Circuit Court for Charles County
Case No. 08-K-15-001225

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 119

September Term, 2018

DARREN ANTHONY WIMBUSH

v.

STATE OF MARYLAND

Berger,
Leahy,
Eyler, James. R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: April 3, 2019

A jury in the Circuit Court for Charles County convicted appellant, Darren Anthony Wimbush, of one count of sexual abuse of a minor and ten counts of second-degree sexual offense.[1] The trial court sentenced appellant to three consecutive terms of life in prison, the first 15 years of each without the possibility of parole, plus an additional 85 years. Thereafter, appellant timely noted this appeal, asking us to consider the following questions:

1. Did the trial court err by allowing the State to present the jury with evidence that Appellant had information on the Maryland Case Search?

2. Did the trial court err in allowing a Sexual Assault Nurse Examiner to offer an expert opinion as to the cause of the victim's injuries when the Sexual Assault Nurse Examiner was not the nurse who performed the examination of the victim?

3. Did the trial judge err in denying Appellant's request to discharge counsel?

4. Is merger of three of Appellant's sentences for second-degree sexual offense required?

For the reasons that follow, we affirm the judgments of the trial court.

FACTS AND LEGAL PROCEEDINGS

In 2006, J.G., who then had three children, the eldest of whom was four-year-old B.M., married appellant. B.M. and her siblings called appellant "Daddy," as he was the only father they had known. After they married, J.G. and appellant had three more children together.[2]

[1] A previous trial had ended in a mistrial after the victim's mother revealed to the jury that appellant was a registered sex offender.

[2] By the time of trial, J.G. had divorced appellant as a result of the accusations against him.

In approximately 2012, J.G. was diagnosed with cancer. Her numerous medical appointments often left the six children in appellant's sole care and required B.M. to take on significant housekeeping and child-care duties for her younger siblings.

While living in Anne Arundel County in the summer of 2013, B.M. testified, appellant began touching her vagina while she was showering. His behavior soon escalated to forcing her to perform oral sex on him and committing anal sex on her, which sometimes caused her to bleed. When B.M. did not perform to his satisfaction, appellant hit her and engaged in the sexual activity with more force.[3] B.M. did not tell anyone about the abuse because appellant threatened her and her family's lives and told her that any revelation would tear her family apart.

After the family moved to Charles County in 2014, appellant's physical abuse of, and oral and anal sexual encounters with, B.M. continued "very frequent[ly]," usually in the bathroom of their Waldorf Motel room, where the entire family of eight lived. On one occasion, appellant also had vaginal sex with B.M.

Sometimes, appellant grabbed B.M. by her hair and pushed her head toward his penis, or restrained her with his hands, zip ties, or socks, to force her to comply with his sexual demands. On some occasions, he covered her mouth with a sock or washcloth to muffle her cries. Appellant told B.M. that if her mother were unavailable for sexual activity, it was her duty to perform in her mother's place.

[3] At the time of the trial in this matter, appellant was pending trial in the Circuit Court for Anne Arundel County on charges of alleged sexual abuse of B.M. in that county. A previous trial in Anne Arundel County had also ended in a mistrial.

After enduring appellant's advances in silence because she was afraid of what he would do if she revealed the abuse, B.M. eventually messaged and told her then-boyfriend, S.N., that appellant had raped her many times. According to S.N., in the telling, B.M. was "extremely sad and could barely control her emotions." Near the end of the 2014-15 school year, S.N. told his mother what B.M. had confided in him and spoke with a police officer.

On July 2, 2015, based on an anonymous Crime Stoppers tip, Charles County Sheriff's Office Detectives Kenneth Klezia and Rochelle Williams responded to the Waldorf Motel. To the detectives, B.M. denied any abuse because appellant was present and staring at her during the visit; appellant had threatened that if she told anyone, he would kill her and her mother and place her siblings in foster care. Klezia left his business card with B.M., but appellant took the card, ripped it up, and told her she would not need it. After the detective's visit, appellant became very paranoid and again threatened B.M.

