MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Christopher Taylor-Price
Taylor-Price Law, LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Megan M. Smith
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Ernesto Lopez-Morales,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 19, 2024

Court of Appeals Case No.
23A-CR-605

Appeal from the
Perry Circuit Court

The Honorable
M. Lucy Goffinet, Judge

Trial Court Cause No.
62C01-2205-F3-269

Memorandum Decision by Judge Foley
Chief Judge Altice and Judge May concur.

Foley, Judge.

[1] A jury found Ernesto Lopez-Morales ("Lopez-Morales") guilty of Level 3 felony rape,[1] Level 6 felony sexual battery,[2] and Level 6 felony criminal confinement.[3] The trial court avoided sentencing Lopez-Morales for the sexual battery conviction to avoid double jeopardy issues, imposing a sentence of ten years for rape with a consecutive one-year sentence for criminal confinement. Lopez-Morales now appeals, presenting the following restated issues:

> I. Whether there was sufficient evidence of sexual intercourse to support the rape conviction where the victim testified that Lopez-Morales "had sex" with her and the State did not elicit testimony about a specific sex act; and
>
> II. Whether the trial court erred by admitting evidence of Lopez-Morales's prior flirtatious and overtly sexual interactions with female coworkers while at work.

[2] Although we identify no error in the admission of evidence, binding caselaw compels us to conclude that, because the State failed to elicit specific testimony about the charged sex act, the State did not prove beyond a reasonable doubt that Lopez-Morales engaged in sexual intercourse, as that term is defined by our legislature. We therefore reverse only the conviction for Level 3 felony rape, and remand with instructions to (1) enter a judgment of conviction upon the guilty verdict for Level 6 felony sexual battery, (2) resolve all sentencing

---

[1] Ind. Code § 35-42-4-1(a)(1).

[2] I.C. § 35-42-4-8(a)(1)(A).

[3] I.C. § 35-42-3-3(a).

issues in a manner consistent with the guidance in *Sanjari v. State* (*Sanjari III*), 981 N.E.2d 578, 583 (Ind. Ct. App. 2013), and (3) amend the sentencing order and Abstract of Judgment to reflect the proper convictions and sentences thereon.

Facts and Procedural History

[3] In May 2022, the State charged Lopez-Morales with two counts of Level 3 felony rape, two counts of Level 6 felony sexual battery, and two counts of Level 6 felony criminal confinement. All counts related to the alleged abuse of S.M., who worked with Lopez-Morales in the kitchen of a restaurant.

[4] A jury trial was held in January 2023. S.M. testified that she was initially under the impression that Lopez-Morales's marriage was falling apart, and the two of them engaged in a consensual sexual encounter. In September 2021, when S.M. realized the marriage remained intact, she informed Lopez-Morales that they could only be friends and coworkers. Lopez-Morales began harassing S.M. at work. She described how Lopez-Morales would frequently follow her into the walk-in cooler where he touched and groped her against her will. She explained how, "inside the cooler it would either be he would leave a hickey or he would . . . if I was wearing shorts, he would go up from the bottom of my shorts and fondle or touch, if not penetrate with his fingers." Tr. Vol. 2 p. 202.

[5] S.M.'s testimony largely focused on two encounters with Lopez-Morales, one on November 10, 2021, and one on May 7, 2022. As to the November 2021 encounter, S.M. testified that Lopez-Morales met her outside her residence,

instructed her to enter her vehicle, and subjected her to sexual intercourse without her consent. She testified that her teenage daughter opened the vehicle door, at which point Lopez-Morales stopped, exited the vehicle, and left. S.M. later texted Lopez-Morales: "I almost got in trouble tonight[.]" Ex. Vol. p. 28.

[6] As for the May 2022 encounter, S.M. testified that Lopez-Morales was verbally aggressive with staff throughout his shift. Toward the end of the shift, a limited staff consisted only of S.M., Lopez-Morales, and three other people. While S.M. was cleaning and putting away food, Lopez-Morales asked her if everyone else was gone, and S.M. answered affirmatively. He then told S.M.: "Come, I [will] show you something." Tr. Vol. 2 p. 204. S.M. followed Lopez-Morales, believing the interaction related to work. Lopez-Morales grabbed S.M. by the hand and pulled her into the back area of the building. The lights were off, and S.M. noticed a chair positioned so that whoever was sitting there could see the movements of staff throughout the restaurant.

