Circuit Court for Montgomery County
Case No. 138895C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1808

September Term, 2022

HUGO ROLANDO PEREZ

V.

STATE OF MARYLAND

Reed,
Ripken,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: June 18, 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).

Appellant, Hugo Rolando Perez, was convicted in the Circuit Court for Montgomery County of one count of sexual abuse of a minor, two counts of second-degree sex offense, and four counts of third-degree sex offense. Appellant presents the following questions for our review:

> 1. "Is the evidence insufficient to sustain the conviction for Count 1, sexual abuse of a minor?
>
> 2. Did the trial court err in allowing the State to amend Count 1 of the indictment?"

We shall hold that the trial court erred in allowing the State to amend Count 1 of the indictment and shall vacate appellant's conviction on Count 1. Consequently, we do not reach appellant's contentions regarding evidentiary sufficiency.

I.

Appellant was indicted by the Grand Jury for Montgomery County of one count of sexual abuse of a minor (Count 1), two counts of second-degree sex offense (Counts 2 and 3), and four counts of third-degree sex offense (Counts 4, 5, 6, and 7). Appellant proceeded to trial, and a jury found appellant guilty of all charges. For sentencing purposes, the court merged appellant's convictions for third-degree sex offenses into Count 4. The court imposed a term of incarceration of twenty-five years, all but twenty suspended, on Count 1; a consecutive term of incarceration of twenty years, all but ten suspended, on Count 2; a consecutive term of incarceration of twenty years, all but eight suspended, on Count 3;

and a concurrent term of incarceration of ten years, all suspended on Count 4, to be followed by five years of probation. This timely appeal followed.

These charges stemmed from appellant's continuous abuse of his niece, AB, when she was approximately eleven years of age to fifteen years of age between approximately 2000 and 2005. AB reported this abuse to the police in 2018, after appellant divorced her aunt. At trial, the State presented substantial evidence that appellant had fondled AB repeatedly, touched her breasts, and inserted his finger into her vagina. In this appeal, appellant does not contest the evidence that he abused AB.

This appeal concerns appellant's status as a "family member" or a "household member." Count 1 of the indictment charged appellant with a violation of Md. Code Ann. Crim. Law § 3-602. Section 3-602(b) contains two prohibitions: "(1) A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor. (2) A household member or family member may not cause sexual abuse to a minor." The indictment specified that appellant was a "household member" and a "person with temporary care and custody of AB."

At trial, however, it became clear that appellant was neither a household member nor a person with temporary care and custody of AB. AB lived with her parents and siblings, not her aunt and uncle. Appellant did not live in the same house as AB or maintain a regular presence in the home. Indeed, AB's mother testified that she was distressed when she learned that appellant had been in her home with her children without permission because "he was not supposed to be in my house" and "he had no business being in my

house with my kids by themselves." Nor was there any evidence that AB's parents had left AB in appellant's care or supervision.

At the close of the State's case, appellant moved for a judgment of acquittal on Count 1 because the State had failed to meet its burden of proving appellant was a household member or a person with temporary care and custody of AB. The State did not contest that it had failed to meet this element of its burden but asked for leave to amend the indictment, changing "household member" to "family member" under the same code provision. The court reserved ruling on appellant's motion for a judgment of acquittal and the State's request for leave to amend. No additional evidence was presented in appellant's case demonstrating that appellant was a household member or a person with temporary care and custody of AB. At the close of appellant's case, the court once again reserved on appellant's motion for a judgment of acquittal. As to the State's request to amend, the court and defense counsel had the following colloquy:

> THE COURT: We'll taking out, on the child sexual abuse, I will allow the State over objection, but I'm reserving on that issue quite frankly. But since I'm giving a jury instruction, I think I have to do it this way. I'll allow them to make the amendment subject to post trial memorandum. And so that way I can give this jury instruction as to family member of. So, we'll go ahead and allow the amendment to the first. So, we'll print it out and we'll do that one as well.
>
> [DEFENSE COUNSEL]: But Your Honor if you're going to leave it in -- so I mean, I've seen this time and time again, where you know they put family member, it can be a family member or household member or this, they clearly put what they wanted, what was in that indictment.
>
> THE COURT: And I know that. And whether or not, I'm reserving on that. But I still have to instruct the jury and he's

> making the amendment, you're objecting to it, and whether or not I should allow the amendment I'm reserving that for posttrial motions. But this is the way I'm handling it because I don't think I can, I don't want to confuse the jury and give them this other quotation, I mean these other definitions.
>
> [DEFENSE COUNSEL]: So, you're letting him amend it too now, instead of, so –
>
> THE COURT: Yes, I said, and I'm letting him amend it to family members over your objection. I reserved on that motion, but I will allow it over your objection. But I will receive post trial memorandum afterwards. I just, this particular issue I think is very close and I just want to get it right, so I'll allow it. We'll see, you know, but I'll leave it at family member in terms of jury instruction. All right.

