Circuit Court for Montgomery County
Case No. 134152C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1716

September Term, 2019

JORGE MORALES-AMADOR

v.

STATE OF MARYLAND

Berger,
Arthur,
Kenney, James A. III,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: December 10, 2020

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1–104.

A jury, sitting in the Circuit Court for Montgomery County, convicted Jorge Morales-Amador, appellant, of one count of sexual abuse of a minor, two counts of second-degree rape, six counts of second-degree sexual offense, and eight counts of third-degree sexual offense. The court sentenced Morales-Amador to 155 years in prison, suspended all but 54, and five years' post-release probation. Morales-Amador timely appealed, and presents four issues for our review, which we have consolidated and rephrased as follows[1]:

1. Did the circuit court abuse its discretion by declining to pose a *voir dire* question, asking the venire whether any of its members "agree[d] with the proposition that Morales-Amador had no obligation to prove, or disprove, any fact[,] but may remain silent?"

2. Was the evidence adduced at trial sufficient to sustain four of Morales-Amador's convictions for second-degree sexual offense?

3. Did the court violate Maryland Rule 4–214, and, in so doing, infringe upon Morales-Amador's Sixth Amendment right to counsel?

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[1] The issues, as framed by Morales-Amador, are as follows:

1. Did the trial court err by refusing to propound a *voir dire* question that inquired about the jurors' attitudes toward a defendant who remained silent at trial?

2. Is the evidence insufficient to sustain four of the convictions for sexual offense in the second degree?

3. Did the trial court fail to comply with Md. Rule 4–214, and err in granting counsel's motion to withdraw?

4. Did the trial court violate appellant's constitutional right to counsel?

We answer Morales-Amador's questions in the negative, and shall, therefore, affirm the judgments of the circuit court.

FACTS

When J. had reached the age of six, Morales-Amador, her stepfather, initiated what ultimately became an approximately five-year pattern of sexual abuse. At trial, J. testified that when she was about six or seven years old, Morales-Amador touched her vagina, and threatened to kill her if she disclosed the abuse to her mother. She further averred that Morales-Amador had both bitten her chest and groped her buttocks. Finally, she testified that Morales-Amador had repeatedly "penetrate[d]" her vagina and "butt." When asked what she had meant by the term "penetrate," J. answered: "When a person's private area touches yours."

When either eight or nine years of age, J. informed her mother of the abuse. Thereafter, J., her mother, and Morales-Amador conferred with their pastor and his wife. According to the pastor's trial testimony, during that discussion J.'s mother accused her daughter of having fabricated her claims, claiming: "[N]o, no, she lied. She lies." Neither the pastor nor his wife reported the incident to the police.

At trial, J. testified that she had relayed the abuse to her elementary school classmates, explaining that her stepfather "was touching [her] where he shouldn't be[.]" She further recounted that she had asked that her friends not share her account with anyone else. K., J.'s fifth-grade classmate and friend, corroborated her account, testifying that J. had told her "she got raped by her stepdad."

In June 2018, J. visited family in New York. Veronica Martinez, J.'s cousin, was among the family members whom she had visited. Testifying for the State, Ms. Martinez averred that in June 2018, J. informed her that Morales-Amador had touched her breasts, had digitally "penetrated" her, and had repeatedly inserted "his thing" in J. According to Ms. Martinez's trial testimony, J. reported that Morales-Amador had begun sexually abusing her when she was either six or seven years of age, and that he had "touched her" shortly before that June 2018 trip. Upon learning of the sexual assaults, Ms. Martinez contacted the police.

Shortly after Ms. Martinez had reported the sexual assaults to the police, Monica Reaves, a social worker with child protective services, conducted an interview of J. During that interview, J. reported that Morales-Amador had touched her "butt," breasts, and "private parts"—both with his hands and with his penis. She further reported that J. had reported that Morales-Amador's penis had gone "into her butt" and "in the private part," and that he had digitally penetrated her.[2]

J. was also examined by Dr. Evelyn Shukat, a child abuse pediatrician with whom J. had met on June 26, 2018. After having been qualified as an expert in pediatrics and child abuse, Dr. Shukat testified that J. had informed her that "starting at the age of 6, her stepfather had digitally penetrated her, penetrated her vaginally and rectally, and starting

[2] Upon Ms. Reaves asking her to clarify what she had meant by "into [her] butt," J. answered, "[l]ike my butt crack."

at 7 or 8 … the abuse changed to penile penetration of the vagina and rectum[.]" Dr. Shukat further opined that "J[]'s history was consistent with child sexual abuse[.]"

