Circuit Court for Montgomery County
Case No. 128021C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1413

September Term, 2019

DANIEL JAY GROSS

v.

STATE OF MARYLAND

Nazarian,
Wells,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: May 13, 2021

Daniel Gross was convicted in the Circuit Court for Montgomery County of sexual offenses—one count of sexual abuse of a minor and two counts of second-degree sexual offense—he committed against his adopted daughter. On appeal, he argues that the circuit court erred in admitting statements the victim made to a social worker, a physician, and her mother; in refusing to ask certain *voir dire* questions; in imposing a mandatory minimum sentence for each of the second-degree sexual offense counts; and in denying his motion to suppress evidence seized pursuant to a search warrant. The State agrees, and so do we, that the court erred in imposing the minimum sentences, so we vacate Mr. Gross's sentences and remand for resentencing. Otherwise, we affirm.

I. BACKGROUND

The victim in this case, A.M., was born in 2007 to J.M. ("Mother"). As a result of some "mental difficulties," Mother lived at home with her mother, C.M. ("Grandmother"). Shortly after A's birth, Grandmother, who was A's primary caregiver, experienced "personal difficulties" of her own, and A was placed in foster care. When A was approximately two years old, Mother's parental rights were terminated and A was adopted by Mr. Gross and his wife. Even so, A continued to visit with Mother and Grandmother.

At trial, A testified that, around the time that she was in kindergarten, Mr. Gross asked her to "put [her] mouth on his man part" and "suck it." According to A, when she went to bed at night, Mr. Gross would come into her bedroom to say goodnight and pray with her. When they were done praying, Mr. Gross would "unzip his pants" and ask her to "suck his man part," which she did. A testified that "white goo" would come out of Mr. Gross's "man part" and that he would ask her to "rub it." Afterward, A would be

rewarded with permission to play with her toys or stay up late. She testified that these encounters occurred "throughout kindergarten."

At some point when she was in first grade, A told her adoptive mother, Ms. G., that Mr. Gross had made her "suck his man part." When Ms. G. confronted Mr. Gross with the allegation, he denied it. After that, A did not spend any more time alone with Mr. Gross.

In June 2015, after she reported the abuse to Ms. G., A was visiting her Grandmother and Mother at their home when she reported the abuse to them. During that same visit, Mother recorded a video, which was shown to the jury, of A telling Grandmother that Mr. Gross made her "suck his private part" and that he did it "a lot of times." A few days later, Grandmother took A to the Montgomery County Police Department to be interviewed.

Britney Colandreo, a social worker with the Montgomery County Child Welfare Services, testified that in June 2015, she was contacted by the Montgomery County Police and asked to participate in an investigation of the allegations against Mr. Gross. That same evening, Ms. Colandreo conducted a recorded interview with A. During that interview, which also was shown to the jury, A told Ms. Colandreo that Mr. Gross would come into her room at night, pull "it" out of his pants, and make her "suck it."

Dr. Evelyn Shukat, a child abuse pediatrician and the medical director of The Tree House Child Advocacy Center of Montgomery County, testified that in July 2015, she met with A to conduct a "foster screening examination." During that examination, A informed Dr. Skukat that "she and her father make deals" that "if she sucks her father's nuts she'll be able to stay up," and that "gooey stuff" came "out of his nuts." She also stated that the

abuse began when she was in kindergarten and that she told her adopted mother about the abuse during the winter of first grade.

The police later filed for and obtained a warrant to search Mr. Gross's home. As they executed it, the police discovered a section of the carpet near A's bed that was stained with what they thought might be bodily fluids. That section of the carpet was later analyzed and found to contain seminal fluid and spermatozoa. DNA samples from the seminal fluid and sperm were also analyzed, and a single DNA profile was compiled and compared to Mr. Gross's DNA profile. As a result of that analysis, the police determined that the DNA from the carpet had come from a single individual and was consistent with Mr. Gross's DNA profile.

Mr. Gross was convicted of one count of sexual abuse of a minor and two counts of second-degree sexual offense. For each of the two convictions of second-degree sexual offense, Mr. Gross was sentenced to a concurrent term of seventeen years' imprisonment, with a mandatory minimum sentence of fifteen years' imprisonment. For the conviction of sexual abuse of a minor, Mr. Gross was sentenced to a consecutive term of ten years' imprisonment, with all but five years suspended.

Mr. Gross noted a timely appeal. We supply additional facts as necessary below.

