts that all his convictions should be reversed because the trial court's instructional error also influenced the jury's verdict on the flagship charge, sexual abuse of a minor. Appellant points out that, not only did the trial court instruct the jury that vaginal intercourse was a predicate offense for the flagship charge, but the prosecutor further argued to the jury that the "sexual abuse that is charged in this case is the vaginal intercourse."

The State counters that "there was no rational basis upon which the jury could have concluded that [appellant] committed second-degree assault, but not third-degree sexual offense." Relying upon *Burrell v. State*, 340 Md. 426 (1995), the State asserts that "'it is not enough to determine that the evidence would be sufficient for the jury to convict on that offense; rather, the evidence must also be such that the jury could rationally convict *only* on the lesser included offense.'" (Quoting *Burrell*, 340 Md. at 434.) According to the State, O "did not testify that" appellant "touched her butt;" rather, she "testified that, when she was first asked what happened, she *said* that he 'touched' her 'butt' 'a couple of times.'" In other words, according to the State, because the transcript of O's interview with the social worker was not admitted into evidence, "[t]here was no substantive evidence that

[appellant] touched O.'s butt." Thus, the State concludes, there was no evidence upon which the jury could render a guilty verdict on the lesser-included offense without also finding him guilty of third-degree sexual offense.

The State appears to suggest that, even if the trial court erred, any error was harmless because "the crime of second-degree assault carries the same maximum penalty as third-degree sexual offense—10 years' imprisonment." "Therefore," contends the State, "regardless of whether [appellant] was convicted of second-degree assault or third-degree sexual offense, his sentencing exposure was the same." Moreover, asserts the State, "under either theory, the jury still could have convicted [appellant] of the sexual abuse of a minor." "Therefore," concludes the State, "even if the trial court erred, the conviction for sexual abuse of a minor should remain intact."

Additional Facts Pertaining to the Claim

During cross-examination of O, the following occurred:

[DEFENSE COUNSEL]: Do you recall being asked by your mom if [appellant] touched you?

[O]: Yeah.

[DEFENSE COUNSEL]: And you recall[] saying yes?

[O]: Mm-hmm.

[DEFENSE COUNSEL]: Do you also recall her asking you where?

[O]: Yeah.

[DEFENSE COUNSEL]: And you saying, your butt? Do you recall that?

[O]: No.

[DEFENSE COUNSEL]: Okay, you don't recall that. So take a look at page nine and look at lines 20 through 22 of your statement. Do you see that?

[O]: Mm-hmm.

[DEFENSE COUNSEL]: And you said you were touched on your butt, correct?

[O]: Yes.

[DEFENSE COUNSEL]: Okay. You didn't say your breasts, you didn't say your private parts, you said your butt, correct?

[O]: Mm-hmm.

[DEFENSE COUNSEL]: Is that yes?

[O]: Yes.

[DEFENSE COUNSEL]: Then go to the next page, page ten, and look at lines 10 through 12. You were asked, "So did [appellant] touch your butt one time, more than one time, or something else?"

[O]: More than one time and something else.

[DEFENSE COUNSEL]: And your answer's like, "A couple times," correct?

[O]: Yep.

[DEFENSE COUNSEL]: And that refers to touching your butt, correct?

[O]: Yes.

During re-direct examination, the prosecutor tried to provide context for O's acknowledgment that previously, she had said that appellant touched her butt:

[PROSECUTOR]: Doesn't [Ajah[8]] then say, after you tell her about the vape, "Okay, let's backtrack for a second,"?

[O]: Yeah.

[PROSECUTOR]: Okay. And then can you see where -- her next question on line 22 and 23?

[O]: Yeah.

[PROSECUTOR]: And she says -- you mentioned that you and [appellant] was in the shed, right?

[O]: Yeah.

[PROSECUTOR]: And then you start to tell her about the shed, correct?

[O]: Mm-hmm.

* * *

[PROSECUTOR]: So then on page nine, starting on 17, isn't it true that you told [Ajah] that this was difficult for you to talk about?

[O]: Yes.

[PROSECUTOR]: And isn't it true that she asked you -- her very next question was, "I know it is. You start wherever you want," correct?

[O]: Yeah.

[PROSECUTOR]: And then you started telling her, correct?

[O]: Yes.