A few days later, B.M. wrote a letter to Klezia, in which she detailed the anal and oral sex appellant forced her to perform and asked for help; she gave the letter to her mother to mail.[4] After he received the letter, Klezia had J.G. bring the children to the Social Services building without appellant, on the pretense that J.G.'s case worker had to discuss a prior referral about a housing voucher. The "case worker" was actually a Child Protective Services investigator working with Klezia to look into the allegation of sexual abuse. In appellant's absence, B.M. relayed the details of the abuse to Klezia, after which he advised her to undergo a Sexual Assault Nurse Examination ("SANE"). Despite the detective's

[4] B.M. did not know whether her mother read the letter before mailing it, and J.G. did not testify to clarify whether or not she had.

encouragement, B.M. did not complete the SANE until approximately two months later, due, in part, to her intervening hospitalizations for treatment of ovarian cysts.[5] Nurse Kathy Almassy performed the SANE on B.M. at the Charles Regional Medical Center on September 5, 2015.

Klezia also interviewed J.G. and four of B.M.'s siblings. T.M., aged 11, and J.M., aged 13 at the time of trial, testified that when the five younger siblings were outside playing, B.M. usually remained inside with appellant. On at least one occasion, T.M. and J.M. saw B.M. and appellant together on a blow-up mattress in the motel room, and the bed was shaking. T.M. and J.M. also saw B.M. and appellant go into the bathroom together on more than one occasion, and, at least once, T.M. heard a "silent-type clapping sound" through the closed door. T.M. and J.M. did not tell anyone about what they had seen because they were afraid of appellant, who was violent with the family.

By the time of trial, Almassy, who had had performed the SANE on B.M., was on medical disability and no longer employed by the Charles Regional Medical Center. Therefore, Deborah Shuck-Reynolds, the hospital's supervisor of the SANE program, accepted by the court as an expert in sexual assault nurse examination, reviewed Almassy's

[5] During that treatment, B.M. denied being sexually active and made no report of sexual abuse. With no allegation of sexual abuse or symptoms related to the treatment of the cysts, the treating physician found no reason to report a suspicion of abuse to the authorities.

chart on B.M., which included photographs of the child's identified genital and anal injuries.[6]

In the photographs, Shuck-Reynolds observed no signs of vaginal sexual assault, but she identified scarring between 3:00 and 5:00 on the child's anus. To Shuck-Reynolds, the scar indicated a "transection of the tissue, which is a tearing of the tissue, and it's not healed, leaving a thickening and a scarring in the anal opening." She attributed the scarring to "[t]raumatic injury to the tissue" by some type of penetration, in accordance with the leading scientific research on the subject.

In Shuck-Reynolds's opinion, the dilatation at the anal opening, which is not the normal appearance of an anus, was consistent with repeated penetration. It was her testimony that no other type of external injury could have caused the type of transection noted on B.M.'s anus. She acknowledged, however, that Almassy had documented no palpation of the anal area to determine if the abnormal appearance of the anus was actually scar tissue or some other skin abnormality.

In his defense, appellant denied having anal, vaginal, or oral sex with B.M., instead accusing B.M. and S.N. of lying about any sexual abuse. Appellant acknowledged that the police had been called to the family's room at the Waldorf Motel for a complaint of domestic violence, but he pointed out that no one had ever been charged.

DISCUSSION

I.

[6] As supervisor, Shuck-Reynolds said she also personally reviews the chart of every SANE examination done at the hospital.

Appellant first contends that the trial court erred when it permitted the State to alert the jury that information relating to his prior convictions existed online in the Maryland Case Search database. In his view, that knowledge "invited the jurors to search" his criminal history and to infer that he had been convicted of more than the one crime of distribution of drugs about which the jury had been informed.[7] He claims that the State's reference to his presence in Maryland Case Search comprised "irrelevant, highly inflammatory, inadmissible other crimes evidence" but had no probative value.

Prior to opening statements, the prosecutor reminded the court of its prior rulings on appellant's motions *in limine*, including one that permitted the admission of evidence of his conviction of a 2009 drug offense, if he testified, but precluded the admission of evidence of his prior conviction of rape, as that would be too prejudicial. The prosecutor then argued that appellant's acknowledgment, during his testimony at the Anne Arundel County trial, of his wrongdoing in the drug case was meant to imply that "he takes responsibility when he has done wrong," and that he had changed his life for the better. Therefore, the prosecutor continued, if he testified and denied having committed the charged crimes in this matter because he would never do such a thing, as he had during the Anne Arundel County trial, that testimony should be deemed as opening the door to the admission of the prior rape conviction. The prosecutor asked the court to reserve on ruling on the admissibility of the rape conviction, which she did not intend to introduce "unless it becomes an issue after the defendant testifies."

