Circuit Court for Prince George's County
Case No. C-16-CR-22-000534

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1662

September Term, 2023

LAMAR PIERRE FENNER

v.

STATE OF MARYLAND

Arthur,
Beachley,
Ripken,

JJ.

Opinion by Ripken, J.

Filed: January 31, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In September of 2023, at the conclusion of a bench trial, the Circuit Court for Prince George's County found Lamar Pierre Fenner ("Appellant") guilty of third-degree sexual offense, fourth-degree sexual offense, and second-degree assault. The court sentenced Appellant to ten years of incarceration, with all but five years suspended. Appellant noted this timely appeal of his conviction, and presents the following issues for our review:[1]

I. Whether the circuit court properly exercised its discretion in permitting Appellant to discharge his attorney and represent himself.

II. Whether the circuit court erred in finding that Appellant waived his right to a jury trial.

III. Whether the evidence was sufficient to convict Appellant of third- and fourth-degree sexual offenses.

IV. Whether the circuit court fashioned its sentence based on impermissible considerations.

[1] Rephrased from:

1. Did the circuit court err in permitting appellant to discharge counsel and represent himself?

2. Did the circuit court err in finding that appellant waived his right to a jury trial?

3. Is the evidence insufficient to sustain the convictions for third and fourth degree sexual offense?

4. Did the circuit court impermissibly consider appellant's exercise of his right to trial in imposing [a] sentence?

5. If this Court finds sufficient evidence to sustain the convictions for the sexual offenses, must the sentences for fourth degree sexual offense and second degree assault merge into the sentence for third degree sexual offense?

V. Whether Appellant's convictions for fourth-degree sexual offense and second-degree assault should merge into his conviction for third-degree sexual offense.

For the reasons to follow, we shall affirm Appellant's convictions. However, as Appellant's convictions on two counts are to merge, we shall remand in part to allow the circuit court to issue an amended commitment record.

FACTUAL AND PROCEDURAL BACKGROUND

In July of 2022, Appellant was at an apartment complex in Prince George's County, where the victim in this case, "E.," an eleven-year-old girl, resided. E., her sister, Q., and another young girl, Y., were playing at the playground across from E.'s and Q.'s apartment building.[2] The girls left the playground, walked into the vestibule of the one of the apartment buildings and knocked on their friend's door. While E., Q., and Y. waited for their friends, Appellant entered the vestibule and initiated a conversation with them. During this conversation, Appellant first spoke to Y., at which point Y. told Appellant each of the girl's names and ages. E., Q., and Y. continued knocking on their friend's door, to no avail. Appellant told the girls about himself, sharing that he was on probation or house arrest. Appellant then spoke directly to E., stating "Oh, you're the shy one, huh[]. You look shy. Just standing in the corner not talking, huh." E. did not reply.

E. observed that Appellant was wearing an ankle monitor. Appellant continued his conversation with Y. and told the girls that he knew the girls' friend whose door they were knocking on, stating, "I know him, we're cool, we're friends." Then Appellant told E., Q.,

[2] To preserve the anonymity of the minor children, we refer to them with the randomly selected initials "E.," "Q.," and "Y."

and Y. that he sells marijuana and asked if they wanted to see pictures of it on his cellphone. E. again did not say anything because she felt uncomfortable.

While the girls continued to wait for their friends, Appellant twice touched E. on her buttocks. E. distinguished the two contacts, indicating that in the first, Appellant touched and squeezed her "more on the side of [her] buttocks[,]" while during the second, Appellant touched and squeezed the back of her buttocks. Shortly after the second incident, E. ran quickly up the steps and away from Appellant. When the three girls saw Y.'s stepmother arrive in the parking lot, they immediately ran to Y.'s stepmother's car and told her about their interactions with Appellant. Then, E. ran into her apartment and told her oldest sister what had occurred. E.'s sister called their mother, who called the police. The following day, E. spoke with detectives, recounted the events, and identified Appellant in a photographic array.

In December of 2022, the State filed charges against Appellant through a criminal information. The case proceeded to a bench trial in June of 2023. Both E. and Q. testified. The circuit court found Appellant guilty of third- and fourth-degree sexual offenses and second-degree assault. In September of 2023, the court sentenced Appellant to ten years of incarceration, with all but five years suspended, followed by five years of supervised probation, and registration as a sex offender at the Tier III level, among other conditions. Additional facts will be discussed as they become relevant to the analysis.

