UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0406

September Term, 2015

JOEY G. POINDEXTER

v.

STATE OF MARYLAND

Graeff,
Friedman,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: December 19, 2016

In this appeal, stemming from convictions in two trials on 12 counts of varying degrees of sexual assault perpetrated against five victims, Appellant Joey Poindexter raises five issues for our review.[1] Poindexter argues that the trial court erred when it: (1) denied Poindexter's motion to sever the trials related to each victim; (2) prohibited striking jurors from the box during jury selection; (3) carried over Poindexter's waiver of counsel from his first trial to his second trial; (4) permitted Detective David Marshall to testify about his conversations with, and identification of, two of the victims; and (5) prevented Poindexter from presenting his defense when the trial court required Poindexter to proffer the content and theory of the testimony of certain witnesses.

For the reasons stated below, we affirm Poindexter's convictions.

FACTS

The evidence presented over the course of the two trials painted a picture of Poindexter's perverse proclivities. Poindexter would befriend the victim, a college-aged man significantly younger than he, during a game of beer pong at a local bar. Poindexter would encourage the victim to drink until the victim blacked out. Poindexter would then transport the victim to his house. Once the victim was incapacitated, Poindexter would sexually assault the victim, at times using a black cylindrical object to penetrate the victim's anus. Poindexter would also engage in a fetishistic tapping, touching, and slapping

[1] Poindexter actually presents six issues for our review, but we combine two issues related to Detective David Marshall's testimony.

of the victim's buttocks. The victim would wake up later in Poindexter's house, dressed only in Poindexter's black shorts. The victim would not remember much, if any, of what had transpired. Poindexter would take photographs and videos of the sexual assault and meticulously categorize them on a computer hard drive.

We know all of this because one victim, A.L,[2] woke up on Poindexter's couch, after a night of drinking and playing beer pong, feeling sick and hungover. He felt pain in his anus when he got up to use the bathroom, and he realized that he was not wearing his own clothes. A.L. had what he described as a "glimpse memory" of being in the shower the previous night with Poindexter, who was trying to penetrate A.L.'s anus. Later that night, A.L. told a friend about the pain in his anus and said "I think I was possibly raped last night."

A.L. then went to the Montgomery County police station and reported the sexual assault. A Montgomery County police detective arranged for A.L. to go to the hospital for an exam. At the hospital, A.L. indicated that he was experiencing a great deal of anal pain. The nurse who performed the exam testified that she did not notice any abrasions around A.L's anus, but that she did see a lot of redness in that area.

After the exam, A.L. agreed to have the police record a telephone call between he and Poindexter in which he would try to get Poindexter to confess to the sexual assault. During the recorded conversation, Poindexter told A.L. that he and A.L. went to

[2] To protect the privacy of the victims, we will refer to the victims only by their initials throughout this Opinion.

Poindexter's house after drinking and playing beer pong, and then they drank some more. Poindexter said he knew A.L. was drunk, but did not think he had blacked out. According to Poindexter, A.L. went to take a shower after he vomited on himself. Poindexter said he only helped prop up A.L. when A.L. slipped in the shower, but did nothing else to A.L. Poindexter then said incongruously, "I don't have any fucking AIDS if anything did happen."

A.L. met Poindexter later at a Starbucks to talk face-to-face, while he was wearing a wire. In explaining himself to A.L., Poindexter stated, "it was never at any point where I was forcing you to do anything," and then admitted that when A.L. fell in the shower, A.L. had "a hard on," and Poindexter "did jerk [him] off a little bit." A.L. accused Poindexter of "put[ting] it in [his] ass," and Poindexter admitted that he had but said that he used "protection."

The Montgomery County police then obtained a search warrant for Poindexter's house. During the search, the police found explicit photographs and videos on Poindexter's computer hard drive related to Poindexter's sexual assault of A.L., as well as explicit photographs and videos that documented sexual assaults on four other victims. The police identified the four other victims—M.P., A.D., J.L., and S.B.—from the distinctive tattoos and scars of, and from the clothing worn by, the victims in the explicit photographs and videos. None of the four victims had any memory of the sexual assault.

Based on the evidence recovered, the State charged Poindexter with 12 counts of varying degrees of sexual assault committed against five victims. The trial court severed

the trial on the charges related to A.L, from the trial on the charges related to the other four victims. The jury found Poindexter guilty of four counts of sexual assault against A.L. A week later, the second trial concluded with the jury finding Poindexter guilty of eight counts of sexual assault against M.P., A.D., J.L., and S.B.

We will provide additional facts as they become necessary throughout the Opinion.

DISCUSSION

Poindexter raises five issues on appeal. We will address each issue in turn.