II. DISCUSSION

Mr. Gross raises several issues on appeal that we have rephrased.[1] He contends *first*

[1] Mr. Gross phrased his Questions Presented as follows:

1. Did the trial court err by introducing inadmissible hearsay?
2. Did the trial court err in refusing to ask *voir dire* questions

that the trial court erred in admitting A's out-of-court statements to Ms. Colandreo, the social worker, and Dr. Shukat, the medical director of The Tree House. *Second*, he contends that the trial court erred in admitting the video made by Mother and Grandmother recording A reporting the abuse to them. *Third*, he contends that the trial court erred in refusing to ask certain *voir dire* questions. *Fourth*, he contends that the sentencing court erred in imposing a mandatory minimum sentence of fifteen years' imprisonment for each of his convictions of second-degree sexual offense. And *fifth*, he contends that the circuit court erred in denying his motion to suppress the DNA evidence officers obtained during the search of his house. For reasons to follow, we vacate Mr. Gross's sentences and remand for resentencing, but affirm in all other respects.

A. The Trial Court Did Not Err In Admitting A's Statements To Ms. Colandreo And Dr. Shukat.

Before trial, the State filed a notice of its intent to introduce A's out-of-court statements to Ms. Colandreo and Dr. Shukat. *See* Maryland Code (2001, 2018 Repl. Vol.) § 11-304 of the Criminal Procedure Article ("CP"). Under that statute, the court was permitted to admit out-of-court statements as evidence if the statements were made to a physician or social worker in the course of the person's profession and if the statements had particularized guarantees of trustworthiness. *Id.* After a contested hearing at which both Ms. Colandreo and Dr. Shukat testified, the circuit court found that the statements had

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requested by Appellant?

3. Did the trial court err in imposing a mandatory minimum sentence?
4. Did the circuit court err in denying the motion to suppress?

been made to Ms. Colandreo, a social worker, and Dr. Shukat, a physician, in the course of their respective professional duties. The court also found that the statements had particularized guarantees of trustworthiness.

Sometime later, the State provided the defense with several additional video recordings of statements by A that Mother and Grandmother had recorded before A had been interviewed by Ms. Colandreo and Dr. Shukat. Those videos included the recording Mother made in June 2015 of A telling Grandmother that Mr. Gross made her "suck his private part."[2] These prompted a new motion challenging the admissibility of A's out-of-court statements to Ms. Colandreo and Dr. Shukat. Mr. Gross claimed, among other things, that these videos were "*prima facie* evidence" that A's statements to Ms. Colandreo and Dr. Shukat were "not spontaneous, but rather the product of family coaching" and therefore lacked the requisite particularized guarantees of trustworthiness.

At the hearing that followed, Ms. Colandreo testified that she was a social worker with the Montgomery County Child Welfare Services and that, as part of her duties, she interviewed children, including A, who made allegations of abuse. She testified that, when she interviewed A, she was not aware that any videos existed.

Dr. Shukat testified that she was a child abuse pediatrician and the medical director of The Tree House, a nonprofit, child advocacy center, and that sometimes she worked with child protective services, local doctors, and law enforcement. She stated that in

[2] The State disclosed three additional videos, one from February 2015 and two from March 2015, but it doesn't appear that any of these contained allegations of abuse by Mr. Gross.

July 2015, she had a "medical appointment" with A to get "a full and accurate medical history, history of any trauma that may have occurred to [the] child, and examine the child." She testified that when she examined A, she was not aware that any videos existed.

Dr. Leigh Hagan, a clinical and forensic psychologist, testified for the defense. He opined that the videos Mother and Grandmother recorded were part of Grandmother's efforts to regain custody of A. He claimed that the February video was "nice and gentle" and did not mention any abuse by Mr. Gross, but that the March videos showed an "escalation" of Mother and Grandmother's efforts to get A to say "bad things" about the Grosses. Dr. Hagan contrasted the videos from February and March with the June video, in which A was "tremendously upset." He posited that A appeared upset in the June video not because of the allegations of abuse, but because of Grandmother's "relentless proselytizing and twisting of the child's words." Dr. Hagan added that the June video showed Grandmother's "agenda" and provided a motive for A to fabricate the abuse allegations. He concluded that the statements A made to Ms. Colandreo and Dr. Shukat following the June 2015 video lacked sufficient guarantees of trustworthiness.

The court ruled that A's statements to Ms. Colandreo and Dr. Shukat had particularized guarantees of trustworthiness. The court noted first that it was "troubled" by the videos Mother and Grandmother had made because the two women were "not forensically trained to conduct interviews" and because it appeared that "there had been other discussions" about the abuse off camera. The court stated further that A seemed upset in the June video in large part due to the pressure being put on her by Grandmother to provide information. The court found that A's description of events to Ms. Colandreo and

Dr. Shukat "probably" was affected by her prior discussions with Grandmother.