DISCUSSION

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN PERMITTING APPELLANT TO DISCHARGE HIS COUNSEL AND REPRESENT HIMSELF.

A. Additional Facts

In June of 2023, Appellant appeared for trial with counsel. The parties proceeded through a significant portion of the *voir dire* process, completing both the exercise of peremptory strikes as well as the requests for strikes for cause. Nearing the end of *voir dire*, Appellant's counsel informed the court that "although [Appellant] appreciates and wants [counsel] to sit with him, he wishes to exercise his right to represent himself[.]" The circuit court inquired of Appellant's counsel how Appellant wished to proceed, as there was some confusion concerning at which point in the proceeding Appellant wanted to begin representing himself. Following a private conference between Appellant and his counsel off the record, Appellant's counsel explained to the court that Appellant wanted his counsel to complete the jury selection, and that afterwards Appellant would begin representing himself. When Appellant's counsel informed the court of this request, the court indicated a concern that this venire would have observed Appellant represented by counsel during *voir dire* and would later observe him pro se for the remainder of the proceedings. The court therefore dismissed the venire panel, noting that a new panel could be convened the following day.[3]

The court had Appellant sworn in, and the following exchange ensued:

[3] The circuit court did not restart *voir dire* because there were not enough people to convene another venire and because of other scheduling and timing concerns. Further, at the time

THE COURT: Okay. So as you've seen so far, we've called the case, we've got potential jurors in here. We questioned all of the jurors and we were, you know, probably 80 percent through selecting the jurors such that we would be ready to proceed with [the] trial that you indicate that you're ready to go forward with.

[APPELLANT]: Yes, ma'am.

THE COURT: At the point where we were almost done, your counsel approached the bench and your counsel indicated to me that you wanted to represent yourself.

[APPELLANT]: Yes, ma'am.

THE COURT: Is that the case?

[APPELLANT]: Yes, ma'am.

THE COURT: Okay. And when you indicate that you want to represent yourself, is it your belief that you would represent yourself with [your attorney] still sitting there, such that you could consult with him, or that [your attorney] would no longer be present at counsel table with you?

[APPELLANT]: No. Yes, ma'am. I said that he can sit right here with me. The reason why I said that, ma'am, I'm not taking off from this man. He's a lawyer. He's been a lawyer 30 years . . . .

. . . .

He can be right here beside me, ma'am. But I'm not going to lie. I don't trust this man. Every time you talk to him, he [talks] to me for two minutes. I can never get my point across . . . . So, yes, ma'am, I'm ready to represent myself, Your Honor. And that's it, ma'am.

. . . .

THE COURT: There's no having him sit here so you can consult. If you're going to represent yourself, you're going to represent yourself; or if he's going to represent you, he's going to represent you. So which way do you want to go?

Appellant made this request, Appellant had yet to waive his right to a jury trial, so the court was rightfully concerned with the mechanics of calling a new venire.

[APPELLANT]: Ma'am, I'll represent myself, ma'am.

The court continued explaining to Appellant the implications of discharging his counsel, including the benefits of having an attorney and what Appellant would be responsible for at trial without an attorney present. The circuit court also informed Appellant of the charges against him, the maximum penalties those charges carried, his responsibilities as a pro se litigant, and that the court could not assist him in presenting his case.

Following the explanations, the circuit court confirmed again that Appellant still wished to discharge his counsel. Appellant indicated that he understood what he would be responsible for, and the court permitted him to discharge his counsel. The court ordered Appellant's counsel to provide the discovery to Appellant, and confirmed with Appellant that he would be prepared to proceed to trial the following day. The next day, the matter proceeded, and Appellant represented himself.

