Circuit Court for Charles County
Case No. 08-K-17-000130

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 583

September Term, 2018

LAFAYETTE REMOINE CRUTCHFIELD

v.

STATE OF MARYLAND

Fader, C.J.,
Reed,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: August 22, 2019

Mr. Lafayette Remoine Crutchfield, appellant, was convicted in the Circuit Court for Charles County by a jury of sexual abuse of a minor, sexual offense in the second degree, and two counts of sexual offense in the third degree. He was sentenced to twenty years for sexual offense in the second degree, a consecutive twenty years for sexual abuse of a minor, and a consecutive eight years for sexual offense in the third degree. On appeal, appellant raises six questions, which we have reordered and slightly reworded:

I. Did the circuit court err by denying appellant's request to discharge counsel?

II. Did the circuit court err by refusing to perform an *in camera* review of the victim witness's mental health records?

III. Did the circuit court err by permitting a detective to recount the victim witness's report of the alleged crime under the "prompt complaint" exception to the hearsay rule?

IV. Did the circuit court err by permitting the prosecution to characterize appellant's conduct as "grooming" the victim witness in its closing argument?

V. Is the evidence insufficient to sustain appellant's conviction for sexual offense in the second degree?

VI. Did the circuit court err by submitting to the jury a charge of third degree sexual offense, which was not contained in the indictment and is not a lesser included offense of second degree sexual offense?

We shall answer the first four questions in the negative, and the fifth and the sixth questions in the affirmative.

FACTUAL AND PROCEDURAL BACKGROUND

The State charged the appellant of sexually abusing his domestic partner's daughter (hereinafter "the victim") during an approximate two-month period, between late September and November 26, 2016, when the victim was twelve years of age.

Appellant stayed in the same house with the victim during most of 2016 and slept downstairs in the victim's mother's bedroom. The victim thought of appellant as a "father figure" because he was "there" when she needed him. She saw appellant at her home "every day" in 2016, and he picked her up from sports practices. On November 10, 2016, a text message from appellant's cell phone to the victim's read: "I really, really love you. I really loved those cute little shorts on you tonight." And, on November 11, 2016: "I hope I didn't make you incorrigible about your shorts, but they are cute as hell on you though, babe."

The victim alleged that appellant had "cuddled" with her "three or four times" prior to November 25, 2016. Her allegation is corroborated by the text message history between the victim and appellant, including one sent from appellant's cellphone on November 12, 2016 at 10:52 p.m., "Hey, I really, really need to ask you a serious question. Do I make you feel uncomfortable when I be kissing on you, and rubbing, or touching on you? Does that better [sic] you? I really need to know." The victim responded: "A little. It kinda does feel uncomfortable. Sorry, I am just saying." Appellant replied, "I sorry. I will never bother you again, not coming upstairs later. I sorry."

On January 12, 2017, the victim described to a teacher at her school an incident that occurred on November 25, 2016. A social worker and the police were contacted, and a police investigation was started on January 13, 2017. At appellant's trial on February 27, 2018, the victim testified that appellant rubbed her "vagina area" with his hand and touched her "butt cheeks" with his penis on November 25, 2016 at about 1 or 2:30 a.m.:

> [I]n the beginning of the day he texted me and said he wanted to cuddle with me. And I was like, "okay." So, he came into my room, it was really late at night. Prior to the time that he came to my room, he told me to put a blanket over a crease in my bedroom because . . . you could see where my grandparents sleep, and he told me to put a blanket over that. He told me to crack my door a little bit open because it does creak. . . . he laid next to me, then he got on top of me and thrusted against my private area of my vagina, and then he laid next to me. . . . He put his hand down my shorts . . . around my vagina area, and then he pulled my shorts down and my underwear down. . . . he put his penis right between my butt cheeks . . . I felt it twitch . . . He . . . was rubbing my vagina area down there, also.

During direct examination, the State inquired:

> [STATE]: . . . you said he was rubbing your vagina? What do you use your vagina for?
> [THE VICTIM]: Using the bathroom.
> [STATE]: . . . is that also the area where your menstrual cycle would come out of, as well?
> [THE VICTIM]: Yes.
> [STATE]: Okay, and was that over top of the clothes, or underneath your clothes?
> [THE VICTIM]: Underneath my clothes.
> [STATE]: Okay, and was that with . . . um . . . both of his hands, one hand?
> [THE VICTIM]: One hand.
> [STATE]: Could you feel his fingers rubbing down there?
> [THE VICTIM]: Yes.

The defense counsel pursued her testimony on cross-examination:

> [DEFENSE COUNSEL]: Okay, but when you say that he was rubbing, did he ever enter your vagina?

[THE VICTIM]: No.
[DEFENSE COUNSEL]: Okay, so this was simply on top?
[THE VICTIM]: Yes.
[DEFENSE COUNSEL]: Rubbing?
[THE VICTIM]: Yes.

Redirect examination followed:

[STATE]: Okay. Now, . . . when you had stated that he was, rubbing of the vagina, and I believe that you testified that there was no penetration inside your body, correct?
[THE VICTIM]: Correct.
[STATE]: Okay, it was all outside your body, correct?
[THE VICTIM]: Yes.
[STATE]: Okay, and this is the area, you testified, and correct me, that you used to go to the bathroom?
[THE VICTIM]: Yes.
[STATE]: And the area in which your menstrual cycle comes out of?
[THE VICTIM]: Yes.
[STATE]: Okay, and I believe you testified that you could feel his one hand or two hands?
[THE VICTIM]: One hand
[STATE]: One hand touching this area?
[THE VICTIM]: Yes.
[STATE]: And that's the area that you call the vagina?
[THE VICTIM]: Yes.

The incident continued for fifteen to thirty minutes. It ended when the victim said that she did not feel well and asked appellant to leave. After he left, the victim received a text message from his cellphone at 3:06 a.m. that read: "Please don't be mad at me, please. Sorry, I made you feel uncomfortable, babe. Please forgive me, please." The victim replied: "I'm fine. I'm not mad. And thanks for coming up here and laying down with me, but next time can you just lay down next to me and sleep, 'cause tonight I'm really tired. So just lay down next to me. I love you so much." The victim also testified

as to what she meant in her text message: "[W]hat I was trying to say is . . . just lay down next to me. Don't really touch me . . . just lay down, and, like, sleep."

Appellant did not testify. Additional facts will be supplied in the discussion of the questions presented.

DISCUSSION

I. Did the circuit court properly deny appellant's request to discharge counsel?

During the first morning of appellant's two-day trial, defense counsel appeared and was told that appellant wanted to discharge him. Counsel notified the court, and the trial judge asked appellant reasons for that decision. Appellant answered that "I don't feel comfortable with him representing me, so I'm going to get an attorney on my own" and that "I just don't feel comfortable with having him as my representative. That's just how I feel." The trial judge then explained to defendant that he needed to provide a more detailed answer:

> But you have to be able to explain some good reason why. Maybe that's the…the word used in the rule is meritorious, some meritorious reason why [counsel] should be discharged. I could give you some examples. . . . [L]et's say there was some sort of ethical issue with [counsel]. Or there was something . . . his defense wasn't sufficient, or it wasn't appropriate. Or he's doing something that harms your case.

