UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0491

September Term, 2015

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MICHAEL JAMES SIMPSON

v.

STATE OF MARYLAND

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Wright,
Graeff,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

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Opinion by Wright, J.

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Filed: March 29, 2016

After a bench trial held in the Circuit Court for Wicomico County on May 11, 2015, the appellant, Michael James Simpson, was found guilty of attempted third-degree sexual offense, third-degree sexual offense, fourth-degree sexual offense, and second degree assault. The court merged the attempted third-degree sexual offense, third-degree sexual offense, and fourth-degree sexual offense, and sentenced appellant to 10 years of incarceration for the third-degree sexual offense, and to a concurrent 10 years of incarceration for the second-degree assault. Appellant presents the following questions on appeal which we have rephrased[1] as follows:

1. Did the trial court err when it failed to comply with Md. Rule 4-215?

2. Was the evidence insufficient to convict appellant of third-degree sexual offense and attempted third-degree sexual offense?

3. Should the sentences for third-degree sexual offense and second-degree assault be merged?

For the reasons discussed below, we shall answer the first two questions in the negative and the third in the affirmative. Accordingly, we shall vacate the sentence for second-degree assault and otherwise affirm.

[1] Appellant phrased the issues raised on appeal as follows:

1. The trial court erred when it failed to comply with [Md.] Rule 4-215.

2. The evidence was insufficient to sustain Mr. Simpson's convictions for third-degree sexual offense and attempted third-degree sexual offense.

3. Mr. Simpson's conviction and sentence for second degree assault must be merged into his conviction and sentence for third-degree sexual offense and his conviction for fourth-degree sexual offense.

## BACKGROUND

On the evening of June 3, 2014, Bernadine S. got off a bus at the Greyhound Bus Terminal in Parsonsburg, Maryland. Once inside the station, she walked into the cafeteria, which was closed for service, and sat at a table to await her ride home. As she sat, she began using her cell phone to text her boyfriend and sister. Soon thereafter, appellant, who was sitting at a nearby table, got up, walked over to Bernadine's table, and sat down next to her. While several people momentarily came in and out of the cafeteria, Bernadine and appellant remained alone in the cafeteria for most of this incident.

After appellant sat next to Bernadine, he began asking Bernadine "weird questions, like how much time do you get for hitting the police in the face?" Bernadine remained seated and continued to text on her phone while the appellant talked to her. Bernadine testified that the appellant then moved his chair close to her, and he was "trying to touch me, tried to get me to touch him or loosened up to him, and I wouldn't." When the appellant put his hand on her knee she told him "[d]on't touch me." Appellant then pulled Bernadine's chair closer to him and tried to touch the side of her breast with one hand and grabbed her thigh with the other. Bernadine was left with an "indentation" of appellant's thumb on her knee which lasted for "a week or so." Bernadine continued to tell appellant not to touch her and to "get off." Appellant then put his arm around her neck and continued to touch her breast and squeeze her thigh. Bernadine reported that as a result, her neck was "fairly red" later that evening. Bernadine testified that appellant:

> [W]as trying to fondle me, my breasts, period. Then he grabbed me by my ponytail and starting kissing me, but I never kissed him back. And I kept

> telling him to stop. Please get off me. At that point right there, he had me by my ponytail, I feared for my life because I didn't know what he was capable of doing to me if he would do anything to me.

Bernadine "moved to get away" but did not want to "just jump up and leave" because she feared that "he probably would have ran after" her. Appellant then stood up, unzipped his pants, and exposed his penis, which Bernadine believed signified that he wanted her to "give him oral sex right there." Appellant then grabbed her ponytail with one hand and put the other hand inside her shirt and bra and placed it on her breast. Appellant then sat down, put his hand under her dress and grabbed Bernadine's thigh, close to her "vaginal area." Bernadine testified that during this incident she was in fear for her life because she "didn't know what state of mind he was in and what he would try to do" if she had tried to leave. Bernadine eventually found an opportunity to get up and then gathered her belongings and went to the bathroom. Once inside the bathroom, Bernadine leaned "against the door to lock it, so [appellant] wouldn't get in."