Even so, the court concluded that A's statements did not appear to be concocted, rehearsed, or scripted, and that they still qualified as "spontaneous." The court found that Ms. Colandreo and Dr. Shukat "did their best not to lead the child" and "tried to crank down the pressure for her" and, after interviewing her separately, that she was an "honest frank child" who had "no confusion about what is truth and what is a lie" and who did "the best she could" while "having to talk with strangers about something as personal and sensitive as what it was." The court noted that A used terminology consistent with her age; that she provided a detailed account of events beyond her expected knowledge and experience; and that she provided a sufficient description of the nature and duration of the abusive conduct. Despite the passage of time between the abuse and when she reported it to Grandmother, the court found her "pretty consistent in her descriptions." The court was "not troubled" by certain inconsistencies given that A "really was torn" about reporting the abuse and did not want "to get her father in trouble." And, the court found, the DNA evidence found in A's bedroom demonstrated that Mr. Gross had an opportunity to commit the acts complained of in A's statements. The court concluded that Ms. Colandreo and Dr. Shukat were "both credible" and were "within the category of persons that were contemplated by the statute," and ruled that A's statements could be admitted at trial provided they were not otherwise inadmissible. At trial, the statements were introduced into evidence.

Mr. Gross argues on appeal that the circuit court erred in admitting A's out-of-court statements. He contends that Ms. Colandreo and Dr. Shukat were not acting in the course

of their profession, but rather as agents of law enforcement, and that the court erred in finding that the statements had particularized guarantees of trustworthiness. He contends that in making those findings, the court ignored key evidence, including the coercive nature of the videos made by Grandmother, discrepancies in A's statements, and the testimony of Dr. Hagan.

Generally, an out-of-court statement offered to prove the truth of the matter asserted is hearsay and inadmissible. *See* Md. Rules 5-801, 5-802. A hearsay statement may be admitted, however, if it falls within one of the recognized exceptions, one of which is a "statement made by a child victim who: (1) is under the age of 13 years; and (2) is the alleged victim . . . in the case before the court concerning . . . (ii) rape or sexual offense under §§ 3-303 through 3-307 of the Criminal Law Article[.]" CP § 11-304(b). Known as the "tender years statute," *Lawson v. State*, 389 Md. 570, 582 n. 2 (2005), CP § 11-304 permits the admission of hearsay by a child victim if the statement was made to and be offered by, among other professions, a physician or social worker who was "acting lawfully in the course of the person's profession when the statement was made." CP § 11-304(c). In addition, the statement must have "particularized guarantees of trustworthiness." In analyzing whether a statement has particularized guarantees of trustworthiness, CP § 11-304(e)(2) provides that "the court shall consider, but is not limited to, the following factors":

> (i) the child victim's personal knowledge of the event;
>
> (ii) the certainty that the statement was made;
>
> (iii) any apparent motive to fabricate or exhibit partiality by the child victim, including interest, bias, corruption, or

> coercion;
>
> (iv) whether the statement was spontaneous or directly responsive to questions;
>
> (v) the timing of the statement;
>
> (vi) whether the child victim's young age makes it unlikely that the child victim fabricated the statement that represents a graphic, detailed account beyond the child victim's expected knowledge and experience;
>
> (vii) the appropriateness of the terminology of the statement to the child victim's age;
>
> (viii) the nature and duration of the abuse or neglect;
>
> (ix) the inner consistency and coherence of the statement;
>
> (x) whether the child victim was suffering pain or distress when making the statement;
>
> (xi) whether extrinsic evidence exists to show the defendant or child respondent had an opportunity to commit the act complained of in the child victim's statement;
>
> (xii) whether the statement was suggested by the use of leading questions; and
>
> (xiii) the credibility of the person testifying about the statement.

When ruling on the admissibility of a statement offered into evidence under CP § 11-304, "the trial judge must comply with the foundational requirements of that statute." *Jones v. State*, 410 Md. 681, 700 (2009). "The 'clearly erroneous' standard is applicable to the factual findings required by this statute." *Id.*

We agree with the circuit court that Ms. Colandreo and Dr. Shukat were acting lawfully and in the course of their professions, when A made her statements to them. Ms. Colandreo, as a social worker with the Montgomery County Child Welfare Services, interviewed children who made allegations of abuse and her interview with A occurred in the courses of those duties. Dr. Shukat, a child abuse pediatrician, interviewed A in

connection with a "medical appointment" for the purpose of examining A and obtaining her full and accurate medical history. We see no error in the court's conclusion that Ms. Colandreo and Dr. Shukat fell within the category of persons contemplated by the statute. To be sure, both interviews were conducted in conjunction with, perhaps even at the behest of, law enforcement.[3] But as the Court of Appeals held in *Lawson*, a social worker who interviews a sexual-abuse victim is not transformed into an "agent of law enforcement" simply because the interview occurred as part of a police investigation. *Lawson*, 389 Md. at 576–85. Social workers act in the course of their profession "even when they are informed of the abuse by police officers or themselves report the abuse to the police." *Id.* at 585. So too here.