I. Severance

The State charged Poindexter in one indictment with multiple sex offenses committed against five victims. Poindexter argued in a pre-trial motion that the trial court should sever the charges related to the five victims into five separate trials. As reported above, the trial court granted Poindexter's motion for severance in part and denied it in part—severing the trial on the A.L. charges from the trials on the charges related to the other four victims, but grouping the charges related to other four victims into a single second trial. The trial court explained that in all of the cases "the totality of the circumstances reflect that there is a strong probability and certainly a very reasonable inference that the person that committed one of the offenses committed the other offenses." In A.L.'s case, however, the trial court explained that determining the "identity" of the perpetrator of the crime was substantially less of an issue because A.L. himself accused Poindexter of committing the crime. According to the trial court, if the charges relating to all of the victims were tried together, and "if the [trial court] at the trial deems that the

[A.L.] case is in a position where the admission of the other cases is unduly prejudicial from an evidentiary standpoint, there's no fixing the harm at that point." Therefore, the trial court severed the trial on the charges related to A.L., but grouped the charges related to the other four victims into one trial. Thus, Poindexter's challenge is to the non-severance in his second trial.

Under Md. Rule 4-253, the court may try a defendant on multiple charges against separate victims in one trial. But:

> If it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the court may, on its own initiative or on motion of any party, order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires.

Md. Rule 4-253(c).

A court evaluates a severance request by first examining whether the evidence concerning the offenses is mutually admissible. *Conyers v. State*, 345 Md. 525, 553 (1997).

> [I]f a judge could determine that the evidence of any two or more offenses would be mutually admissible, that is, evidence of one crime would be admissible at a separate trial on another charge, then joinder of those offenses would be permissible because the defendant would not suffer any *additional* prejudice as a result of the joinder.

Id. at 549 (internal quotations and citation omitted). Mutual admissibility is a question of law that does not allow for any exercise of discretion. *Id.* at 553.[3]

[3] The Court of Appeals recently addressed whether a court must automatically grant severance where the evidence is found *not* to be mutually admissible. *State v. Hines*, ___ Md. ___, 2016 WL 6651891, *10-11 (Nov. 10, 2016). The Court held that both in the

If the evidence is mutually admissible, then the court moves on to the second step of the analysis—determining whether the interest in judicial economy outweighs any arguments favoring severance. *Conyers*, 345 Md. at 553. At this second stage, "any judicial economy that may be had will usually suffice to permit joinder unless other non-evidentiary factors weigh against joinder." *Id.* at 556. The decision to try a defendant on multiple charges in one trial in this second step is committed to the sound discretion of the trial court. *Wilson v. State,* 148 Md. App. 601, 647 (2002) (citations omitted). No Maryland appellate court has ever found an abuse of discretion in this stage of the balancing test. *See Taylor v. State*, 226 Md. App. 317, 376 (2016) (citing *Solomon v. State*, 101 Md. App. 331, 348 (1994)).

First, we will address the first prong of the *Conyers* severability test by considering, as a matter of law, mutual admissibility through the "identity" exception to the "other crimes" evidence rule. *Second*, we will address the second prong of the *Conyers* severance

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context of offense joinder, like in this case, and in the context of co-defendant joinder, "when confronted with a severance question, a trial court must first determine whether there is non-mutually admissible evidence, and then must ask whether the admission of non-mutually admissible evidence results in any unfair prejudice to the defendant." *Id.* at 10. The *Hines* Court went on to clarify that in the context of offense joinder, "non-mutually admissible evidence is *inherently* prejudicial because evidence pertains to only one defendant and is accompanied by the risk of improper propensity reasoning on the part of the jury." *Id.* at *10 (emphasis in original).

Here, as we explain below, because we hold that the "identity" exception to the "other crimes" evidence rule makes the charges against the other four victims mutually admissible against Poindexter in a single trial, we need not examine the outcome if the evidence is found not to be mutually admissible.

test by analyzing whether the trial court abused its discretion in finding that the interest in judicial economy outweighs the arguments favoring severance.

A. Mutual admissibility

Poindexter argues that the charges related to the other four victims—M.P., A.D., J.L., and S.B.—should have been severed into four separate trials because the charges were not mutually admissible under the "identity" exception to the "other crimes" evidence rule. Specifically, Poindexter contends that the characteristics of the offenses in this case did not fit into any of the generally accepted sub-categories of the "identity" exception. The State responds that the characteristics of the offenses in this case fit into the "*modus operandi*" sub-category of the "identity" exception to the "other crimes" evidence rule.[4] Therefore, it argues, the charges related to the other four victims were mutually admissible against Poindexter and the trials did not have to be severed from one another.

