Rel: May 29, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-19-0332

Detreile O'Monte Devon Jones

v.

State of Alabama

Appeal from Chambers Circuit Court
(CC-19-352)

KELLUM, Judge.

The appellant, Detreile O'Monte Devon Jones, was convicted of rape in the first degree, a violation of § 13A-6-61, Ala. Code 1975; burglary in the first degree, a violation of § 13A-7-5(a)(2), Ala. Code 1975; assault in the second

degree, a violation of § 13A-6-21, Ala. Code 1975, and sexual abuse in the first degree, a violation of § 13A-6-66, Ala. Code 1975. The circuit court sentenced Jones to 35 years' imprisonment for the rape conviction, 35 years' imprisonment for the burglary conviction, 20 years' imprisonment for the assault conviction, and 10 years' imprisonment for the sexual-abuse conviction. The court ordered that Jones's sentences for the rape, assault, and sexual-abuse convictions were to run concurrently but those sentences to run consecutively with the burglary conviction.

The evidence presented at trial established the following pertinent facts. In 2018, A.O. was living alone in a house in Lanier, Alabama. At some point, the electricity to the house was turned off. A.O. left the house but moved back in and began the process of restoring the electricity to the house. A.O. had "small furniture, like beds, dressers" in the house but no clothes. (R. 24.) The landlord did not know A.O. was living in the house but, A.O. testified, she intended to "call and speak with him the next day prior to the incident." (R. 25.)

Jones lived across the street from the house A.O. was living in, and A.O. had been to Jones's house on many occasions. Jones lived in the house with his girlfriend. On or about September 23, 2018, A.O. asked Jones's girlfriend if A.O. could stay with her and Jones because A.O. had no electricity and could not get it turned back on until the next day. Jones's girlfriend agreed; however, Jones had a problem with A.O. staying the night and asked A.O. to leave. With no other option, A.O. returned to the house across the street to spend the night. A.O. did not know at what time she returned to the house because her cellular telephone had been stolen, but testified that it was dark when she returned to the house.

When A.O. returned to the house, she had a pocketbook with some dirty clothes in it. A.O. laid down on a "pallet" of couch cushions to go to sleep in the front bedroom of the house when she was awakened by Jones and another man who had entered the house. (R. 33.) A.O. told both to leave and when they did she locked the door and laid back down to sleep.

Shortly thereafter, A.O. was awakened again when Jones started to come through the front bedroom window of the house where she was trying to sleep. Jones accused A.O. of stealing

his girlfriend's cellular telephone. They argued "back and forth." (R. 34.) When A.O. noticed that Jones had a knife and brass knuckles, she got up and went to the living room where the front door and her sneakers were located. After she put her sneakers on, A.O. approached the front door but Jones was blocking the door. In order to avoid "things getting ugly," A.O. went back into the bedroom and sat down. (R. 34.) The argument continued in the bedroom while A.O. sat "balled up" on the couch. (R. 35.) A.O. testified:

> "But I just began to pray. And as I'm sitting there, he's telling me that I've been using people and doing different things when I wasn't. And so he proceeded to cut my clothes off from the back. And I'm telling him, Please don't do this; don't do this; you don't have to do this. And as he gets to my pants -- to cut my pants off from the back, then I feel the knife cut me, and I feel the blood running down my leg. And I'm telling him like, You cut me; you cut me. And he's like, No I didn't; no I didn't. And I'm like, Yes, you did, just to get him to not do it. And so he still wouldn't stop...."

(R. 35.)

The next thing A.O. heard was a condom wrapper opening. Jones laid down behind A.O. and inserted his penis in her vagina. A.O. testified that she "tensed up real tight" and slid her body to the front until she could feel A.O. "sliding back out of [her]." (R. 36.) A.O. laid there for "a second"

and Jones stopped. (R. 36.) Jones then got up and left the house. A.O. then quickly wrapped herself in a sweater and ran out of the house to a neighbor's house where she telephoned emergency 9-1-1. The police arrived quickly and A.O. was transported to a hospital where a sexual-assault nurse examiner performed a rape kit. A.O. also received treatment for the cut on her leg that required 13 staples and resulted in an "ugly" permanent scar. (R. 41.) At the State's request, A.O. showed the jury the scar during trial.