We shall include additional facts as necessary for the resolution of the issues.

DISCUSSION

I.

Relying on the Court of Appeals's holding in *Kazadi v. State*, 467 Md. 1 (2020), Morales-Amador contends that the circuit court abused its discretion by declining to ask the venire members whether they "agree[d] that the State must prove specifically the defendant's guilt and that [Morales-Amador] need not prove his innocence and that *he is not compelled to testify*." (Emphasis added). The State counters that the requested question was duplicative of the court having asked: "Do you agree that the State must prove specifically the defendant's guilt and that he need not prove his innocence and that *he's not compelled to testify?*" (Emphasis added).

Notably, Morales-Amador does not assert that the *voir dire* questions failed to ferret out members of the venire who were either unwilling or unable to apply the appropriate burden of proof. He solely claims that the *voir dire* questions the court posed inadequately elicited whether any panel members would draw adverse inferences from his invoking the Fifth Amendment right to remain silent.

Standard of Review

Whether to pose a requested *voir dire* question is a decision entrusted to the sound discretion of the trial judge. *Pearson v. State*, 437 Md. 350, 356 (2014) ("An appellate

court reviews for abuse of discretion a trial court's decision as to whether to ask a *voir dire* question."). That broad discretion notwithstanding, "'parties to an action triable before a jury have a right to have questions propounded to prospective jurors on their *voir dire*, which are directed to a specific cause for disqualification, and failure to allow such questions is an abuse of discretion constituting reversible error.'" *Washington v. State*, 425 Md. 306, 317 (2012) (quoting *Langley v. State*, 281 Md. 337, 341–42 (1977)). When reviewing such a discretionary decision, we "look[] at the record as a whole to determine whether the matter has been fairly covered." *Stewart v. State*, 399 Md. 146, 159–60 (2007) (citing *State v. Logan*, 394 Md. 378, 396 (2006); *White v. State*, 374 Md. 232, 243 (2003).

Voir Dire

"In Maryland, the sole purpose of *voir dire* is to ensure a fair and impartial jury by determining the existence of cause for disqualification, and not, as in many other states, to include the intelligent exercise of peremptory challenges." *Washington*, 425 Md. at 312 (citation omitted). Accordingly, "[a] requested *voir dire* instruction must be asked when it is "relevant to the facts or circumstances presented in a case which assists the trial judge in uncovering bias." *Moore v. State*, 412 Md. 635, 662 (2010) (citation omitted). While the relevance of some *voir dire* questions vary from case to case, others are warranted no matter the facts and circumstances at issue. As the Court of Appeals recently held in *Kazadi*, "on request, during *voir dire*, a trial court must ask whether any prospective jurors are unwilling or unable to comply with the jury instructions on the long-standing fundamental principles of the presumption of innocence, the State's burden of proof, and the defendant's right not

to testify." *Id*. at 36. Such requested questions are necessary in order to reveal venire members' prejudicial partialities. Although a trial court is obligated to make such inquiries, it should not ask questions that are "argumentative, cumulative, or tangential." *Stewart*, 399 Md. at 163 (citation omitted). A court does not, therefore, abuse its discretion by declining to pose *voir dire* questions that are either duplicative or repetitious. *See Thomas v. State*, 139 Md. App. 188, 201 (2001) ("Significant to the determination of whether there has been an abuse of discretion is whether the proposed question was "more than adequately covered by the trial court's *voir dire*." (Quoting *Miles v. State*, 88 Md. App. 360, 381 (1991))).

The Duplicative Question at Issue

Morales-Amador does not contend that the venire members were unable or unwilling to apply the burden of proof or to presume his innocence. The narrow question before us, therefore, is whether the question at issue might have reasonably elicited answers that the propounded questions *voir dire* would not have.