Defense counsel interjected and asked appellant to "run" what he planned to say by counsel because "he is on the record . . . I don't want him to say something that maybe he shouldn't."

The trial judge sequentially explained what a court is required to do when a defendant wants to discharge counsel:

> [T]he rule that applies is 4-215, and the name of the rule is called, "Waiver of Counsel." . . . And then, there's a little e) Discharge of Counsel, which is what you want to do . . . And then it says, "If a defendant requests permission to discharge an attorney whose appearance has been entered . . . 'The court shall permit the defendant to explain the reasons for the request," which is what I'm trying to do right now. "If the Court finds there is a meritorious reason for the defendant's request, the Court shall permit the discharge of Counsel, continue the action if necessary, and advise the defendant that if new Counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented." So, that's part one, if there is a meritorious reason, and that's what I want to make sure that I give you the opportunity to state.

In his efforts to understand appellant's reason for his request, the trial judge asked appellant to either give him a particular reason, or talk with counsel in private first:

> [THE COURT]: Alright, so I know you don't feel comfortable. Is there a particular reason, or do you want to, you know, run it through [counsel]?
> [APPELLANT]: Yes, that's fine.
> [THE COURT]: Or is there a particular thing?
> [APPELLANT]: Yes, so just walk out of the court and talk to him?
> [THE COURT]: If you want to.
> [APPELLANT]: Please.
> [THE COURT]: Sure, go right ahead.

The trial court recessed to allow appellant and counsel to communicate. The following exchange ensued when the court reconvened:

> [DEFENSE COUNSEL]: Before Mr. Crutchfield speaks - -
> [THE COURT]: Yes?
> [DEFENSE COUNSEL]: I think I'm going to sort of throw this out there, mainly because I think we're getting into kind of information that really shouldn't be spoken in specificity.
> [THE COURT]: And that's not what I'm looking for.
> ***
> [DEFENSE COUNSEL]: Essentially, I think what Mr. Crutchfield is trying to say, and the Court should hear it from him, I'm just going to throw it out there first, is that he and I do have a disagreement with potential defenses.
> ***

> [THE COURT]: There's a strategy disagreement?
> [DEFENSE COUNSEL]: There's a strategy disagreement.
> ***
> [THE COURT]: I just want to be extra careful. Mr. Crutchfield, the source of your uncomfortable feeling is that you have an idea on how the case should play out, and it's different than [counsel]'s, is that right?
> [APPELLANT]: Yes, sir.
> [THE COURT]: Okay, so it's not . . . it's not that, and I just want to make sure, and tell me if I'm wrong, it's not that he's not working on the case, or he has done anything unethical?
> [APPELLANT]: No.
> [THE COURT]: It's just, you guys have different visions on the case?
> [APPELLANT]: Yes, sir.

The State, at this point, proposed that the court hear appellant's explanation *ex parte*. The trial judge stated that he did not find a meritorious reason but was willing to listen if appellant and counsel so wanted to proceed. At the bench, appellant asserted that the text messages sent between him and the victim's cell phones did not come from him:

> [APPELLANT]: [T]hey didn't come from me.
> [THE COURT]: Okay?
> [APPELLANT]: And that's what…um…explaining them, because text messages can be manipulated and everything like that, I did my research.
> [THE COURT]: Right?
> [APPELLANT]: But…um…and they can be sent fake. . . . But I didn't send these, so I'm fighting for my life over text messages.
> [THE COURT]: Well, I understand that. So, I guess my question is, are you saying that [counsel] doesn't understand that concept, or…?
> [APPELLANT]: That's what I'm feeling that he's not understanding, but I could be wrong.

Counsel then proceeded to explain generally his view of the different defense strategies:

> I think the defenses would just be too…too opposed to one another, and it's going to sound like . . . I think the jury would laugh at me. . . . I just think it's…it's going to seem like I'm arguing two different things. . . . And I just think it would be painfully obvious to the jury, that that would not be an

> appropriate way to present the case. . . . [E]ven if I was willing to say, "Okay, let's look at your defense again," I can't do that today, obviously. . . . Because I would need to probably get somebody involved from a technical standpoint, and obviously, I can't do that today.

The trial judge then restated that he did not find a meritorious reason and that trial would proceed as scheduled:

> [THE COURT]: I mean, to me, there's a few things. It's a strategy decision, number one.
> [APPELLANT]: Yes, sir.
> [THE COURT]: Number two, the time to change attorneys would have been when the case got continued.
> [APPELLANT]: Yes, sir.
> [THE COURT]: I mean, this all things that we all would have known, or should have known.
> [APPELLANT]: Uh-hum...uh-hum.
> [THE COURT]: I don't think there is a meritorious reason. That doesn't mean you can't discharge Counsel. Your problem is that according to the rule, I've got to advise you, if you want to discharge, I will advise you of the maximum penalty for all of these offenses . . .
> ***
> [THE COURT]: And if you want to discharge, I will go over again in greater detail. The issue is, if you discharge, I mean, I think you are totally, you want an attorney, right?
> [APPELLANT]: Uh-hum, uh-hum.
> [THE COURT]: Alright, so, I mean, this case has got to go forward, and it's really up to you if it's going to be [counsel] or if you want to represent yourself. And if you do, I've got to go over some more things with you.
> [APPELLANT]: Uh-hum?
> [THE COURT]: So, do you need a …go ahead?
> [APPELLANT]: I don't want to represent myself.
> [THE COURT]: Okay, okay.
> [APPELLANT]: So, you know, I just wanted [sic] understand where I was at because I'm…it makes no sense if I discharge and then, you know—
> [THE COURT]: Uh-hum, then you're solo?
> [APPELLANT]: Yes.

After the above colloquy, the trial judge offered appellant more time to talk with counsel in private. Appellant stated that there was no need because:

> I mean, and you just basically broke it all down to me just now, right in front of him. . . . So it's not like I really need to go outside and explain, because I'm in front of you and you are in front of him. . . . And it's being explained to me, and it makes more logical sense for me to keep him as representation. . . . Because I've been dealing with him. . . . [I]t's not because he's a bad person at all. . . . I just want to be defended well, that's all."

The trial judge, after inviting the State back, stated for the record that he did not find a meritorious reason for the discharge:

> [THE COURT]: I couldn't find a meritorious reason for the discharge. Mr. Crutchfield said to me at the bench that he wishes to continue with [counsel], he does not want to represent himself. Am I right, counsel?
> [DEFENSE COUNSEL]: Yes, he did say that.
>
> The trial proceeded.

Contentions

Appellant contends that the circuit court violated his federal and state constitutional rights to counsel. He argues that there was a meritorious reason for him to discharge counsel because a "breakdown in communication" existed between him and the defense counsel, and that the court should have ensured that appellant "went to trial either with court-appointed counsel," or "a different Assistant Public Defender." The State argues that, given the timing of the request, the circuit court properly denied the request because a dispute over defense strategies was not a meritorious reason to discharge counsel.