[4] The parties treat "*modus operandi*" as a sub-category of the "identity" exception. As this Court explained in *Solomon*:

> Whereas *Ross* [*v. State*, 276 Md. 664, 670 (1976)], treats this use of a peculiar *modus operandi* or "signature" as an exception in its own right, *State v. Faulkner,* 314 Md. [630], 638-40 [(1989)], treats it merely as a variety or aspect of the "identity" exception. This minor difference of opinion in conceptualization makes the larger point—that it is relevant evidence on a material issue in any event, regardless of how one categorizes or conceptualizes it.

101 Md. App. at 354. For the purposes of this Opinion, we will follow *Faulkner* and also treat "*modus operandi*" as a sub-category of the "identity" exception.

"Whether evidence of one offense would be admissible in a trial on another offense concerns, by definition, 'other crimes' evidence … [which is] evidence that relates to an offense separate from that for which the defendant is presently on trial." *Conyers*, 345 Md. at 550 (internal quotations and citations omitted). "Other crimes" evidence is only admissible "if it is substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on propensity to commit crime or his character as a criminal." *State v. Faulkner*, 314 Md. 630, 634 (1989) (citations omitted). This is the presumptive rule of exclusion. In a severance analysis—a procedural question that must be resolved during a pre-trial hearing—the trial court must consider whether the evidence fits within one of the exceptions to the presumptive rule of exclusion to determine mutual admissibility. *Conyers*, 345 Md. at 551.

One of the recognized exceptions to the presumptive rule of exclusion of "other crimes" evidence is the "identity" exception. *Faulkner*, 314 Md. at 637-38; *see also* Md. Rule 5-404(b) ("['Other crimes'] evidence … may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident."). One of the methods to prove "identity" under the exception is if "a peculiar *modus operandi* used by the defendant on another occasion was used by the perpetrator of the crime on trial." *Faulkner*, 314 Md. at 638. In *Faulkner*, the appellant was on trial for robbing a particular Safeway. *Id.* at 636. The trial court allowed the State to introduce "other crimes" evidence of three other robberies of the same Safeway store, including that the thief in all three cases had the same physical

characteristics, wore a mask cut out from denim jeans, wore gloves, jumped on the check-out counter, and demanded bills in large denominations. *Id.* The Court of Appeals held that even though, when isolated, each piece of evidence was unremarkable, taken together they were sufficient as evidence of "identity" through a particular *modus operandi*. *Id.* at 639-40.

Similarly, in *Moore v. State*, an assailant committed three separate sexual assaults. 73 Md. App. 36, 48 (1987). Each of the victims was encountered at the same time of day and approached and attacked in a similar manner. *Id.* This Court held that while certain common circumstances surrounding a number of sexual assaults were, when considered individually, "entitled to little or no weight," when considered together these unremarkable characteristics provided evidence of the "identity" of the assailant by portraying a specific *modus operandi. Id.*

Here, the trial court granted Poindexter's motion for severance in part and denied it in part—severing the trial on the A.L. charges from the trials on the charges related to the other four victims, but grouping the charges related to other four victims into a single second trial. We agree with that choice. In this case, a number of the victims could not identify their attacker because they were incapacitated at the time of the crime. Indeed many of the victims did not know that they had been attacked at all. The crimes committed against the four victims, however, included a similar *modus operandi* that could identify Poindexter as the perpetrator in each assault. Each assault involved: (1) a beer pong tournament at a College Park bar; (2) Poindexter befriending a significantly younger

victim; (3) taking the victim to Poindexter's house; (4) drinking alcohol until blackout; (5) specific sexual acts being photographed and/or videotaped; and (6) the photographs and videotapes being meticulously categorized and filed. The sexual acts themselves included: (1) severe incapacitation of the victim; (2) a cylindrical object being used to penetrate the anus of the victim; (3) a fetishistic tapping, touching, and slapping of the victim's buttocks; and, afterwards (4) Poindexter's black shorts being placed on or being seen on the victim. While A.L.'s trial could be severed from the trial of the other four victims because A.L. recognized Poindexter as his attacker and confronted Poindexter about the assault, the other victims who could not make this kind of identification required a joint trial to prove the identity of the attacker—Poindexter. Taking these many circumstances into account, we conclude that the crimes perpetrated against all four victims were mutually admissible against Poindexter under the "identity" exception to the "other crimes" evidence rule.[5]

B. Judicial Economy

We next turn to the second prong of the *Conyers* severance test, whether the interest in judicial economy outweighs any arguments favoring severance. Under this step, the trial

[5] Poindexter argues further that if the "identity" exception does not apply, then, under *Vogel v. State*, separate trials are automatically required whenever the State alleges sexual assault against multiple victims. 315 Md. 458, 466 (1989) (holding that the "sexual propensity" exception to the "other crimes" evidence rule "is strictly limited to the prosecution for sexual crimes in which the prior illicit sexual acts are similar to the offense for which the accused is being tried and involve the same victim."). Because we conclude, however, that the "identity" exception to the "other crimes" evidence rule applies, *Vogel* is not dispositive in our case.

court found that the strong interest in judicial economy—avoiding five separate trials on similar facts that would each last a number of days, particularly where there were multiple witnesses, police officers, and experts that would testify redundantly at each trial—outweighed any arguments against severance.