We likewise reject Mr. Gross's claim that the court erred in finding that the statements had particularized guarantees of trustworthiness. The court considered all of the factors outlined in § 11-304(e) of the Criminal Procedure Article and gave due regard to all the evidence, including the circumstances under which the videos were made, the consistency of A's statements, and Dr. Hagan's testimony.[4] The court recognized that the videos made by Grandmother were troubling and that Grandmother had put undue pressure on A. All the same, the court found A's statements to Ms. Colandreo and Dr. Shukat were

[3] Mr. Gross relies on *Snowden v. State*, which analyzed whether statements to a social worker were admissible where the child making the statements was unavailable to testify and not subject to cross-examination. 385 Md. 64, 84–92 (2005). Here, A testified and was cross-examined.

[4] The fact that the court did not mention Dr. Hagan's testimony specifically in its findings doesn't mean that the court did not consider that evidence. To the contrary, the court stated expressly that it had "listened carefully to all of the testimony and the evidence given."

sufficiently spontaneous and fairly consistent despite that pressure. The court noted as well that Ms. Colandreo and Dr. Shukat avoided leading questions and had alleviated pressure on A, that A appeared genuinely conflicted about reporting the abuse, and that A seemed on the whole to be an honest child who understood the difference between telling a lie and telling the truth. None of those findings were clearly erroneous, and we affirm the court's ruling.

B. The Trial Court Erred In Admitting The June 2015 Video, But The Error Was Harmless.

After A completed her testimony at trial, the State indicated that it intended to introduce into evidence the June 2015 video in which A first reported the abuse to Grandmother. The State argued that although A's statements in the video were hearsay, they were admissible nevertheless as prior consistent statements. Defense counsel objected, arguing that to qualify as a prior consistent statement not excluded by the rule against hearsay, the statement must be offered to rebut a charge of fabrication or improper influence or motive against the declarant. Defense counsel noted further that the prior consistent statement must also have pre-dated the charge of fabrication or improper influence or motive. He argued that because the defense's theory was that A had fabricated the allegations of abuse before making the June 2015 video, the statements in the video did not qualify as prior consistent statements. The trial court ultimately disagreed and admitted the video.

Mr. Gross raises the same contentions again here, we review them *de novo*, *Acker v. State*, 219 Md. App. 210, 220 (2014), and we agree with him. Maryland Rule 5-802.1

provides, in pertinent part, that an out-of-court statement by a witness is not excluded by the hearsay rule if it is "consistent with the declarant's testimony" and is "offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive[.]" But Rule 5-802.1(b) includes a "premotive" requirement: "as a prerequisite to admissibility, a prior statement must predate the alleged motive to fabricate." *Thomas v. State*, 429 Md. 85, 101 (2012). If a witness has been attacked by a charge of fabrication or improper influence or motive, "the applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made *before* the source of the bias, interest, influence, or incapacity originated." *Id.* at 102 (emphasis in original) (*quoting Holmes v. State*, 350 Md. 412, 417 (1998)). Thus, "a prior consistent statement may not be admitted to counter all forms of impeachment or to bolster the witness merely because he or she has been discredited." *Id.* (cleaned up) (*quoting Holmes*, 250 Md. at 420, 422). Put another way, "Rule 5-802.1(b) is not an avenue for the admission of a witness's consistent out-of-court statement unless the statement is introduced to rebut an impeachment based upon a specific event which is the source of the witness's motivation to fabricate." *Acker*, 219 Md. App. at 226.

Here, the defense's theory at trial was that Grandmother coerced A into making the accusations against Mr. Gross and that A's motive to fabricate had arisen before Grandmother made the June 2015 video. Because the charge of fabrication predated A's statements in the June 2015 video, those statements were inadmissible as prior consistent

statements. Thus, the trial court erred in admitting the statements.[5]

Nevertheless, the error was harmless. "An appellate court undertaking harmless-error analysis must 'be satisfied that there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict.'" *Walter v. State*, 239 Md. App. 168, 191–92 (2018) (*quoting Dove v. State*, 415 Md. 727, 743 (2010)). "In considering whether an error is harmless, we also consider whether the evidence presented in error was cumulative evidence." *Dove*, 415 Md. at 743. "[C]umulative evidence tends to prove the same point as other evidence presented during the trial." *Id.* at 744.

When the video was admitted, A already had testified both on direct and cross that she told her Grandmother that Mr. Gross had abused her. In fact, during her direct testimony, A stated specifically that she told her Grandmother that Mr. Gross wanted her "to suck his man part." When the June 2015 video was admitted, the jury had been exposed to the substance of the statements contained in the video. Moreover, the point that the statements tended to prove—that Mr. Gross made A perform oral sex on him—was well-established by other evidence presented at trial, most notably A's testimony, her statements to Ms. Colandreo and Dr. Shukat, and the DNA evidence linking Mr. Gross to the semen stain found near A's bed. The marginal cumulative impact of admitting A's statements to her Grandmother in the June 2015 video was negligible, and the error harmless.

[5] The State argues that A's statements were also admissible as a prompt complaint of sexual assault. We are not persuaded, though, that statements A made to her Grandmother several months after the abuse ended qualify as prompt.