[7] Indeed, appellant had also been convicted previously of second-degree rape of a 13-year-old girl.

The court ruled that, were appellant to testify and say something such as, "I would never do something like this," he would do so "at his own peril," and the court would address the issue at that time. The court also reminded the attorneys to ensure that no witness revealed appellant's status as a registered sex offender.

During direct examination, appellant testified that after he was injured and became unable to work at his job as a sprinkler installer, he performed odd jobs and attempted to distribute drugs, but he "got caught" during his first sale. Upon cross-examination, appellant acknowledged that he had been convicted of distribution of drugs in 2009.

Later during cross-examination, the prosecutor asked appellant if he was aware of the June 30, 2015 anonymous Crime Stoppers tip to the police about his alleged abuse of his stepdaughter, which was purportedly made by the mother of a boy who was a friend of B.M.'s, and whether he agreed that it was in line with S.N.'s testimony that he told his mother about B.M.'s claim of abuse at the end of the 2014-15 school year, which ended days before the tip was received. Appellant agreed that the tip did correspond with S.N.'s testimony, but he averred that it was actually J.G., not S.N.'s mother, who made the anonymous tip.

On re-direct examination, defense counsel had appellant read the description of the suspect in the anonymous tip, which listed his name, date of birth, and address and described him as a black male, 6'2" tall, 250 pounds, with short black hair and brown eyes. Appellant explained that he had never met S.N. or his mother, and it was therefore highly unlikely either of them would know his height, weight, or date of birth.

On re-cross examination, the prosecutor asked one further question: "Due to your 2009 conviction, your information is on Maryland Case Search, correct?" Appellant answered in the affirmative, after which defense counsel asked to approach the bench, where he argued that the prosecutor's question was "outrageous, because it is going to cause one of those twelve people to search in Case Search."

The prosecutor responded that appellant "made a point that [S.N.] doesn't know the information, and anyone can find his information to fill out that anonymous tip. You just go to Maryland Case Search and the information is there." Defense counsel again stated his objection to placing the information in front of the jury, to which the court responded, "Well, I'm about to tell them not to look." Defense counsel replied, "I would like you to tell them not to look" but made no further objection or request for a cure.

Immediately thereafter, the court instructed the jury not to discuss the case with anyone and to "Please remember that you should not research or investigate the case or the individuals involved in it. Do not conduct any searches relating to this case in books, newspapers, on the internet, websites, blogs, or any other source of information. . . If anyone tries to discuss this case with you, or you learn that my instructions are not being followed, please write me a note and give it to the bailiff as soon as possible, and do not discuss it with anyone else." And, on every, or nearly every, subsequent occasion the jury was dismissed from the courtroom, the court repeated its admonishment to refrain from doing any research about the case.

Although not argued by the State in its brief, we conclude that appellant's contention that the court erred in permitting the jury to learn that his information was in Maryland

Case Search raises no ground for appeal.[8] In *Klauenberg v. State*, 355 Md. 528, 545 (1999), the defendant objected to a witness's testimony that the defendant had previously beaten his father and the witness and asked the trial court to strike the testimony, but for no other remedy. *Id*. at 545. Although the trial court sustained the objection and struck the testimony, the defendant claimed error on appeal because the testimony "obviously. . .could not be erased from the minds of the jurors." *Id.* The Court of Appeals held that "[b]ecause he received the remedy for which he asked, appellant has no grounds for appeal." *See also Ball v. State*, 57 Md. App. 338, 358-59 (1984), *aff'd in part and rev'd in part on other grounds by Wright v. State*, 307 Md. 552 (1986) (in getting the remedy he requested and asking for no other relief, "[i]n a nutshell, the appellant Ball got everything he asked for. This is not error.").