Standard of Review

> In evaluating the trial court's compliance with Rule 4-215(e), Maryland appellate courts generally apply a de novo standard of review. *State v. Graves*, 447 Md. 230, 240 (2016). However, a trial court's determination that a defendant had no meritorious reason to discharge counsel under Rule

> 4-215(e) is reviewed for an abuse of discretion. *State v. Taylor*, 431 Md. 615, 630, 638, 642 (2013). To constitute an abuse of discretion, the decision "has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Evans v. State*, 396 Md. 256, 277 (2006).

Cousins v. State, 231 Md. App. 417, 438, *cert. denied*, 453 Md. 13 (2017).

Analysis

Maryland Rule 4-215 implements a defendant's right to waive counsel with safeguards to ensure that the defendant is acting knowingly and voluntarily in making that choice. *Dykes v. State*, 444 Md. 642, 651 (2015). The rule provides:

> If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

Maryland Rule 4–215(e).

"In light of the fundamental rights implicated, Md. Rule 4-215(e) provides a 'precise rubric' with which we demand 'strict compliance.'" *State v. Graves*, 447 Md. 230, 241 (2016) (quoting *Pinkney v. State*, 427 Md. 77, 87 (2012)) (cleaned up). Appellant does not expressly contend that the trial judge did not comply with Rule 4-215(e). He argues that the "breakdown in communication" between defense counsel and

appellant was a meritorious reason to discharge counsel. Appellant cites *State v. Brown*, in which the Court of Appeals stated that a good cause to discharge counsel "may include . . . 'a *complete* breakdown of communication.'" *State v. Brown*, 342 Md. 404, 415 (1996) (quoting *McKee v. Harris*, 649 F.2d 927, 931 (2d Cir. 1981)) (emphasis added).

Although appellant directs us to two statements in which he said that he felt "uncomfortable" with counsel's representation, our review of the record does not reveal a "complete breakdown of communication." What we see is that both appellant and counsel were willing to communicate with each other throughout the trial judge's 4-215(e) inquiry.

When the trial judge asked appellant for his reasons to discharge counsel, counsel interjected and wanted to hear appellant's response first, because "[appellant] is on the record . . . I don't want him to say something that maybe he shouldn't." The trial judge then asked appellant whether he wanted to give the court his reason, or "run it through" counsel. Appellant chose the latter. This communication reflected not only counsel's proactiveness in defending appellant's interest, but appellant's trust in his counsel. Whatever their differences, his willingness to share his "reason to discharge" with the very person he wished to discharge before anyone else does not indicate a breakdown in communication.

After appellant and counsel spoke in private and the court reconvened, counsel stated that appellant's reason to discharge him concerned a dispute over defense strategies. The trial judge confirmed that with appellant multiple times:

> [THE COURT]: I just want to be extra careful. Mr. Crutchfield, the source of your uncomfortable feeling is that you have an idea on how the case should play out, and it's different than [counsel]'s, is that right?
> [APPELLANT]: Yes, sir.
> [THE COURT]: Okay, so it's not . . . it's not that, and I just want to make sure, and tell me if I'm wrong, it's not that he's not working on the case, or he has done anything unethical?
> [APPELLANT]: No.
> [THE COURT]: It's just, you guys have different visions on the case?
> [APPELLANT]: Yes, sir.

At this point the trial judge had already found no meritorious reason to discharge counsel. But at the State's suggestion, he asked whether appellant and counsel wanted a bench conference without the State present, which they chose to do. At the bench, appellant indicated that he wanted to present to the jury that certain text messages extracted from his and the victim's cell phones were not sent by him, and that he was not sure if counsel understood his "concept." Counsel responded:

> [I]t's going to seem like I'm arguing two different things. . . . And I just think it would be painfully obvious to the jury, that that would not be an appropriate way to present the case. . . . [E]ven if I was willing to say, "Okay, let's look at your defense again," . . . Because I would need to probably get somebody involved from a technical standpoint, and obviously, I can't do that today.

It appears that counsel intended to use some of the text messages between appellant and the victim to argue that the victim was concerned about marijuana use by family members in the home and may have fabricated a criminal charge for "deflection" away from her "true concern." And, to make the claim that the text messages were forged would undermine that argument. After explaining this to appellant and the trial judge, counsel further explained that, even if he did not reject appellant's approach, the

defense would require expert testimony that was not readily available on the day of the trial.

The trial judge indicated to appellant that, standing alone, a dispute in defense strategy did not constitute meritorious reason to discharge counsel, that the trial would proceed as scheduled, and that appellant needed to choose between "going solo" and retaining the same counsel. Appellant responded: "[I]t's being explained to me, and it makes more logical sense for me to keep him as representation." He also acknowledged that there was no hostility between him and counsel: "[I]t's not because he's a bad person at all. . . . I just wanted to be represented well, that's all."

In short, we perceive neither error nor abuse of discretion in rejecting appellant's request to discharge counsel.

II. Did the circuit court err by refusing to perform an *in camera* review of the victim's mental health records?

Appellant subpoenaed Julie Capizzi, LGPC, a licensed graduate professional counselor, for her appearance at trial and for production of a complete copy of her file related to her treatment of the victim. Ms. Capizzi objected to disclosing whether she had provided treatment to the victim and to the release of client records absent client authorization or a court order. A week later, the victim's mother wrote to the court objecting to the subpoena. The State filed a "Motion for Appropriate Relief–Mental Health Records," asking the circuit court to set a hearing regarding appellant's subpoena. A hearing was held on September 20, 2017, three days before then scheduled trial date.

At the hearing, defense counsel proffered a text-message history where the victim expressed her concern about her mother and grandmother's use of marijuana, and suggested that the charges against appellant may be a deflection away from her "true concern":

> [The victim] is sending out concerns about the presence of marijuana in the house. I believe this is specifically related to her mother's usage of marijuana. As well as her grandmother's usage of marijuana. . . . [A]s far as mental health issues go, this is weighing very heavily on her. And I don't see anything else in the text messages that particularly related to any sexual abuse. . . . The thing that I'm seeing is concern about drugs in the house. . . . And certainly, this could be sort of a smoke screen. Pardon the pun. Or some sort of a deflection away from the true concern, which is the marijuana usage in the house.

Defense counsel also alluded to the inconsistent statements made by the victim to the social worker at the Department of Social Services (DSS) and to the police officer in her initial reporting of what had happened in January 2017. He suggested that the mental health records may contain other inconsistencies:

> I reviewed the DSS records. . . . And again, this is reporting about two months after the allegations themselves. In the recounting to the DSS people - - she is making inconsistent statements. . . . The social worker treatment begins sometime around Valentine's Day of this year. . . . So another month goes by. And we now have reports to the Charles County Sherriff's Office and reports to DSS that are inconsistent. . . . So now I also have to feel that there's quite likely a probability . . . . that there is a third inconsistent - - or a second inconsistent statement being made to the social worker.

