Circuit Court for Baltimore City
Case No. 118059011

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3430

September Term, 2018

LUIS BONILLA RODRIGUEZ

v.

STATE OF MARYLAND

Kehoe,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: August 12, 2020

After inviting a 15-year-old girl, to sneak away from her house at around 1:00 a.m. on a school night, appellant Luis Bonilla Rodriguez[1] and his friend Juan Carlos Alvarez Ortiz brought her to Rodriguez's house, where they served her vodka until her blood-alcohol content was more than double the legal threshold for intoxication. The girl, A.,[2] was then forcibly raped in Rodriguez's bedroom. At around 4:30 a.m., A.'s brother and sister found her in their backyard, unconscious and seriously injured. After A. reported that she had been raped by both Ortiz and Rodriguez, a sexual assault forensic examiner found traumatic genital injuries, as well as bruising and petechial hemorrhaging consistent with strangulation.

The State charged Rodriguez with first-degree rape and assault of A. and two counts of aiding and abetting the first-degree rape perpetrated by Ortiz. In a bench trial before the Circuit Court for Baltimore City, the court heard testimony from A., her sister, several police officers, the forensic examiners, the nurse who performed the sexual assault forensic examination ("SAFE"), Rodriguez's mother, and Rodriguez. In addition, the court considered a cell phone video, on Rodriguez's phone, showing 106 seconds of A.'s encounter with Ortiz. The court also considered body-worn camera video from the police officers who responded to A.'s home, evidence obtained during a search of Rodriguez's house, and DNA evidence of Ortiz's sperm on A.

[1] The statement of charges, the circuit court docket entries, and other documents filed in the circuit court spell the appellant's name as "Rodriquez." We use the spelling that the parties used in the briefs.

[2] The initial "A." has been chosen at random. Neither A.'s first name nor her surname begins with the letter "A."

Rodriguez testified in his defense, admitting that he asked A. to come to his house, served her vodka, made a video-recording of her alone with Ortiz through his bedroom window, remained nearby while Ortiz was raping her, and accompanied her home. Rodriguez denied that A. was intoxicated to the point that she was incapacitated or helpless, denied that he raped A., and insisted that he did not anticipate that Ortiz was going to rape her. After granting Rodriguez's motions for judgment of acquittal on the charges of first-degree assault and first-degree rape (alleging vaginal intercourse and fellatio), the trial court convicted Rodriguez on both counts of aiding and abetting the first-degree rapes (vaginal intercourse and fellatio) committed by Ortiz.[3]

Rodriguez, who was sentenced to consecutive terms of 20 years, with all but 12 years suspended, appeals both convictions. He presents the following issues:

> I. Whether the evidence produced at trial was legally sufficient for the Trial Court to find Rodriguez guilty of two counts of aiding and abetting rape in the first degree.
>
> II. Whether the Trial Court's verdict finding Rodriguez guilty of two counts of aiding and abetting first degree rape was supported by the law and the factual findings.

We conclude that the evidence was sufficient to support the guilty verdicts. We decline to address the second question, because it is not preserved.

[3] Before this trial began, on November 5, 2018, Ortiz pleaded guilty to one count of first-degree rape. He was sentenced to 50 years of imprisonment, with all but 13 years suspended.

BACKGROUND

The State's Case

A. lived with her older brother and sister in Baltimore City. She had two classes with Rodriguez at high school, but had communicated with him only once, on a messaging app.

At around 1:00 a.m. on Monday, January 29, 2018, A. was already in bed when she received a message from Ortiz, whom she said she had only seen "at restaurants" and "on Facebook," but had "never met . . . in person." When Ortiz asked "if [she] wanted to go out with" him and Rodriguez, she "told them yes." A. left "secretly," without telling her sleeping family members. Ortiz picked her up and brought her to Rodriguez's house.

When A. arrived at Rodriguez's house, Ortiz and Rodriguez "already had drinks" poured into little glasses. Rodriguez and Ortiz served her five or six drinks from a large bottle of vodka in the kitchen. She had never consumed alcohol before.

Rodriguez went outside and returned "smelling of marijuana." He "was kissing" her on the left side of her neck, but she "told him no and got away from him" by using her hand to "block him."

By that time, she felt "dizzy" and as though her "body didn't have any energy." She "couldn't walk because [she] was very drunk." Ortiz led her to Rodriguez's bedroom "with his arms around [her] waist" even though she told both Ortiz and Rodriguez that she "wanted to go to [her] house." The bedroom was on the same floor, near the kitchen and living room. "All [she] remember[ed] after that is what happened in the room."

A. recalled that she was "sitting on the edge of the bed" in Rodriguez's room when Ortiz "started pulling down his pants," "squeezed" her mouth open, and put his penis in her mouth. He laid her down on the bed and "started grabbing [her] by the neck," so she "felt like – like [she] couldn't breathe." After grabbing her by the neck, he "started putting his penis inside [her] vagina."

A. testified that, once Ortiz had finished raping her, Rodriguez "came into the bedroom," "took his pants off," and "put his penis in [her] vagina." She "said no" and told him that she "wanted to move." "He was holding [her] by the neck."

Afterwards, Ortiz and Rodriguez "put [her] clothes back on." Although she does not "remember a lot," A. recalled that they took her "back to [her] house."

At her home, the "lights were already on because [her] sister always woke up at 4 a.m. to cook." Her brother "picked [her] up" because she "couldn't move and [her] body was sore." Her "siblings asked [her] what had happened . . . because [her] lips were swollen, [her] pants were bloody and [she] had bruises on [her] neck." She "just told them to kill [her]." "[T]hat's all [she] remember[s] saying."