Poindexter argues that the trial court's refusal to sever the trials of the other four victims—M.P., A.D., J.L., and S.B.—caused him undue prejudice. Specifically, Poindexter points to a question from the jury during deliberations in the second trial as evidence that the denial of the motion to sever caused him undue prejudice. The jury asked: "Can we use all the evidence to determine guilty or not guilty on a specific count or only to the exhibit tied to the count by the State?" Poindexter argues that this question shows that the trial court's refusal to sever the trials led the jury to convict based on the volume of cumulative evidence.

We agree with the trial court's assessment. The potential costs to the witnesses and to the court inherent in holding five separate trials outweigh the general prejudice described by Poindexter—the assertion that trying the offenses against all four victims together would lead the jury to convict based on the volume of cumulative evidence. As far as the jury question noted by Poindexter, the main issue at the second trial was not whether the acts took place, but whether Poindexter was the one who committed the acts. Therefore, this jury question reflects a permissible application of the "identity" exception to the "other crimes" evidence rule: the jury could properly use all the evidence to tie Poindexter to the crimes. As we said above, no Maryland appellate court has ever found an abuse of

discretion by the trial court in this second step of the *Conyers* severance test, however the trial court weighed the factors, and we decline to be the first.

Because we hold that the "identity" exception to the "other crimes" evidence rule renders the charges against the other four victims mutually admissible against Poindexter in a single trial, and because the interests in judicial economy in this case outweigh the prejudice claimed by Poindexter, we affirm the trial court's decision to group the trials on the charges related to the other four victims.[6]

II. Striking Jurors from the Box

Poindexter argues that the trial court erred when it prohibited him from using his remaining peremptory challenges once 12 jurors were seated in the box and the selection process was about to turn to the alternate jurors. After 12 jurors were seated, the following discussion took place between the trial court and defense counsel:

> **[COURT]:** Okay. Before we call other people up, do counsel have anything further or need to consult? Anything further from counsel on either side at this point?
>
> **[DEFENSE COUNSEL]:** Nothing from the defense, Your Honor.
>
> **[COURT]:** Okay.
>
> **[PROSECUTOR]:** Nothing from the State, Your Honor.

[6] Although not challenged on appeal, we also affirm the trial court's decision to sever the trial on the charges related to A.L. because A.L. recognized Poindexter as his attacker and confronted Poindexter about the assault. Therefore, the State could not use the "identity" exception to the "other crimes" evidence rule in the A.L. trial.

> **[COURT]:** Okay. Listen for your jury number folks, please.
>
> **[CLERK]:** *Juror No. 116, please come forward and Juror No. 119, please come forward.*
>
> **[DEFENSE COUNSEL]:** Your Honor, can we approach for one second.
>
> **[COURT]:** Okay.
>
> (Bench conference follows:)
>
> **[DEFENSE COUNSEL]:** Are we now moving on the alternates? Are we now moving on the alternates?
>
> **[COURT]:** Yes.
>
> **[DEFENSE COUNSEL]:** Okay. I just wanted to make sure we are clear.
>
> **[COURT]:** Yes, and just so we are clear, now that we are with the alternates, the 12 are in.
>
> **[DEFENSE COUNSEL]:** Right.
>
> **[COURT]:** There's no exercising on the 12 spots. You'll have four strikes for the two spots.
>
> **[DEFENSE COUNSEL]:** Right.
>
> **[COURT]:** You'll have two strikes for the two spots. Okay?
>
> **[DEFENSE COUNSEL]:** Fair enough. I just wanted to make sure.

(emphasis added).

Md. Rule 4-313(b)(3) discusses the proper procedure for any peremptory challenges that remain after 12 jurors have been seated:

> After the required number of qualified jurors has been called, a party may exercise any remaining peremptory challenges to

> which the party is entitled at any time before the jury is sworn, except that **no challenge to the first 12 qualified jurors shall be permitted after the first alternate juror is called**.