The circuit court, recognizing that appellant only had to show a reasonable likelihood that the mental health records contained exculpatory information, denied appellant's request:

> There's, there's no one here that can say that there was ever a conversation about marijuana. . . . I have on my phone text messages about marijuana. Right. The messages on the complaining witness's phone. That doesn't mean when she goes to therapy in February that she's in there talking about marijuana. She might be, but that's[1] [sic] really what the case is about. Now, she, you say, makes an inconsistent statement in her DSS record. You know, then that puts us right back into this area of it[']s just potentially for impeachment. So, I'm gonna [ ] deny the defense motion as it relates to the issuance of a subpoena or a court order in this case.

Defense counsel objected to the denial:

> [DEFENSE COUNSEL]: I just want to note my objection.
> [THE COURT]: Yes, sir.
> [DEFENSE COUNSEL]: I feel that the strength of this case is boiling very much down to [the victim]'s credibility.
> [THE COURT]: Sure.
> [DEFENSE COUNSEL]: And my client is really fighting for his life.
> [THE COURT]: I understand that.
> [DEFENSE COUNSEL]: And without being able to see these records, I mean, I just can't fight as hard. And I feel that I have made that proffer that I think there's reasonable likelihood they are there.
> [THE COURT]: You did. I feel that you've expressed it for sure.

Three days later, the trial was postponed to February 2018. Appellant did not issue another subpoena to Ms. Capizzi or otherwise renew his request for *in camera* review of the mental health record for the new trial date.

Contentions

Appellant contends that the circuit court erred in rejecting an *in camera* review of the victim's mental health records because he had established a reasonable likelihood that the review would have discovered exculpatory evidence. The State responds that appellant failed to renew his request prior to the new trial date and therefore did not

[1] Context suggests that the sentence should be "that's *not* really what the case is about."

preserve this issue for appeal; that appellant failed to show a reasonable likelihood of the existence of exculpatory evidence; and that the circuit court properly rejected an *in camera* review of such privileged information.

Standard of Review

We review the circuit court's decision to reject an *in camera* review for abuse of discretion. To constitute an abuse of discretion, the circuit court's decision "has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Cousins v. State*, 231 Md. App. 417, 438 (2017); *Evans v. State*, 396 Md. 256, 277 (2006).

Analysis

1. Preservation

The State argues that this issue is not preserved because appellant did not renew its request for *in camera* review on the rescheduled trial date. Citing *State v. Johnson*, 440 Md. 228, 240-41 (2014) for support, the State contends that a determination of whether to review mental health records "must be made at the time of trial." We read *Johnson* differently. In *Johnson*, the Court of Appeals held that witnesses' mental health records were barred during pretrial discovery but may be available for use at trial. *See id.* at 240. The rationale was that the trial judge "would be in a better position to protect the interests of both parties when evaluating a trial subpoena because at that point the trial judge knows that the case is actually going to trial." *Id.* at 241. In this case, the circuit court heard and denied appellant's request to use mental health records when all parties were

expecting trial in three days, and appellant's counsel promptly raised his objection to the court's decision. A renewal of the request was not necessary to preserve the issue for our review.

2. In camera review

Mental health records are privileged information. *See* Md. Code. Ann., Cts. & Jud. Proc. § 9-109(b); *see also Thomas v. Stat*e, 372 Md. 342, 358-59 (2002) (witness's psychotherapy records "are privileged and therefore not discoverable" during pre-trial discovery). When a criminal defendant requests a witness's mental health records for trial, it is important to strike a balance between the competing interests of that privilege and the defendant's federal and state constitutional rights to obtain and present evidence necessary to mount a proper defense. *Goldsmith v. State*, 337 Md. 112, 121 (1995). When a defendant can show a reasonable likelihood that the records contain exculpatory information necessary for a proper defense, an *in camera* review by the court serves to strike that balance. *Johnson*, 440 Md. 228 at 248; *Goldsmith v. State*, 337 Md. 112, 133 (1995). But that showing must be "more than the fact that the record may contain evidence useful for impeachment on cross-examination." 440 Md. 228 at 248.

In *Johnson*, the defendant requested access to a witness's mental health records asserting that if the witness had any mental health condition that could render him "delusional" or to "have hallucinations," those records would lead to exculpatory evidence. 440 Md. 228 at 233-34. Although agreeing with the defendant that "it would be appropriate to know of [the witness's] propensity for veracity," the Court of Appeals,

rejecting the request, stated that "that alone is not enough to outweigh" a witness's statutory privilege. *Id.* at 253. At the hearing in this case, defense counsel advanced a similar justification: "I feel that *the strength of this case is boiling very much down to [the victim]'s credibility*. . . And my client is really fighting for his life[.]" (Emphasis added).

In *Goldsmith*, the defendant requested examination of witness's mental health records, asserting that, because the witness was reporting an alleged crime that happened ten years ago, her "emotional state" was "tied into the credibility." 337 Md. at 118. The Court of Appeals held that there was no showing of a reasonable likelihood of finding exculpatory information, pointing out that defendant raised no issue of the witness having repressed memory syndromes, and that the witness had reported the incident years before her counseling sessions. *Id.* at 128.

The facts of this case are similar to those in *Goldsmith*. For example, the victim in this case began receiving treatment after she reported the alleged crime. And, the counsel's statements regarding marijuana use in the home and that "this is weighing very heavily on her," do not suggest a likelihood of finding exculpatory information in her mental health records regarding the charges against appellant. Counsel also referenced, without elaboration, inconsistent statements made by the victim to the DSS and the police in January 2017. But inconsistent statements ordinarily are the basis for impeachment.

In sum, the trial court did not abuse its discretion in denying appellant's request to perform an *in camera* review of the victim's privileged mental health records.

III. Did the circuit court err by permitting a detective to recount the victim's report of the alleged crime under the "prompt complaint" exception to the hearsay rule?

Detective Kristen Gross from the Charles County Sherriff's Office spoke to the victim after learning about the alleged crimes from a social worker. At trial, Detective Gross testified that, on January 13, 2017, the victim disclosed what occurred on November 25, 2016 to her.

On direct examination, Detective Gross testified:

> [STATE]: Okay, did she tell you when this had occurred?
> DETECTIVE GROSS: Yes.
> [STATE]: Okay, and when was that?
> DETECTIVE GROSS: That was November 25th, 2016.
> [STATE]: Okay, and when she told you when, did she tell you who?
> DETECTIVE GROSS: Yes.
> [STATE]: And who did she say was the person who had done something to her?
> DETECTIVE GROSS: Mr. Crutchfield.
> [STATE]: And generally, did she tell you what was done?
> DETECTIVE GROSSL: Yes.
> [STATE]: Okay, and generally, what was that?
> DETECTIVE GROSS: It was a sexual abuse investigation.
> [STATE]: Okay, *generally, did she describe the acts that were done*?
> DETECTIVE GROSS: Yes.
> [STATE]: Okay, *generally, what was that act*?
> [DEFENSE COUNSEL]: *Objection.*
> [THE COURT]: *What is the objection*?
> [DEFENSE COUNSEL]: *Hearsay.*
> [THE COURT]: *I think it's a prompt complaint. Go ahead*?
> DETECTIVE GROSS: *It was a touching of the genitalia and some touching with his penis in her rectum area*.[2]
>
> * * *

[2] Appellant objects to the italicized portion above the three asterisks. The colloquy below the three asterisks was cited in a footnote in appellant's brief. Appellant did not object to this colloquy at trial or in this appeal.