A.'s sister testified that she was in the kitchen preparing lunches for her brother and husband that morning, when she saw a man, whom she later identified as Rodriguez, looking through the window. When Rodriguez saw her, he "ran away." The sister and their brother found A. lying in the backyard, "unconscious," with "[h]er pants unbuttoned" and "blood stained."

When her siblings carried A. inside, her mouth "was swollen," and she had "marks . . . on her cheek." Her sister checked "[h]er vagina" and found her "bleeding" and "very

inflamed." She "called 911" and took photos because she "knew that something had been done to her."

A. "was passed out until the police got there." When the police arrived, she began "crying," "saying she didn't want to live," and telling them to "just kill [her.]" She identified Ortiz and Rodriguez as the perpetrators.

Baltimore City Police Officer Jeffrey West arrived at A.'s house at 5:05 a.m. His body-worn camera footage and still images from that footage were admitted into evidence. Officer West testified that A. "was sitting on the floor," "appeared to be in pain and discomfort," and was "crying and vomiting." "[S]he had bruising on her neck and on her face." Her sister and brother reported that they found A. in the backyard. In distress, A. told them that "she had been raped."

Officer Justo Padin was called in to communicate in Spanish with A. and her family. Officer Padin testified that A. "appear[ed] to be very intoxicated and crying." She had "a swollen lip and she was throwing up." Still images and footage from the officer's body-worn camera show A.'s physical and emotional distress.

A. told Officer Padin that "a friend" had taken her to Rodriguez's house. While she was at the house, she said, "they" gave her alcohol. She kept repeating that she "didn't want to do it." She recalled that, while they were still in the kitchen drinking, Rodriguez kissed her neck, but she put her hand up to block him from continuing. Eventually, she said, Ortiz started kissing her, and then they "abused her" and "raped her." Initially, A. reported that "they" both had sexual intercourse with her, but later she said that she could only remember Ortiz taking her to the room.

Detective Dennis Bailey directed the officers to take A. to the hospital and obtained a search warrant for Rodriguez's residence. The police recovered A.'s phone and Rodriguez's phone from Rodriguez's bedroom.

A forensic serologist with the Baltimore City Police Department tested A.'s SAFE kit. Finding evidence of sperm and blood, she sent those samples for DNA testing. A DNA analyst examined eight samples against three standards from A., Rodriguez, and Ortiz and determined that DNA from A.'s external genitalia swabs matched Ortiz. On swabs taken from the right side of A.'s neck, the analyst concluded that Rodriguez "cannot be included or excluded" as a contributor, but that Ortiz was a match.

Christine Cooley testified as an expert in SAFE and in the analysis of blood-alcohol content. Cooley, a nurse of 27 years with four years of experience in sexual assault forensic examination, serves as the leadership coordinator and teaches all SAFE classes at Mercy Medical Center.

Cooley clearly recalled A.'s case because A. "had one of the worst genital injuries" that she had ever seen in performing 150 SAFE exams and 500 additional peer reviews. A.'s blood and urine were not tested for date rape drugs because of a lack of funding, but her blood-alcohol content was .08, which is the legal threshold for intoxication. Cooley testified that, at the time of the reported assault, A.'s blood-alcohol content would have been about .20, more than double the legal threshold for intoxication.

Cooley recorded the following statement by A.:

> [T]hey both started kissing me and I told them no and they drug – drug me [sic] to the bedroom. They began to take off my shirt and I told him and I told him I wanted to go home. I said no, I don't want to. They grabbed –

> they grabbed me by my waist and drug me [sic] to the bedroom. I felt like I could not move my body. I was a virgin and it feels like something happened. I don't remember how I got home. I remember being with my sister and they called the police.

Although A. told Cooley that there were two assailants and that Ortiz had licked her vagina, she mostly answered that she could not remember whether certain specific acts occurred. According to Cooley, A. reported that the assailants applied force to her neck and used physical force when they dragged her to the bedroom.

Cooley found that A. had bruises on her neck. Cooley also found that A. "had petechial hemorrhaging in the eyes." She explained that petechial hemorrhaging can occur when a blood vessel in the neck is "occluded" or blocked. These findings led Cooley to believe that strangulation "could have occurred." A.'s other injuries included "a red mark and swelling on the top of her head," another area on "the right side of her mouth that was swollen and red," bruising behind her ear, and "round, finger-tip like bruising" on her left arm.

Cooley explained that A. had so many genital injuries that the nurse had to create two separate traumagrams to diagram them. She testified that, in all of the exams she has done, she has "never seen such a horrendous injury." "[T]he right side of the labia major[a] was [so] swollen" that "it actually looked like a penis," which caused Cooley to check her "notes to see if [A.] was a hermaphrodite." Cooley observed "shearing and tearing." She compared the injuries to "a bad, bad diaper rash for a child or an abrasion where . . . you fall off a bike and you lose that first layer of skin." A. "was in such excruciating pain" that she reported "ten over ten pain," with "ten being the absolute

worst pain that you can think of" like "the birth of twins at the same time[.]" Because she was a virgin, there were also multiple tears of the hymen. Additional injuries to her cervix were indicative of "[b]lunt force trauma."

First Motion for Judgment of Acquittal

At the close of the State's case, defense counsel moved for a judgment of acquittal on all counts. After the State acknowledged that it had no evidence to support the charge that Rodriguez had committed first-degree rape by forcing A. to engage in fellatio with him,[4] the trial court granted the motion as to that charge. The court denied the motion as to the remaining offenses.