The indictment was then amended to reflect a change from "household member" to "family member" in Count 1. The court instructed the jury consistent with the amended indictment. The jury found appellant guilty of all charges. After the verdict, appellant never submitted a post-trial memorandum regarding the amendment to the indictment. The trial court never revisited its ruling that the indictment could be amended.

II.

Appellant argues that the evidence was insufficient to support a conviction on his original indictment. No evidence was presented to suggest that appellant was a household member or a person with temporary care and custody of AB. Thus, the State failed to meet its burden of proof on Count 1, and his motion for a judgment of acquittal should have been granted. In the alternative, appellant argues that the court should not have permitted the State to amend the indictment. The amendment was a substantive amendment to the

elements of the charges. Appellant argues that such an amendment could not have been made at that point in the proceedings without his consent, which he did not give. Appellant argues that we should vacate his conviction on Count 1.

The State concedes that there was insufficient evidence to demonstrate that appellant was a household member or a person with temporary care and custody of AB. The State argues, however, that this is immaterial because, by the time of the verdict the indictment had been amended to charge appellant with sexual abuse as a "family member." The State argues that appellant's objections to the amendment are waived because the court made its judgment subject to post-trial memoranda on the appropriateness of the amendment and appellant never submitted a post-trial memorandum. Thus, the State argues that we should not consider appellant's claim that the amendment was improper.

The State, however, concedes that, if we reach the propriety of the amendment, we should hold that the amendment was improper and vacate appellant's conviction on Count 1. In that case, the State requests that this court remand the entire case to the trial court for resentencing. *See Twigg v State*, 447 Md. 1 (2016).

In appellant's reply brief, he argues that the court's ruling, subject to a post-trial memorandum regarding the amendment of the indictment, was tantamount to a final ruling in favor of the State, over appellant's objections. According to appellant, because there is no such thing as a post-trial motion for a judgment of acquittal, a court's decision to reserve on matters appropriate to a motion for a judgment of acquittal should be taken as a denial of that motion. Thus, appellant argues, he could not have waved an objection to the amendment the trial court had denied previously.

Appellant also argues that, should his conviction on Count 1 be vacated, we should not remand the remainder of his sentences to the trial court for resentencing pursuant to *Twigg* because *Twigg* only provides authority for this court to remand following a ruling that convictions bearing separate sentences must merge. *Id.* at 30. Appellant argues that this court should not remand for resentencing following the wholesale vacatur of a conviction.

III.

The State and appellant appear to agree on most of the substantive issues in this case. Notably, both parties concede that there was insufficient evidence to support appellant's conviction upon the initial indictment and that, should we reach the substantive issue of the amendment, we should hold that the indictment was not properly amended. The outcome of this case, therefore, turns almost entirely on the question of whether appellant waived his objection to the amendment by failing to file a post-trial memorandum. If he did waive his objection, then we do not disturb the trial court's ruling amending the indictment and the lack of evidence supporting the unamended indictment becomes immaterial. If he did not, then we must reach the appropriateness of the amendment at which point both parties concede that the correct outcome is for us to vacate appellant's conviction on Count 1.

Ordinarily, we do not decide any issue unless it plainly appears by the record to have been raised in or decided by the trial court. Md. Rule 8-131(a). Both parties agree that, when the State moved to amend the indictment, appellant indicated that the

amendment would be inappropriate because the indictment had asserted a different basis for the charge than the one the State later sought to pursue. Both parties agree that this comment was sufficient to raise an objection to the amendment pursuant to Md. Rule 4-323(c) ("[I]t is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court . . . the objection to the action of the court."). However, the State argues that, because the court reserved ruling at that point, the issue remained live until after the verdict subject to post-trial briefing. By failing to submit any post-trial briefing, the State maintains that appellant effectively withdrew his objection.

The first question we must address, therefore, is whether the issue remained live after the verdict, as the State contends. This court has not addressed whether a trial court can reserve ruling on an amendment to the indictment until after the jury's verdict. Some motions cannot remain live after a verdict. As appellant notes, we have held that a court cannot reserve ruling on a motion for judgment of acquittal until after the verdict. *Malarkey v. State*, 188 Md. App. 126 (2009); *State v. Sirbaugh*, 27 Md. App. 290 (1975).

An analysis of *Malarkey* is instructive. In that case, we noted that Maryland has no rule permitting a trial judge to reserve ruling on a motion for judgment of acquittal. *Malarkey*, 188 Md. App. at 160. Rule 4-324 governs motions for judgments of acquittal, and, while it provides a procedure for making such a motion before the verdict, it does not provide any procedure for making or considering such a motion after the verdict. *Johnson v. State*, 452 Md. 702, 716 (2017). Thus, we held that a court cannot consider a motion for judgment of acquittal after the verdict. *Malarkey*, 188 Md. App. at 160. A trial court's decision to reserve ruling until after the verdict would run afoul of this concept and render

any decision of the court issued after the verdict a nullity. As a result, we held that a court's decision to reserve ruling was analogous to a court's simple inaction and would be treated as though the motion had been denied. *Malarkey*, 188 Md. App. at 161.