C. The Trial Court Did Not Err In Declining To Ask Mr. Gross's Requested *Voir Dire* Questions.

Before trial, Mr. Gross submitted a list of *voir dire* questions for the court to ask to prospective jurors. Included were six questions relating to child sex crime defendants, the credibility of children as accusers, and adoptive parents:

> 4. Do you believe people accused of child molestation are commonly found to have child pornography in their possession?
>
> 5. Do you think young children can be especially susceptible to manipulation or suggestion by family or authority figures who may try to influence them?
>
> 6. Do you believe that children simply do not lie about allegations of sexual abuse?
>
> 7. Do you believe that children can be exposed to sexual matters as a result of access to the internet or electronic devices?
>
> * * *
>
> 9. Do you believe adoptive parents can experience difficulties with adoptive children that they may not experience with their own children?
>
> 10. Do you believe some people have used false allegations of sexual abuse in order to gain an advantage during custody or adoption battles?

The court declined to ask Mr. Gross's proposed questions, but did ask whether prospective jurors could be fair and impartial based upon the fact that the defendant was alleged to have had oral sex with a child; whether they (or a family member or close friend) were the victim of sexual abuse or domestic violence; whether they had ever adopted a child; and whether they would be more likely or less likely to believe a witness because the witness was a child. Approximately thirty-three prospective jurors responded in the affirmative to one or both of the court's questions regarding the nature of the charges and

whether the juror (or a family member or close friend) had been the victim of sexual abuse or domestic violence.[6] Of those, approximately twenty-five were stricken for cause, several of whom had indicated that they were more inclined to believe the victim. Only one of the remaining prospective jurors responded to the court's adoption question and that juror was not stricken for cause. None of the remaining prospective jurors responded to the court's question about whether they would be more or less likely to believe a child witness.

At the conclusion of *voir dire*, defense counsel objected on the grounds that the court did not ask Mr. Gross's proposed questions 4, 5, 6, 7, 9, and 10:

> THE COURT: Any other questions that you take exception to that I haven't asked?
>
> [DEFENSE]: Yes. No. 4, do you believe people accused of –
>
> THE COURT: And you already mentioned that. No, I understand. You did call them out by number.
>
> [DEFENSE]: No. 6 is very, very important. Some people believe that children simply don't lie about allegations of abuse. 4, 5, 6, 7, there's possible exposure to children's pornography on the internet or electronic devices. No. 9, whether adoptive parents experience difficulties – maybe that's not so relevant in light of only one person talked about adoption.
>
> THE COURT: The questions that you've called my attention to, frankly, those are evidentiary matters that may or may not come in. I don't think that those are questions that I need to ask in order to determine whether there should be a strike for cause, so I will respectfully deny that.
>
> [DEFENSE]: Your Honor, just for purposes of the

[6] There were some inconsistencies in the trial transcript that made it difficult to identify precisely how many prospective jurors responded in the affirmative. The same is true for the number of jurors struck for cause.

> record, the Defense is excepting to the Court's refusing to ask *voir dire* questions 4, 5, 6, 7, 9, 10[.] They are more than evidentiary questions. They go to the core belief systems of the jurors. They may come in here with preconceived knowledge about whether children lie or they don't lie.
>
> THE COURT: I think I've fairly covered that. You've made your record, and the record will reflect your exceptions.
>
> [DEFENSE]: How did you cover about whether children lie?
>
> THE COURT: I've gone into great detail about whether they're more likely or less likely to believe the testimony of a child. We've had a number of questions at the bench where I've explored that with them.

Mr. Gross argues that the trial court erred in refusing to ask his requested *voir dire* questions because the questions were "reasonably calculated to reveal juror disqualification and directly related to juror bias against the very nature of [his] case." "Voir dire, the process by which prospective jurors are examined to determine whether cause for disqualification exists, is the mechanism whereby the right to a fair and impartial jury, guaranteed by Art. 21 of the Maryland Declaration of Rights, is given substance." *Dingle v. State*, 361 Md. 1, 9 (2000) (citations and footnote omitted). Generally, the scope and form of the questions presented during *voir dire* rest solely within the discretion of the trial court. *Washington v. State*, 425 Md. 306, 313 (2012). In the exercise of that discretion, "[i]t is the responsibility of the trial judge to conduct an adequate *voir dire* to eliminate from the venire panel prospective jurors who will be unable to perform their duty fairly and impartially and to uncover bias and prejudice." *Id.* (*citing State v. Logan*, 394 Md. 378, 346 (2006)). Moreover, the questions posed by the trial court to the venire "should focus

on issues particular to the defendant's case so that biases directly related to the crime, the witnesses, or the defendant may be uncovered." *Dingle*, 361 Md. at 10. "If there is any likelihood that some prejudices in the jurors' mind which will even subconsciously affect his decision of the case, the party who may be adversely affected should be permitted questions designed to uncover that prejudice." *Id.* at 11 (*quoting Bedford v. State*, 317 Md. 659, 671 (1989)).