Id. (emphasis added). Here, the trial court correctly applied Md. Rule 4-313(b)(3). Once the trial court ensured that neither the State nor the defense wanted to exercise any further strikes after 12 jurors were seated, the clerk called the alternate jurors—Juror Nos. 116 and 119. During the bench conference, the trial court reiterated to the defense that the court had moved onto selecting the alternate jurors, and that, under the Rule, neither the State nor the defense could use any leftover peremptory challenges. We hold, therefore, that the trial court did not err in its administration of Md. Rule 4-313(b)(3).

III. Waiver of Counsel

Waiver of counsel is governed by Md. Rule 4-215. Although Poindexter agrees that the trial court did not err in conducting the Md. Rule 4-215 inquiry in the first trial—allowing him to discharge his defense counsel and waive his right to counsel—Poindexter argues that his waiver in the first trial did not extend to cover the second trial that took place a week later. The State responds that the trial court made it abundantly clear to Poindexter during a long discussion in the first trial that his waiver of counsel would apply not only to the first trial, but also to the second trial.[7]

[7] As explained above, although the State charged Poindexter with 12 counts of sexual assault against five victims in a single indictment, the trial court severed the trial of A.L. (four counts) from the trial of the other four victims (eight counts). The second trial began a week after the first trial ended, with the same judge and the same prosecutor, and under the same case number, as the first trial. The evidentiary rulings made in the first trial applied in full force to the second trial. The second trial was, in essence, a continuation of

We recount the history of Poindexter's tumultuous relationship with his defense counsel. The Office of the Public Defender appointed Kevin B. Collins, Alexander A. Berengaut, and Ashley A. Nyquist, from Covington & Burling LLP, as pro bono defense counsel for Poindexter. Two months before the first trial, Poindexter requested that the trial court appoint new counsel to replace his counsel. The trial court denied Poindexter's request, finding that it had no merit.

On the first day of Poindexter's first trial—related to the four counts of sexual assault perpetrated against A.L.—Poindexter interrupted Collins during his argument on a motion in limine and said "I have no interest in anything [Collins] has to say." Poindexter further accused Collins of "perjury" and claimed "they're not doing a thing I'm asking them to do. They're filing motions I don't want filed and they're not filing motions that I do want filed." The trial court denied a motion by the State asking the trial court to find that Poindexter had constructively discharged his defense counsel.

After jury *voir dire*, Collins requested that his appearance be stricken. In explaining the reason, Collins told the trial court about a discussion he and Poindexter had during the lunch recess, which led Collins to allege a "complete breakdown" in the attorney-client relationship. Collins noted that Poindexter's statements to him, including Poindexter's accusation that Collins was conspiring against him, were "divorced from reality." Poindexter asserted that he was "completely capable of assisting or directing his defense,"

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the first trial. As the trial court stated, "this case has been bifurcated, but I think it's one case."

that he wanted new counsel, and that he did not wish to represent himself. The trial court once again denied the request to substitute defense counsel.

Finally, after the State rested its case in the first trial, Poindexter moved to discharge his defense counsel. The court inquired, "[n]ow, you want to fire your attorneys again, is that correct?" Poindexter responded that the "third time's a charm." The trial court conducted an extensive discussion with Poindexter concerning: (1) Poindexter's mental state in waiving counsel; (2) the importance of counsel; (3) warnings to Poindexter about the possible effects on the jury, and on Poindexter's chances of success at trial, if he waived counsel; and (4) the exemplary job done by defense counsel up to that point in the proceedings. The trial court also reviewed in detail the charges that Poindexter faced and the possible penalties for each charge, should Poindexter be found guilty. The trial court allowed Poindexter to consult with his brother and sister, who were present in the courtroom, about his decision to waive counsel. After Poindexter said that he still wanted to discharge counsel and represent himself, the trial court found his decision to waive counsel to be knowing and voluntary. Poindexter does not contest the trial court's finding that this waiver of counsel in the first trial was proper, therefore, we will not delve into the Rule 4-215 factors, which govern such discharges.

During the discussion with Poindexter, the trial court made clear that Poindexter's waiver of counsel at this point in the first trial applied to the second trial as well. Defense counsel stated:

> I believe Your Honor covered Counts 1 through 4, but we understand Mr. Poindexter to be seeking to represent himself in this case as a whole, and there is the scheduled trial to begin a week from Monday, I believe, and the indictment covers both the charges in this trial, and the charges in that trial. So, I just wanted to make sure everyone was aware of that.