[7] Lopez-Morales sat in the chair and began to rub and kiss S.M. He told her, "I want you[.]" *Id.* at 205. When S.M. told him to stop and that she was tired, Lopez-Morales told her to be quiet or else. He reached up her shorts and inserted his fingers into her vagina. Eventually, Lopez-Morales stood and led S.M. into a dark room, closing the door behind them. He then pulled her shorts down. During the exchange, S.M.'s glasses fell off her face, she dropped her phone, and she kept saying she "didn't want it[.]" *Id.* S.M. said that, at that point, Lopez-Morales "took what he wanted," and she "just wanted it to end so

[she] could go home." *Id.* at 205–06. When asked to clarify what she meant by "he took what he wanted," S.M. testified: "He had sex with me." *Id.* at 206.

[8] The next day, S.M. told a coworker about what happened with Lopez-Morales. S.M. told the coworker, "it was more than the cooler incidents, more than a hickey," and that Lopez-Morales had "raped" her. *Id.* at 209. The coworker told the owner of the restaurant, who helped S.M. get in touch with the police.

[9] At one point, the State asked S.M. whether she saw Lopez-Morales fondling anyone else at work. Lopez-Morales objected, and the trial court overruled the objection. S.M. testified that she saw Lopez-Morales "slapping [coworkers] on the bottoms" and grabbing "[t]he butts of the females, pinching." *Id.* at 196. She also heard Lopez-Morales interacting inappropriately with coworkers. She said these interactions took place "[d]aily," with Lopez-Morales "catcalling, whistling, describing what he would think a female's body parts would look like." *Id.* When the State asked if S.M. had seen Lopez-Morales follow other female coworkers, she answered affirmatively, testifying: "I would see another female walk through the kitchen and she would be doing things, and sometimes . . . they both would disappear." *Id.* She added: "I never thought of anything and then one day he came out of the [back] and was . . . smelling his fingers" and he "made comments in regards to what a female's area smelled like[.]" *Id.* Over Lopez-Morales's objections, the State also questioned other restaurant employees regarding how Lopez-Morales interacted with female coworkers.

[10] The jury found Lopez-Morales guilty of the three counts associated with the May 2022 encounter in the back of the restaurant, but not guilty of the three counts associated with the November 2021 encounter outside S.M.'s residence. At a sentencing hearing, the trial court imposed no sentence for the sexual battery count due to the State's concerns that the conduct was "inherent in the rape[.]" Tr. Vol. 3 p. 66. The trial court ultimately imposed an aggregate sentence of eleven years, consisting of ten years in the Indiana Department of Correction for Level 3 felony rape, with a consecutive one-year suspended sentence for Level 6 felony criminal confinement. Lopez-Morales now appeals.

Discussion and Decision

I. Sufficiency of the Evidence of Rape

[11] Lopez-Morales challenges the sufficiency of the evidence supporting his conviction for Level 3 felony rape. As the Indiana Supreme Court recently explained, challenges to the sufficiency of the evidence "trigger a deferential standard of appellate review, in which we 'neither reweigh the evidence nor judge witness credibility, instead reserving those matters to the province of the jury.'" *Owen v. State*, 210 N.E.3d 256, 264 (Ind. 2023) (quoting *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018)). In conducting our review, "[w]e consider only 'the probative evidence and reasonable inferences supporting the verdict.'" *Id.* (quoting *Matheney v. State*, 583 N.E.2d 1202, 1208 (Ind. 1992)). "We will affirm a conviction if there is substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt." *Powell v. State*, 151 N.E.3d 256, 263 (Ind. 2020).

[12] Under Indiana Code Section 35-42-4-1(a), a person commits Level 3 felony rape if the person "knowingly or intentionally has sexual intercourse with another person or knowingly or intentionally causes another person to perform or submit to other sexual conduct" when "the other person is compelled by force or imminent threat of force[.]" In the charging information, the State specifically alleged that, on or about May 7, 2022, Lopez-Morales committed Level 3 felony rape because he "knowingly or intentionally ha[d] sexual intercourse" with S.M. in that he "used force to pull her into a small room and by force placed his penis into her vagina." Appellant's App. Vol. II p. 69.