That said, "the sole purpose of *voir dire* 'is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification[.]'" *Pearson v. State*, 437 Md. 350, 356 (2014) (alterations in original) (*quoting Washington*, 425 Md. at 312). "To that end, '[o]n request, a trial court must ask a *voir dire* question if and only if the *voir dire* question is reasonably likely to reveal specific cause for disqualification.'" *Collins v. State*, 463 Md. 372, 376 (2019) (alteration in original) (*quoting Pearson*, 437 Md. at 357). "There are two categories of specific cause for disqualification: (1) a statute disqualifies a prospective juror; or (2) a 'collateral matter [is] reasonably liable to have undue influence over' a prospective juror." *Pearson*, 437 Md. at 357 (alteration in original) (*quoting Washington*, 425 Md. at 313). "The latter category is comprised of 'biases directly related to the crime, the witness, or the defendant[.]'" *Id.* (alteration in original) (*quoting Washington*, 425 Md. at 313).

"[I]n determining whether to pose a requested voir dire question, the trial judge should first determine whether a '*demonstrably strong correlation* [exists] between the status [or experience] in question and a mental state that gives rise to cause for disqualification.'" *Curtin v. State*, 393 Md. 593, 607 (2006) (emphasis and alterations in

original) (*quoting Dingle*, 361 Md. at 17). In addition, the trial judge should weigh "the expenditure of time and resources in the pursuit of the reason for the response to a proposed *voir dire* question against the likelihood that pursuing the reason for the response will reveal bias or partiality." *Perry v. State*, 344 Md. 204, 220 (1996). "We review the trial judge's rulings on the record of the voir dire process as a whole for an abuse of discretion." *Washington*, 425 Md. at 314 (*citing White v. State*, 374 Md. 232, 243 (2003)).

We discern no abuse of discretion in the trial court's decision not to ask Mr. Gross's proposed *voir dire* questions. The questions Mr. Gross requested either were not reasonably likely to reveal specific cause for disqualification or were cumulative to questions already posed by the court. Mr. Gross's question 4, which asked whether prospective jurors perceived a correlation between child molestation and child pornography, was irrelevant, as Mr. Gross was not charged with possession of child pornography, and there was no indication that any such evidence might be presented at trial. Same for his question 7, which asked about whether prospective jurors believed children could be exposed to sexual matters on the internet. Question 9, which asked whether adoptive parents experience difficulties, was similarly irrelevant (and also cumulative) given that only one juror responded to the question that the court did ask about prospective jurors' experience with adoption. In fact, when defense counsel objected to the court's refusal to pose his question 9, he recognized that the question was likely "not so relevant."

We likewise fail to see a connection between a mental state that would give rise to cause for disqualification and the beliefs that Mr. Gross's questions 5 and 10 would reveal. Although a juror's response to questions about children's susceptibility to manipulation or

propensity to make false sexual abuse allegations might reveal a cause for disqualification, they seemed designed primarily to aid the defense's peremptory challenge decisions given its theory that Mother and Grandmother had manipulated A into making false allegations against Mr. Gross to regain custody. *See Collins*, 463 Md. at 404 ("[I]n Maryland, *voir dire*'s sole purpose is to elicit specific cause for disqualification, not to aid counsel in the intelligent use of peremptory strikes.").

Finally, Mr. Gross's question 6, which asked whether prospective jurors believed that "children simply do not lie about allegations of sexual abuse," was addressed adequately by the court's question about whether prospective jurors would be more likely or less likely to believe a witness because the witness was a child. And because none of the prospective jurors responded to the court's broader question, there is no reason to believe that Mr. Gross's more specific question would have revealed biases that the court's question didn't. In addition, the court had already asked prospective jurors whether they had strong feelings about and/or experience with sexual abuse, and those questions garnered a large response and led to a significant number of strikes for cause. Several of the jurors who were stricken for cause indicated that they were more likely to believe the victim of sexual abuse. We see no abuse of discretion in the court's decision not to ask Mr. Gross's proposed question, which addressed the same issue.

D. The Sentencing Court Erred In Imposing A Mandatory Minimum Sentence For Each of Mr. Gross's Convictions For Second-Degree Sexual Offense.

Mr. Gross claims that the sentencing court erred in imposing a mandatory minimum sentence of fifteen years' imprisonment for each of his two convictions of second-degree

sexual abuse. The State agrees and so do we.