B. Party Contentions

Appellant argues that because the circuit court conducted its waiver of counsel inquiry after the venire was excused, he was "effectively returned to a pretrial posture[,]" and therefore Maryland Rule 4-215(e) strictly applies. Appellant asserts that to ensure his waiver was knowing and voluntary, the circuit court was required to follow Rule 4-215(a)[4]

[4] Maryland Rule 4-215(a) specifies the steps the circuit court must take for a defendant's first appearance without counsel. Appellant asserts that the circuit court was required to follow Rule 4-215(a) because, subsection (e) of the Rule provides: "[i]f 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. *See* Md. Rule 4-215(e).

and Rule 4-215(b).[5] Appellant contends that the circuit court did not strictly comply with subsections (a) and (b) of Rule 4-215 after he made the request to discharge counsel, and therefore the court's acceptance of Appellant's discharge of counsel was erroneous.

The State asserts that the circuit court was not required to strictly follow the procedure outlined in Rule 4-215(e), which directs the court to subsections (a) and (b), because "meaningful trial proceedings" had already begun, as Appellant made the request during the *voir dire* process. The State thus asserts that the only question this Court should consider is whether the circuit court properly exercised its discretion in allowing Appellant to discharge his counsel.

C. Standard of Review

Where a motion to discharge counsel is made after "meaningful trial proceedings" have begun, "we evaluate a trial court's ruling on [the] motion . . . under the far more lenient abuse of discretion standard." *State v. Hardy*, 415 Md. 612, 621 (2010) (referencing *State v. Brown*, 342 Md. 404, 429 (1996)). Where a motion to discharge counsel is made during trial, a court abuses its discretion "only when it acts without reference to any guiding rules or principles, . . . when the court's act is so untenable as to place it beyond the fringe of what the [reviewing] court deems minimally acceptable." *Id.* at 621–22 (internal quotation marks and citation omitted).

[5] Maryland Rule 4-215(b) regards the express waiver of counsel. Pertinent to this discussion, the Rule states that, "[i]f the file or docket does not reflect compliance with [sub]section (a) of this Rule, the court shall comply with that section as part of the waiver inquiry. The court shall ensure that compliance with this section is noted in the file or on the docket." Md. Rule 4-215(b).

D. Analysis

If a request to discharge counsel is timely, as in before "meaningful trial proceedings" have begun, "the trial court must strictly comply with the mandates of Rule 4-215(e)[.]" *Hargett v. State*, 248 Md. App. 492, 502–03 (2020). Historically, the Supreme Court of Maryland and this Court have "refused to draw a bright line definition delimiting the precise moment that marks the beginning of 'meaningful trial proceedings,' choosing rather to evaluate each situation on a case-by-case basis." *Hardy*, 415 Md. at 624–25; *see also State v. Wischhusen*, 342 Md. 530, 532, 543 (1996) (holding that "meaningful trial proceedings" had begun by the time a party moved to reinstruct the jury after deliberations had begun); *Brown*, 342 Md. at 429 (holding that "meaningful trial proceedings" had commenced when the request to discharge counsel was made after the State presented evidence).

If a request to discharge counsel is untimely, as in after "meaningful trial proceedings" have begun, then the trial court is not required to strictly comply with Maryland Rule 4-215(e). *Brown*, 342 Md. at 427–28.

i. "Meaningful trial proceedings"

Voir dire is a "meaningful trial proceeding." *Hardy,* 415 Md. at 624. Hence, where a defendant makes a request to discharge counsel during *voir dire*, the circuit court is not obligated to adhere to the strict procedural requirements of Rule 4-215(e) when considering the defendant's request. *Id.*

A review of *State v. Hardy* and *Marshall v. State* is explicative. In *Hardy*, whether "meaningful trial proceedings" commenced during *voir dire* was a matter of first

impression. *Hardy*, 415 Md. at 626. Hardy made his request to discharge his counsel on the first day of trial after the venire panel was sworn and the trial judge had made introductory remarks to the venire. *Id.* at 617–20.

The Supreme Court of Maryland, in holding that *voir dire* is a "meaningful trial proceeding," relied on two considerations. First, the Court explained that *voir dire* is a "meaningful trial proceeding" under the plain meaning of the phrase because *voir dire* "represents a necessary step in any jury trial," as there can be no trial without the trier of fact. *Id.* at 627. Second, the Court emphasized that *voir dire* is a "meaningful trial proceeding" under the functional definition of the phrase. *Id.*

> In situations where Rule 4-215(e) applies, it permits essentially a criminal defendant to discharge defense counsel almost at will. When the process of jury selection begins, however, the soon-to-be members of the jury share the courtroom with the defendant and defense counsel. From this point on, allowing the defendant to change at will his or her representation, as Rule 4-215(e) permits, would risk confusing the prospective jurors[.]