The trial court then advised Poindexter:

> Okay. You are being represented through the Office of the Public Defender. It is the rigid policy of the public defender that if you dismiss your attorneys, without cause, and I've already made a finding that any dismissal by you would be without cause, other than your own personal preferences, but without merit as far as the Court is concerned as the reasons for the termination, that you will not get another public defender, which would mean that you would go to trial, unless the trial [is] avoided either by the State or by a guilty plea, not only in the rest of this case, but in the other parts of the indictment that are set for trial, I believe, the first week in February.

Then, once defense counsel was discharged, the now former-defense counsel asked: "And, Your Honor, on that note with the rest of this case that means the entirety of this case, as well as the proceedings that are scheduled a week from now?" The trial court responded:

> Well, you're discharged from this case, and this case has been bifurcated, but I think it's one case. … [Y]ou are discharged from this case, which includes the rest of this trial, and the trial that's scheduled for a couple of weeks from now. … I believe [the trials are] one case number … then there's a superseding indictment that contained I believe there were 12 counts with all alleged victims. We're only trying in this case the four counts that were severed from the other counts, Counts 1 through 4 that is, that were severed from the other counts. … [T]he Court's understanding is this is one case, and counsel[] [is] discharged from the case in its entirety. … Once that door

> swings closed, Mr. Poindexter, it's the point of no return. If you've got any second thoughts, now is the time to speak up.[8]

Poindexter did not object to the idea that his waiver of counsel was to apply to the second trial as well. Then, a week later, on the first day of the second trial, the trial court (with the same judge and prosecutor as in the first trial) confirmed that the Public Defender's office's appearance had been stricken by Poindexter's express waiver in the first trial. The trial

[8] At oral argument in this Court, Poindexter argued that this statement by the trial court demonstrated that the trial court impermissibly closed all avenues for Poindexter to obtain a lawyer for the second trial. We disagree. The trial court's statement must be taken in context with the rest of its long discussion with Poindexter, in which it attempted to dissuade Poindexter from discharging his extremely-able defense counsel. As quoted above, the trial court told Poindexter that "[o]nce that door swings closed … it's the point of no return," in that thereafter Poindexter could no longer retain the services of the *public defender* for the second trial. The trial court did not mean that Poindexter could not obtain *private counsel* for the second trial. The trial court warned Poindexter, however, that if he discharged his assigned public defender, without merit, in the middle of the first trial, with the second trial to begin a week later, the public defender's policy would not allow Poindexter to get that counsel back for the second trial. As the trial court stated:

> But I can tell you, once you've crossed the line and you make that decision, and I find that you've knowingly, and intelligently, and voluntarily made that decision, there's no turning back. We don't have a restart with your attorneys. It's a decision, it's a final decision in this trial, and barring some true, extraordinary change of viewpoint from the public defender, it would apply to the next trial.
>
> And I cannot imagine that the public defender would, in any way, do anything other than say[] we provided him with representation, in fact, we provided him through the good graces of a superb law firm with the ultimate in professional representation.

Thus, in context, we understand the trial court to have meant that Poindexter was free to obtain private counsel for the second trial, but that he would not regain the services of his public defender after the unceremonious discharge.

court also discussed with Poindexter about advising the jury not to draw any conclusions from his self-representation in the second trial. At no time did Poindexter ask for a lawyer or indicate that he did not agree that the waiver of counsel in the first trial also applied to the second trial.

As explained above, Poindexter does not allege that trial court failed to comply with any aspect of Md. Rule 4-215 in the first trial. Poindexter only argues that the trial court improperly extended the waiver of counsel to the second trial. Of course, "[a]ny decision to waive counsel (or to relinquish the right to counsel through inaction) and represent oneself must be accompanied by a waiver inquiry designed to ensure that the … defendant has undertaken waiver in a knowing and voluntary fashion." *Broadwater v. State*, 401 Md. 175, 181 (2007) (internal quotations and citation omitted). Here, the trial court explained clearly to Poindexter during the lengthy discussion about discharging counsel in the first trial that the waiver of counsel also applied to the second trial—which was, in essence, a continuation of the first trial.

Poindexter argues that an additional Rule 4-215 inquiry should be required for each new significant trial proceeding that takes place after the original Rule 4-215 waiver of counsel. In this case, such a rule would require the trial court to repeat the entire Rule 4-215 inquiry for the second half of Poindexter's trial that began a week after the first trial ended. The State responds that once the Rule 4-215 inquiry is conducted, then that defendant does not receive another such inquiry. We decline to adopt either extreme. Instead, we hold that

the trial court's responsibility to repeat the Rule 4-215 inquiry in a particular case depends on the circumstances of that case.