Here, appellant objected to the State's question regarding the availability of his personal information in Maryland Case Search, but his only request to the court was that it advise the jury not to look at the Case Search database, which the court did immediately thereafter and on several subsequent occasions. Appellant did not ask for any further relief or remedy, so he has no ground for appeal on this issue.[9]

[8] This Court may, *sua sponte*, conclude that an issue has not been properly preserved for appellate review. *See Haslup v. State*, 30 Md. App. 230, 239 (1976).

[9] Even were we to consider the issue, appellant would not prevail. We agree with the State that, in raising doubt about the likelihood that S.N. or his mother could have known the details submitted in the anonymous Crime Stoppers tip, appellant opened the door to the admission of evidence as to how they easily could have obtained that information, that is, by inputting appellant's name into the Maryland Case Search, which reveals such personal information when a person has been convicted of a crime. *See Mitchell v. State*, 408 Md. 368, 388 (2009) (quoting *Clark v. State*, 332 Md. 77, 85 (1993))

II.

Appellant next avers that the trial court erred in permitting Deborah Shuck-Reynolds, as a "surrogate witness," to offer an expert opinion that B.M. had suffered injury to her anus as a result of repeated penetration when it was not she who performed the SANE examination on the child. He claims that his inability to cross-examine Kathy Almassy, the nurse who performed the examination, negatively impacted his right to confront the witnesses against him.

The State initially raises a preservation argument, on the grounds that: (1) the argument appellant presented to the trial court in support of his motion *in limine* differs from the one he presents on appeal and; (2) appellant did not object, as required, to Shuck-Reynolds's testimony following the court's denial of his motion. In any event, the State continues, the court properly admitted Shuck-Reynolds's testimony as expert opinion because she did not simply repeat Almassy's conclusions but reviewed B.M.'s chart, including photos of the child's alleged injuries, and explained what she observed "in the pictures," based on her own extensive experience in conducting over 500 SANEs,

("'[O]pening the door' is simply a way of saying: 'My opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue.'").

Moreover, even if the court's admission of the evidence were erroneous, any such error would be harmless. *See Dorsey v. State*, 276 Md. 638, 659 (1976). Appellant had admitted to a 2009 drug conviction, and the prosecutor, in referring to his presence in the Case Search system, specifically referred to the 2009 conviction but said nothing about a prior sex offense. There is no evidence to suggest the jury would have assumed another conviction. And, given the court's numerous instructions to the jurors not to conduct any research, which we presume they followed, *see Dillard v. State*, 415 Md. 445, 465 (2010), any assertion that the jury would look at Case Search and find the prior rape conviction is entirely speculative.

specialized training, and relevant research. In addition, appellant thoroughly cross-examined the witness, establishing that no confrontation clause violation occurred.

We agree with the State that appellant has failed to preserve this issue for our review.

On December 12, 2017, appellant filed a written motion *in limine* asking the court to limit Shuck-Reynolds's testimony "to the findings of the initial sexual assault forensic examiner" because Shuck-Reynolds, who did not perform the SANE on B.M., had testified in the Anne Arundel County case, and was likely to testify in the trial of this matter, that the anal scarring Almassy had observed on B.M. was indicative of ongoing sexual abuse. In appellant's view, Shuck-Reynolds's opinion was "not based upon any accepted science in the field of sexual assault forensic exams," because experts in the field "have opined that one cannot offer an opinion as to how many times a victim has been assault[ed] if an injury is observed."

That same day, prior to Shuck-Reynolds's trial testimony, defense counsel orally argued that Shuck-Reynolds should be prevented from asserting an opinion that B.M.'s injuries were evidence of repeated sexual abuse because: (1) she was not a medical doctor; and (2) she was not the person who performed the SANE on B.M. and "really can't say anything more than what Nurse Almassy said in her report." After the intervening testimony of another witness, defense counsel added that Shuck-Reynolds should not be permitted to offer an expert opinion of repeated abuse based on allegations of the victim and photographs, rather than "scientific reasons."

The court, in expressing a lack of understanding as to the exact objection, asked defense counsel if the objection was that "the witness can't give this opinion because she

didn't do the examination, or because it has to a doctor?" Counsel responded, "I believe she can't give the opinion for both reasons." The court ruled that "that's all perfect, and fine, and fair for cross examination."