Id. The Court in *Hardy* was concerned with the possibility that jurors could become confused by observing the defendant represented by counsel at one point, and without counsel at a later point, and that "allowing such a change to defense counsel after the entire venire panel is summoned to the courtroom poses a considerable risk of disruption to the trial proceedings in that courtroom, to the court's jury assignment system . . . , and to the court's administration as a whole." *Id.* The Court affirmed the trial court's denial of Hardy's request and emphasized that allowing Hardy to discharge his counsel at this point would cause a serious disruption to the court's administration. *Id.* at 630–31.

In *Marshall*, building on the precedent from *Hardy* and noting that *voir dire* constituted a "meaningful trial proceeding," the Supreme Court of Maryland addressed the point in time at which *voir dire* begins. *Marshall v. State*, 428 Md. 363, 374 (2012). The Court applied *Hardy*'s "functional meaning" analysis and held that "meaningful trial proceedings" may commence during *voir dire* even before any questions have been asked of the venire panel. *Id.* at 374–76. The Court underscored this by stating that even though counsel for Marshall had yet to speak during the proceeding, upon the jury's return to the courtroom, Marshall was without his counsel, and "[t]his may have created the sort of confusion we warned about in *Hardy*." *Id.* at 376.

Based on these precedents, "meaningful trial proceedings" commence once *voir dire* begins. *Compare Hardy*, 415 Md. at 617, *and Marshall*, 428 at 364–65, *with Hargett*, 248 Md. App. at 507 (determining that the defendant's request to discharge counsel was timely and that Rule 4-215(e) strictly applied because "the jury panel had been called but had not arrived or entered the courtroom[,]" and that "[j]ury confusion was not [an] issue because the venire panel was not present in the courtroom until after the court had resolved appellant's request to discharge counsel.").

In this case, "meaningful trial proceedings" had commenced. Appellant made the request to discharge counsel once eighty percent of *voir dire* had been conducted. The venire was summoned to the courtroom, sworn, and had ample opportunity to observe Appellant at the trial table with his attorney.

The case before us is analogous to *Hardy*. There, Hardy made the request to discharge counsel on the first day of trial, immediately after the court had sworn the venire

panel, "introduced the factual allegations of the case to the venire, and proceeded to ask the venirepersons several questions and receive their responses." *Hardy*, 415 Md. at 617. Here, Appellant made a request to discharge his attorney on the first day of trial near the close of *voir dire* after the court introduced the factual allegations of the case to the venire, asked the venirepersons a plethora of questions, and received their responses. Moreover, as in *Marshall*, where this Court held that "meaningful trial proceedings" had begun once the venire panel was summoned to the courtroom but before any questions had been asked of them, it follows that here, where most of *voir dire* had been completed, "meaningful trial proceedings" had commenced. *Marshall*, 428 Md. at 378. Thus, Appellant's request was untimely, and the trial court was not required to strictly comply with Rule 4-215.

Appellant asserts that *Hardy* is incongruent with the case before us because under the functional meaning of the phrase—which carries two primary concerns: the risk of juror confusion, and the risk of disruptive effects on the trial procedure and on judicial economy—"meaningful trial proceedings" had yet to commence. *See Hardy*, 415 Md. at 625. We disagree. Both concerns under the functional meaning of the phrase "meaningful trial proceedings" were present, and the circuit court discussed them on the record.

The circuit court noted the risk of juror confusion. Although the venire was excused during much of the court's interchange with Appellant and his attorney when it addressed the issue, the venire previously had the opportunity to observe Appellant at the trial table with his counsel for a substantial period of time. Further, Appellant's counsel notified the circuit court that Appellant wished to discharge his attorney at a bench conference with the jury present in the courtroom, after approximately eighty percent of *voir dire* had been

completed. In evaluating Appellant's request, the circuit court noted, "[s]o I think I'm at the point right now where I'm letting these people go . . . . I need a fresh crop." The circuit court was also concerned with the disruption of trial procedure, as evidenced by its discussion with the attorneys regarding when the trial could be rescheduled, after the court noted that there were not enough people present to start *voir dire* anew. Thus, the circuit court directly considered and addressed the same concerns noted in *Hardy*.