Here, the trial court conducted the Rule 4-215 inquiry as to Poindexter's decision to waive counsel in the first trial with extreme clarity. Poindexter acknowledged to the trial court that he understood the consequences of his decision to waive counsel, and that he had no qualms about his decision and the effect it would have on his counsel options in the second trial. The second trial began only one week after the first trial ended. Under the totality of the circumstances, there is no reason that a knowing, voluntary, and clear waiver of counsel by Poindexter in the first trial would not apply to the second trial that began a week later. We hold that Poindexter's choice to waive counsel for both trials was "made with eyes open." *Brye v. State*, 410 Md. 623, 634-35 (2009) (citation omitted).

IV. Detective Marshall's Testimony

Victims J.L. and S.B. both lived in Louisiana and were not present at trial. Moreover, J.L. and S.B. could not be identified solely by the explicit photographs and videos recovered from Poindexter, and neither J.L. nor S.B. recalled having a consensual sexual encounter with Poindexter. Detective Marshall testified, therefore, that he used photographs provided to him by the victims, and information learned from his conversations with the victims, to identify J.L. and S.B. in the explicit photographs and videos recovered from Poindexter.

Poindexter argues that the trial court erred when it permitted Detective David Marshall of the Montgomery County Police Department to testify about his conversations

with, and identification of, two of the victims. Specifically, Poindexter contends that allowing Detective Marshall to testify that these two victims identified themselves in the explicit photographs and videos recovered from Poindexter, violated the Confrontation Clause and the hearsay rule. Additionally, Poindexter argues that Detective Marshall's testimony regarding his identification of J.L. and S.B., based on photographs provided to him by the victims and based on his conversations with the victims, violated the prohibition in Md. Rule 5-701 against offering an impermissible lay opinion. We do not agree.

Rather than analyze the merits of Poindexter's claims, we think it is more expedient to move directly to a discussion of harmlessness. Any possible error by the trial court in allowing Detective Marshall's testimony was harmless. *See Clark v. State*, 218 Md. App. 230, 241-42 (2014) ("An error is harmless when a reviewing court is 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.") (Internal quotations and citations omitted). The errors in Detective Marshall's testimony, claimed by Poindexter, all go to the identity of the victims. The identity of the victims, however, is not a constituent element of the crime of sexual assault. *See* Md. Code Ann., Crim. Law ("CR") §§ 3-306, 3-307 (stating that a second or third degree sexual offense prohibits a person from engaging in certain sexual acts, under certain conditions, with "another"—the name or identity of the victim is not an element of the crimes).[9] Put simply, the State did

[9] Although the *suggested* short form charging document for rape and sexual offenses under CR § 3-317 includes a space for the prosecutor to list the name of the victim, the

not have to prove the identities of the victims of Poindexter's crime. Therefore, Detective Marshall's testimony regarding the self-identification and his own identification of the victims in the photographs and videotapes taken from Poindexter was harmless.

V. Requiring Poindexter to Proffer the Content of Witness Testimony

Finally, Poindexter argues that his right to present a defense and produce witnesses was violated when the trial court indicated that it might require him to proffer the testimony that he planned to elicit from certain witnesses, including A.L., who Poindexter wished to call (or have recalled) after he discharged his defense counsel during the first trial. The trial court told Poindexter that his ability to call and recall witnesses, "may be subject to a proffer on your part as to what you believe the testimony would be, because we're not going to march people in here left and right if they don't have something to add of any meaning to the case." The trial court allowed Poindexter to conduct direct examinations of the witnesses that he requested, although A.L. was not able to return due to his personal schedule. As the trial court stated:

> [A.L.] has been excused from trial. He's going to Florida tomorrow. We could not procure his presence today. I will say on the record that when he testified first there was a request to reserve him on call. When he testified yesterday, he was told that he was excused without objection and he apparently is

name or identity of the victim is still not an element that needs to be proved to find a person guilty of a second or third degree sexual offense. *See generally Edmund v. State*, 398 Md. 562, 571 (2007) (explaining that in the context of first degree assault, although the suggested short form charging document under CR § 3-206 includes a space for the prosecutor to list the name of the victim, the name or identity of the victim is still not an element that needs to be proved to find a person guilty of first degree assault under CR § 3-202).

> unavailable through the remainder of this trial because of his personal schedule, which is certainly reasonable for him to engage in.