A surveillance video shows appellant pushing on this bathroom door at least one time after Bernadine went inside the bathroom. Appellant is also seen on the video speaking briefly with a custodian who had positioned a cleaning cart outside of the women's bathroom. While Bernadine was in the bathroom, she heard appellant ask someone if they had cleaned the women's bathroom yet. At trial, the custodian identified appellant as the person who had asked her if she had cleaned the women's bathroom. Soon thereafter, cleaning staff found Bernadine "crying and shaking" in the bathroom. Bernadine then reported the assault to the cleaning staff who then summoned the police**.**

Additional facts will be provided as they become relevant to the discussion of the issues under review.

## DISCUSSION

### I. Discharge of Counsel

Appellant argues that "on three separate occasions, the court was put on notice that [he] wanted to discharge the Assistant Public Defender who was representing him," but that the court "failed to comply" with Md. Rule 4-215(e), which "requires the trial court to inquire into the reasons for the request." The State responds that "the record does not reflect that [appellant] ever articulated any desire to actually fire his lawyer," and as such, "there was no need to comply with [Md.] Rule 4-215."

Md. 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 reasons 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 reasons 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.

In *State v. Hardy*, 415 Md. 612, 621-22 (2010), the Court of Appeals discussed the standard used to review a trial court's compliance with Md. Rule 4-215(e):

> When applicable, [Md.] Rule 4-215(e) demands strict compliance. The provisions of the rule are mandatory and a trial court's departure from them constitutes reversible error. Where a motion to discharge counsel is made during trial, however, [Md.] Rule 4-215(e) does not apply, and we evaluate the trial court's ruling on a motion to discharge counsel under the far more lenient abuse of discretion standard. We have noted that a court abuses its discretion in this regard only when it acts without reference to any guiding rules or principles, and that we find an abuse of discretion only when the court's act is so untenable as to place it beyond the fringe of what the court deems minimally acceptable.

(Internal citations and footnote omitted.)

Pursuant to this Rule, "upon a defendant's request to discharge counsel, the court must provide the defendant an opportunity to explain his or her reasons for seeking the change." *State v. Davis*, 415 Md. 22, 31 (2010) (citation omitted). A defendant's request to discharge counsel need not "be a talismanic phrase or artfully worded to qualify as a request to discharge, so long as a court could reasonably conclude" that the individual "sought to discharge his counsel." *State v. Campbell*, 385 Md 616, 632 (2005) (citations omitted). Next, the court is to determine whether the defendant's stated reasons for seeking to discharge counsel are meritorious. *Moore v. State*, 331 Md. 179, 185 (1993). "The failure to inquire into a defendant's reasons for seeking new counsel when the proper request has been made to the court is a reversible error." *Davis*, 415 Md. at 31 (citations omitted).

Turning to the present case, appellant points to three occasions which he claims should have triggered the [Md.] Rule 4-215(e) inquiry.

**November 7, 2014 Bail Review**

On July 11, 2014, the Office of the Public Defender filed their appearance on behalf of appellant. During a bail review held on November 7, 2014, the following exchange occurred on the record:

> [DEFENSE COUNSEL]: **[T]here has been some concern expressed by my client about my ongoing representation.** We're scheduled for a trial on Wednesday of next week, so I wanted to make sure the Court had an opportunity to, you know, take up that issue, instead of just showing up on the trial date and addressing that issue.
>
> THE COURT: Sure.
>
> [DEFENSE COUNSEL]: There may be other issues as well, which the State and/or my client may want to raise with the Court, I guess what I'm saying is, this might be somewhat involved, but it's a bail review request, plus other issues potentially.

(Emphasis supplied.)

The circuit court then addressed the bail review and the State's request for a competency evaluation, after which the following exchange occurred:

> THE COURT: I'm going to go ahead and order the competency evaluation. And given that fact, I think probably, [defense counsel], **before I address any other issues, I should make sure that he has the benefit of the full competency evaluation. Do you agree?**
>
> [DEFENSE COUNSEL]: **Yes**, Your Honor.
>
> THE COURT: Do you agree with that, Counsel?
>
> [THE STATE]: Absolutely.
>
> [DEFENSE COUNSEL]: Given that it appears to be my client's wishes, I'm consenting.

THE COURT: So ordered.

(Emphasis supplied).

The hearing concluded with the circuit court ordering a competency evaluation and without further comment regarding defense counsel's representation of the appellant. On December 4, 2014, after receiving the competency evaluation, the court found appellant not competent to stand trial.