[13] On appeal, Lopez-Morales points out that, although the pertinent criminal statute contemplates a conviction based on "sexual intercourse" *or* "other sexual conduct," the charging information alleged only that "sexual intercourse" occurred during the May 2022 sexual encounter. He directs us to the statutory definition of "sexual intercourse," i.e., "an act that includes any penetration of the female sex organ by the male sex organ." Ind. Code § 35-31.5-2-302. This statute "does not require that the vagina be penetrated, only that the female sex organ be penetrated." *Mastin v. State*, 966 N.E.2d 197, 202 (Ind. Ct. App. 2012), *trans. denied*. Thus, "[p]enetration of the external genitalia, or vulva, is sufficient to support an unlawful sexual intercourse conviction." *Id.* "Penetration can be inferred from circumstantial evidence." *Id.* (citing *Pasco v. State*, 563 N.E.2d 587, 590 (Ind. 1990)). Furthermore, it is well-established that "[t]he uncorroborated testimony of a rape victim is sufficient to support a conviction." *Parrish v. State*, 516 N.E.2d 69, 70 (Ind.

1987). "However, the prosecution, having the burden of proof, has the responsibility to [en]sure that the testimony of the witness is clear on the issue of sexual intercourse." *Id.* (citing *Chew v. State*, 486 N.E.2d 516, 519 (Ind. 1985)).

[14] Lopez-Morales claims the State's evidence was insufficient to prove beyond a reasonable doubt that "sexual intercourse" occurred, as specifically alleged in the charging information and defined by statute. He focuses on S.M.'s testimony that he "took what he wanted," which she clarified to mean: "He had sex with me." Tr. Vol. 2 pp. 205–06. Directing us to two cases, *Chew*, 486 N.E.2d at 518–19 and *Lambert v. State*, 516 N.E.2d 16 (Ind. 1987), he argues that his Level 3 felony conviction must be reversed.

[15] In *Chew*, our Supreme Court reversed a conviction for rape premised on sexual intercourse because, in that case, the victim's testimony about the sexual encounter "would simply leave serious doubt in the mind of any reasonable [person] as to the manner in which she was violated." 486 N.E.2d at 518. *Chew* involved broad testimony that the defendant "made love to [the victim] from the back." *Id.* Later, in *Lambert*, our Supreme Court looked to *Chew* and reversed a rape conviction where the State elicited nonspecific testimony about sexual intercourse. 516 N.E.2d at 21. There, the victim testified that the defendant "got on top of her and then "he had sex[.]" *Id.* at 20. The State's failure to present evidence on the specific act of sexual intercourse in *Chew* and *Lambert* is substantially similar to this case, where the State did not seek

clarification about the specific sex act the victim was referring to when she said Lopez-Morales "had sex" with her.

[16] In defending the Level 3 felony rape conviction, the State claims that "the only reasonable understanding of S.M.'s testimony" was that "Lopez-Morales compelled S.M. to submit to sexual intercourse[.]" Appellee's Br. p. 18. But this argument overlooks that the phrase "had sex" encompasses sex acts other than vaginal penetration by the male sex organ. Indeed, the Merriam-Webster dictionary does not define "sex" as only "sexual intercourse," but first provides a broad definition encompassing any "sexually motivated phenomena or behavior." *Sex*, *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/sex [https://perma.cc/8UR2-CYG3]. And although the State cited a thesaurus entry for the phrase "had sex" that indicates this phrase can be understood to mean "to engage in sexual intercourse," the thesaurus entry also lists other synonyms, including the broad phrase "fooled around." *Had Sex*, *Merriam-Webster Online Thesaurus*, https://www.merriam-webster.com/thesaurus/had%20sex [https://perma.cc/PJ5T-CE24].

[17] The State attempts to distinguish *Chew* and *Lambert* by noting that those cases involve at least some equivocal or confusing testimony from the victim whereas, here, "S.M.'s testimony was not equivocal or confusing[.]" Appellee's Br. pp. 18–19. For example, (1) *Chew* involved the victim's inability to "describe the intercourse," along with testimony that the victim did not know the meaning of the phrases "vaginal intercourse" or "vaginal sex," 486 N.E.2d at 518, and (2) *Lambert* involved the victim's testimony that she "really couldn't