Mr. Gross was convicted of violating § 3-306 of the Criminal Law Article of the Maryland Code (2002, 2012 Repl. Vol.) ("CR"), which prohibits both sexual acts compelled by force and sexual acts with victims under the age of thirteen:

> (a) A person may not engage in a sexual act with another:
>
> (1) by force, or the threat of force, without the consent of the other;
>
> (2) if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the sexual act knows or reasonably should know that the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual; or
>
> (3) if the victim is under the age of 14 years, and the person performing the sexual act is at least 4 years older than the victim.
>
> (b) A person 18 years age or older may not violate subsection (a)(1) or (2) of this section involving a child under the age of 13 years.
>
> (c)(1) Except as provided in paragraph (2) of this subsection, a person who violates this section is guilty of the felony of sexual offense in the second degree and on conviction is subject to imprisonment not exceeding 20 years.
>
> (2)(i) Subject to subparagraph (iv) of this paragraph, a person 18 years of age or older who violates subsection (b) of this section is guilty of the felony of sexual offense in the second degree and on conviction is subject to imprisonment for not less than 15 years and not exceeding life.
>
> (ii) A court may not suspend any part of the mandatory minimum sentence of 15 years.
>
> (iii) The person is not eligible for parole during the mandatory minimum sentence.
>
> (iv) If the State fails to comply with subsection (d) of this section, the mandatory minimum sentence shall not apply.
>
> (d) If the State intends to seek a sentence of imprisonment for

> not less than 15 years under subsection (c)(2) of this section, the State shall notify the person in writing of the State's intention at least 30 days before trial.

In this case, Mr. Gross was convicted of two different violations of subsection (a)(3), each of which carries a penalty of imprisonment not exceeding twenty years. CR § 3-306(c)(1). But the mandatory minimum sentence of fifteen years' imprisonment defined in subparagraph (c)(2)(i) applies only to convictions pursuant to subsections (a)(1) and (2), not (a)(3). So although a fifteen-year sentence on each count is permissible, it isn't mandatory, and Mr. Gross's sentences must be vacated and his case remanded for resentencing. *See Clark v. State*, 218 Md. App. 230, 257–58 (2014) (vacating the defendant's sentence and remanding for resentencing where sentencing court erroneously thought that the defendant's conviction carried a mandatory minimum sentence of ten years' imprisonment when in fact the conviction carried a mandatory minimum sentence of five years' imprisonment).

E. Mr. Gross Waived Any Challenge To The Search Warrant.

In July 2015, shortly after A disclosed the abuse to authorities, the police applied for and obtained a search warrant for Mr. Gross's home. The warrant listed Mr. Gross's home address as the place to be searched and described the items to be seized as "evidence of crimes of . . . Child Abuse, Criminal Law Article 3-602 of the Annotated Code of Maryland." The warrant also referenced the supporting application in which the officer seeking the warrant provided a statement of probable cause indicating that A had told Ms. Colandreo that Mr. Gross had, on multiple occasions, come into her room and made her perform fellatio on him. The application also stated that A had told Dr. Shukat that

Mr. Gross made her "suck his nuts" and that "clear gooey stuff came out of the top of his nuts; it (fluid) went into his hand or paper towels or toilet paper, and it went into [her] mouth once." The application provided an extensive list of places to be searched and items to be seized, including "semen, saliva, blood and/or urine within the bedroom of [A]"

As they executed the warrant, the police discovered a section of the carpet near A's bed that was stained with semen. The semen was later analyzed and matched to Mr. Gross's DNA, and he was arrested and charged after.

On October 16, 2015, Mr. Gross, represented by counsel, made his first appearance in court. That same day, he filed an "Omnibus Pre-Trial Defense Motion" in which, among other things, he asked the court to "suppress all evidence obtained by police authorities as the result of an illegal search and seizure." For reasons not clear from the record, Mr. Gross chose not to litigate the validity of the warrant itself.

On January 19, 2016, the State notified Mr. Gross that it intended to introduce DNA evidence at trial. A few months later, the State provided the DNA results to defense counsel. Mr. Gross later filed a motion to exclude the DNA evidence but, again, didn't challenge the validity of the search warrant.

On April 25, 2017, Mr. Gross obtained new counsel because prior counsel withdrew from the case. On October 25, 2017, Mr. Gross filed a "Motion to Suppress, Motion to Find Good Cause for Filling a Belated Mandatory Motion & Incorporated Brief." In that motion, Mr. Gross challenged the search warrant that led to the discovery of the DNA evidence. He recognized that his motion was untimely under the Maryland Rules but argued that there was "good cause" for the court to hear his motion.

On November 30, 2017, the circuit court held a hearing on several pending motions. Defense counsel indicated that he wanted to argue his motion to suppress. The State responded that the motion was untimely, and the court agreed:

> THE COURT: All right. I'm going to deny that request to litigate that based on the time constraints that are authorized to file mandatory motions. They were waived by previous counsel. The new counsel step in the shoes of the previous counsel. It's not, all of a sudden, a new case. It's a continuation of that. And so I'll deny that request.