Appellant now contends that defense counsel's statement that "there has been some concern expressed by my client about my ongoing representation" triggered a Md. Rule 4-215(e) inquiry. The State replies that the statement was too "ambiguous" to be interpreted as a request to discharge his attorney. Further, the State argues that the appellant was not "competent" and, therefore, "legally incapable of making a knowing, intelligent, and voluntary waiver of his right to counsel."

We agree with the State, as the Court of Appeals has observed, "[o]nce the issue of a defendant's competency has been raised, the proceedings cannot continue until the trial judge determines that the defendant is competent to stand trial beyond a reasonable doubt." *Kennedy v. State*, 436 Md. 686, 692 (2014) (citation omitted). "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). Here, the circuit court indicated to the parties that it wished to resolve the competency issue prior to addressing "any other issues." Defense counsel

concurred, noting that the course of action "appears to be my client's wishes." The court acted properly in this regard as appellant was later found not competent to stand trial. It was unnecessary for the court to conduct a Md. Rule 4-215(e) inquiry, because it would have been improper to allow appellant to discharge counsel due to his incompetence.

**April 2, 2015 Competency Hearing**

A second competency evaluation performed in March 2015 concluded that appellant had become competent to stand trial. The circuit court then found appellant competent during a competency hearing held on April 2, 2015. After the court's competency ruling, the following colloquy ensued:

> THE COURT: What is your question? I don't know if I can answer it or not. It might be more appropriate for your counsel.
>
> [APPELLANT] **My question is that, since me and [defense counsel] here seem to have a little bit of miscommunication at times, I think it would be, well, my question is, I can talk at the trial, right?** If I want to ask the witness questions, I can do that?
>
> THE COURT: Not if you have a lawyer, sir.
>
> [APPELLANT]: Well, if . . . okay, if I had –
>
> THE COURT: You can consult with your lawyer about the questions that are going to be asked.
>
> [APPELLANT]: I understand. But, like I said, it's difficult to communicate because sometime he's not understanding what I'm saying, sometimes.
>
> THE COURT: Okay. Here is what I'm going to tell you to do. Right now he is your lawyer. If you have any issue with him being your lawyer, then you need to consider what those issues are. And what I'm going to suggest you do when you go downstairs is, and get a trial date, is set the case in for a status hearing about two or three weeks in advance of trial at least, to see if there's going to be any issue with counsel.

I'm not going to entertain an oral motion from you today concerning who's going to be your counsel; and I cannot, absolutely cannot, go through your relationship with your counsel individually, I can't do that. You need to talk with [defense counsel]. If you have any issue, you can file something with the Court.

[THE STATE]: Your Honor, I would just put on the record that, I understand [defense counsel] is standing there, but just so that Mr. Simpson hears it from the State as well, it's my understanding is the Public Defender's Office, that their policy is that they do not switch attorneys. You are assigned an attorney, and if you choose to not proceed with that attorney, then you would forgo all of the Public Defenders, the ability to have a Public Defender, a free attorney. That is the policy of the Office of the Public Defender.

THE COURT: That's correct.

[THE STATE]: So unless he retains private counsel that he pays for, he has to have [defense counsel].

[APPELLANT]: Or, or I could –

THE COURT: You need to stand up when you address the Court, sir.

[APPELLANT] Or I could proceed *pro se*.

THE COURT: That's your other alternative. But if you wish to have counsel at trial, you have to take the Public Defender that is assigned to you. With some exceptions where I guess—

[APPELLANT]: **I didn't say there was anything to do with [defense counsel], Really what I was saying was, I would just like to be able to ask questions so, if it's possible**, because there is a couple things going through my mind right now –

THE COURT: Mr. Simpson, I am not going to rule on any of that today. What I'm going to say to Counsel now is, go down and get your trial date. You **think about what you want to talk about on this issue, talk to [defense counsel]. And in the next ten days or so, let's have a status conference. Because I don't want the trial to be postponed because we get to trial and he doesn't want his Public Defender.**

> [DEFENSE COUNSEL]: Her Honor is trying to protect your rights. She doesn't want you to say something that ends up being able to be used against you at a later point. So what she's trying to do saying, if we can discuss it, that way, if I'm saying things to the Court, it doesn't necessarily get imputed on to you. So she's just trying to protect you, I think, at this point, have us sit down, and if there's an issue we can raise it in a formal way.