say for sure" how long the defendant was on top of her, and that she merely "believe[d]" and "thought" certain things occurred, 516 N.E.2d at 21 (emphases removed)). However, although *Chew* and *Lambert* may be distinguishable due to the presence of equivocation, we cannot accept the State's invitation to skirt the central holding of this binding line of caselaw. That is, through *Chew* and *Lambert*, the Indiana Supreme Court ultimately enforced the strict burden of proof in criminal cases, emphasizing that the State must elicit sufficiently detailed evidence regarding a charged sex act. Indeed, in *Chew*, the Court acknowledged that it was "*probable* that by [the] testimony . . . the victim intended to relate that she had suffered vaginal penetration," but the Court indicated it could not affirm the conviction based on probability alone. 486 N.E.2d at 518. Rather, reversal was necessary because "to infer such" would undermine the applicable burden of proof by "requir[ing] speculation not permitted under the requirement that proof be 'beyond a reasonable doubt.'" *Id.* (noting the testimony "would simply leave serious doubt in the mind of any reasonable man as to the manner in which [the victim] was violated"); *cf. Lambert*, 516 N.E.2d at 21 (adhering to *Chew* and vacating a rape conviction).

[18] The specificity required by *Chew* and *Lambert* is illuminated by caselaw that applied those holdings and identified sufficient evidence of the charged sexual conduct. For example, in *Parrish*, we determined there was sufficient evidence of sexual intercourse when the victim specifically testified that the defendant "took his penis out and merged." 516 N.E.2d at 70–71. There, we acknowledged that "it would certainly have been more precise if the witness

had used terminology such as 'he put his penis in my vagina,'" but we concluded that "the word 'merged' was sufficient to demonstrate the same event given the context in which it was used and the meanings commonly attributed to the word." *Id*. Similarly, in *Crabtree v. State*, we identified sufficient evidence of the specific charged acts when the victim used clearly defined terminology—i.e., "the terms 'sexual intercourse' and 'anal intercourse'"—"to describe acts forced upon her" by the defendant. 547 N.E.2d 286, 291–92 (Ind. Ct. App. 1989), *trans. denied*.

[19] We are not unmindful of the challenges and difficulties present in sex crime cases, where a victim is called upon to testify regarding such painful, horrific, and violative acts. Yet, based on *Chew* and its progeny, proof limited to testimony that the defendant "had sex" with the victim—absent corroborative or supporting evidence—is insufficient to prove the specific elements of the criminal offense that the State elected to charge in this case. That is, the broad and euphemistic phrase "had sex" does not independently prove beyond a reasonable doubt that a person engaged in "sexual intercourse," which is a term our legislature defined to refer only to "an act that includes any penetration of the female sex organ by the male sex organ." I.C. § 35-31.5-2-302.

[20] As to the method in which the State elected to charge Lopez-Morales, we note that the State could have sought a Level 3 felony rape conviction by alternatively alleging that Lopez-Morales "cause[d] another person to perform or submit to other sexual conduct." I.C. § 35-42-4-1. Had the State sought this type of rape conviction, it would not have been obligated to prove penetration

of the female sex organ by the male sex organ. Rather, the State could have obtained a Level 3 felony conviction based on a broader set of conduct, with the term "other sexual conduct" encompassing the sex act of digital penetration of the female sex organ. *See generally* I.C. § 35-31.5-2-221.5 (defining "other sexual conduct"); *Carranza v. State*, 184 N.E.3d 712, 715 (Ind. Ct. App. 2022).

[21] On appeal, the State focuses on this alternative charging method, pointing out that there was proof that Lopez-Morales digitally penetrated S.M.'s vagina. The State argues that, regardless of the sufficiency of evidence that Lopez-Morales engaged in sexual intercourse, we should affirm the conviction because there was sufficient evidence of "other sexual conduct." In essence, the State argues that the evidence presented at trial was adequately related to the charge.

[22] Yet, to charge a defendant, the State must prepare a charging information that "set[s] forth the nature *and elements* of the offense charged[.]" I.C. § 35-34-1-2(a)(4) (emphasis added). Here, the State alleged in Count 2 that Lopez-Morales "did knowingly or intentionally have sexual intercourse with [S.M.]; when such person was compelled by force, to wit: used force to pull her into a small room and by force placed his penis into her vagina." Appellant's App. Vol. 2 p. 24. At trial, the pertinent jury instructions paralleled the elements set forth in the charging information, with instructions tailored to "sexual intercourse." *Compare id. with* Appellant's App. Vol. 2 pp. 187, 192. Just as the charging information did not contain an allegation of "other sexual conduct"—even though the statutory scheme permitted a Level 3 felony conviction based on proof of this element—so, too, the jury was not instructed that it could

convict Lopez-Morales of Level 3 felony rape based on "other sexual conduct." *See generally* Appellant's App. Vol. 2 pp. 176–208; Tr. Vol. 2 pp. 42–53. Further, the jury was not provided the statutory definition of this term. *See generally id.*