The Defense Case

Rodriguez's mother testified that, during the entire night when the assault occurred, she was upstairs in her bedroom while her son had friends, including Ortiz, in their house. She explained that when someone is "downstairs talking," she "could hear it all the way to [her] bedroom" upstairs, but nothing woke her up that night.

Rodriguez also testified. He said that he was 18 at the time of the assault. That evening, he and some friends went to a liquor store, where Ortiz, who was over 21, and another person bought liquor. When they returned to Rodriguez's house, they put about

[4] *See* Md. Code (2002, 2012 Repl. Vol., 2017 Supp.), § 3-303(a)(1)(ii) of the Criminal Law Article ("CL") (defining first-degree rape to include "engag[ing] in a sexual act," which includes fellatio, "with another by force, or the threat of force, without the consent of the other").

50 small cups on the table in the kitchen. Because one friend needed to leave, Ortiz took him home.

Upon his return, Ortiz asked Rodriguez to send A. a message "because she wasn't responding to him." Around midnight or 1:00 a.m., Rodriguez asked A. "if she wanted to come to [his] house but she didn't respond until" later.[5] Rodriguez testified that his "plan was to just drink and drink, that's it."

Ortiz picked up A. When she came into the house, Rodriguez "said hi" and then left to walk another friend home. When he returned, Ortiz and A. "were kissing [i]n the kitchen." Rodriguez joined them in the kitchen "for a little bit." He already had seen A. drink "about two" drinks and "told her if you want[,] you can drink one because there was a lot of them." He then "went outside to smoke."

When he came back inside, Ortiz and A. were not in the kitchen. He testified that he did not know where they were and "didn't pay any attention to that either." Instead, he "started to drink a lot." Eventually, he went outside "[t]o keep smoking and to listen to music."

While sitting on steps to the basement, Rodriguez "heard voices" and could tell that "they were coming from [his] bedroom." He "was curious" and "wanted to see what was going on," so he stood "on a step stool" to look into his window, but he "wasn't able to balance" and fell down. He held up his phone and tried to take a picture "[o]f the

[5] It appears that Ortiz sent a message, to which A. did not initially respond. Later, Ortiz asked Rodriguez to send another message. A. testified that she ultimately responded to Ortiz's message.

inside of the bedroom to know what was going on." He "didn't see anything," but he "pressed video" and raised his arm so that the camera was aimed into his bedroom window.

Rodriguez denied ever watching that video. He claimed that after recording it he "didn't look at it" because "his body was hurting from the fall." Instead, he said, he sat down and "kept smoking." He said that he did not watch the video later because he "forgot."

When Rodriguez went inside later, he saw Ortiz "outside of the bathroom." Rodriguez "asked him what's going on," and Ortiz replied, "[S]he's in the bathroom." When A. came out of the bathroom, all three of them went to sit in the living room, until she "wanted to go to her house" because "it was 4:00." Rodriguez testified that A. was able to speak at that point and that "she could walk too," but he "didn't want her to stay at [his] house because [he] didn't want to have problems with [his] mom." He told Ortiz that he "was going to go with them so that she could make it to her house." He claimed that A. walked to Ortiz's car without assistance and got out without assistance when they arrived at her house.

Rodriguez went with A. while Ortiz stayed behind. A. wanted to go in through a window, so Rodriguez walked beside her to the back of the house. As she was "going in through the window," she slipped and fell on the ground. Rodriguez claimed that "she got up quickly" and that he "just left because . . . she was already going to go in through the window."

The police woke him up at his house the next morning and seized his phone. The week before trial, he remembered the video he had taken and informed defense counsel about it.

The video begins at 3:26 a.m. and lasts for less than two minutes. It was admitted as evidence and played on a laptop with headphones for the trial judge. The judge received a partially-redacted transcript with an English translation of what can be heard on the video; the transcript was not admitted into evidence.

The court described what the video depicted:

> [T]he video depicts a young woman of 15 years of age who is partially clothed wearing only a top engaged in an act of approaching Mr. Ortiz as he stands next to Mr. Rodriguez's bed. [A.] having gotten off of the bed and approaching Mr. Ortiz and gently approaching him and holding both sides of his face in her hands and leaning into [sic] kiss him, suggesting consensual intimacy at that point. And then taking her right hand and briefly rubbing the back of Mr. Ortiz and getting back on the bed and Mr. Ortiz in no other terms effectively mounting [A.] in a missionary position to engage in vaginal sexual intercourse as best can be [discerned] from looking at the video.

The court also observed that most of the transcript consisted of questions by A. to Ortiz:

> Will you remember this tomorrow? You should remember this tomorrow, my love. And upon that continual prompting by [A.] Mr. Ortiz finally stating yes, I will of course remember this tomorrow, my love. That's essentially the gist of it.

In closing argument, the State pointed out that the video records A. saying "no" and "it hurts me" just before it "cuts off."

Rodriguez denied kissing A., going into his bedroom while she was in his house, engaging in sexual intercourse or fellatio with her, or helping to dress her. He testified

that he was drunk, but denied "blacking out" and claimed that he "remember[ed] everything."

On cross-examination, Rodriguez confirmed that Ortiz "is a good friend." He insisted that he did not know that A. was in his bedroom with Ortiz. He claimed that he "didn't really pay attention" to the fact that, while he had gone out to smoke, the only two people who were awake in the house had left the kitchen, were not in the living room, and had not said goodbye. He acknowledged that he could hear voices coming from his bedroom. Even though he was curious enough to hold up his phone to record what was going on through the bedroom window, he claimed that he did not look at the video. He also claimed that he did not tell police about the video "because he hadn't seen anything and . . . hadn't even looked at it."