The court accepted Shuck-Reynolds as an expert in sexual assault nurse examination, without objection from the defense, and the witness testified, without objection, that the anal scarring she observed in the photographs taken during B.M.'s SANE indicated healed tearing of the tissue that was caused by repeated penetration; her findings, she said, were supported by the "research in this field." Thereafter, defense counsel cross-examined Shuck-Reynolds about the fact that she personally had not created a report, her reliance on the history as reported by the patient, and the failure of any SANE nurse to palpate the injury to determine if it was truly scar tissue, as advocated by the same research she had cited on direct examination.

Although defense counsel filed a timely motion *in limine* seeking to limit Shuck-Reynolds's testimony regarding her opinion that B.M.'s injuries were caused by repeated anal penetration, he did so on the grounds that Shuck-Reynolds had not personally performed the SANE on B.M. and that her conclusion was not based on accepted scientific research in the field of sexual assault forensic exams. At trial, defense counsel renewed his objection on the basis that Shuck-Reynolds had not performed the SANE and added that only a doctor could offer an expert opinion that repeated sexual abuse had occurred. Because these grounds differ from the confrontation clause argument raised by appellant in his appeal, his challenge to Shuck-Reynolds's testimony is waived, and we will not consider it. *See State v. Jones*, 138 Md. App. 178, 218 (2001) (quoting *Leuschner v. State*,

41 Md. App. 423, 436 (1979)), *aff'd*, 379 Md. 704 (2004) ("[W]hen particular grounds for an objection are volunteered or requested by the court, 'that party will be limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated.'").[10,11]

III.

Next, appellant claims that the trial court erred or abused its discretion in denying his requests to discharge trial counsel.[12] Because he had meritorious reasons to dismiss his

[10] We are not persuaded, however, by the State's second stated reason for non-preservation, that is, that appellant did not offer a contemporaneous objection during Shuck-Reynolds's testimony. Although we have made clear that "'when a motion *in limine* to exclude evidence is denied, the issue of the admissibility of the evidence that was the subject of the motion is not preserved for appellate review unless a contemporaneous objection is made at the time the evidence is later introduced at trial,'" *Morton v. State*, 200 Md. App. 529, 540–41 (2011) (quoting *Klauenberg*, 355 Md. at 539), we have reviewed the admission of testimony, even in the absence of an objection, when the motion *in limine* and the objectionable testimony occurred within close "temporal proximity[.]" *See Dyce v. State*, 85 Md. App. 193, 198 (1990). Here, the court's ruling on appellant's motion *in limine* immediately preceded Shuck-Reynolds's testimony, furnishing sufficient temporal proximity between the two to excuse renewed objection.

[11] And, again, were we to consider the issue raised by appellant, we would find no violation of his right to confront a witness against him. At the time of trial, Almassy was on medical disability and unavailable. In testifying, however, Shuck-Reynolds did not rely on hearsay evidence generated by Almassy's report; instead, she offered her own independent opinion, based on her experience and position as SANE nurse manager who personally reviews every file of an alleged sexual assault victim and accepted research in the field, that the photographs and history presented by B.M. indicated anal injury caused by repeated penetration. Appellant was given, and took advantage of, the opportunity to cross-examine Shuck-Reynolds on her opinion.

[12] Appellant was represented by both Breon Johnson and Edwin MacVaugh at trial, although the professional relationship between the two attorneys is unclear from the record. In moving to discharge his trial counsel prior to sentencing, appellant was unsure whether MacVaugh was still his attorney, but he referenced both lawyers in his argument that he should be permitted to discharge counsel.

attorneys, he argues that: (1) his sentence must be vacated, with the matter remanded for a new sentencing proceeding; and (2) the court's denial of his motion for a new trial must also be vacated, with new attorneys given the opportunity to amend the motion.

Although a request to discharge counsel is generally governed by Maryland Rule 4-215(e), the rule only applies pre-trial and not once "meaningful trial proceedings" have begun.[13] *Barkley v. State*, 219 Md. App. 137, 162 (2014) (citing *State v. Brown*, 342 Md. 404, 426 (1996)). "Once meaningful trial proceedings have commenced, the decision of whether to permit the discharge of counsel is entrusted to the discretion of the trial judge." *Id.*

[13] Rule 4–215(e) 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.