> [STATE]: Okay, and you said, "genitalia." What is the genitalia?
> DETECTIVE GROSS: Her vagina area.
> [STATE]: Okay, and does the genitalia area include the outside, as well as the internal components?
> DETECTIVE GROSS: Yes, ma'am.

(emphasis added).

In closing argument, the State said the following to the jury:

> And if you recall on Monday, yesterday, Detective Gross, when she was reiterating what [the victim] had told her, Detective Gross used the term, genitalia. And I said, "*Well, is that what [the victim] used?" "No, she used vagina*, but she was talking about. . . . *I had her tell me what area, and that is the genitalia area*."

(emphasis added).

Contentions

Appellant contends that Detective Gross's recount of the victim's report of the incident was hearsay and its admission was not harmless. The State responds that because appellant's counsel allowed the testimony to be given without objection, the issue is not preserved for review; that, if preserved, the recount from Detective Gross falls under the "Prompt Complaint" exception to the hearsay rule; and that if the exception does not apply, admission of Detective Gross's testimony was harmless.

Standard of Review

The circuit court's ultimate determination of whether evidence is admissible under a hearsay exception is reviewed de novo. *See Gordon v. State*, 431 Md. 527, 538 (2013); *Bernadyn v. State*, 390 Md. 1, 7-8 (2005).

Analysis

1. Preservation

The State argues that because appellant's counsel did not object to the State eliciting "more detail from Detective Gross concerning where the victim said Crutchfield touched her," the "entire issue is unpreserved." We do not agree.

The colloquy, characterized by the State in its closing argument as the "further testimony" of "where the victim said" appellant touched her follows:

> [STATE]: Okay, generally, did she describe the acts that were done?
> DETECTIVE GROSS: Yes.
> [STATE]: Okay, generally, what was that act?
> [DEFENSE COUNSEL]: Objection.
> [THE COURT]: What is the objection?
> [DEFENSE COUNSEL]: Hearsay.
> [THE COURT]: I think it's a prompt complaint. Go ahead?
> DETECTIVE GROSS: It was a touching of the genitalia and some touching with his penis in her rectum area.
>
> ***
>
> [STATE]: Okay, and you said, "genitalia." *What is the genitalia*?
> DETECTIVE GROSS: Her vagina area.
> [STATE]: Okay, and *does the genitalia area include the outside, as well as the internal components*?
> DETECTIVE GROSS: Yes, ma'am.

(Emphasis added).

Following the court's overruling of the counsel's objection, the prosecutor's two questions elicited Detective Gross's understanding of what genitalia meant. The prosecutor did not ask Detective Gross *the victim's* definition of "genitalia" or what part of her genitalia *the victim* claimed to have been touched. Appellant's counsel only objected to Detective Gross testifying to *the victim*'s description of "acts" done to her by

appellant, and that objection was made when the evidence was offered. The issue is preserved for our review. *See* Md. Rule 4-323(a).

2. The Prompt Complaint Exception to Hearsay

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). "Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802. One exception, set forth in Md. Rule 5-802.1(d), is "[a] statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony."

The exception allows the State to introduce the basics of the complaint, i.e., the time, date, crime, and identity of the offender. To be admissible, the complaint must be timely, the victim must testify, and any references to the complaint "may be restricted to the fact that the complaint was made, the circumstances under which it was made, and the identification of the culprit, rather than recounting the substance of the complaint in full detail." *Nelson v. State*, 137 Md. App. 402, 411 (2011).

Appellant argues that Detective Gross's recount cannot be admitted under the prompt complaint exception because the victim's complaint was made "four weeks after the alleged incident."[3] We disagree. The requirement of promptness is "not defeated by

[3] The complaint to Detective Gross was made on January 13, 2017, seven weeks after November 25, 2016, date of the alleged crime.

some delay in the reporting if the delay is adequately explained." *Gaerian v. State*, 159 Md. App. 527, 542 (2004); *cf. Robinson v. State*, 151 Md. App. 384, 391, *cert. denied*, 377 Md. 276 (2003) (complaint must be made "without a delay which is unexplained").

In *Gaerian*, a thirteen-year-old girl told her best friend about sexual abuse in October 2001 and reported it to authorities in January 2002. *See* 159 Md. App. at 531. After considering the victim's age, the ten-year age difference between the offender and the victim, and the fact that the offender lived in the same household and threatened the victim, this Court found that the delay in reporting was adequately explained and upheld the admission of the best friend's recount of the victim's report. *Id.* at 545.

The facts in this case are similar to those in *Gaerian*: the victim was twelve and lived in the same household with appellant, an adult who had an infant son with the victim's mother. Although appellant did not threaten the victim, she thought of appellant as a "father figure." We will not disturb the circuit court's finding that the victim's reporting was prompt in this case. *See Gordon*, 431 Md. at 538; *State v. Suddith*, 379 Md. 425, 430-31 (2004); *see also Nelson*, 137 Md. App. at 418 (holding that court should evaluate promptness by what a reasonable victim, considering age and family involvement and other circumstances, would probably do by way of complaining).

Appellant also argues that the admission of Detective Gross's recount exceeded what is permitted under the prompt complaint exception because it went "beyond the facts that the victim made the accusation against appellant and the circumstances under

which the complaint was made." The State views Detective Gross's testimony as having "merely stated the essential nature of the crime[.]"

In *Hyman v. State*, 158 Md. App. 618, 632-34 (2004), we held that testimony was admissible under the prompt complaint exception where the witness recounted what the victim said: "her husband had pulled a gun out on her and raped her, basically, asking her to do things." But we held in *Muhammad v. State*, 223 Md. App. 255, 271 (2015) that a detective's recount of the victim's report was inadmissible when he testified in great detail that: "L.M. told him that the [defendant] emerged from some bushes and approached her; that he identified himself as a member of BGF; that he put her in a 'sleeper hold'; that he forced her into a vacant house; that he [demanded fellatio]; that she tried to escape by biting his penis; that he beat her about the head; that she defended herself by scratching his face; that he pushed her to the ground and beat her more; and that she could not recall anything beyond that point in time until she woke up at Shock Trauma."