[23] In arguing we should affirm the Level 3 felony conviction based on proof of "other sexual conduct," the State does not explain why the State should be excused from including an essential element in the charging information, or how there is no defect in the guilty verdict where the jury was not apprised of that element. Instead, the State argues that the variance between the charging information and the proof at trial was immaterial, resulting in no prejudice to Lopez-Morales. In so arguing, the State focuses on a line of caselaw indicating that the State need not prove "[u]nnecessary descriptive material" included in the charging information. *Mitchem v. State*, 685 N.E.2d 671, 677 (Ind. 1997) (quoting *Madison v. State*, 130 N.E.2d 35, 42 (Ind. 1955)). However, "other sexual conduct" is not purely descriptive material in this instance; rather, "other sexual conduct" is an element of the criminal offense. *See id.* (determining that the difference between the charging information and the evidence presented at trial was immaterial and a conviction must be affirmed where the information included unnecessary descriptive material alleging that the defendant committed the offense "with a handgun and a shotgun," but the "[e]vidence at trial suggested that [the] defendant committed the crime . . . with a rifle").

[24] To be sure, the evidence at trial suggests that the State may have obtained a conviction had it asked the jury to find Lopez-Morales guilty of Level 3 felony

rape premised upon committing "other sexual conduct." But the State did not include this element in the charging information, nor was the jury instructed on that element prior to its deliberations. Under the circumstances, we discern no proper basis to affirm the conviction. Rather, because the nonspecific phrase "had sex" is reasonably susceptible of meanings other than penetration of the female sex organ by the male sex organ, and the record is otherwise devoid of evidence indicating that Lopez-Morales engaged in "sexual intercourse" as defined by our legislature, we must reverse the Level 3 felony rape conviction.

[25] In addition to finding Lopez-Morales guilty of Level 3 felony rape, the jury also found him guilty of Level 6 felony sexual battery and Level 6 felony criminal confinement. However, because of double jeopardy concerns, the trial court did not impose a sentence upon the verdict for Level 6 felony sexual battery. When a lead count is reversed on appeal, our approach is to remand the case to the trial court with instructions to enter a judgment of conviction upon the lesser count. *See generally, e.g.*, *Sanjari v. State*, 961 N.E.2d 1005, 1009 (Ind. 2012). We do so here. On remand, we instruct the trial court to enter a judgment of conviction upon the guilty verdict for Level 6 felony sexual battery. We also instruct the trial court to determine an appropriate sentence for the two Level 6 felony convictions. In doing so, we alert the trial court to our discussion of remand in *Sanjari III*, 981 N.E.2d at 583, where we recognized that "a trial court is likely to view individual sentences in a multi-count proceeding as part of an overall plan, a plan that can be overthrown if one or more of the convictions is reversed or reduced in degree." *Id.* at 583. We

concluded that, in these scenarios, a trial court is afforded "flexibility upon remand, including the ability to increase sentences for individual convictions . . . so long as the aggregate sentence is no longer than originally imposed." *Id.*

II. Evidence of Interactions with Coworkers

[26] Lopez-Morales challenges the admission of evidence related to his interactions with female coworkers at the restaurant. He argues that the evidence was inadmissible character evidence under Evidence Rule 404 and that the evidence was inadmissible under Evidence Rule 403 because it was unduly prejudicial.

[27] "Trial courts have broad discretion to admit or exclude evidence, and our review is limited to whether the trial court abused that discretion." *Satterfield v. State*, 33 N.E.3d 344, 352 (Ind. 2015). "We will reverse only if the trial court's ruling was clearly against the logic and effect of the facts and circumstances before it" and the alleged evidentiary error "affect[s] a party's substantial rights." *Hall v. State*, 177 N.E.3d 1183, 1193 (Ind. 2021). Moreover, "[a]s an appellate court, we may affirm a trial court's judgment on any theory supported by the evidence," and "will sustain the trial court . . . on any legal ground apparent in the record." *Ratliff v. State*, 770 N.E.2d 807, 809 (Ind. 2002).