In further support of his contention that the functional meaning of the phrase "meaningful trial proceedings" under *Hardy* were not an issue here, Appellant cites *Hargett v. State*. In *Hargett*, Hargett made a request to discharge his attorney on the morning of trial after the venire had been summoned but before the venire had arrived or entered the courtroom. *Hargett*, 248 Md. App. at 507. We held that "meaningful trial proceedings" had not commenced for two reasons. First, "[j]ury confusion was not at issue as the venire panel was not present in the courtroom until after the court had resolved [Hargett's] request to discharge counsel." *Id.* Second, because the venire panel entered the courtroom after Hargett elected not to discharge his counsel, and *voir dire* started anew the next day, "any disruption occasioned by [Hargett's] last-minute request was in fact inconsequential[.]" *Id.* Appellant alleges that just as in *Hargett*, there was no risk of jury confusion because the venire panel was not present when the court resolved Appellant's request; moreover, there was no risk of disruption to the trial proceedings because the court dismissed the venire before conducting the discharge of counsel inquiry.

This case is distinguishable from *Hargett*. While it is true that in both *Hargett* and this case the discharge of counsel discussions occurred outside the presence of the venire,

here, the venire had been summoned, arrived, sworn, and approximately eighty percent of *voir dire* had been conducted. The parties were completing their respective peremptory strikes and challenges for cause at the time of Appellant's request. Further, there was a disruption of the trial proceedings as the venire panel waited approximately four hours during the *voir dire* process prior to being dismissed, as opposed to *Hargett*, wherein they had yet to be asked any questions. Consequently, the risks of juror confusion and disruption of the trial procedure warned of in *Hardy* were present, and *Hargett* is factually distinct. Appellant's request was untimely, the trial court was not required to strictly comply with Rule 4-215, and we will review the circuit court's decision under an abuse of discretion standard.

ii. Procedure for discharge of counsel once "meaningful trial proceedings" commence

"When a defendant makes a request to discharge counsel at a time when Rule 4-215(e) does not [strictly] apply . . . , '[t]he court must conduct an inquiry to assess whether the defendant's reason for dismissal of counsel justifies any resulting disruption' and [then] rule on the request[,] exercising broad discretion." *Hardy*, 415 Md. at 628 (quoting *Brown,* 342 Md. at 428). The court must "provide the defendant the opportunity to explain his or her reasons for making the request; in other words, the court need not do any more than supply the forum in which the defendant may tender this explanation." *Id.* "[H]ow to address the [defendant's] request is left almost entirely to the court's sound discretion." *Id.* at 629.

Acknowledging that there was little to guide a trial judge's discretion in this area, the Supreme Court of Maryland articulated criteria in *State v. Brown* as considerations for trial courts:

> (1) the merit of the reason for discharge; (2) the quality of counsel's representation prior to the request; (3) the disruptive effect, if any, that discharge would have on the proceedings; (4) the timing of the request; (5) the complexity and stage of the proceedings; and (6) any prior requests by the defendant to discharge counsel.

342 Md. at 428. "All six of these factors, however, may be considered in a brief exchange between the court and the defendant about the defendant's reasons for requesting the dismissal of defense counsel." *Hardy*, 415 Md. at 629. When applying these criteria, a reviewing court need not examine every factor. *See, e.g., Marshall*, 428 Md. at 371 ("the [Appellate Court of Maryland] considered the first two factors relevant, disregarded the others as irrelevant, and concluded that the trial court had not abused its discretion in granting Petitioner's request to discharge counsel and allowing him to proceed pro se."); *State v. Campbell*, 385 Md. 616, 634–35 (2005) (where the defendant made a request to discharge his counsel at the close of the State's case-in-chief, and the trial court, after providing a forum for the defendant to tender his explanation, told the defendant, "we are beyond that point, sir[,]" the Court found that the "trial judge's response to Campbell's request reflected his assessment that the request lacked merit[.]").