Detective Gross's testimony was far less detailed than in *Muhammad* and more comparable to the testimony in *Hyman*. She first corroborated the victim's identification of appellant, the time of the alleged crime, and the nature of the alleged crime as sexual abuse. When the prosecutor asked her to describe the act "generally," she stated that it involved "a touching of the genitalia and some touching with his penis in her rectum area." Sexual abuse encompasses a broad spectrum of acts. *See Walker v. State*, 432 Md. 587, 616 (2013) (stating that the "statute setting forth the offense of sexual abuse of a

minor encompass[es] a wide range of behavior"). Detective Gross's answer did not include the substance of the complaint in full detail. We perceive no error in the admission of Detective Gross's testimony.

IV. Did the circuit court err by permitting the prosecution to characterize appellant's conduct as "grooming" the victim in its closing argument?

The State used the term "grooming" in its opening statement:

> [T]he evidence will show the defendant was *grooming*, what the State calls *grooming*, [the victim]. . . . He would call her baby, he would text her, "I love you." And not just meaning, "I love you, you did a good job, daughter," but "I love you. You are so beautiful. I want to be with you." He would comment on her clothes that she was wearing, how she looked good in her shorts.

(Emphasis added).

It was used again in the State's closing argument:

> [STATE]: She didn't know how to have a relationship with a father. She didn't have one. This defendant is the first father-like relationship she had, and as a twelve years [sic] old at this time, leading up to the 25th, she thought this was all normal. Then we get to November 6th, 2016. From the defendant, "I feel where you are coming from, babe. When I come to see you this morning and I was going to come lay with you, [the victim's grandmother] came around the corner, wondering why I was coming out of your room in the morning." . . . [P]rior to the 25th, there were times that he was up there, cuddling with her and laying with her. I told you yesterday in opening, the State believes the previous contact and all that was a *grooming* mechanism by the defendant.
> [DEFENSE COUNSEL]: Objection.
> [THE COURT]: Overruled.
> [STATE]: It was his way to get the trust and gain the trust, and exploit the relationship he had with [the victim] for his own benefit, his need and desire to have sexual gratification with [the victim]. . . . Does he have her hooked? Yes. He exploited his relationship for his personal gain and benefit of sexual exploitation, when all she wanted was to have a father.

(Emphasis added).

Contentions

Appellant contends that the term "grooming" in the context of child sexual offenses cannot be established without expert testimony. He also argues that the reference to "grooming" in the State's closing argument prejudiced his right to a fair trial. The State responds that no particular evidence was necessary to refer to "grooming" in closing argument and that appellant did not suffer prejudice from its use.

Standard of Review

The circuit court is usually in the best position to determine whether counsel has stepped outside the bounds of propriety during closing argument. *Ingram v. State*, 427 Md. 717, 726 (2012). For that reason, "we do not disturb the trial judge's judgment in [regulating closing arguments] unless there is a clear abuse of discretion that likely injured a party." *Id.*; *Whack v. State*, 433 Md. 728, 742 (2013). "Abuse of discretion means that a ruling will be reversed when that ruling does not logically follow from the findings from which it supposedly rests or has no reasonable relationship to its announced objective." *Anderson v. Burson*, 424 Md. 232, 243 (2011) (internal citations omitted).

Analysis

In the context of child sexual offenses, we have explained "grooming" as a process by which "a perpetrator subtly persuades or manipulates the child not to disclose the abuse," *Walter v. State*, 239 Md. App. 168, 181 (2018), and by which "an abuser

gains a child's trust through special attentiveness." *Coates v. State*, 175 Md. App. 588, 607 (2007).

To support the need for expert testimony, appellant cites *Coates*, where a social worker who had been qualified as an expert included a description of the "grooming" process in her testimony. We did not, however, address admissibility of the term "grooming" or indicate that expert testimony was required or expected for using the term in trial arguments. *Id.* That expert witness testimony related to "grooming" was admitted in *Coates* does not mean that expert testimony is always necessary for its admission.

During closing arguments, the prosecution is allowed liberal freedom of speech and may make comments on the evidence and advance inferences that may reasonably be drawn from it. *See Lee v. State*, 405 Md. 148, 163 (2008). In addition to the victim's testimony, evidence relevant to appellant's sexual abuse of a minor charge included text messages extracted from appellant's and the victim's cell phones. Before closing arguments, the jury had heard evidence that, prior to November 25, 2016, the victim thought of appellant as a "father figure" whom she saw in home almost every day; that appellant supported the victim in her school activities; that appellant had asked the victim if his touching, kissing, and rubbing her made her feel uncomfortable; that appellant told her he was "sorry"; that appellant complimented the victim's appearance when she wore shorts; and that appellant called her "babe" and told her "I love you." There was also evidence that on November 25, 2016, before appellant entered the victim's bedroom, he

told the victim to leave her creaky door ajar and cover the crease on her wall, through which her grandparents were able to view her bedroom.

A rational jury could reasonably infer from the evidence that, by maintaining such intimate and attentive interactions with the victim, appellant had exploited for sexual gratification her longing for a father and that he had attempted to keep the victim from disclosing his behaviors to family members. In its closing argument, the State supported the reference to "grooming" with evidence that was clearly before the jury. Simply put, "[j]urors may be reminded of what everyone else knows." *Smith v. State*, 388 Md. 468, 487 (2005). The circuit court did not abuse its discretion by permitting the State to use the word "grooming" in connection with the evidence.

V. Is the evidence insufficient to sustain appellant's conviction for sexual offense in the second degree?

Contentions

Appellant contends that his conviction of sexual offense in the second degree be vacated, because the evidence of this case is insufficient to support a finding of penetration, however slight, of the victim's vagina. The State, in response, asks that we decline appellant's "invitation on appeal to draw a different inference" than did the jury, and argues that the jury could reasonably infer from the victim's testimony that the required penetration occurred.

Standard of Review

In reviewing whether evidence is legally sufficient, we examine the record to determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Martin v. State*, 218 Md. App. 1, 34 (2014) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In our examination, we view the State's evidence and all reasonable inferences that can be drawn from it, in the light most favorable to the State. *State v. Rendelman*, 404 Md. 500, 513-14 (2008). If the evidence "either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt[,]" we will affirm the conviction. *State v. Stanley*, 351 Md. 733, 750 (1998).

