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Recent Development: Brooks v. State: Extrinsic Evidence of a Prior Inconsistent Oral Statement Must Be Verbatim Unless Previously Adopted or Ratified by the Declarant; A Witness' Statement Suggesting Evidence Corroborated a Complainant's Story May Be Harmless Error if Not Intended to Imply Truthfulness; Separate Charges Must Be Merged for Sentencing if Not Unambiguously Based on Different Acts

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RECENT DEVELOPMENT

***BROOKS V. STATE*: EXTRINSIC EVIDENCE OF A PRIOR INCONSISTENT ORAL STATEMENT MUST BE VERBATIM UNLESS PREVIOUSLY ADOPTED OR RATIFIED BY THE DECLARANT; A WITNESS' STATEMENT SUGGESTING EVIDENCE CORROBORATED A COMPLAINANT'S STORY MAY BE HARMLESS ERROR IF NOT INTENDED TO IMPLY TRUTHFULNESS; SEPARATE CHARGES MUST BE MERGED FOR SENTENCING IF NOT UNAMBIGUOUSLY BASED ON DIFFERENT ACTS.**

By: Stephanie Lurz

The Court of Appeals of Maryland held that a witness may not be impeached with evidence of a prior inconsistent oral statement unless the evidence is substantially verbatim or has previously been adopted or ratified by the witness as an accurate summary of their prior oral statement. *Brooks v. State*, 439 Md. 698, 98 A.3d 236 (2014). The court also held that a statement of a witness suggesting that a physical examination of the complainant was consistent with the complainant's story does not necessarily imply that the complainant's story was truthful. *Id.* at 702, 98 A.3d at 238. Finally, if the facts are unclear as to whether a jury's verdicts on separate charges are based on different acts, the convictions must be merged for the purposes of sentencing. *Id.*

One evening, Laura B. awakened to find Wendall Monroe Brooks, a handyman who worked for Laura B. in the past, standing beside her bed. He demanded that she have sex with him. When she refused, he beat and choked her. Laura B. stated she would comply with his demands if she could take a break. She went downstairs and he followed her around the house. After a few minutes, they returned to the bedroom where he raped her. This continued until she was eventually able to call the police, who dispatched officers to the scene. The first officer to arrive, Deputy Faby, spoke to Laura B. and took notes, which he later used to write a police report. In his report, Deputy Faby stated that Laura B. indicated she invited Brooks into her home. She was transported to the hospital, where a forensic nurse examined her.

During the trial, the defense moved to admit Deputy Faby's police report into evidence to impeach Laura B. on her testimony that she awoke to find Brooks in her home, uninvited. The trial court denied the motion. The defense also objected to the statement of the forensic nurse that Laura B.'s injuries "would verify" her testimony. The trial court overruled the defense's objection. *Id.*

After a five-day trial in the Circuit Court for Harford County, Brooks was convicted of first-degree rape, false imprisonment, and other related crimes. He was sentenced to life imprisonment with all but fifty years suspended for

first-degree rape. Brooks was also sentenced to a consecutive forty-year sentence for false imprisonment, with all but twenty years suspended. Brooks appealed to the Court of Special Appeals of Maryland, which affirmed. Brooks filed a petition for writ of certiorari, which the Court of Appeals of Maryland granted.

The court began its analysis by determining whether the trial court should have admitted Deputy Faby's police report into evidence. *Brooks*, 439 Md. at 709, 98 A.3d at 242. Maryland Rule 5-616 permits both testimonial and written extrinsic evidence of a prior inconsistent oral statement for impeachment purposes. *Id.* 439 Md. at 715-16, 98 A.3d at 245-46. Rule 5-613 provides that such evidence may be admitted if the declarant: (1) is made aware of the statement's content and circumstances under which it was made; (2) is given the opportunity to admit or deny the statement; (3) has not admitted to making the statement; and (4) the statement concerns a non-collateral matter. *Id.* at 717, 38 A.3d at 246-47. The court acknowledged that these requirements were met in this case. *Id.* However, under common law, written extrinsic evidence of a prior inconsistent statement must be a verbatim version or otherwise signed or adopted by the declarant. *Id.* at 719-720, 98 A.3d at 247-248. As the defense did not establish Deputy Faby's report to be a substantially verbatim version of Laura B.'s statement or that she adopted it, the court held that the police report was properly excluded. *Id.* at 727, 98. The court noted that if the defense had, in the alternative, elected to use Deputy Faby's testimony in lieu of his report, it would have been admissible under Rule 5-613(b). *Id.* at 718, 98 A.3d at 247.3d at 253.