The Court of Appeals has held that "meaningful trial proceedings" have begun as early as the *voir dire* proceeding. *State v. Hardy*, 415 Md. 612, 627 (2010).

The Court of Appeals has discussed the required consideration of a defendant's request to discharge counsel mid-trial, explaining:

> When a defendant makes a request to discharge counsel at a time when Rule 4-215(e) does not apply strictly, "[t]he court must conduct an inquiry to assess whether the defendant's reason for dismissal of counsel justifies any resulting disruption" and rule on the request exercising broad discretion. *Brown*, 342 Md. at 428, 676 A.2d at 525. The court's burden in making this inquiry is to provide the defendant the opportunity to explain his or her reasons for making the request; in other words, the court need not do any more than supply the forum in which the defendant may tender this explanation. *See* [*State v.*] *Campbell*, 385 Md. [616, 635 (2005)] (stating that "the trial judge was not required to make any further inquiry" after the defendant made clear his reasons for wanting to dismiss his counsel); *Brown*, 342 Md. at 430, 676 A.2d at 526 (describing court's burden as duty to "provide an opportunity for [the defendant] to explain his [or her] desire to discharge counsel" (emphasis added)).
>
> If the court provides this opportunity, how to address the request is left almost entirely to the court's "sound discretion." *Brown*, 342 Md. at 426, 676 A.2d at 524. According to *Brown*, the court should consider six factors in exercising its discretion in this regard:
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> > (1) the merit of the reason for discharge; (2) the quality of counsel's representation prior to the request; (3) the disruptive effect, if any, that discharge would have on the proceedings; (4) the timing of the request; (5) the complexity and stage of the proceedings; and (6) any prior requests by the defendant to discharge counsel.
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> 342 Md. at 428, 676 A.2d at 525. All six of these factors, however, may be considered in a brief exchange between the court and the defendant about the defendant's reasons for requesting the dismissal of defense counsel.

Hardy, 415 Md. at 628–29 (footnote omitted).

The *Hardy* Court further explained that "it is the defendant's duty to explain fully the reasons for the request after this opportunity has been provided, rather than there being a continuing burden on the trial judge to probe the defendant with questions until the

defendant has given a fuller answer." *Id.* at 628 n. 12. The Court concluded, based upon these principles, that "trial courts abuse their discretion when they fail to allow a defendant any opportunity to explain his or her request at all, thus making it impossible to consider the six factors in *Brown.*" *Id.* at 629.

In the present case, appellant sought to discharge his attorneys after the jury had rendered its verdict. Given the timing of his request, Rule 4-215 does not apply, and the court's determination of the merit of appellant's request for discharge was left to its sound discretion.

Following trial, but prior to sentencing, the court held a hearing to discuss with counsel the psychosexual evaluation that had been ordered in conjunction with appellant's pre-sentence investigation. During that hearing, appellant moved to discharge defense counsel. The court acknowledged that appellant had written his attorneys a letter advising of his decision to discharge them and asked whether appellant wished to represent himself or proceed with another plan. Appellant stated he wished to obtain a public defender to represent him in post-trial matters and through appeal.

When the court inquired why he wished to discharge his trial counsel, appellant expressed his displeasure that counsel had not visited him after trial. In addition, when he had asked defense counsel to file a motion for new trial, counsel advised that post-trial activity exceeded their obligation, forcing appellant to file the motion, *pro se*. Although he acknowledged that counsel later offered to file a motion for new trial—only to learn appellant had already filed one—and appeared at the hearing on the motion, appellant said that the attorneys spoke with him solely to let him know they would request a continuance

and to advise him of "issues that [he was] facing in the criminal procedure." Appellant also asserted "ongoing issues within this firm. . . that ha[ve] had a negative impact on their obligated services as [his] Defense Counsel," including tension between the firm's attorneys and inaction on appellant's requests to them.

Johnson responded that he "recognize[d his] responsibilities to the Court, as well as Mr. Wimbush" and had "tried to discharge those as such." He explained the difference of opinion between him and appellant regarding the time period in which the motion for new trial was required to be filed, which led to appellant's *pro se* filing of that motion.