We must remember, however, that in a criminal case "the requirement that guilt be proved beyond a reasonable doubt is somewhat at odds with the deference owed to a fact-finder's determination." *Bible v. State*, 411 Md. 138, 156 (2009). When reviewing findings made by a trier of fact, circumstantial evidence that "amount[s] only to strong suspicion or mere probability" is insufficient. *Taylor v. State*, 346 Md. 452, 458 (1997). For that reason, the Court of Appeals "has held that when the evidence equally supports two versions of events, and a finding of guilt requires speculation as to which of the two versions is correct, a conviction cannot be sustained." *Id.*

Analysis

Under Maryland law, a sexual offense in the second degree is committed when a person engages in a "sexual act" with a victim "under the age of 14 years, and the person

performing the sexual act is at least 4 years older than the victim." Md. Code. Ann., Crim. Law § 3-306(a)(3) (effective from October 1, 2016 to September 30, 2017).[4] A "sexual act" includes an act "in which an object or *part of an individual's body penetrates, however slightly, into another individual's genital opening* or anus," when that act "can be reasonably construed to be for sexual arousal or gratification, or for the abuse of either party." Md. Code. Ann., Crim. Law § 3-301(d)(1)(v) (effective from October 1, 2016) (emphasis added).[5]

Appellant's conviction of sexual offense in the second degree hinges on digital penetration of the victim's "genital opening," which requires "penetration only of the *labia majora*." *Wilson v. State*, 132 Md. App. 510, 519 (2000). "No penetration of or entry into the vaginal canal itself is now or has ever been required." *Id.* The State argued that for the victim to feel touching "where the pee and menstrual cycle comes out," the

[4] The Revisor's Note (Acts 2002, c. 26) stated: "This section is new language derived without substantive change from former Art. 27, § 464A." Maryland cases interpreting "sexual act" under Art. 27, § 464A have relied on *Craig v. State*, 214 Md. 546 (1957), and the common law understanding of "penetration" as a part of "sexual act." *E.g.*, *Wilson v. State*, 132 Md. App. 510 (2000); *Kackley v. State*, 63 Md. App. 532 (1985).

Section 3-306, the provision for second degree sexual offense, was repealed by the General Assembly, effective October 1, 2017, in a bill that "[r]eclassif[ied] criminal conduct . . . classified as sexual offense in the first degree and sexual offense in the second degree as rape in the first degree and rape in the second degree, respectively[.]" *See* 2017 Md. House Bill No. 647, Md. 437th Session of the General Assembly, 2017. Second degree rape in Maryland now includes a "sexual act" in addition to "vaginal intercourse." Md. Code Ann., Crim. Law § 3-304 (effective October 1, 2017). The incident in this case occurred on November 25, 2016.

[5] The Revisor's Note for the provision stated: "This subsection [(d)] is new language derived without substantive change from former Art. 27, § 461(d)."

touching was "past the opening because you have the outer lips." In other words, the touching must have penetrated the *labia majora*.

The only evidence to establish penetration in this case was the victim's testimony. In *Simms v. State*, 52 Md. App. 448, 453 (1982), we explained that:

> [I]t is clear that the victim need not go into sordid detail to effectively establish that penetration occurred during the course of a sexual assault. Where the key to the prosecutor's case rests with the victim's testimony, the courts are normally satisfied with descriptions which, *in light of all the surrounding facts*, provide a reasonable basis from which to infer that penetration has occurred.

(Emphasis added).

In *Raines v. State*, 142 Md. App. 206, 208 (2002), the victim testified that the defendant worked a vibrator "in and out" of her vagina and inserted a dildo in her vagina. We held that testimony sufficient for a finding of penetration. *See id.* at 218. In *Martin v. State*, 113 Md. App. 190, 198 (1996), the victim testified that the defendant placed his fingers inside her vagina and inserted a flashlight "into her vagina, moved the flashlight back and forth." Despite defendant's pre-trial exculpatory statements, we held that the victim's testimony was sufficient to establish penetration. *See id.* at 238.

In *Ohio v. Morefield*, 24 N.E.3d 633, 635 (Ohio Ct. App. 2014), a victim firmly testified that "[h]e took his fingers and put it in my vagina." Although the defendant denied inserting any part of his hand in the victim's vagina, the Ohio Court of Appeals, Second District, affirmed the defendant's conviction. *See id.* at 638, 640.

In comparison to *Raine*, *Martin*, and *Morefield*, the victim's testimony in this case was less explicit. She did not mention any interior part of her genitals being touched or

describe appellant's conduct in terms of "in," "inside," or "insert." But even when a victim does not expressly testify to penetration, our appellate courts have upheld the convictions when other evidence supported the finding of penetration.

In *Bayne v. State*, 98 Md. App. 149, 153 (1993), the defendant contended that the evidence was insufficient because the victim testified that the defendant had touched and hurt her, put "her hands between her legs to indicate where she had been touched," but did not refer to penetration. In upholding the conviction for second degree rape, we considered other evidence available to the jury, including an expert's testimony of injury consistent with penile penetration and defendant's cousin's assertion that defendant had done the same with her. *Id.* at 155. In *Wilson v. State*, a victim said that she was raped "back and front many times" but "'honestly didn't know' whether her attacker had penetrated her vagina and anus." 132 Md. App. at 516. We affirmed the convictions for rape and first degree sexual offense because a nurse practitioner testified that tissue injuries found in the victim's vagina and rectum areas indicated penile penetration. *See id.* at 522. And, a victim with limited cognitive capacity in *Edmondson v.* State, 230 Md. 66, 68 (1962), gave barely any testimony other than "Yes, you, you" in the presence of the defendant, yet the Court of Appeals held that the evidence of laceration and bleeding in the victim's vagina within two hours of the crime was sufficient to support penetration.

Here, unlike in *Bayne*, *Wilson*, or *Edmondson*, the victim's testimony was not supported by other physical evidence.

In *Craig v. State*, 214 Md. 546, 548-49 (1957), an eight-year-old victim testified that the defendant accosted her on the street with a knife, led her to an empty house, committed an act of cunnilingus with her, and "messed with" her several times. When the prosecution asked the victim to define "messing," she answered that "he stuck his hand up in me" and "he put his private in my legs." In reversing a common law rape conviction, the Court of Appeals reasoned that the "witness' statement that the appellant 'messed' with her is not synonymous with, nor necessarily descriptive of, penetration." *Id.* It further explained:

> This is demonstrated by her two answers as to what she meant when she stated the appellant 'messed' with her. Her first answer was that 'he stuck his hand up in me,' and the second was that 'he put his private in my legs.' What an eight year old child meant by language of this nature is subject to too much conjecture and speculation to form a basis upon which to support a conviction of so grave an offense. Of course, when she is permitted to explain fully what she meant by the terms she used, it may develop with sufficient certainty that there was an actual penetration, but, as the matter now stands, what she meant is too uncertain and indefinite.

Id. at 549. The victim's testimony in this case cannot be read as "synonymous with," or "descriptive" of a penetration of the genital opening.

A case from a sister jurisdiction is also instructive. In *Missouri v. Barbee*, 568 S.W.3d 28 (Mo. Ct. App. 2018), testimony from a victim witness was found insufficient to support penetration, which was required for a conviction of first-degree statutory rape:

> Q. And when you say "mine in his mouth," what are you talking about?
> A. My private part.
> Q. If I tell you my word for that is vagina, do you know what I am talking about?
> A. Um-hum.

> Q. *Is the private part of yours that he put in his mouth, is that the part that you use to go pee*?
> A. *Yes*.
> Q. And did the defendant do anything else?
> A. *He put his—he touched his private part with mine*.
> Q. What did he touch his private part to your what?
> A. Mine, meaning my private part.
> Q. And *is that still the part we were just talking about that you use to go pee*?
> A. *Yes*.

Id. at 32 (emphasis added).