The Court of Appeals of Maryland then considered the question of whether the trial court properly admitted the nurse's statement. *Brooks*, 439 Md. at 727, 98 A.3d at 253. Previously, the court held that "a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth." *Id.* at 730, 98 A.3d at 254 (quoting *Bohnert v. State*, 312 Md. 266, 278, 539 A.2d 657, 663 (1988)). In its analysis, the court recognized that the prosecutor's question of whether Laura B.'s statements were consistent with her injuries was appropriate. However, the nurse's response that the injuries "would verify" what Laura B. told her could suggest an evaluation of Laura B.'s truthfulness. *Id.* at 734, 98 A.3d at 256. The court reasoned that the nurse's use of the word "would" before "verify" implied that her statement was intended to suggest the injuries were consistent with her knowledge of what happened, not that Laura B.'s story was truthful. *Id.* at 734, 98 A.3d at 256-57. The court also noted that even if the trial court erred by not striking the nurse's response, it would be harmless error, given the weight of the other evidence. *Id.* at 736, 98 A.3d at 258.

The court concluded its analysis by addressing whether the trial court should have merged the false imprisonment conviction with the first-degree rape conviction for sentencing purposes. *Brooks*, 439 Md. at 736-7, 98 A.3d at 258. The court noted the paramount purpose of merging convictions is to protect the defendant from double jeopardy in accordance with the Fifth

Amendment and Maryland common law. *Id.* at 737, 98 A.3d at 258 (citing *Nicolas v. State*, 426 Md. 385, 400, 44 A.3d 396 (2012)). The protections require the merger of sentences if two conditions are met: (1) the convictions are based on the same act or acts; and (2) according to the required evidence rule, the offenses are essentially the same or one offense is a lesser-included offense of the other. *Id.* at 737, 98 A.3d at 258 (citing *State v. Lancaster*, 332 Md. 385, 391, 631 A.2d 453 (1993)).

The Court of Special Appeals of Maryland previously held that false imprisonment merges into a rape conviction, as the three elements of false imprisonment are also elements of first-degree rape. *Brooks*, 439 Md. at 737-38, 98 A.3d at 258-59 (citing *Hawkins v. State*, 34 Md. App. 82, 92, 366 A.2d 421 (1976)). However, the court also noted “confinement after or before the rape is committed would preclude the merger.” *Id.* (quoting *Hawkins*, 34 Md. App. at 92, 366 A.2d at 421). In this case, the basis for the jury’s decision was not apparent. *Id.* at 739, 98 A.3d at 260.

Laura B. testified that Brooks threatened and attacked her before he raped her and followed her throughout the house, refusing to let her leave, after he raped her. *Brooks*, 439 Md. at 739, 98 A.3d at 259-60. This could support the notion that the false imprisonment charges stem from acts that occurred before or after the rape. *Id.* However, the prosecutor insinuated during closing arguments that the false imprisonment began when Brooks first appeared in Laura B’s bedroom. *Id.* at 741, 98 A.3d at 261. The court stated it must resolve such ambiguities of fact in the defendant’s favor, and held that the false imprisonment conviction should have been merged with the first-degree rape conviction. *Id.* at 741, 98 A.3d at 262.

In *Brooks v. State*, the Court of Appeals of Maryland affirmed two decisions of the lower courts. First, it affirmed the decision to disallow non-verbatim extrinsic evidence to be used as evidence of an un-adopted prior inconsistent statement. The court also allowed the statement of a witness suggesting that a physical exam verified the story of the complaining witness, holding that the statement did not necessarily imply the truthfulness of the complainant’s story. However, the court reversed the decision of the lower court not to merge separate charges because the record did not show that the jury based its verdict on separate acts of the defendant.

Attorneys should note that prior inconsistent oral statements made to police officers will likely be allowed into evidence through the officer’s testimony but not allowed to be admitted into evidence through police reports. Attorneys should also encourage expert witnesses to restate their answers if their initial response to a question during the trial could be perceived as pertaining to the truthfulness of the complaining witness, especially if the other evidence is insufficient to render the statement as a harmless error. Finally, prosecutors seeking separate sentences for rape and false imprisonment must be careful to establish the separate acts constituting those crimes