The court, agreeing that there had been "some strategy disagreements" between appellant and defense counsel and that their relationship had been "sort of rocky,"[14] found that, having "watched the performance of Counsel. . .even today," the attorneys had nonetheless fulfilled their duties to appellant. The court therefore declined to find a meritorious reason to discharge counsel.

The court advised appellant that he could still discharge counsel and attempt to have a new attorney appear on his behalf at sentencing but that sentencing would proceed as scheduled. Appellant declined to discharge his attorneys.

[14] Indeed, at a pretrial hearing, defense counsel had moved to withdraw their representation of appellant based on his inability to pay, in satisfaction of the retainer agreement. The court ruled that defense counsel's reasons were not meritorious enough to leave appellant without counsel less than 12 days before trial and denied the motion. Defense counsel repeated the request prior to the start of the first day of trial, arguing that appellant would be prejudiced by their inability to pay their planned rebuttal expert witness. The court did not amend its ruling. During the post-trial hearing, the court acknowledged that counsel's attempts to withdraw "might not be something that inspires faith" in appellant but nonetheless found that defense counsel had acted appropriately in defending appellant.

The colloquy, taken as a whole, indicates that the trial court afforded appellant "the opportunity to explain his or her reasons for making the request" to dismiss counsel. *Hardy*, 415 Md. at 628. The trial court was not required to "do any more than supply the forum in which the defendant may tender this explanation." *Id.* By providing appellant an opportunity to explain the reasons for his dissatisfaction with counsel, and by asking clarifying questions in order to determine the underlying basis for appellant's dissatisfaction, the trial court evaluated appellant's request to discharge counsel and found it unmeritorious. Accordingly, we hold that the trial court did not abuse its discretion by denying appellant's request to discharge counsel, particularly at such a late stage in the proceedings.

IV.

Finally, appellant argues that two of his three consecutive life sentences imposed for second-degree sexual offenses based on anal sex by force and one of his two consecutive 30-year sentences for second-degree sexual offense based on fellatio by force must merge because the jury instructions and verdict sheet were ambiguous as to what conduct the jury relied upon in convicting upon each count. In his view, a remand is required for a new sentencing procedure, with instructions that he receive "no more than one sentence for second-degree sex offense of anal intercourse by force and one sentence for second-degree sex offense of fellatio by force."[15]

[15] Appellant acknowledges three theories of merger—the required evidence test, which he agrees does not apply in this matter, the rule of lenity, and the principle of fundamental fairness—and argues that merger is required due to the alleged ambiguity "as to what conduct the jury relied upon to reach the guilty verdicts." He makes no claim that

The jury convicted appellant of one count of sexual abuse of a minor and 10 counts of second-degree sexual offense.[16] According to the verdict sheet, the second-degree sexual offenses were broken down, as follows:

1. Two counts of anal intercourse based on the use of force between October 5, 2014 and June 30, 2015;

2. Two counts of anal intercourse based on the victim's age between October 5, 2014 and June 30, 2015;

3. Two counts of fellatio based on the use of force between October 5, 2014 and June 30, 2015;

4. Two counts of fellatio based on the victim's age between October 5, 2014 and June 30, 2015;

5. One count of anal intercourse based on the use of force between June 1, 2015 and June 30, 2015;

6. One count of anal intercourse based on the victim's age between June 1, 2015 and June 30, 2015.

During sentencing, the court imposed separate sentences, as follows:

1. Life sentence for second-degree sexual offense, anal sex by force, between June 1, 2015 and June 30, 2015 (Count 13);

2. Life sentence for second-degree sexual offense, anal sex by force, between October 5, 2014 and June 30, 2015, consecutive to Count 13 (Count 7);

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the sentences themselves are illegal or that the court relied upon impermissible considerations during sentencing.

[16] Effective October 1, 2017, the crimes of second-degree sexual offense, including fellatio and anal sex, were re-codified as the crime of second-degree rape, which, if committed by a person over the age of 18 on a child under the age of 13, carries a penalty of not less than 15 years and not exceeding life in prison. Md. Code, §§3-301 and 3-304 of the Criminal Law Article.