As recounted above, among the *voir dire* questions requested by the defense were the following:

> 17. *Do you agree* the State must prove specifically the defendant's guilt and that he need not prove his innocence and *that he is not compelled to testify*[?]
>
> 27. *Do you agree with the proposition that Jorge Morales Amador* has no obligation to prove, or disprove, any fact but *may remain silent*?

(Emphasis added). The State asserts that "[t]here is no appreciable daylight between the areas of inquiry described by those two questions" and that by declining to pose the latter the court did not, therefore, abuse its discretion. We agree. To have posed both Question 17 and Question 27 would, under these circumstances, have been an exercise in redundancy. Accordingly, we perceive no abuse of discretion in the court's ruling.

II.

Next, Morales-Amador challenges the sufficiency of the evidence to sustain four of his convictions for second-degree sexual offense. The alleged acts underlying those convictions consisted of Morales-Amador's purportedly having twice engaged in anal intercourse with J. and his having twice digitally penetrated her. The State maintains that the testimony of Dr. Shukat, Ms. Martinez, and J., herself, furnished sufficient evidence on the basis of which the jury could have reasonably concluded beyond a reasonable doubt that Morales-Amador was guilty of the counts in question.

Standard of Review

"[W]e review a challenge to the sufficiency of the evidence in a jury trial by determining whether the evidence, viewed in a light most favorable to the prosecution, supported the conviction ..., such that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Allen v. State*, 402 Md. 59, 76–77 (2007) (citations omitted). When conducting such a review, we neither reweigh the evidence nor re-evaluate the fact finders' assessment of witness credibility. We will not, moreover, disturb a jury's resolution of conflicting evidence. Rather, we "defer to any

possible reasonable inferences the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *State v. Mayers*, 417 Md. 449, 446 (2010) (citations omitted).

Second-Degree Sexual Offense

At the time of his arrest, Maryland Code Ann., Criminal Law Article ("CL"), § 3–306(a)(3) provided, in pertinent part:

> (a) A person many not engage in … a sexual act with another
>
> * * *
>
> (3) if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim.

CL § 3–301(d)(1) provides the following definitions of a "sexual act":

> (d)(1) "Sexual act" means any of the following acts, regardless of whether semen is emitted:
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> (i) analingus;
>
> (ii) cunnilingus;
>
> (iii) fellatio;
>
> (iv) anal intercourse, including penetration, however slight, of the anus; or
>
> (v) an act:
>
> 1. in which an object or part of an individual's body penetrates, however slightly, into another individual's genital opening or anus; and

2. that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party.

The Evidence at Issue

Although he challenges the weight of the State's evidence, Morales-Amador does not meaningfully contest its sufficiency. Contrary to his contention, the testimony of J., Dr. Shukat, and Ms. Martinez, furnished adequate evidence which, when viewed in the light most favorable to the State, sufficiently supported his convictions for the counts at issue.

On direct examination, J. testified that in addition to having "touch[ed]" her buttocks, Morales-Amador had "put his private parts there." When asked to clarify whether "it [had] go[ne] inside anything," she answered in the affirmative. She further testified that on several occasions Morales-Amador had digitally penetrated her "butt."

Corroborating J.'s testimony, Ms. Martinez testified that J. had informed her that in addition to having "put[] his hands inside [her] pants [and] inside [her] underwear," Morales-Amador had "put his fingers inside [her]." She further averred that J. had reported that Morales-Amador had "put[] his thing inside [her]." According to Ms. Martinez, when asked to what "thing" she was referring, J. answered "what males have that women don't have." Upon further inquiry by Ms. Martinez, J. informed her that such abuse began when she was six or seven years of age, and that it had recently recurred.