A.O. testified that she did not give Jones permission to have sex with her and that she gave Jones no reason to think that the sex was consensual. A.O. stated that she did not try to fight Jones off because Jones had a knife and brass knuckles. A.O. testified that she was wearing "leggings" when Jones attacked her. (R. 38.) While Jones was cutting the leggings off, he touched A.O.'s bottom with his hands.

On cross-examination, A.O. testified that she had known Jones a "fairly good while" and that they spoke "on an everyday basis." (R. 50.) A.O. admitted that she had been arrested in 2015 for unlawful possession of a controlled substance. When asked if Jones had anything to do with the

drugs A.O. was arrested with in 2015, A.O. answered in the affirmative. A.O. denied that she ever had a sexual relationship with Jones. A.O. admitted that she had used drugs with Jones the week before the incident but testified that she was not using drugs or alcohol at the time of the incident. A.O. testified that Jones cut her clothing off from the top to the bottom, including the tight leggings that she was wearing at the time. A.O. testified that she did not "think [Jones] meant to cut [her] on purpose" and that the "knife scraped [her] skin while he was cutting [her] pants off." (R. 60.)

On redirect, a photograph of A.O.'s leg wound was admitted into evidence. A.O. testified that she did not see the knife Jones used but knew it was a pocket knife because "he kept opening and closing it", and "kept clicking it." (R. 72.) A.O. testified that Jones intentionally removed her clothing but did not believe her when she told him that she had been cut and thought that she was lying. Jones argued with A.O. about whether he had cut her. A.O. testified that she had been drug free for a "whole year." (R. 76.)

Sgt. Robert Waldrop with the Lanett Police Department was assigned to investigate the incident. Sgt. Waldrop took

photographs of the inside and outside of the house were the incident occurred. In the front bedroom, Sgt. Waldrop found a used condom, condom wrapper, blood, cut clothing, couch cushions, and A.O.'s pocketbook. Sgt. Waldrop went to the hospital and met with A.O. At first, when Sgt. Waldrop met with A.O., A.O. appeared upset and "shut down emotionally." (R. 115.) A.O. did not make eye contact with Sgt. Waldrop and was not forthcoming with information. Later, after the sexual-assault examination was completed, A.O. made eye contact with Sgt. Waldrop and stated that she was grateful for the assistance of police. After being advised of his Miranda[1] rights, Jones declined to give a statement to police. Sgt. Waldrop recovered a blue pocket knife from Jones's pocket. The knife was submitted to the Alabama Department of Forensic Sciences but the mixture of DNA on the knife blade was not "suitable for comparison purposes." (R. 139-40.)

Jones testified on his own behalf at trial. Jones testified that he and A.O. had used methamphetamine together. According to Jones, A.O. exchanged sex for drugs. Jones testified that on September 23, 2018, A.O. told him to meet

[1]Miranda v. Arizona, 384 U.S. 436 (1966).

her at the house across the street to have sex. Jones testified that he had consensual sex with A.O. and denied cutting A.O. with a knife. Jones testified that he left A.O. after they had sex to get some drugs but that he never returned.

After both sides rested and the circuit court instructed the jury on the applicable principles of law, the jury found Jones guilty of first-degree rape, first-degree burglary, second-degree assault, and sexual abuse in the first degree. This appeal followed.

I.

Jones first contends that there was a fatal variance between the indictment charging him with assault in the second degree under § 13A-6-21(a)(2) and the evidence presented at trial. Specifically, Jones contends that the indictment charged, in pertinent part, that Jones "did with intent to cause physical injury to another person, cause physical injury to another person ... by cutting [A.O.] with a knife" but the evidence at trial showed that Jones did not intentionally cut A.O. (Jones's brief, p. 8.) Jones cites three instances at trial when A.O. testified that she did not believe that Jones

meant to cut her on purpose. The record indicates that Jones never raised this issue before the circuit court but presents this argument for the first time on appeal.

> "In Shouldis v. State, 953 So. 2d 1275, 1283 (Ala. Crim. App. 2006), this Court held that issues relating to a variance between an indictment and the proof presented at trial must be raised at trial. Specifically, this Court held that 'issues as to a variance between the indictment and proof ... are not preserved for review where they are not raised at trial.' Id."