(Emphasis supplied). The hearing concluded without further mention of defense counsel's representation.

Appellant contends that his comments, that there were "miscommunications" between himself and his counsel, "were ones from which the court reasonably could have concluded that [he] may have been inclined to discharge counsel." The State responds that these statements "never included any request to discharge counsel."

We hold that appellant's statements did not rise to the level of mandating a Md. Rule 4-215(e) inquiry because his statements did not indicate that he desired to seek different counsel. Rather, appellant expressed that he had a "little bit of miscommunication at times" with his defense counsel, and he wanted to know if he would be able to "talk" and "ask questions" of the witnesses at trial. When pressed, whether he wanted a different attorney or wanted to represent himself, appellant said "I didn't say there was anything to do with [defense counsel], really what I was saying was, I would just like to be able to ask questions." Before setting a scheduling conference, the circuit court instructed appellant to "think about what you want to talk about on this issue" and "talk to [defense counsel]." It is notable that appellant had been found competent only moments before, and defense counsel had indicated to the court that he

needed "a little bit of time" to "interact" with appellant given that he had just been found competent. We are not persuaded that appellant's statements that he had merely "a little bit of miscommunication" with his counsel, in light of his follow-up statement that he "didn't say there was anything to do with [defense counsel]," triggered a Md. Rule 4-215(e) inquiry. *See Wood. v. State*, 209 Md. App. 246, 288 (2012) (holding that a defendant's letter to the court stating that he had "been having problems" with his defense attorney due to his lack of discovery did not trigger a Md. Rule 215(e) inquiry because the statements did not indicate the defendant had a present intent to seek a different legal advisor).

**April 24, 2015 Status Conference**

On April 24, 2015, the case was again before the circuit court for a status conference and the following exchange occurred:

> [DEFENSE COUNSEL]: **Basically I think the Court just wanted to inquire, the Court more generally, I forget if it's Judge Seaton or Judge Beckstead, just wanted to make sure, because we have a trial date set, that Mr. Simpson wanted to go ahead and have me represent him at trial**, and so that was the purpose of this hearing. Just to make sure that Mr. Simpson either said I want [defense counsel] to represent me or I want to represent myself.
>
> [APPELLANT]: But this is a motions hearing, too.
>
> [DEFENSE COUNSEL]: Just for purposes of this issue today.
>
> [APPELLANT]: The charges?
>
> [THE STATE]: **Your Honor, Mr. Simpson at the last hearing had made indications that he may not want to proceed with [defense counsel] as his attorney**, if that was the only attorney that the Public Defender's Office was going to provide, which it is. So the Court put a status hearing in to

> see if Mr. Simpson wanted to either represent himself, obtain private counsel, or continue with [defense counsel].

(Emphasis supplied).

A discussion then occurred regarding appellant's request for a judicial determination of probable cause to proceed on the third-degree sexual offense charges. The exchange continued:

> THE COURT: **What you need is a good attorney, and you've got one of the best standing right next to you.**
>
> [APPELLANT]: **Right.**
>
> THE COURT: **So do you want [defense counsel] to represent you? I don't think you want to represent yourself.**
>
> [APPELLANT]: **As long as I reserve the right to change my mind at any point in time.**
>
> THE COURT: You can always discharge him at any time.
>
> [APPELLANT]: **Okay.**
>
> THE COURT: But you have to understand that you will not get another Public Defender representing you.
>
> [APPELLANT]: All right then.
>
> THE COURT: Because once you get their – or they make their resources available to you, you have no choice about who it is. Do you understand that?
>
> [APPELLANT]: I got it.
>
> THE COURT: All right. So [defense counsel] will remain as the attorney for the Defendant in this case.
>
> [DEFENSE COUNSEL]: I will be out to see you.

THE COURT: All right, then there's nothing else to do.

(Emphasis supplied). The issue of defense counsel's representation of appellant was not raised again, and he continued to represent appellant through trial and sentencing.

Appellant argues that "the statements by the defense counsel and the prosecutor required the Court to inquire into the reasons for [appellant's] request to discharge." The State counters that there "was no request to discharge counsel" and therefore "no basis for reversal."