[PROSECUTOR]: And you told her about the touching of the butt?

[O]: Yeah.

[8] The trial transcript spelled the interviewer's name phonetically as "Arja," but it appears that her name was "Ajah," a social worker from the Child Advocacy Center who interviewed O approximately five days after she reported the abuse to Mother and Aunt.

[PROSECUTOR]: That was the first thing you started with?

[O]: Mm-hmm.

After the conclusion of the State's case-in-chief, the court convened with the parties in chambers to discuss proposed jury instructions. After that discussion had concluded, and the parties reconvened in open court, defense counsel requested an instruction on second-degree assault as a lesser-included offense of third-degree sexual offense, declaring:

> Your Honor, with respect to the verdict sheet, we would ask that you add second-degree assault. We believe that any offense fairly generated by the facts, which could be arguably a lessor included. I understand it's not the same as a possession, which falls under the possession with intent to distribute. But we do believe that we fairly generated an issue that the jury could find that at worst, there was offensive touching and that there was no vaginal intercourse.

The prosecutor replied that

> we charged sexual acts -- not sexual contact and not offensive contact. So the State submits based on Middleton vs. State, 238 Md. App. 295, 2018. And Crutchfield's (phonetic) unrecorded so I guess the Court can't look at that,[9] but it cites to Middleton that it's not charged. We did not charge anyway offensive contact.

The court denied the defense request to include second-degree assault in the verdict sheet, declaring:

> All right, the Court is going to deny the motion to add the second-degree assault. The Court having looked at the indictment and what was charged does not believe that it would be appropriate in this case to add the second-degree assault charges to the verdict sheet.

[9] The prosecutor was referring to *Crutchfield v. State*, No. 583, Sept. Term, 2018 (filed Aug. 22, 2019).

After the trial court instructed the jury, it asked whether the defense was satisfied with the jury instructions. Appellant's trial counsel replied, "Only with the exception of the objection overruled, Your Honor."

Analysis

In *Hook v. State*, *supra*, 315 Md. 25, the Supreme Court of Maryland held that "fundamental fairness" imposed limitations on the State's otherwise nearly unfettered discretion to enter nol pros on a lesser-included offense during a criminal trial. *Id.* at 41-42. The Court declared:

> When the defendant is plainly guilty of some offense, and the evidence is legally sufficient for the trier of fact to convict him of either the greater offense or a lesser included offense, it is fundamentally unfair under Maryland common law for the State, over the defendant's objection, to nol pros the lesser included offense. . . . In short, it is simply offensive to fundamental fairness, in such circumstances, to deprive the trier of fact, over the defendant's objection, of the third option of convicting the defendant of a lesser included offense. And if the trial is before a jury, the defendant is entitled, if he so desires, to have the jury instructed as to the lesser included offense.

Id. at 43-44.

Subsequently, in *Burrell v. State*, *supra*, 340 Md. 426, the Court explained that the justification for the rule articulated in *Hook* is that, "when faced with an 'all-or-nothing' choice, a jury would likely convict a clearly culpable defendant of a more serious crime than the evidence truly supports rather than acquit the defendant and allow him to go unpunished for the crimes he *did* commit." *Burrell*, 340 Md. at 431. But the Court further explained that a defendant is not automatically entitled to an instruction on a lesser-included offense. Rather,

> "the test is not simply the existence of legally sufficient evidence [of the lesser included offense]. Even when there is evidence that would support a finding of guilt of the lesser included offense, the State is not precluded from entering a nolle prosequi of that offense if, under the particular facts of the case, there exists no rational basis by which the jury could conclude that the defendant is guilty of the lesser included offense but not guilty of the greater offense."

Id. at 433-34 (quoting *Jackson v. State*, 322 Md. 117, 127-28 (1991)).

The Court explained the justification for the limitation *Jackson* placed on the *Hook* test:

> Just as jurors may not want to *acquit* a "plainly guilty" defendant altogether, they also may not want to *convict* a defendant, plainly guilty of the more serious charge, when he appears sympathetic for some reason. If nolle prossing the less serious charge is precluded, the jury may select the option of convicting the defendant of a less serious crime than is warranted by the evidence. Attempting to prevent this type of "compromise" verdict is fair. Justice is no more done when a defendant is wrongly acquitted of a crime than it is when the defendant is wrongly convicted of that crime.