Second Motion for Judgment of Acquittal

Defense counsel renewed the motion for a judgment of acquittal on the remaining counts. The court reviewed the evidence presented by both the State and the defense, pointing out that its standard of review was "whether any rational factfinder could find that the defendant committed the crime as charged beyond a reasonable doubt."

The court observed that the events depicted in the video were "remarkably different" from A.'s testimony. Nonetheless, the video, in the court's words, represented "but a snippet of what appears to be consensual intimacy."

With respect to credibility determinations, the trial court emphasized the vast differences between the testimony of A. and that of Rodriguez. The court observed that Rodriguez, in his testimony, attempted to "distance[] himself from what was going on

mere feet from him when he was in his home and indeed right outside the bedroom while [he was] outside the home." The court found Rodriguez's testimony "wholly inconsistent" and "absolutely incredible and unworthy of belief on balance compared to the other testimony and documentary evidence and demonstrative evidence in this case."

Because of its credibility determinations, the court denied the motion for judgment of acquittal on both of the aiding and abetting counts and on the first-degree assault charge. The court, however, granted the motion for judgment of acquittal on the count charging first-degree rape by means of vaginal intercourse. It explained that the DNA evidence linking Rodriguez to the assault was "of such little quantity and quality" that a rational factfinder could not find beyond a reasonable doubt that Rodriguez did what A. "seemingly believes" he did.

Verdicts

After a recess, the trial court returned to announce its verdicts. The court found Rodriguez not guilty of first-degree rape, because "the State ha[d] failed to meet its burden of proof" on that count. The court then addressed the two counts charging that Rodriguez aided and abetted first-degree rape.

The court first recognized that a critical question was:

> whether Mr. Rodriguez was more than aware, if he was aware at all[,] of what was happening in his bedroom, whether he knew and with that knowledge whether he did more than fail to object because the awareness and the failure to object is insufficient to sustain a guilty finding.

The court reviewed Rodriguez's role in the events leading up to the assault:

> In this case Mr. Rodriguez opened up his house to his friend, Mr. Ortiz and Mr. Rodriguez opened up his house to a woman he knew to be [A.]. Mr.

> Rodriguez sent the text message to ask [A.] if she wanted to come over to him house. He did so at the request of Mr. Ortiz. Mr. Ortiz was not a stranger to Mr. Rodriguez. Mr. Ortiz was a friend. And that relationship, . . . it's very significant. It takes Mr. Rodriguez out of the realm of being a mere bystander to someone he doesn't know who's committing a crime. And indeed places him physically and literally in his own home with a friend who is committing a crime, rape, Mr. Ortiz.
>
> Mr. Rodriguez having had those individuals in his home, at a minimum fostered the consumption of alcoholic beverages by [A.] who he knew to be a minor. Mr. Rodriguez poured two, if not three shots of vodka for [A.] who he knew to be a minor. There was in the view of the court, based upon the evidence, a prearranged concert of action between Mr. Rodriguez and Mr. Ortiz by arranging the invitation through the proactive act of Mr. Rodriguez to send the text to [A.] to lure her, if she wished, out of her home at 1:00 o'clock in the morning on what was a Monday morning, January 29th, 2018. Mr. Rodriguez could have changed his mind, could have gone to sleep, could have disinvited Mr. Ortiz and [A.] to his home when they arrived, but he didn't do that. He welcomed them into his home. He welcome[d] them to his kitchen. He welcomed them to drink with him . . . .
>
> Mr. Rodriguez fostered the environment of the drinking of alcohol. Notwithstanding that he is three years younger than Mr. Ortiz and notwithstanding that it was not Mr. Rodriguez who purchased the alcohol. The court notes that Mr. Rodriguez did accompany his friends to go to purchase the alcohol and did everything but go inside and pay for it. And he waited outside because he's underage.

The court rejected Rodriguez's claims that he was unaware of and uninvolved in what was going on in his bedroom between Ortiz and A.:

> Mr. Rodriguez would have the court believe that . . . he went outside to smoke a cigarette in the very early morning hours just outside the kitchen door off the back of his home with no knowledge of what was likely to happen, with no knowledge that there would be any act of overpowering a female of tender years who was incapacitated by the consumption of alcohol and absolutely unable to defend herself and to help herself from the physical attack that was about to ensue. Mr. Rodriguez through his testimony would have the court believe that when he went outside to smoke a cigarette, having not seen Mr. Ortiz and [A.] inside the kitchen or living room of the first floor of his home adjacent to his bedroom on the first floor

of his home, that when he went outside he heard voices that appeared to be emanating from his bedroom and that he was curious and then – and that he went to the bedroom to attempt to gain a height to be able to look into the bedroom to determine who was speaking in his bedroom or who was in his bedroom and what, if anything they were doing.

Mr. Rodriguez would have the court believe that he was unable to see inside his bedroom and to satisfy his curiosity as he called it, he used his cell phone to reach up and to take a video of whatever was happening in his bedroom to ameliorate his curiosity, to satisfy that curiosity and for no other purpose. Mr. Rodriguez has argued to the court that he was unaware of what was happening in his bedroom because he himself was intoxicated and that therefore, he could not possess the mental capacity to appreciate the conduct, the illegal conduct, the rape that was happening in his bedroom.

That protestation is diametrically opposed to the evidence in the case in the form of the less than two minute cell phone video taken by Mr. Rodriguez himself at 3:26 a.m., where he[,] the court finds, reached up while standing outside of his home to his bedroom window. And the court looked at this video three times and with a very steady hand Mr. Rodriguez was able to capture the physical acts being undertaken within his bedroom on the bed in his bedroom. And the video itself is, to the court's observation, remarkably still and not at all suggestive of a person who was under the influence of alcohol to the extent that he could not control his own fine motor skills or gross motor skills.