While the statements made by defense counsel and the State indicated that, from their view, there may have been an earlier issue with defense counsel's representation of appellant, appellant clearly disavowed that he wished to discharge counsel. When asked by the circuit court if he wanted defense counsel to represent him, appellant responded "[a]s long as I reserve the right to change my mind at any point in time." While appellant correctly points out that, in fact, one may not discharge counsel after trial has begun, the error was harmless as appellant did not raise the issue again. *See State v. Brown*, 342 Md. 404 (1996). The Court of Appeals has stated that "a [Md.] Rule 4-215(e) inquiry is not mandated unless counsel or the defendant indicates that the defendant has a *present* intent to seek a different legal advisor." *Davis*, 415 Md. at 33 (emphasis added). In this case, appellant did not express a present intent to seek a different legal advisor or to represent himself. Thus, there was no error on the circuit court's part.

## II. Sufficiency of Evidence

Appellant contends that his convictions for third-degree sexual offense and attempted third-degree sexual offense should be reversed because the State did not prove that appellant "place[d] Bernadine in fear, that Bernadine . . . imminently [would] be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping," pursuant to Md. Code (2002, 2012 Repl. Vol.) § 3-307 of the Criminal Law Article ("CL"). Appellant argues that Bernadine's fear, in this case, was not reasonable in light of the circumstances, and therefore the State did not meet its burden of proof. The State responds that appellant's "sufficiency claim cannot survive scrutiny under the deferential standard of review, because it is premised on this Court refusing to credit the testimony of Bernadine and on this Court giving [appellant's] own testimony weight and credibility which the fact-finder refused to assign."

We review a challenge to the sufficiency of the evidence by determining "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Smith*, 374 Md. 527, 533 (2003) (citations omitted). "[I]t is not the function or duty of the appellate court to undertake a review of the record that would amount to, in essence, a retrial of the case." *State v. Albrecht*, 336 Md. 475, 478 (1994). "Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony,

we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010) (citations omitted).

Appellant was found guilty of third-degree sexual offense and attempted third-degree sexual offense under CL § 3-307. The statute reads, in pertinent part, as follows:

> (a) A person may not:
>
> (1)(i) engage in sexual contact with another without the consent of the other; and
>
> * * *
>
> (ii) 3. threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping[.]

Appellant concedes that the State proved that he "engage[d] in sexual contact with another without the consent of the other," but he argues that State "failed to prove the aggravating element." Appellant cites *State v. Rusk*, 289 Md. 230, 244 (1981), for the proposition that generally, "Bernadine's fear be reasonably grounded in order to obviate the need for either proof of actual force on the part of the assailant or physical resistance on the part of Bernadine."

While the *Rusk* Court reviewed a case involving a second-degree rape charge, its discussion regarding consent and fear is pertinent here. "[T]hreats of force need not be made in any particular manner in order to put a person in fear of bodily harm." *Rusk*, 289 Md. at 246 (citations omitted). In fact, "conduct, rather than words, may convey the threat." *Id*. (citations omitted). "That a victim did not scream out for help or attempt to escape, while bearing on the question of consent, is unnecessary where she is restrained

by fear of violence." *Id.* (citations omitted). The reasonableness of Bernadine's "apprehension of fear" is a question of fact for the fact- finder to determine. *Id.* at 245.

Upon the conclusion of the evidence in the present case, the circuit court made the following findings of fact:

> The Court finds that the defendant initiated contact with Bernadine. I do not find that they were in the words of I believe defense counsel, I don't believe they were interacting with each other. I believe that the defendant was imposing his desires on Bernadine, that he touched her breast with his hand inside her bra, that he touched her upper thigh.
>
> **He initiated this contact, first, by grabbing her ponytail, yanking her head back. Bernadine testified that she was in fear. She acted like she was in fear. She was found shaking and crying.**
>
> The Court, with respect to the charge of third-degree sex offense, **I find that he did engaged** [sic] **in sexual contact. The defendant did with the defendant** [sic] **without her consent and that he placed her in fear of imminent bodily injury by his actions of yanking her hair, placing his arm around her neck to the extent that it left red marks around her neck**, and the Court finds him guilty of having committed a third-degree sex offense.
>
> I find that the attempted third-degree sex offense merges into the third-degree sex offense. And I find the fourth-degree sex offense, he's guilty of a fourth-degree sex offense, but I find that merges also. And he is guilty of a second-degree assault by making physical contact with Bernadine of this offense against her will, without her consent.