[28] Evidence Rule 404(a)(1) generally prohibits the introduction of character evidence, specifying that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Along these lines, Evidence Rule 404(b)(1) provides that "[e]vidence of a crime, wrong, or other act is not

admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." There are exceptions allowing admission of the evidence "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Ind. Evidence Rule 404(b)(2).

[29] Here, Lopez-Morales challenges the admission of evidence regarding his interactions with female coworkers, arguing this evidence "was nothing more than forbidden character evidence meant to prove he acted in accordance with such character on November 7, 2021 and May 7, 2022." Br. of Appellant p. 24. He argues this evidence "was only relevant to show his propensity to do so, i.e., for the jury to make the forbidden inference that because he treated women in such a way, he likely committed the instant offenses." *Id.* Lopez-Morales claims that admitting the evidence "was improper and unfairly prejudicial to [him] as it cast him as having the character of being vulgar and misogynistic." *Id.*

[30] Synthesizing the pertinent evidentiary rules, the Indiana Supreme Court has explained that whenever "the defendant objects on the ground that the admission of particular evidence would violate Rule 404(b)," a court must (1) "determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act"; and then (2) "balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403." *Thompson v. State*, 690 N.E.2d 224, 233 (Ind. 1997). Evidence is relevant to an issue if it "has any tendency to

make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Evid. R. 401.

[31] Here, Lopez-Morales challenges the admission of evidence that he openly flirted with female coworkers, made crude statements, engaged in overtly sexual conduct, and at times "would disappear" with a female coworker during a shift. Tr. Vol. 2 p. 196. Lopez-Morales contends that this evidence related only to his character. Yet, the challenged evidence bore on a different matter at issue because it indicated that, while at the restaurant, Lopez-Morales had the opportunity to engage in the type of criminal conduct alleged. Notably, Lopez-Morales suggested in his Opening Statement that he lacked the opportunity to sexually abuse S.M. at the restaurant. Indeed, he invited the jury "to look at the surrounding circumstances in these cases and determine whether or not it makes sense to [them]," Tr. Vol. 2 p. 158, and he pointed out that although S.M. "claims . . . he called her into" the back of the restaurant "while they were both working," *id.* at 158, "[t]here were at least three other people there . . . at the restaurant at the time," *id.* at 158–59. Moreover, on appeal, Lopez-Morales continues to focus on the presence of other employees, providing the following header in his Statement of the Facts: "The May 7, 2022 Encounter With Three Other Employees Present." Br. of Appellant pp. 2, 11. We ultimately agree with the State that "[b]ecause Lopez-Morales's conduct with coworkers was not admitted to establish bad character or conformity therewith," but instead was admissible for a permitted purpose, "the trial court did not abuse its discretion by admitting that testimony" under Evidence Rule 404. Br. of Appellee p. 26.

[32] Of course, even when Rule 404 does not prohibit the admission of certain evidence, the evidence must be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Evid. R. 403. Other than asserting that the challenged evidence was prejudicial because it was inadmissible, Lopez-Morales devotes limited briefing to discussing the prejudicial effect of the evidence. In any case, because Lopez-Morales encouraged the jury to consider whether he had the opportunity to engage in the alleged sexual abuse at the workplace, we are unpersuaded that the probative value of the evidence was substantially outweighed by a danger of unfair prejudice. Furthermore, in the end, the jury could have found Lopez-Morales guilty only if it believed S.M.'s testimony regarding a sexual encounter in the back of the restaurant. As earlier noted, S.M. provided unequivocal testimony regarding this encounter, which leads us to conclude that, under the circumstances, the evidence about peripheral issues, such as opportunity, did not pose a substantial risk of unfair prejudice.

Conclusion

[33] Lopez-Morales has not identified error in the admission of evidence. However, because the State did not elicit specific enough testimony to prove beyond a reasonable doubt that Lopez-Morales engaged in "sexual intercourse," as that term is defined by our legislature, we reverse the conviction for Level 3 felony rape and remand with instructions. On remand, we instruct the trial court to enter a judgment of conviction upon the guilty verdict for Level 6 felony sexual

battery; determine the appropriate sentence for each conviction; and issue an amended Abstract of Judgment and sentencing order that are consistent with this opinion.

[34] Reversed and remanded.

Altice, C.J., and May, J, concur.