Spradley v. State, 128 So. 3d 774, 795 (Ala. Crim. App. 2011).

Because Jones did not first raise this issue in the circuit court and preserve the issue he now raises on appeal, he is not entitled to any relief.

To the extent Jones argues that the circuit court erred by denying his motion for a judgment of acquittal based on the State's failure to present evidence that Jones intended to cause physical injury, Jones is not entitled to relief.

> "'"In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution."' Ballenger v. State, 720 So. 2d 1033, 1034 (Ala. Crim. App. 1998), quoting Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985). '"The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the

evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt."' Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997), quoting O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992). '"When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision."' Farrior v. State, 728 So. 2d 691, 696 (Ala. Crim. App. 1998), quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990). 'The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury.' Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978).

> "'The trial court's denial of a motion for judgment of acquittal must be reviewed by determining whether there was legal evidence before the jury at the time the motion was made from which the jury by fair inference could find the defendant guilty. Thomas v. State, 363 So. 2d 1020 (Ala. Cr. App. 1978). In applying this standard, this court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala. Cr. App. 1983). When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for judgment of acquittal does not constitute error. McConnell v. State, 429 So. 2d 662 (Ala. Cr. App. 1983).'"

Gavin v. State, 891 So. 2d 907, 974 (Ala. Crim. App. 2003), cert. denied, 891 So. 2d 998 (Ala. 2004)(quoting Ward v. State, 610 So. 2d 1190, 1191 (Ala. Crim. App. 1992)).

Under § 13A-6-21(a)(2), Ala. Code 1975, a person commits assault in the second degree if "[w]ith intent to cause physical injury to another person, he or she causes physical injury to any person by means of a deadly weapon or a dangerous instrument." This Court has stated, "intent, ... being a state or condition of the mind, is rarely, if ever, susceptible of direct or positive proof, and must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence." Connell v. State, 7 So. 3d 1068, 1090 (Ala. Crim. App. 2008) (internal citations omitted). The question of intent is generally a matter for determination by the finder of fact. See Rivers v. State, 624 So. 2d 211, 213 (Ala. Crim. App. 1993)(stating "the question of intent is always a jury question").

The evidence, when viewed in a light most favorable to the State, established that Jones entered the house where A.O. was sleeping. Jones, who was carrying a knife, approached A.O., who saw the knife, "balled up," and began to pray. Jones

used the knife to cut off A.O.'s leggings. A.O. begged Jones to stop, but Jones continued. A.O. sustained a large wound to her leg that required 13 staples. A.O. showed the scar to the jury. Although A.O. testified that she did not believe that Jones cut her on purpose, A.O.'s testimony was not the only evidence before the jury at trial. To the extent that the evidence regarding Jones's intent to cut A.O. was conflicting, the conflicting evidence merely created a question for the jury. See Waddle v. State, 473 So. 2d 580, 582 (Ala. Crim. App. 1985)("[W]e have held that, where there is a conflict in the evidence, the inferences to be drawn from the evidence, the weight of the evidence, and the credibility of the witnesses are all questions for the jury." (citations omitted)). Therefore, this issue does not entitle Jones to any relief.

II.

Jones also contends that his conviction for both rape in the first degree and sexual abuse in the first degree violated double-jeopardy principles because, he argues, both offenses arose from the same set of facts involving the same victim. Although Jones did not raise this issue in the circuit court,

the issue implicates the jurisdiction of the circuit court; therefore, the issue may be raised for the first time on appeal. See Ex parte Benefield, 932 So. 2d 92 (Ala. 2005)(holding that Benefield's claim that he could not be convicted of both first-degree rape and the lesser-included offense of first-degree sexual abuse arising out of the same act presented a jurisdictional issue).

> "Section 13A-1-8(b)(1), Ala. Code 1975, provides that '[w]hen the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if ... [o]ne offense is included in the other, as defined in Section 13A-1-9.' Section 13A-1-9(a), Ala. Code 1975, provides:
>
> > "'(a) A defendant may be convicted of an offense included in an offense charged. An offense is an included one if:
> >
> > > "'(1) It is established by proof of the same or fewer than all the facts required to establish the commission of the offense charged; or
> > >
> > > "'(2) It consists of an attempt or solicitation to commit the offense charged or to commit a lesser included offense; or
> > >
> > > "'(3) It is specifically designated by statute as a lesser degree of the offense charged; or

> "'(4) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interests, or a lesser kind of culpability suffices to establish its commission.'