The court does not believe that that video was taken to assuage or to answer the curiosity, if you will, of Mr. Rodriguez to find out who was in his bedroom and what was happening. It was taken to satisfy . . . a prurient interest to record what Mr. Rodriguez, in the view of this court[,] knew to be happening, which was a physical conquest by his friend, Mr. Ortiz[,] upon an incapacitated [victim]. The court finds that [A.] was mentally incapacitated due to her consumption of five, if not six[,] vodka shots. The court finds upon the evidence that [A.] was physically helpless and that that state of physical helplessness ensued after 3:28 a.m., which is at around the time that the two minute video stopped. Because the two minute video depicted [A.] able to ambulate, able to even in a mentally inebriated state physically express affection for the man with whom she was in the bedroom, Mr. Ortiz. That observation of [A.'s] state physically then is remarkably different from the court's observation of [A.'s] state shortly after 4:00 a.m.

But an hour and a half later she had been returned to her home by Mr. Ortiz and by Mr. Rodriguez when she is shown on a police body worn camera in the throws [sic] of emotional and mental shock and physical shock and literally vomiting on the living room floor. What happened between 3:29 a.m. and 4:00 a.m. was brutal savagery of [A.] to please the interests of Mr. Ortiz. [A.] was incapable of giving consent, nor does this court believe she would have ever given consent to such savagery or such sadomasochistic act. And I say sadomasochistic and savagery because the injuries which are documented of [A.], by way of the photography of sexual assault forensic examiner Nurse Cooley clearly document injuries which are noted as shearing, tearing, abrasions. And in the view of this court frankly mutilation of the genitalia of [A.]. To the end that Nurse Cooley opined that it was the worst injury to any vagina she has seen in 500 cases and 150 that she had directly examined. There is but no doubt in this court's mind that the rape was committed upon [A.] vaginally and orally by Mr. Ortiz with force applied to her neck, her jaw and her entire body.

Mr. Rodriguez would have the court believe that he was unaware of what was ensuing in the bedroom and that had he been aware he would have never countenanced it. At issue is whether this court's findings of Mr. Rodriguez's awareness of what was going on in that bedroom after 3:28 a.m. and before 4:00 a.m., whether he did more than fail to object. One might ask, why did Mr. Rodriguez instead of going to the bedroom window just not go to his door? Wouldn't that have been the normal, human response to go to a door out of concern if only to knock and say, are you all okay in there or what is happening in there? I'm just curious and I want to know. There's no evidence that Mr. Rodriguez did that. There's no evidence that Mr. Rodriguez, in the view of the court, knowing what was happening in his bedroom that [A.] was being used as the sexual instrument for Mr. Ortiz's pleasure. Knowing that there's no evidence that Mr. Rodriguez took any action whatsoever to try to stop it.

What went on for about 35 minutes in that bedroom might as well have been a lifetime of hell for [A.]. And to suggest that Mr. Rodriguez did not know of and could not appreciate the severity of that would frankly be asking that this court to find that Mr. Rodriguez is both deaf and blind and this court cannot make that finding given Mr. Rodriguez's proximity to what was happening in his own bedroom. Mr. Rodriguez then knowing what was happening assisted and aided what was happening by not only not objecting to it, but by allowing it to continue. He permitted it to continue until Mr. Ortiz finished what Mr. Ortiz needed to finish. That's not merely a failure to object, it's turning your head the other way and countenancing a

savagery that's being committed on another human being by a friend of yours.

For those reasons the court would further note that there is more than ample evidence that [A.] was mentally incapacitated inasmuch as her blood alcohol level upon the credible evidence at the time of the event was .20 or . . . between two and three times the legal limit of alcohol intoxication. Knowing that [A.] was physically helpless and was essentially [a]n inanimate rag doll to Mr. Ortiz, that force was used as demonstrated and as evidence [sic] by the injuries sustained physically by [A.], noting the presence of those three elements[6] and noting, as the court has, Mr. Rodriguez's significant totality of acts under a continuum of time beginning at 1:00 a.m. to initiate the entire chain of events by sending the text message to [A.] resulting in the then 4:30 a.m. or so body worn camera evidence of [A.'s] trauma, that Mr. Rodriguez put into place, the continuum of those events.

The court finds that Mr. Rodriguez knew – not that he should have known, but that he knew that [A.] was incapacitated and physically unable to help herself. And that by not walking the ten paces or so to his bedroom door to do something about that, that he was aiding Mr. Ortiz in the commission of rape in the first degree, both as to vaginal rape and fellatio rape. This court has been asked and it has been the subject of argument to consider that Mr. Rodriguez didn't know. And the evidence belies that. This court possesses no reasonable doubt that Mr. Rodriguez knew what was going on. And upon those findings the verdicts as to counts three and four are guilty.

DISCUSSION

I. The Sufficiency of the Evidence

Rodriguez contends that "there was insufficient evidence to prove beyond a reasonable doubt that [he] committed rape in the first degree as an aider and abettor." Applying the standards governing review of a sufficiency challenge to an aiding and abetting conviction for first-degree rape, we disagree.

[6] The "three elements" apparently are A.'s mental incapacitation, her physical helplessness, and Ortiz's use of force, to which the court had just referred.