A defendant's right to present a defense and call witnesses is guaranteed by the Sixth Amendment and Article 21 of the Maryland Declaration of Rights, but is subject to the trial court's discretion of how to best conduct the trial. *See generally Cooley v. State*, 385 Md. 165, 176 (2005) ("The conduct of the trial must of necessity rest largely in the control and discretion of the presiding judge and an appellate court should [not] interfere with that judgment unless there has been an abuse of discretion by the trial judge … likely to have injured the complaining party.") (Citation omitted); *Taneja v. State*, ___ Md. App. ___, 2016 WL 6996292, *4-5 (Nov. 30, 2016) (explaining that while the right of a defendant to present witnesses in her defense is a critical right, it is not an absolute right, and is subject to the trial court's wide discretion in controlling the admissibility of evidence). "To insure that a trial does not stray into distracting and confusing by-ways, broad discretion is entrusted to the trial judge to control the flow of the trial and the reception of evidence." *Muhammad v. State*, 177 Md. App. 188, 273-74, 281 (2007) (holding that the trial judge properly required a *pro se* defendant to proffer the materiality of the witness testimony that the defendant wanted to introduce). The trial court's discretionary determination regarding the conduct of the trial and the presentation of witnesses will ordinarily not be disturbed on appellate review. *See id.* at 293.

That discretion, can, however, be abused, and, as a result, a trial court can unconstitutionally limit a defendant's trial rights. *Kelly v. State* presents an example of

conduct by the trial court that was a bridge too far for the Court of Appeals. 392 Md. 511 (2006). In *Kelly*, the trial court required Kelly to proffer the admissibility of the witness testimony he intended to introduce during the trial to prove that he was not, in fact, the shooter. *Id.* at 522-30. Because Kelly could not proffer to the court's satisfaction, the trial court ultimately refused to allow any of Kelly's witnesses to testify, and defense counsel was forced to rest its case. *Id.* at 530. On appeal, the Court of Appeals granted Kelly a new trial, holding that:

> When the trial court makes a ruling as to the admissibility of evidence on its own without a prior objection by any of the parties, the court leaves its role as an arbiter and assumes another role as a party to the proceeding, placing into question the defendant's right to a fair trial.

Id. at 541. The Court of Appeals, therefore, reversed Kelly's conviction and remanded the case for a new trial. *Id.* at 543.

Our recent decision in *Taneja v. State*, however, helps explain how rare and extreme the trial court's actions were in *Kelly*. 2016 WL 6996292, at *9-12. According to *Taneja*, *Kelly*'s reach is limited because in *Kelly*: (1) the trial court required a pre-examination proffer for all of the Kelly's witnesses but did not require the same for any of the State's witnesses; (2) the trial court did not accept the proffers offered by Kelly's defense counsel as to why the witnesses should be called; (3) the trial court did not allow *any* of Kelly's witnesses to testify; and (4) the trial court abandoned its role as a neutral arbiter and required Kelly's defense counsel to proffer its entire defense. *Id.* at *11-12. By contrast, in *Taneja*, the trial court only required a proffer from three of the proposed defense witnesses,

and Taneja was able to present a defense through the other witnesses that he called. *Id.* at *12. Because the *Kelly* factors did not apply in *Taneja*, this Court held that the trial court did not abuse its discretion in refusing to allow the testimony of three proposed defense witnesses. *Id.* at *13.

Poindexter's case is even more cut and dried than *Taneja*, however, because the trial court here did not prevent any of Poindexter's requested witnesses from testifying. Poindexter, who had just discharged his counsel, told the trial court that he wanted to call a long list of witnesses. The trial court understandably did not want Poindexter to march a parade of witnesses into court if his witnesses were not going to add anything of substance to the case. Poindexter only takes issue with the trial court's suggestion that it might require Poindexter to proffer the testimony that he planned to elicit from certain witnesses. But unlike *Kelly*, the trial court here: (1) did not require a pre-examination proffer for all of Poindexter's witnesses; (2) accepted the proffers advanced by Poindexter; (3) allowed *all* of Poindexter's requested witnesses to testify; and (4) did not abandon its neutral role during the trial (and Poindexter does not assert to the contrary). Poindexter's ability to present a defense and call witnesses were not hampered in any way by the trial court insisting that he make a proffer as to some of the witness testimony that he planned to elicit. Therefore, we hold that the trial court did not abuse its discretion in requiring the proffer.

The only witness that Poindexter sought to examine, but was not able to examine, was A.L. A.L. had already testified, and had been subject to cross-examination by Poindexter's counsel, twice during the trial. Further, A.L. was not held under subpoena

after his second time testifying during the trial. Although A.L. did not end up testifying a third time, it was not the trial court that prevented A.L. from testifying again. Rather, the trial court agreed to have A.L. return for a third time, but A.L. was not available to do so because of a previously scheduled vacation. The trial court appropriately balanced Poindexter's trial rights with the efficient administration of the trial. And, we hold that the trial court was well within its discretion to refuse to prevent A.L. from taking his Florida vacation to testify for a third time in the same trial.

For the reasons stated above, we affirm Poindexter's convictions in both trials.

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