"In Ford v. State, 612 So.2d 1317 (Ala. Crim. App. 1992), this Court explained:

> "'"'[T]o be a lesser included offense of one charged in an indictment, the lesser offense must be one that is necessarily included, in all of its essential elements, in the greater offense charged[,]' Payne v. State, 391 So. 2d 140, 143 (Ala. Cr. App.), writ denied, 391 So. 2d 146 (Ala. 1980), ... unless it is so declared by statute.'
>
> "'James v. State, 549 So. 2d 562, 564 (Ala. Cr. App. 1989). "Whether a crime constitutes a lesser-included offense is to be determined on a case-by-case basis." Aucoin v. State, 548 So. 2d 1053, 1057 (Ala. Cr. App. 1989). "In determining whether one offense is a lesser included offense of the charged offense, the potential relationship of the two offenses must be considered not only in the abstract terms of the defining statutes but must also ... in light of the particular facts of each case." Ingram v. State, 570 So. 2d 835, 837 (Ala. Cr. App. 1990) (citing Ex parte Jordan, 486 So. 2d 485, 488 (Ala. 1986); emphasis in original). See also Farmer v. State, 565 So. 2d 1238 (Ala. Cr. App. 1990).'

> "612 So. 2d at 1318. The 'particular facts' of each case are those facts alleged in the indictment. Thus, 'the statutory elements of the offenses and facts alleged in an indictment -- not the evidence presented at trial or the factual basis provided at the guilty-plea colloquy -- are the factors that determine whether one offense is included in another.' Johnson v. State, 922 So. 2d 137, 143 (Ala. Crim. App. 2005)."

Williams v. State, 104 So. 3d 254, 263-64 (Ala. Crim. App. 2012).

At the time of the crime, § 13A-6-61(a)(1), Ala. Code 1975, stated that "[a] person commits the crime of rape in the first degree if ... [h]e or she engages in sexual intercourse with a member of the opposite sex by forcible compulsion."[2] The indictment charged that Jones "did engage in sexual intercourse with a female, to wit: [A.O.], by forcible compulsion, in violation of Section 13A-6-61 of the Code of Alabama against the peace and dignity of the State of Alabama." (C. 9.)

[2]Section 13A-6-61, Ala. Code 1975, was amended effective September 1, 2019, see Act No. 2019-465, Ala. Acts 2019. "It is well settled that the law in effect at the time of the commission of the offense controls the prosecution." Stewart v. State, 990 So. 2d 441, 442 (Ala. Crim. App. 2008).

At the time of the crime, § 13A-6-66(a)(1), Ala. Code 1975, provided that "[a] person commits the crime of sexual abuse in the first degree if ... [h]e subjects another person to sexual contact by forcible compulsion."[3] The indictment charged that Jones "did subject another person, to wit: [A.O.] to sexual contact by forcible compulsion, in violation of § 13A-6-66(a)(1) of the Code of Alabama against the peace and dignity of the State of Alabama." (C. 9.)

In King v. State, 574 So. 2d 921 (Ala. Crim. App. 1990), this Court addressed whether sexual abuse in the first degree was a lesser-included offense of rape in the first degree:

> "We recognize that sexual abuse in the first degree requires intent, which is not required for rape in the first degree. That alone does not mean that sexual abuse in the first is not a lesser included offense of rape in the first degree. Several decisions by this court imply that sexual abuse in the first degree is a lesser included offense of rape in the first degree. See Young v. State, 453 So. 2d 1074 (Ala. Cr. App. 1984); Lewis v. State, 439 So. 2d 1357 (Ala. Cr. App. 1983); Myers v. State, 401 So. 2d 288 (Ala. Cr. App. 1981). We see no reason to depart from this theory.
>
> "After evaluating the appellant's convictions in light of the above cases, we find that the appellant could not be convicted of sexual abuse in the first

[3]Section 13A-6-66, Ala. Code 1975, was amended effective September 1, 2019. See Act No. 2019-465, Ala. Acts 2019.