The Standards Governing Sufficiency Review of Aiding and Abetting Conviction

When considering the sufficiency of the evidence supporting a conviction in an action tried without a jury, appellate courts "will review the case on both the law and the evidence." Md. Rule 8-131(c). Reviewing courts, however, do not weigh the evidence, resolve conflicts in it, or evaluate the witnesses' credibility, "[b]ecause the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony." *Smith v. State*, 415 Md. 174, 185 (2010).

Our role is to determine "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id*. at 184 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original). In making that determination, we must be mindful that the factfinder may believe all, some, or none of the evidence presented, and it may draw inferences based on its findings and credibility determinations. *See Holmes v. State*, 209 Md. App. 427, 438 (2013). "[W]e will not set aside the trial court's findings of fact unless they are clearly erroneous." *Espinosa v. State*, 198 Md. App. 354, 399 (2011) (citing Md. Rule 8-131(c)).

Based on his role as an aider and abettor, Rodriguez was convicted of two counts of first-degree rape, corresponding to Ortiz's acts of forcible vaginal intercourse and fellatio. Under CL section 3-303, rape in the first degree encompasses vaginal intercourse and fellatio, when accomplished "by force, or the threat of force, without the

consent" of the victim (CL § 3-303(a)(1)) or where the defendant suffocates, strangles, or inflicts serious physical injury on the victim. CL § 3-303(a)(2)(ii).

In comparison, CL section 3-304, the second-degree rape statute, prohibits vaginal intercourse and fellatio either when committed "by force, or the threat of force, without the consent" of the victim (CL § 3-304(a)(1)), or when the victim "is . . . a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is" so incapacitated or helpless. CL § 3-304(a)(2).

A "[m]entally incapacitated individual" is "an individual who, because of the influence of a drug, narcotic, or intoxicating substance, . . . is rendered substantially incapable of" either "appraising the nature of the individual's conduct" or "resisting vaginal intercourse, a sexual act, or sexual contact." CL § 3-301(b). A "[p]hysically helpless individual" is as "an individual who . . . is unconscious" or who "does not consent to vaginal intercourse, a sexual act, or sexual contact" and "is physically unable to resist, or communicate unwillingness to submit to, vaginal intercourse, a sexual act, or sexual contact." CL § 3-301(c).

Under Maryland law, "accomplices" are persons who, as a result of their status as parties to an offense, are "criminally responsible for a crime committed by another." *Sheppard v. State*, 312 Md. 118, 122 (1988), *abrogated in part on other grounds by State v. Hawkins*, 326 Md. 270 (1992). An accomplice's criminal responsibility may take two forms: "(1) responsibility for the planned, or principal

offense (or offenses), and (2) responsibility for other criminal acts incidental to the commission of the principal offense." *Id.* (citation omitted).

"In order to establish complicity for other crimes committed during the course of the criminal episode, the State must prove that the accused participated in the principal offense either as a principal in the first degree (perpetrator), a principal in the second degree (aider and abettor)[,] or as an accessory before the fact (inciter)[.]" *Id.* at 122-23. "[W]hen two or more persons participate in a criminal offense, each is responsible for the commission of the offense and for any other criminal acts done in furtherance of the commission of the offense or the escape therefrom." *Id.* at 121-22; *accord State v. Raines*, 326 Md. 582, 598 (1992); Maryland Criminal Pattern Jury Instruction (MPJI-Cr) 6:00 cmt. ("stating that [a]n accomplice's liability extends not only to the planned or principal offense, but to all other crimes incidental thereto, if done in furtherance of the commission of the offense").

"A principal in the second degree is one who is actually or constructively present when a felony is committed, and who aids or abets in its commission." *Pope v. State*, 284 Md. 309, 326 (1979); *accord State v. Raines*, 326 Md. at 593 (stating that "[a] second degree principal must be either actually or constructively present at the commission of a criminal offense and aid, counsel, command, or encourage the principal in the first degree in the commission of that offense"); *Owens v. State*, 161 Md. App. 91, 99 (2005) (same).

"'The activity of a principal in the second degree is generally referred to as aiding and abetting, and the aider or abettor is usually called an accomplice.'" *Owens v. State*,

161 Md. App. at 99 (quoting MPJI-Cr 6:00 cmt.).[7] "'An accomplice . . . who knowingly, voluntarily, and with common interest with the principal offender, participates in the commission of a crime . . . is a guilty participant, and in the eye of the law is equally culpable with the one who does the act.'" *Id.* at 99-100 (quoting *Woods v. State*, 315 Md. 591, 615 n.10 (1989)). The guilt of accomplices "'is not determined by the quantum of [their] advice or encouragement.'" *Pope v. State*, 284 Md. at 332 (quoting R. Perkins, *Criminal Law* 658-59 (2d ed. 1969)). Rather, if the accomplice's advice or encouragement "'is rendered to induce another to commit the crime and actually has this effect, no more is required.'" *Id.* (quoting R. Perkins, *Criminal Law*, *supra*, 659). "'One may . . . encourage a crime by merely standing by for the purpose of giving aid to the perpetrator if necessary, provided the latter is aware of this purpose.'" *Id.* (quoting R. Perkins, *Criminal Law*, *supra*, 659).