3. Life sentence for second-degree sexual offense, anal sex by force, between October 5, 2014 and June 30, 2015, consecutive to Counts 13 and 7 (Count 2);

4. 30 years for second-degree sexual offense, fellatio by force, between October 5, 2014 and June 30, 2015, consecutive to Counts 13, 7, and 2 (Count 4);

5. 30 years for second-degree sexual offense, fellatio by force, between October 5, 2014 and June 30, 2015, consecutive to Counts 13, 7, 2, and 4 (Count 9);

6. 25 years for sexual abuse of a minor between October 5, 2014 and June 30, 2015 (Count 1).

The convictions on the remaining charges, including all the charges based on B.M.'s age, were merged for sentencing purposes.

Appellant claims that the court should not have imposed separate, consecutive sentences on Counts 7, 9, and 13 because the jury's verdict was ambiguous as to the number and timing of the acts the jury found him guilty of committing on B.M. We disagree.

We have held that "when the indictment or jury's verdict reflects ambiguity as to whether the jury based its convictions on distinct acts, the ambiguity must be resolved in favor of the defendant." *Morris v. State*, 192 Md. App. 1, 39 (2010). On the other hand, in *Graham v. State*, 117 Md. App. 280, 288-90 (1997), we held that when the charging document and the jury instructions make clear that the separate charges are based upon separate and distinct acts, and the jury's verdict evidences its finding of distinct acts, the separate assault sentences may stand. The State's closing argument to the jury may also be considered in determining whether any ambiguity existed. *See Lamb v. State*, 93 Md. App. 422, 464 (1992).

Here, the court instructed the jury on the elements of the charged crimes and advised that it "must consider each charge separately and return a separate verdict for each charge."

The prosecutor, during her closing argument, explained that the State bore the burden of proving beyond a reasonable doubt that appellant committed ten acts of sexual offense in the second-degree to support the ten charged counts. She went on to clarify that the State had charged

> three acts of anal intercourse that occurred between October 5th, 2014 and June 3th, 2015. You have two acts of fellatio that the State charged during that time period. You get the multiple counts because there's elements based on the age and elements based on the force for the same act. So, for instance, when you get to the bottom of 10 and 11, [B.M.] testified that the last time that she remembered the anal intercourse happening, the most concise date she could give was the month of June. You will see the dates for that are June 1st of 2015. So, for that one act of anal intercourse, you have a question based on age and the force. So, that's why there are multiple counts.

The prosecutor added that appellant had undertaken anal sex with B.M. "over and over, here in Charles County," "at a minimum, five times," but that the oral sex "happened so frequently or more, at a minimum, the two, which goes back to the number of sexual acts the State charged. [B.M.] said, at a minimum, five. That was her best guess. Ten or more total acts, including Ann[e] Arundel and here, as you learned from Detective Klezia. But when breaking it down specifically to Charles County, a minimum of five, and at least two were oral sex."[17]

Although B.M., given her youth and the amount of time that had passed between the sexual abuse and the trial, was unable to specify the exact number of times, or the dates on which, the abuse occurred, she made it clear that she was subjected to anal sex more

[17] Indeed, B.M. had testified that, in Charles County, "I know for sure that the anal sex was very, very frequent, and the oral was just kinda like once or twice a week." When asked by the prosecutor how many times she had been subjected to anal sex by appellant in Charles County, B.M. answered, "More than five."

than five times between October 2014, when the family moved to Charles County, and June 2015, shortly before appellant was arrested. She also made clear that appellant had forced her to perform oral sex on him at least once or twice a week during that same time frame.

The victim's testimony, the court's jury instructions setting forth the elements of the crimes of second-degree sexual assault based on force and age, and the prosecutor's closing argument, taken together, made clear to the jury that each charged count referred to a separate act the State was required to prove beyond a reasonable doubt. Any claim that the jury found the verdict sheet or instructions ambiguous to the point that it was unclear what conduct the jury relied upon in convicting upon each count is entirely speculative. Because we perceive no impermissible ambiguity in the jury's verdict, and because the sentences imposed for the crimes of which appellant was convicted were within the prescribed penalties, we are not persuaded that merger of any of the consecutive sentences is required.

JUDGMENTS OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.