> degree and rape in the first degree, since sexual abuse in the first degree is a lesser included offense of rape in the first degree."

King, 574 So. 2d at 929.

Similarly, in this case the statutory offenses and the minimal facts as alleged in the indictments charging them lead us to conclude that sexual abuse in the first degree is a lesser-included offense of rape in the first degree. Because Jones was convicted of both a greater offense and a lesser offense included within the greater offense, his convictions for both rape in the first degree and sexual abuse in the first degree violate double-jeopardy principles. Accordingly, Jones's conviction and sentence for sexual abuse in the first degree must be vacated. See, e.g., Gholston v. State, 57 So. 3d 178 (Ala. Crim. App. 2010); Renney v. State, 53 So. 3d 981 (Ala. Crim. App. 2010); Lewis v. State, 57 So. 3d 807 (Ala. Crim. App. 2009); Holloway v. State, 971 So. 2d 729 (Ala. Crim. App. 2006); and Young v. State, 892 So. 2d 988 (Ala. Crim. App. 2004)(noting that the proper remedy when a defendant is convicted of both a greater and a lesser-included offense is to vacate the conviction and the sentence for the lesser-included offense).

III.

Jones also contends that, should this Court decide not to take jurisdictional notice of his double-jeopardy issue, he received ineffective assistance of trial counsel because Jones's trial counsel waived the double-jeopardy claim by not objecting to it below. Because we have held in Jones's favor with regard to the double-jeopardy issue, his ineffective-assistance-of-counsel claim is moot.[4]

IV.

Finally, although not raised by Jones on appeal, we must address the circuit court's imposition of a 20-year sentence for Jones's second-degree-assault conviction. "Matters concerning unauthorized sentences are jurisdictional." Hunt v. State, 659 So. 2d 998, 999 (Ala. Crim. App. 1994). Therefore, this Court may take notice of an illegal sentence at any time. Pender v. State, 740 So. 2d 482, 484 (Ala. Crim. App. 1999). Jones was convicted of assault in the second degree, a Class

[4]Even if the issue was not moot, Jones would not be entitled to relief because he did not first raise the issue in the circuit court. See Montgomery v. State, 781 So. 2d 1007 (Ala. Crim. App. 2000)(recognizing that an ineffective-assistance-of-counsel claim cannot be presented on direct appeal when it has not first been presented to the trial court).

C felony. See § 13A-6-21(b), Ala. Code 1975. A Class C felony is punishable by a term of imprisonment of "not more than 10 years or less than 1 year and 1 day." § 13A-5-6(a)(3), Ala. Code 1975. Because Jones used a deadly weapon during the assault, his sentence was governed by § 13A-5-6(a)(6), Ala. Code 1975, which requires a circuit court to impose a sentence of "not less than 10 years" upon conviction of "a Class B or C felony in which a firearm or deadly weapon was used or attempted to be used in the commission of the felony." The record indicates that Jones was not sentenced as a habitual felony offender. Therefore, Jones's 20-year sentence is not authorized by law.

CONCLUSION

Based on the foregoing, this Court affirms Jones's convictions and sentences for rape in the first degree and burglary in the first degree, and his conviction for assault in the second degree. However, this Court reverses Jones's conviction and sentence for sexual abuse in the first degree and we remand this cause for resentencing on Jones's conviction for assault in the second degree. Due return should

be filed in this Court within 42 days from the date of this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

McCool and Minor, JJ., concur. Windom, P.J., concurs in part and dissents in part, with opinion, which Cole, J., joins.

WINDOM, Presiding Judge, concurring in part and dissenting in part.

I agree with the majority's affirmance of Detreile O'Monte Devon Jones's convictions and sentences for first-degree rape and first-degree burglary and his conviction for second-degree assault. I also agree with the majority's remanding the cause to the circuit court for it to resentence Jones for his conviction for second-degree assault. I disagree, however, with the majority's determination that Jones's conviction for first-degree sexual abuse is due to be vacated because it is a lesser-included offense of first-degree rape.