Rodriguez's Sufficiency Challenge

Rodriguez argues that the evidence was not sufficient for the court to find him guilty beyond a reasonable doubt of aiding and abetting first-degree rape. [At 9]. "Rather than a diabolical plan to commit rape," Rodriguez argues, the evidence demonstrates merely that he "provided his home to his friend [Ortiz] who hoped to have consensual sex with A." Although "[c]onsensual intercourse . . . may or may not be a crime in this case based on the relative age of the parties," he argues, "it certainly was not

[7] The *Owens* Court stated that it was quoting the comment to MPJI-Cr 6:01, but the quoted language currently appears in the comment to MPJI-Cr 6.00.

the crime of first degree rape."[8] Citing his video as proof that the encounter was consensual at the time when he recorded it, Rodriguez maintains that he "never knew, and never could have known," that Ortiz intended "to commit a forcible rape, because [Ortiz] himself did not know that he was going to commit a forcible rape until the moment A. withdrew her consent to intercourse[,] sometime after" the video was recorded. In his view, after looking at the video in light of the other evidence, "there is no way a rational factfinder could find beyond a reasonable doubt . . . that a forcible rape was occurring or would occur in the near future."

Rodriguez argues that, even if the evidence is sufficient to establish his presence during the rape, in the sense that he "was nearby," the State had no evidence to establish that he committed "an act in furtherance of first degree rape with the intent that the rape be committed." According to Rodriguez, the "most that can be said here is that Rodriguez aided and abetted" what he calls "consensual intercourse between [Ortiz] and A."[9]

As detailed in the trial record, the State's successful theory was that Rodriguez aided and abetted an "incapacitation" modality of second-degree rape that escalated into a second-degree forcible rape and then into the "strangulation and serious physical injury"

[8] Viewing the evidence in this case in the light most favorable to the State, it is difficult to imagine how A. could have "consented" to a sexual encounter with anyone, given the extent of her intoxication. CL § 3-307(a)(2).

[9] As for whether A. was actually capable of "consenting" to a sexual encounter, *see supra* n.8.

modality of first-degree rape in the half hour after the brief video ended. We hold that the evidence is sufficient to support those findings and verdicts.

As a threshold matter, we reject Rodriguez's claim that his video undercuts his convictions. The video does not establish that the encounter between A. and Ortiz was consensual at that point. To the contrary, the trial court found that, although A. is shown "physically express[ing] affection for" Ortiz, her "inebriated state" meant that she was "mentally incapacitated," so that she could not validly consent to the ensuing vaginal intercourse and fellatio.

The court specifically credited the evidence that, while she was still in the kitchen with Rodriguez and Ortiz, A. drank five or six shots of vodka, which resulted in a blood-alcohol content that climbed as high as .20, "between two and three times the legal limit of alcohol intoxication." A., who had never previously drank alcohol of any sort, testified that before she left the kitchen, she felt "dizzy" and "very drunk," and as though "her body didn't have any energy." She had trouble walking, and she asked to go home. Instead, Ortiz took her by the waist and led her into the bedroom. Even though the court found that she was able to walk and speak when the video began at 3:26 a.m., it also found that she was "in a mentally inebriated state" while she was "physically express[ing] affection for" Ortiz. The court also found that over the next 30 minutes her condition deteriorated to the point that she became physically helpless and unable to resist.

This evidence supports the court's finding that before the video was taken A. was incapacitated by her alcohol intake, so that she was already "substantially incapable of . .

. appraising the nature of [her] conduct" and that thereafter, between 3:30 a.m. and 4:00 a.m., she became "physically unable to resist, or communicate unwillingness to submit to" sexual activity. *See* CL § 3-301(b), (c). For that reason, the video does not establish that A. somehow consented to sexual intercourse with Ortiz.

Even if the video shows that the intoxicated, 15-year-old A. was willing to have sexual contact with Ortiz at some point during their encounter, we are not persuaded that the video is the instrument of acquittal that Rodriguez maintains it is. If, as Rodriguez insisted at trial, he did not watch that video, then it cannot have influenced his view of what was going on in his bedroom. Nor can the video negate the fact that Rodriguez witnessed A.'s alcohol consumption, her ensuing intoxication, and her request to go home before Ortiz led her into Rodriguez's bedroom.

Most importantly, nothing in the video prevented the trial court from finding that Rodriguez was aware that Ortiz was forcibly raping the incapacitated and helpless A. while inflicting serious physical injuries on her. To the contrary, in the seconds before that video ends, A. can be heard through a closed window saying "no" and "that hurts." The video does not reveal what Rodriguez perceived after it ended, during the ensuing half hour while Ortiz brutalized A. in a room close enough to Rodriguez that he could hear the voices (and presumably the cries) of the persons inside.

Based on its consideration of all the evidence, including the video that it watched three times, the trial court found that Rodriguez aided and abetted what began as a second-degree rape of an incapacitated victim who was incapable of consent, became a forcible second-degree rape, and ultimately became a first-degree rape by strangulation

and the infliction of serious personal injury. *See* CL § 3-303(a)(2). As Rodriguez tacitly concedes, the DNA match between Ortiz and the sperm recovered from A. together with the injuries catalogued by the SAFE nurse, are sufficient to establish that Ortiz committed second-degree rape against an incapacitated person (CL § 3-304(a)(2)), second-degree rape by force without consent (CL § 3-304(a)(1)), and first-degree rape (by intercourse and fellatio) by "strangl[ing]" and "inflict[ing] serious physical injury on A. . . . in the course of committing the crime" (CL § 3-303(a)(2)(ii)).

Although the trial court concluded that the State did not prove beyond a reasonable doubt that Rodriguez himself raped A., the court found that he aided and abetted Ortiz in committing first-degree rape. As the trial court's remarks establish, the State's theory of prosecution was that Rodriguez aided and abetted Ortiz in committing first-degree rape, by facilitating his friend's access to a victim incapacitated by the alcohol that they served her, ignoring what was happening while a forcible rape was taking place in his own bedroom, and later taking steps to try to ensure that Ortiz got away with the crime.