In this case, Rule 4-204 governs the court's ability to amend an indictment or permit the indictment to be amended. It provides as follows:

> "On motion of a party or on its own initiative, the court *at any time before verdict* may permit a charging document to be amended except that if the amendment changes the character of the offense charged, the consent of the parties is required. If amendment of a charging document reasonably so requires, the court shall grant the defendant an extension of time or continuance."

We analyze the plain text of the Rule to determine whether it permits the court to reserve ruling until after the verdict. *Knox v. State*, 404 Md. 76, 85 (2008) ("When we interpret the Rules of Procedure, we use the same canons and principles we use to construe statutes. . . . In our effort to discern the meaning of a rule, we look first to the words of the rule").

The Rule clearly provides for amendment prior to a verdict. But it makes no provision for a court to amend an indictment or consider amending an indictment after the verdict. The Maryland Supreme Court has held that no amendment to an indictment made outside the procedures set forth by Rule 4-204 can be valid. *Johnson v. State*, 427 Md. 356, 373 (2012) ("Rule 4-204 now details the exclusive means to amend an indictment."). A trial judge cannot grant a motion to amend after a verdict. Just as a decision on a motion for judgment of acquittal would be a nullity after a verdict, so too would a decision on a motion to amend.

Here, the court's announcement that it intended to reserve ruling on the motion to amend had no more effect than the court in *Malarkey*'s purported decision that it would reserve ruling on the motion for judgment of acquittal. And, just as the Court in *Malarkey* was left with the trial court's pre-verdict ruling (or lack thereof) on the motion for judgment of acquittal, we too are left with the trial court's pre-verdict ruling on the motion to amend. The trial court permitted the amendment to the indictment before the verdict over appellant's timely objection. Once the case went to the jury, the issue was no longer live, and appellant could not have waived his objection. The matter is preserved for our review.

Turning to the permissibility of the amendment, the State confesses error, and we agree. Rule 4-204 provides that "if [an] amendment changes the character of the offense charged, the consent of the parties is required." An amendment changes the character of the offense charged when it substantively changes the elements the State must prove. *Shannon v. State*, 468 Md. 322, 328 (2020). In cases where a code provision criminalizes several different acts and an indictment charges one of those acts but is later amended to charge a different act under the same code provision, the amendment changes the character of the offense charged. *Counts v. State*, 444 Md. 52, 65 (2015) ("[W]hen a charging document alleges a violation of a Code section that prohibits several different acts, the charging document may not be amended to charge an act not alleged in the original document.").

The amendment in this case changed the elements the State was required to prove—it removed the requirement that the State prove appellant was a member of AB's household or a person with temporary care and custody of AB. Indeed, it changed the elements from

ones the State could not prove, to ones the State could prove. The change substantively affected the conditions under which appellant could be found guilty. *Mohan v. State*, 257 Md. App. 65 (2023) (reversing a conviction under Md. Code Ann. Crim. Law § 3-602 where the State had proved abuse, but the indictment stated incorrectly the relationship between the defendant and the victim). Appellant's consent was required under Rule 4-204, and appellant did not consent. The amendment was improper.

We vacate the conviction on Count 1.

IV.

The final matter for our consideration is whether, once we have vacated appellant's conviction on Count 1, we should remand for resentencing on the remaining counts. The Maryland Supreme Court held in *Twigg v State*, 447 Md. 1 (2016) that, where we vacate one sentence, it may be appropriate to remand for resentencing on the remaining counts. As the Court in *Twigg* noted, judges routinely consider the full sentencing package when sentencing a defendant for each individual count. *Id.* at 27. "After an appellate court unwraps the package and removes one or more charges from its confines, the sentencing judge, herself, is in the best position to assess the effect of the withdrawal and to redefine the package's size and shape (if, indeed, redefinition seems appropriate)." *Id.* at 28. Where a large portion of the overall sentencing package is removed, it is appropriate to remand to the sentencing court for that court to resentence on the remaining counts. *Id.*

Appellant argues that we can remand for resentencing on the remaining counts only where the removal of one part of the sentencing package is based on merger. It is true that

Twigg, itself, had to do with merger. *Id.* at 5. But we have applied the principles in *Twigg* to cases in which we have vacated one conviction underlying a sentencing package. *Mohan*, 257 Md. App. at 88-89. Appellant's sentence for sexual abuse of a minor constituted a substantial part of the overall sentencing package, a package which included substantial time that the court had suspended. Resentencing is appropriate.

CONVICTION AND SENTENCE ON COUNT 1 IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED. ALL OTHER JUDGMENTS OF CONVICTION AFFIRMED BUT SENTENCES ON ALL REMAINING COUNTS VACATED. CASE REMANDED TO THAT COURT FOR RESENTENCING ON ALL REMAINING COUNTS. COSTS TO BE PAID BY MONTGOMERY COUNTY.