The Missouri Court of Appeals, Western District, rejected the prosecution's argument that there was "a reasonable inference of penetration based upon evidence that defendant's penis touched the victim's vagina":

> The problem with the State's argument, however, is that the record does not reflect that anyone was using the term "vagina" in a purely anatomical sense. On the contrary, the record indicates that, when used, the term "vagina" was meant to refer to the entirety of the female sex organ.

Id.

The prosecuting theory in this case is similar to the one in *Barbee*. When asked to define what she used her vagina for, the victim testified that she used it to "go to the bathroom" and that it was where her "menstrual cycle comes out of." As in *Barbee*, the record does not reflect the use of the term "vagina" anatomically, i.e., beyond the *labia majora*, as opposed to "the entirety of the female sex organ." *See* 568 S.W.3d at 32. For example, the victim testified on cross examination that appellant did not enter her vagina but had "rubb[ed]" "simply on top" of it. And, when the prosecutor, on redirect, asked, "I believe that you testified that there was no penetration inside your body, correct?" the

victim replied, "Correct." The prosecutor then asked if "the area in which [her] menstrual cycle comes out of" was "the area that you call the vagina?" The victim replied, "Yes."

There is an instinctive urge to protect children from sexual offenses and to punish the perpetrator. But even when the same evidence could support two versions of what happened—one resulting in "guilty" and the other "not guilty"—choosing between the two cannot be based on speculation. "[S]trong suspicion or mere probability" is not enough; a finding of guilt cannot be sustained when it requires speculation as to which of the two versions is correct. *Taylor v. State*, 346 Md. 452, 458 (1997); *and see Bible v. State*, 411 Md. 138, 157 (2009) (trier of fact is required to make inferences on a sounder basis than "speculation or conjecture"). Our examination of the record in this case leads us to conclude that the victim's statements were too indefinite to support an inference of penetration beyond a reasonable doubt.

VI. Did the circuit court err by submitting to the jury a charge of third degree sexual offense, which was not contained in the indictment and is not a lesser included offense of second degree sexual offense?

Appellant was indicted on five counts, count no. 1 and 3 were *nolle prossed* before trial. He was convicted on four counts: count no. 2 - second degree sexual offense; count no. 4 - sexual abuse of a minor; count no. 5 - third degree sexual offense; and an additional unindicted count of third degree sexual offense, which was submitted to the jury as a lesser-included offense of the second degree sexual offense.

The second-degree sexual offense charge was based on committing a sexual act with a victim under the age of 14 when appellant was at least four years older. The unindicted third degree sexual offense count was based on the same age element, but "sexual act" was replaced with "sexual contact," specifically the "touching of the genitals" of the victim. That conviction was merged into the second-degree offense for sentencing. The indicted third degree sexual offense count was based on a different "sexual contact," specifically appellant's "plac[ing] his penis between the butt cheeks" of the victim.

Contentions

Appellant and the State agree that appellant's conviction of the unindicted third degree sexual offense be reversed, because an element of the uncharged crime is not included in the second-degree sexual offense.

Standard of Review

We review a trial court's legal conclusions to determine whether they are "legally correct." *See Middleton v. State*, 238 Md. App. 295, 304-05 (2018); *Anderson v. State*, 385 Md. 123, 131-32 (2005).

Analysis

A defendant may be convicted of an unindicted crime that is a lesser-included offense of one of the crimes with which the defendant was charged. *See, e.g., Williams v. State*, 200 Md. App. 73, 86 (2011); *Anderson v. State* 385 Md. 123, 132 (2005). In determining whether an offense is a lesser-included offense of another, we employ the

"required evidence" test. *See, e.g.*, *Middleton*, 238 Md. App. at 306; *Hagans v. State*, 316 Md. 429, 450 (1989); *Blockburger v. United States*, 284 U.S. 299 (1932). Under that test, all elements of the lesser included offense must be included in the greater offense. *Hagans*, 316 Md. 429 at 449-50. In other words, it would be impossible to commit the greater offense without having also committed the lesser. *Id*.

To be convicted of a sexual offense in the second degree, the State must establish that the defendant engaged in a sexual *act* with the victim. Sexual offense in the third degree, however, requires a sexual *contact*. *Compare* Md. Code. Ann., Crim. Law § 3-306(a)(3) *with* Md. Code. Ann., Crim. Law § 3-307(a)(3).

The General Assembly defines "sexual act" and "sexual contact" differently:

> "Sexual act" means any of the following acts: . . . an act in which an object or part of an individual's body penetrates, however slightly, into another individual's genital opening or anus; and that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party.

Md. Code. Ann., Crim. Law § 3-301(d)(1)(v).

> "Sexual contact", as used in §§ 3-307, 3-308, and 3-314 of this subtitle, means an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party. . . .

Md. Code. Ann., Crim. Law § 3-301(e)(1).

We have previously explained:

> What is involved in sexual contact is purposeful tactile contact and tactile sensation, not incidental touching. It is the sexually-oriented act of groping, caressing, feeling or touching of the genital area or the anus or the breasts of the [ ] victim. *It is something other than the necessarily involved contact that is merely incidental to the vaginal intercourse or the sexual act itself.*

Travis v. State, 218 Md. App. 410, 465 (2014) (emphasis added).

Appellant's second-degree sexual offense conviction was based on the digital penetration of the victim's genital opening on one particular occasion. Any touching of the victim's genital area was incidental to the charged sexual act. We agree that the uncharged sexual offense in the third degree must be reversed.

CONCLUSION

We have reversed two of appellant's convictions but other convictions remain. It is appropriate, as the State argues, to remand for resentencing the entire "sentencing package" under *Twigg v. State*, 447 Md. 1 (2016). "After an appellate court unwraps [a sentencing] package and removes one or more charges from its confines, the sentencing judge . . . is in the best position to assess the effect of the withdrawal and to redefine the package's size and shape (if, indeed, redefinition seems appropriate)." *Id.* at 28 (citations omitted); *see also Middleton v. State*, 238 Md. App. at 314 ("Our resolution of the question presented necessitates vacatur of what the court clearly regarded as the flagship charge. Under these circumstances, we deem it appropriate to give the court an opportunity 'to redefine the package's size and shape' as it thinks appropriate."). Under Courts and Judicial Proceedings § 12-702(b), appellant's sentence on remand cannot exceed the originally imposed sentence or the maximum sentence for the remaining two convictions.

CONVICTION OF SECOND DEGREE SEXUAL OFFENSE AND CONVICTION OF THE UNINDICTED THIRD DEGREE SEXUAL OFFENSE REVERSED.

SENTENCES FOR SEXUAL ABUSE OF A MINOR UNDER COUNT 4 AND THIRD DEGREE SEXUAL OFFENSE UNDER COUNT 5 VACATED. CASE REMANDED FOR RESENTENCING CONSISTENT WITH THIS OPINION.

COSTS TO BE PAID 2/3 BY APPELLANT AND 1/3 BY CHARLES COUNTY.