Perhaps most persuasive was the testimony of Dr. Shukat, according to which J. had "stated that starting at the age of 6, her stepfather had digitally penetrated her, penetrated her vaginally and rectally, and starting at the age of 7 or 8 … the abuse changed to penile penetration of her vagina and rectum[.]" Upon the State's request, Dr. Shukat clarified that

by “digital penetration” she meant “[f]inger in the vagina and rectum.” Dr. Shukat further averred that J. had reported symptoms related to the rectal penetration, testifying: “[S]he described it as feeling wet, and she felt like she had to make number two, and it was painful.” In her expert opinion, Dr. Shukat confirmed that such symptoms were consistent with “penile rectal penetration.” Dr. Shukat further testified that, according to J., “the penile penetration occurred about a year prior [to her medical examination], and the digital, the touching kept on, well, she called it touching, but when you asked her to describe what the touching was, she described digital penetration [last occurred] about several weeks prior to my meeting with her.” Viewed in the light most favorable to the State, the foregoing testimony provided an adequate evidentiary basis from which the jury could have reasonably concluded that Morales-Amador had repeatedly digitally penetrated J.’s rectum and engaged in anal intercourse with her.

III.

Finally, Morales-Amador contends that the trial court erroneously granted defense counsel’s motion to withdraw, and, in so doing, violated Maryland Rule 4–214’s requirement that it conduct further proceedings consistent with Rule 4–215. In the alternative, he claims that the court erroneously disregarded the prejudicial effect of counsel’s withdrawal. Finally, he asserts that by ruling on Morales-Amador’s motion for a new trial after his attorney’s appearance had been stricken, the court violated his Sixth Amendment right to counsel.

Procedural History

Upon Morales-Amador's having been convicted of the crimes with which he was charged, his privately-retained attorney filed a timely "Motion for New Trial, and/or to Set Aside Jury's Verdict and/or Judgment of Acquittal." The State, in turn, filed an opposition thereto. On May 3, 2019, the court held a sentencing hearing. At that hearing, Morales-Amador's attorney moved to withdraw his appearance, explaining:

> I need to withdraw my appearance in the matter. [Morales-Amador] had scheduled and has already applied for the services of the representation through the Office of the Public Defender. A situation has arisen where I cannot continue to represent him. Because of the dispositive motion, there may be additional arguments that can be raised on his behalf in his defense which I cannot argue for him because this would be in conflict of myself.
>
> So, and I believe this is a theory that he is going to pursue through the assistance of the Office of the Public Defender. So, I cannot represent him because it would be a conflict and there are other issues, as well, mainly being communication being a problem. I am unable to represent him.
>
> We do not communicate at all anymore. We used to have a very unfortunate and, how to describe it, we had a meeting yesterday that didn't go very well at all and it ended not well and we just can't talk and communicate any further.

Defense counsel then requested that the court postpone sentencing until Morales-Amador obtained substitute representation. Though the court denied the defense motion for a new trial, it agreed to postpone sentencing. In so doing, it explained: "[W]ith regard to sentencing, I believe that Mr. Morales-Amador needs to have the effective assistance of

counsel today, so I am going to postpone the sentencing but no more than 30 days."[3] Having addressed his former two motions, the court granted defense counsel's oral motion to withdraw so that an assistant public defender could enter his or her appearance in his stead.

On May 6, 2019, the State requested that the court schedule a status hearing. Citing a concern that the failure to do so might run afoul of Md. Rule 4–215(e), the State requested that at such hearing "the defendant … be formally advised of his right to an attorney as required and given notice that if he does not obtain one due to inaction, that right may be deemed waived[.]" The court granted the State's request and ordered that "a writ shall issue." During the ensuing status hearing, held on May 17th, Morales-Amador informed the court that he had not yet heard from the Office of the Public Defender. During a brief recess, the court confirmed that an assistant public defender had, in fact, been assigned to Morales-Amador's case, whose appearance was entered later that day.

On June 3rd, the trial court further postponed the sentencing hearing, scheduling it for September 12, 2019. At that hearing, Morales-Amador was represented by the assistant public defender who the court had confirmed was assigned to his case. Although defense counsel had not received a copy of the presentence investigation report prior to the day of the hearing, he did have the opportunity to review it prior to oral argument. He did not, moreover, request a continuance or otherwise indicate that he was unprepared.

[3] The court ultimately rescheduled sentencing for June 7, 2019.