The evidence supports those findings and verdicts. As the trial court emphasized, Rodriguez assisted in causing A. to become "mentally incapacitated" and "physically helpless," under the influence of the five or six shots of vodka that he and Ortiz served her. Rodriguez facilitated the forcible rape by summoning A.; hosting the encounter at his house; making his bedroom available to Ortiz; disregarding the intoxicated victim's protest and request to go home while Ortiz was leading her into the bedroom; surreptitiously and voyeuristically recording what was happening in his bedroom (until

A. said "no" and "that hurts"); sitting by silently, steps away, as he became aware that Ortiz was forcibly raping A., inflicting serious physical injury upon her, and undoubtedly causing her to suffer extreme pain; and assisting Ortiz in dressing the grievously injured victim and removing her from the crime scene. The court reasonably inferred from this evidence that Rodriguez did not intend to facilitate a consensual sexual encounter between his good friend and A., but (in the court's words) the "conquest" of an inexperienced girl at least six years younger, whose intoxication rendered her "incapable of . . . appraising the nature of [her] conduct" and made her "physically unable to resist" so brutal a rape that Rodriguez had to be aware of "what was going on."

Accordingly, we are not persuaded by Rodriguez's view of cherry-picked evidence that he lacked the requisite intent for first-degree rape because he had no idea that Ortiz would forcibly rape A. after his initial "consensual" activity. Because Rodriguez knew that A. was severely intoxicated, his intent was patently to aid and abet Ortiz in having nonconsensual sex with an incapacitated 15-year-old. He continued to support Ortiz as the sexual encounter escalated from second-degree "incapacity" rape to a second-degree forcible rape, and then to a first-degree "serious physical injury" rape. Because Rodriguez must have known A. was being forcibly raped, he facilitated the rape by allowing Ortiz to continue using his bedroom, thereby giving aid to the perpetrator during the commission of the crime. He also facilitated the rape by waiting outside until the crime had been completed, so that he could assist Ortiz in disposing of the victim. *See Pope v. State*, 284 Md. at 332 (stating that one may "encourage a crime by merely

standing by for the purpose of giving aid to the perpetrator if necessary, provided the latter is aware of this purpose").

Here, the evidence is sufficient to establish Rodriguez's intent to facilitate Ortiz's sexual intercourse with a person who he knew was incapacitated or helpless (i.e., the primary crime of second-degree rape). From that evidence, the trial court could reasonably conclude that Rodriguez was complicit in the ensuing vaginal intercourse and fellatio, which involved the infliction of serious personal injury (i.e., the secondary or "incidental" crime of first-degree rape). *Sheppard v. State*, 312 Md. at 121-22. Alternatively, the court could infer that Rodriguez "knew what was going on" in his bedroom and that he intentionally facilitated the first-degree rape by not intervening, as he had the right and ability to do, but by continuing to afford Ortiz the time and space to complete that crime.[10]

II. Challenges to the Grounds Cited by the Trial Court for Guilty Verdicts

In an alternative challenge to the guilty verdicts, Rodriguez contends that "the trial court misapplied the law of second degree incapacity rape" and that its "findings of fact . . . do not support convictions for aiding and abetting first degree rape." The State counters that Rodriguez failed to preserve these contentions by failing to lodge them

[10] In arguing that the evidence was sufficient to support Rodriguez's convictions for aiding and abetting first-degree rape, the State relies, in part, on A.'s testimony that Rodriguez himself raped her. In evaluating the sufficiency of the evidence that Rodriguez aided and abetted Ortiz in committing first-degree rape, we do not consider A.'s testimony that Rodriguez himself raped her, because the court granted motions for judgment of acquittal on the counts charging that Rodriguez committed first-degree rape by means of vaginal intercourse and fellatio.

when the trial court rendered its bench verdict. *See* Md. Rule 8-131(a); *Chisum v. State*, 227 Md. App. 118, 139-40 (2016). Rodriguez concedes that neither allegation of error is preserved, but asks for plain error review.

"'[A]ppellate invocation of the "plain error doctrine" 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *Winston v. State*, 235 Md. App. 540, 567 (2018) (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003)). The following four conditions must be met before an appellate court will reverse for plain error:

1. There must be a legal error that has not been intentionally relinquished or abandoned by the appellant.

2. The error must be clear or obvious, and not subject to reasonable dispute.

3. The error must have affected the appellant's substantial rights, which in the ordinary case means that it affected the outcome of the proceedings.

4. If the previous three parts are satisfied, the appellate court has discretion to remedy the error, but it should exercise that discretion only if the error affects the fairness, integrity or reputation of judicial proceedings.

Id. (citation omitted).

"Meeting all four conditions is, and should be, difficult." *Id.* at 568.

"Because each one of the four conditions is, in itself, a necessary condition for plain error review," the appellate court may choose not to" review the unpreserved error if any one of the four has not been met." *Id.* "For the same reason, the court's analysis need not proceed sequentially through the four conditions; instead, the court may begin with any one of the four and may end its analysis if it concludes that that condition has not been met." *Id.*

In this case, we choose not to review the unpreserved objection, because we see no error, much less plain error. Rodriguez seems to argue that a second-degree "incapacity" rape, which Ortiz was found to have committed, cannot devolve into a first-degree forcible rape. Even if that were true, Rodriguez fails to recognize that the court also found that Ortiz committed a second-degree forcible rape. The second-degree forcible rape was transformed into a first-degree rape because Ortiz strangled A. and inflicted serious physical injury upon her.

Rodriguez's remaining arguments are a reworking of his challenges to the factual underpinnings for the court's decision. We reject those arguments for the same reason that we rejected his challenge to the sufficiency of the evidence.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.