Burrell, 340 Md. at 434-35.

In the present case, appellant was not charged with the lesser-included offense of assault in the second degree, but the rule articulated in cases such as *Hook*, *Jackson*, and *Burrell* also applies here, as we next explain. In *Hagans v. State*, *supra*, 316 Md. 429, the Supreme Court of Maryland examined the circumstances where a defendant may be convicted of an uncharged lesser-included offense. The Court pointed out that, "[a]lthough the lesser included offense doctrine developed at common law largely for the benefit of the prosecution, it may now also be invoked by the defendant." *Id.* at 453. Thus,

> where the State enters a nolle prosequi as to an uncharged lesser included offense, or where the charging document is drawn so as necessarily to exclude the lesser included offense, it would obviously be inappropriate to submit the lesser included offense to the jury, except to the extent that the

> defendant desires and is entitled to have it submitted under the principles recently set forth in *Hook v. State*[.]

Id. at 455. The Supreme Court recognized the close nexus between the *Hook* line of decisions and *Hagans* in *State v. Bowers*, 349 Md. 710 (1998), declaring:

> Although *Hook* dealt with the authority of the State to enter a *nolle prosequi* to a lesser included charge, and *Hagans* dealt with whether a jury may convict a defendant of an uncharged lesser included offense, we agree with Bowers that a trial judge's obligation to instruct a jury on an uncharged lesser offense is evaluated in light of the principles established in those cases and their progeny.

Bowers, 349 Md. at 719.

"The inquiry in assessing whether a defendant is entitled to a lesser included offense jury instruction is a two-step process." *Id.* at 721. First, we determine "whether one offense qualifies as a lesser included offense of a greater offense" under the required evidence test. *Id.* at 721-22. If that threshold test is satisfied, the court then "must assess 'whether there exists, in light of the evidence presented at trial, a rational basis upon which the jury could have concluded that the defendant was guilty of the lesser offense, but not guilty of the greater offense.'" *Id.* at 722 (quoting *Ball v. State*, 347 Md. 156, 191 (1997)). "If a rational jury could not reach this conclusion, then the judge need not submit the lesser offense to the jury." *Ball*, 347 Md. at 191.

In *Malik v. State*, 152 Md. App. 305, *cert. denied*, 378 Md. 618 (2003), we elaborated on how to apply the second step of the test—it is the same test we use to determine whether a jury instruction has been generated by the evidence. Thus, "[o]ur task on review is 'to determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury

rationally to conclude that the evidence supports the application of the legal theory desired.'" *Id.* at 333 (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)). That is, we must determine "whether some evidence exists to support the request for the jury instruction." *Id.*

Turning to the present case, we note that the parties agree that the threshold test is satisfied—second-degree assault is a lesser-included offense of third-degree sexual offense. *Travis v. State*, 218 Md. App. 410, 421 (2014). The only point of dispute is whether the second part of the test is satisfied.

Whether appellant has established "some evidence" to generate a requested jury instruction is a low bar. In *Wilson v. State*, 422 Md. 533 (2011), the Supreme Court of Maryland rejected the notion that a trial court could reject a defense request for an instruction because the only evidence to support it was "preposterous and/or inane." *Id.* at 543. Even where the evidence to support a requested jury instruction is "'overwhelmed by evidence to the contrary,'" so long as it is "legally sufficient to require a jury determination" of the issue, then the trial court must give the requested instruction. *Id.* (quoting *Dykes v. State*, 319 Md. 206, 217 (1990)).

In *Wilson*, the defendant was charged with murder in the first degree and related offenses. *Id.* at 535. He had been engaged in a verbal altercation with several people he encountered while walking past a gas station. *Id.* at 536. Wilson continued walking to his grandmother's home (where he lived), which was "located several minutes away." *Id.* Upon arriving there, he tried unsuccessfully to contact his cousin, who lived "on the other side" of the neighborhood. *Id.* Wilson decided to walk to his cousin's home. *Id.* Before

leaving, "he changed his clothes so that he would not be recognized" and took a steak knife "for backup." *Id.* While walking to his cousin's home, Wilson encountered the same group with whom he had previously engaged in the verbal altercation. *Id.* When he approached them, one of the group, Adams, pulled out a gun and "smiled" at Wilson. *Id.* at 537. Wilson surprised Adams by "grab[bing]" for his gun and seizing it from him. *Id.* Instead of leaving (after all, Wilson now had both the knife and the gun), Wilson shot Adams four times and killed him. *Id.*