Even so, the court reconsidered the decision denying the motion to suppress at another hearing on March 22, 2019. After that hearing, the court issued a written order denying the motion and opining on the merits:

> While it would appear from the record that [Mr. Gross's motion has] previously been denied, to the extent that may not be so, the motion [is] hereby denied. Defendant concedes that the Motion to Suppress was not timely filed and requests a finding of good cause for not having timely filed it. The primary concern seems to be the carpet sample taken pursuant to [the] warrant from the child victim's bedroom and found to contain semen with Defendant's DNA. Ample probable cause to support this warrant was contained in the search warrant and the nature of the allegations further supported the warrant which yielded the evidence. Failure to pursue the suppression was more likely due to a perception of the futility of such a motion, rather than ineffective assistance of counsel. Assuming, arguendo, that the late filed motion was allowed to be heard, the court does not see a path for its success.

Mr. Gross argues on appeal that the search warrant was facially invalid because it lacked probable cause and did not specify with particularity the items to be seized and the place to be searched. He leaps right to the merits and doesn't address the timeliness issue or the court's findings regarding "good cause."

Maryland Rule 4-252 states, in relevant part, that motions challenging a search and seizure must be filed "within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213(c), except when discovery discloses the basis for a motion, the motion may be filed within five days after the discovery is furnished." Md. Rule 4-252(b). The consequences for missing this deadline are severe: challenges to a search and seizure "shall be raised by motion in conformity with this Rule and if not so raised are waived unless the court, for good cause shown, orders otherwise[.]" Md. Rule 4-252(a). "Failure to make a mandatory motion within the prescribed time limits, absent good cause to forgive the dereliction, bars all claims, even those full of constitutional merit." *Davis v. State*, 100 Md. App. 369, 385 (1994) (*citing Carbaugh v. State*, 49 Md. App. 706, 709 (1981), *aff'd*, 294 Md. 323 (1982)). "Defendant has the burden to show good cause." *Pugh v. State*, 103 Md. App. 624, 655–56 (1995) (*citing Davis*, 100 Md. App. at 385). To be sure, the "good cause" requirement vests the court with wide discretion, and the court's determination of good cause "is entitled to the utmost respect and should not be overturned unless there was a clear abuse of that discretion." *Id.* at 656 (*quoting Grandison v. State*, 305 Md. 685, 711 (1986)).

Mr. Gross acknowledges that his motion to suppress was untimely—it was filed approximately eighteen months after the State disclosed the DNA evidence and approximately two years after his initial appearance. That clock doesn't reset or adjust because Mr. Gross obtained new counsel in that time. *See Thompson v. State*, 245 Md. App. 450, 462 (2020) (noting that the appearance of new counsel does not revive the time period outlined in Rule 4-252). On the face of the Rule, then, the claims Mr. Gross sought

to raise in the motion to were waived.

We also see no reason to disturb the circuit court's finding that he lacked "good cause" to justify the late filing. The search warrant described with particularity the places to be searched and the items to be seized. Among other things, the accompanying warrant application listed "semen" as an item to be seized and A's bedroom as a place to be searched.[7] *See Eusebio v. State*, 245 Md. App. 1, 26 (2020) ("[T]he description of the limited places to be searched . . . must be 'such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended.'" (*quoting Steele v. United States*, 267 U.S. 498, 503 (1925))). The search warrant and accompanying application also included the statements A made to Ms. Colandreo and Dr. Shukat describing the sexual acts and provided ample probable cause to justify the search for semen in A's bedroom. *See Patterson v. State*, 401 Md. 76, 91 (2007) ("Probable cause has been defined by this Court as 'a fair probability that contraband or evidence of a crime will be found in a particular place.'" (*quoting Malcolm v. State*, 314 Md. 221, 227 (1988))).

Finally, even if the search warrant was facially invalid, exclusion of the DNA evidence would not be warranted, as the police acted in "good faith" in executing the warrant. *See Carroll v. State*, 240 Md. App. 629, 654 (2019) (cleaned up) (under the "good faith exception" to the exclusionary rule, evidence seized pursuant to an invalid warrant

[7] It appears from the record that the warrant application, and all of its supporting detail, was included as part of the warrant itself. *Compare Groh v. Ramirez*, 540 U.S. 551, 557–58 (2004) (reliance on warrant application for particularity requirement was inappropriate where the warrant "did not incorporate other documents by reference, nor did either the affidavit or the application . . . accompany the warrant").

may be admissible if the warrant is "not based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or is not so facially deficient otherwise that the executing officers cannot reasonably presume the warrant to be valid" (*quoting McDonald v. State*, 347 Md. 452, 468–69 (1977))). In identifying semen as an item to be seized and A's bedroom as a place to search, the warrant and accompanying application contained enough detail that an officer reasonably would presume the warrant to be valid. Similarly, A's statements describing the sexual acts, and in particular her statement about "clear gooey stuff" coming out of Mr. Gross's "nuts," provided a fair probability that evidence of the crime, *i.e.*, semen, would be found in her bedroom.

APPELLANT'S SENTENCES VACATED; CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR RESENTENCING. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID 75% BY APPELLANT AND 25% BY MONTGOMERY COUNTY.