(Emphasis supplied).

The circuit court's findings are supported by the record. Bernadine testified that while in a mostly empty cafeteria, appellant grabbed her thigh, leaving a bruise, yanked her hair, wrapped his arm around her neck with enough force to leave red marks around her neck, reached into her shirt and bra and grabbed her breast, and kissed her on the lips.

She testified that appellant did these things without her consent and that she was placed in fear for her life. She further testified that she was fearful that if she left, appellant would "do something" to her. In fact, when she did finally leave the appellant and barricaded herself in the bathroom, appellant followed and pushed on the bathroom door. At trial, the court extensively viewed the videotape of this incident and heard first-hand the testimony of Bernadine and the appellant. After doing so, the court accepted Bernadine's version of the facts and discredited the appellant's testimony that this event was a consensual encounter. We note that we too have viewed the videotape of this incident, and it is consistent with Bernadine's testimony.

In light of all of the evidence in this case, we conclude that a trier of fact could rationally find that the essential elements of third-degree sexual offense and attempted third-degree sexual offense had been established, and that appellant was guilty of those offenses beyond a reasonable doubt.

**III. Merger**

As noted, for sentencing purposes, the circuit court merged appellant's convictions for attempted third-degree sexual offense and fourth-degree sexual offense with third-degree sexual offense and sentenced him to ten years of incarceration for that offense. Appellant was also found guilty of second-degree assault and sentenced to ten years for that offense to be served concurrently with the other sentence. Appellant, however, argues that the second-degree assault should merge "into both third and fourth-degree

sexual offense under the required evidence test," and as a result, appellant's sentence for second-degree assault must be vacated.

The State responds that arguably, the battery should not merge into the third-degree sexual offense conviction because "the battery was independent of the force used to effectuate the third-degree sex offense." The State concedes, however, "that the court's verdict was ambiguous on this point," and consequently, it "acknowledge[s] that merger of the second-degree assault sentence with the third-degree sexual offense is justified."

Indeed, it appears that the circuit court initially signaled to the parties that it intended to merge the second-degree assault. At the close of the case, as the court announced its findings of facts and verdict, the following exchange took place:

> THE COURT: I find that the attempted third-degree sex offense merges into the third-degree sex offense. And I find the fourth-degree sex offense, he's guilty of a fourth-degree sex offense, but I find that merges, also. And he is guilty of a second-degree assault by making physical contact with Bernadine of this offense against her will, without her consent.
>
> All right.
>
> On sentencing?
>
> [THE STATE]: **Your Honor, I would just ask with respect to the assault second, are you specifically finding that under the State's theory of initially –**
>
> THE COURT: **I'm going to merge that for the purposes of sentencing.**
>
> [STATE]: Okay.

The circuit court later gave a separate sentence on the second-degree assault.

To determine whether the two offenses are the same, and therefore must merge, we use the "required evidence test." *Snowden v. State*, 321 Md. 612, 616 (1991). Under this test, "if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." *State v. Jenkins*, 307 Md. 501, 517 (1986) (citations omitted). Where the offenses merge, "separate sentences for each offense are prohibited." *Snowden*, 321 Md. at 617 (citations omitted).

At trial, the State argued that the appellant's forceful grabbing of Bernadine's knee at the start of the incident was a second-degree assault and was a separate offense that should not merge with the sex offenses. On appeal, however, the State correctly points out that the circuit court "did not distinguish grabbing the knee from the other conduct which created the reasonable fear of serious bodily injury." Further, as described above, the court first indicated that it would merge the second-degree assault with the other counts, but nonetheless, issued a separate sentence on the second-degree assault. For these reasons, we find that the second-degree assault should have merged into the other offenses.

**SENTENCE FOR SECOND-DEGREE ASSAULT VACATED. JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY OTHERWISE AFFIRMED. TWO-THIRDS OF COSTS TO BE PAID BY APPELLANT, ONE-THIRD OF COSTS TO BE PAID BY WICOMICO COUNTY.**