The majority primarily relies on King v. State, 574 So. 2d 921 (Ala. Crim. App. 1990), in support of its holding that first-degree sexual abuse is a lesser-included offense of first-degree rape and that, therefore, Jones's convictions for those two offenses violate double-jeopardy principles. In King this Court held that "the appellant could constitutionally only be convicted of one count instead of the four counts of which he was convicted here" because the evidence was "clear that only one act took place." King, 574

So. 2d at 930. Yet, the State's evidence in the instant case demonstrated that Jones committed more than one sexual offense against A.O. Thus, I believe this Court's holding in King is inapposite.

As the majority detailed, Jones committed the offense of first-degree rape by engaging in sexual intercourse with A.O. by forcible compulsion, in violation of § 13A-6-61, Ala. Code 1975. I believe that Jones also committed the offense of first-degree sexual abuse, which is proscribed by § 13A-6-66, Ala. Code 1975. At the time of the offense, § 13A-6-66(a)(1), Ala. Code 1975, stated that a "person commits the crime of sexual abuse in the first degree if he ... [s]ubjects another person to sexual contact by forcible compulsion." "Sexual contact" is "[a]ny touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party." § 13A-6-60(3), Ala. Code 1975. It appears to me that the State was careful to elicit testimony that could support Jones's charge of first-degree sexual abuse:

> State: "When he was cutting [your leggings] off, did his hands touch you anywhere? Any of your private areas, on your bottom, your

breasts? Did any of that other -- did any of that kind of thing happen as well?"

A.O.: "He touched my butt."

State: "I'm sorry. I couldn't hear you."

A.O.: "He touched my butt."

State: "He touched your butt. With his hands?"

A.O.: "Yes."

(R. 38-39.) A.O.'s "butt" is an "intimate part." See D.L.R. v. State, 188 So. 3d 720, 729 (Ala. Crim. App. 2015). See also Parker v. State, 406 So. 2d 1036, 1039 (Ala. Crim. App. 1981) ("Common use of the English language would indicate that the term 'intimate parts,' in the context of the statute, refers to any part of the body which a reasonable person would consider private with respect to touching by another."). Jones has not challenged on appeal whether his touching of A.O.'s intimate part was done by forcible compulsion or whether it was done for the purpose of sexual gratification, and, even if he had, those issues were for the jury. See Cobb v. State, 548 So. 2d 620, 622 (Ala. Crim. App. 1989) ("We have commonly held that '"consent, force and intent to gratify the sexual desire of either party are jury questions."'" (quoting

Parrish v. State, 494 So. 2d 705, 709 (Ala. Crim. App. 1985), quoting in turn Hutcherson v. State, 441 So. 2d 1048, 1052 (Ala. Crim. App. 1983))).

Where, as here, "'"there is evidence of separate and distinct acts constituting separate criminal offenses, separate convictions and sentences may be legally had under multiple counts of an indictment."'" Holley v. State, 671 So. 2d 131, 132-33 (Ala. Crim. App. 1995) (quoting Hendrix v. State, 589 So. 2d 769, 772 (Ala. Crim. App. 1991), quoting in turn Terrell v. State, 429 So. 2d 656, 659 (Ala. Crim. App. 1982)). See also Chapman v. State, 64 So. 3d 1133 (Ala. 2010).

Additionally, I do not believe that Jones's claim that trial counsel was ineffective for failing to raise a double-jeopardy claim below, which the majority understandably did not address, entitles him to any relief. Jones did not preserve this issue for review, see Shouldis v. State, 953 So. 2d 1275, 1285 (Ala. Crim. App. 2006), and, regardless, Jones's trial counsel cannot be ineffective for failing to raise a meritless claim. Jackson v. State, 133 So. 3d 420, 455 (Ala.

Crim. App. 2009) (citing Lee v. State, 44 So.3d 1145, 1173 (Ala. Crim. App. 2009)).

I believe that Jones's convictions for first-degree rape and first-degree sexual abuse are based on separate and distinct acts and thus comport with the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Consequently, I believe that the majority incorrectly holds that Jones's conviction for first-degree sexual abuse is a lesser-included offense of first-degree rape and must therefore be vacated. Therefore, I respectfully dissent from that portion of the opinion.

Cole, J., concurs.