Maryland Rule 4–214(d)

Maryland Rule 4–214(d) governs the withdrawal of defense counsel in criminal proceedings, and provides:

> **(d) Striking Appearance.** A motion to withdraw the appearance of counsel shall be made in writing or in the presence of the defendant in open court. If the motion is in writing, moving counsel shall certify that a written notice of intention to withdraw appearance was sent to the defendant at least ten days before the filing of the motion. If the defendant is represented by other counsel or if other counsel enters an appearance on behalf of the defendant, and if no objection is made within ten days after the motion is filed, the clerk shall strike the appearance of moving counsel. If no other counsel has entered an appearance for the defendant, leave to withdraw may be granted only by order of court. The court may refuse leave to withdraw an appearance if it would unduly delay the trial of the action, would be prejudicial to any of the parties, or otherwise would not be in the interest of justice. *If leave is granted and the defendant is not represented, a subpoena or other writ shall be issued and served on the defendant for an appearance before the court for proceedings pursuant to Rule 4–215.*

(Emphasis added). We review a circuit court's decision to grant a motion to withdraw for abuse of discretion. *Simms v. State*, 445 Md. 163, 181 (2015). A court abuses its discretion "where no reasonable person would take the view adopted by the court or if the court acts without reference to any guiding rules or principles." *Id*. (Quotation marks and citations omitted).

Morales-Amador claims that after granting counsel's motion to withdraw, Rule 4–214(d) required that the court conduct proceedings pursuant to Rule 4–215 prior to ruling on his motion for a new trial. As the State rightly notes and as is clear from the record,

however, the court's denial of Morales-Amador's motion for a new trial was already a *fait accompli* when the court granted counsel's request to withdraw. As the court repeatedly emphasized, on the date of the sentencing hearing it had already resolved that issue. The court explained:

> I hadn't planned on taking argument today. In fact, I didn't think it would be fair to the State to have a hearing today because they're not here to address that. They probably could but they weren't put on notice with regard to arguing that motion. I'm just taking advantage of everyone being here today for me to give my decision with regard to that motion.

Upon granting defense counsel's motion to withdraw, the court repeated: "I am not hearing argument. As I said, I'm just taking advantage of the opportunity that everyone is here." As the State aptly notes, the court's May 8th order made indelibly clear that its ruling had been based exclusively "on its consideration of the motion, the State's written opposition thereto, and for the reasons stated on the record." It was well within the court's purview to deny Morales-Amador's motion without hearing oral argument. *See* Md. Rule 4–331 ("The court *may* hold a hearing on any motion filed under this Rule." (Emphasis added)). Having made its decision prior to the hearing and by deferring sentencing, the court's ruling did not violate the requirements of Rule 4–214(d).

Abuse of Discretion

As addressed above, Morales-Amador further claims that in granting counsel's motion to withdraw, the court "failed to consider the prejudice to the defendant," and, therefore, abused its discretion. He argues that "it would have been difficult for any attorney to gain the familiarity that trial counsel had with the case in order to zealously

advocate for [Morales-Amador] at sentencing." We disagree. In apparent recognition of the prejudice that might result from counsel's withdrawal, the court deferred sentencing until September 12th—nearly four months after the assistant public defender had entered his appearance. The record does not, moreover, reflect that either Morales-Amador or his assistant public defender had any misgivings regarding the latter's degree of preparedness. On this record, we neither perceive any unfair prejudice incurred by Morales-Amador, nor any abuse of the court's discretion.

The Sixth Amendment Right to Counsel

Finally, Morales-Amador claims that, "[i]n the absence of a valid waiver, depriving a defendant of the right to counsel at any critical stage of a criminal proceeding, including ruling on his outstanding motion, is reversible error." As the State rightly notes, a defendant does not necessarily enjoy the protections afforded by the Sixth Amendment when a court merely declares its ruling on such a motion. *See Hudson v. State*, 16 Md. App. 49, 70 (1972) ("In the circumstances we think that the mere formal rendering of the decision as to the motion for a new trial was not … such a critical stage of the proceedings as to make the presence of [the defendant's] counsel a matter of constitutional necessity."). Once the court had granted defense counsel's motion to withdraw and had postponed sentencing, the proceeding was no longer an adversarial hearing which implicated the Sixth Amendment, but became a mere forum in which the court relayed a decision that it had already reached.

For the foregoing reasons, we affirm the judgments of the circuit court.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.