At his murder trial, Wilson testified that he was "'shook' when Adams pulled out the gun and that he 'froze' when Adams aimed it at him and smiled[,]" declaring, "'I ain't never been that scared in my life.'" *Id.* at 538. He continued:

> I was shook. Like I said, when he pulled his out, I was shook. Honest. Turned like this, smiled. And I ain't his bitch ass. I mean, shit, ***Kill or be killed. You know what I'm saying?*** What you gonna do if somebody pulled a gun on you? Man.

Id. (emphasis in original).

The trial court refused to give a requested instruction on imperfect self-defense, and the jury found Wilson guilty of first-degree murder. *Id.* at 539-41. We affirmed in a reported opinion, declaring that while "[i]t may take only slight evidence to generate a jury issue," that evidence "must still be somewhat more than preposterous." *Wilson v. State*, 195 Md. App. 647, 668 (2010), *rev'd*, 422 Md. 533 (2011). But the Supreme Court of Maryland reversed, reasoning that we (and the trial court) had invaded the province of the jury. *Wilson*, 422 Md. at 543.

In the present case, O acknowledged, during cross-examination, that she originally had told a social worker at the Child Advocacy Center that appellant had "touch[ed]" her "butt." Although, after subsequent questioning, O opened up and told the investigator the full extent of the abuse, her testimony during cross-examination was "some evidence" to support an instruction on the lesser-included offense of second-degree assault. *Wilson*, 422 Md. at 542; *Dykes*, 319 Md. at 219-25. We hold that the trial court erred in denying appellant's request to instruct on the lesser-included offense of assault in the second degree.

As for the State's contention that this error made no difference because assault in the second degree and sexual offense in the third degree carry the same maximum penalty, ten years' imprisonment, we disagree. The State neglects to mention that a defendant convicted of sexual offense in the third degree not only is subject to imprisonment, but further is required to register as a Tier II sex offender. Md. Code (2001, 2018 Repl. Vol.), Criminal Procedure Article, § 11-701(p)(1) (providing that a person convicted of Md. Code (2002, 2021 Repl. Vol.), Criminal Law Article, § 3-307(a)(4) ("engag[ing] in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old"), is a Tier II sex offender).

Moreover, we agree with appellant that his conviction of the flagship charge, sexual abuse of a minor, must also be vacated. Although it is true that, regardless of whether the jury had found that appellant committed third-degree sexual offense or the specific variety of second-degree assault (touching O's "butt") the defense claimed, it also *could* have

found him guilty of sexual abuse of a minor,[10] the State's argument presumes that the jury *would* have found appellant guilty of the flagship charge regardless of whether the trial court had instructed the jury on the lesser-included offense.[11] We cannot say beyond a reasonable doubt that the jury would have done so.

JUDGMENTS OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY ST. MARY'S COUNTY.

[10] *See*, for example, *Tribbitt v. State*, 403 Md. 638 (2008), which held that "sexual contact that does not constitute a sexual offense in any degree or otherwise violate any provision of Maryland law nonetheless [may] provide the basis for 'sexual abuse' within the meaning of Section 3-602 of the Criminal Law Article[.]"*Id.* at 643 (quotation marks omitted). Among other acts, Tribbitt "grabbed" and "rubbed" the victim's "butt." *Id.* at 642. The Supreme Court of Maryland rejected Tribbitt's argument that, "in order to be convicted of a violation of the statute, a defendant's particular acts as found by the trial court must be 'otherwise criminal' in nature." *Id.* at 645.

[11] Our conclusion does not require us to conclude that the battery type of second-degree assault claimed in this case is a lesser-included offense of sexual abuse of a minor, and we state no opinion on that issue. *But see Koushall v. State*, 479 Md. 124, 156-60 (2022) (rejecting a claim that second-degree assault is a lesser-included offense of misconduct in office). That is because the assault is indisputably a lesser-included offense of third-degree sexual offense; the latter condition was required because, otherwise, appellant would not have been entitled to the jury instruction on the lesser-included offense.