Here, because "meaningful trial proceedings" had commenced, the trial court's role was limited to conducting an inquiry to assess whether Appellant's reason for the dismissal of his counsel justified any resulting disruption, and then ruling on the request. *See Hardy*, 415 Md. at 628 (referencing *Brown,* 342 Md. at 428). The circuit court conducted such an

inquiry. The circuit court inquired of Appellant whether he wanted to represent himself. The circuit court provided Appellant with the opportunity to explain his reasons for making the request, which he stated on the record: "I'm not going to lie. I don't trust this man. Every time you talk to him, he . . . talk[s] to me for two minutes. I can never get my point across." The circuit court summarized Appellant's reasoning, stating that Appellant indicated that he had "questionable contact, or contact with [his attorney] that caused him concern[,]" and specifically, that Appellant's counsel had not visited him. The circuit court, as required by *Hardy* and *Brown*, properly supplied the forum for Appellant to tender his explanation. *Id.*; *Brown*, 342 Md. at 428.

As the circuit court provided Appellant with an opportunity to explain his reasons for the request to discharge his counsel, how the circuit court addressed Appellant's request was "left almost entirely to the court's 'sound discretion.'" *Hardy*, 415 Md. at 629 (quoting *Brown*, 342 Md. at 426). In exercising its discretion, the trial court considered the factors from *Brown*. The court considered: the merit of the reason for discharge, as displayed by the court's inquiry into Appellant's reasons for the request to discharge his counsel; the quality of counsel's representation prior to Appellant's request, of which the court conducted a deeper inquiry following Appellant's statements that his attorney had not visited him; the disruptive effect that a discharge would have on the proceedings, as demonstrated by the court's concern with the timing of Appellant's request; and the need to dismiss the venire panel, noting that the venire saw Appellant represented by counsel during *voir dire* and then would see him pro se during trial. Therefore, the circuit court did not abuse its discretion. It tendered Appellant a forum to explain the reasons for his request

and then considered the *Brown* factors in response to Appellant's request, acting with reference to guiding rules and principles. Thus, we affirm the circuit court's decision with respect to Appellant's discharge of counsel.

II. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT APPELLANT WAIVED HIS RIGHT TO A JURY TRIAL.

A. Additional Facts

During *voir dire*, Appellant was present and heard the court when: it instructed the venire that the court had to go through a process to select twelve jurors plus two alternates; it asked every member of the venire whether that person was capable of being a fair and impartial juror; it asked whether anyone on the venire was "not a resident of Prince George's County"; and it asked whether anyone on the venire opposed Appellant's legal right to the presumption of innocence until proven guilty beyond a reasonable doubt.

Later in the proceedings, during the court's colloquy with Appellant regarding his request to discharge his counsel, Appellant's counsel informed the court that he had just spoken to Appellant regarding a bench trial, stating, "Judge. I just did advise him that he has a right to have a bench trial, should he choose. That's never been an issue."[6] The court observed that a bench trial was an election Appellant could make. Appellant's counsel continued, stating, "[w]e've never discussed it before because it was always just going to be a jury trial, but I just let him know that he did have that option." The court then inquired

[6] The circuit court's inquiry of Appellant's waiver of his right to a jury trial was interspersed and mingled with his waiver of counsel and decision to proceed pro se. As such, the two interchanges cannot be siloed.

of Appellant his understanding of the difference between a bench trial and a jury trial. Appellant replied that he understood and that he was "familiar."

The court continued with the inquiry regarding Appellant's motion to discharge his counsel. Of note, during this interchange, Appellant and the circuit court had the following exchange:

> THE COURT: And so -- and let me just ask you this: Are you under the influence of any drugs or alcohol right now?
>
> [APPELLANT]: No, ma'am.
>
> THE COURT: Even any prescription drugs, anything that might interfere with you understanding what's happening?
>
> [APPELLANT]: No, ma'am.
>
> THE COURT: And do you suffer from any mental disease or defect that might get in the way of you understanding what's going on here today?
>
> [APPELLANT]: No, ma'am.
>
> THE COURT: Is there anybody who's threatened you or promised you in some type of way to entice you or force you to rid yourself of your counsel?
>
> [APPELLANT]: No, ma'am.
>
> THE COURT: Okay. So is it your belief and understanding that you're making this request knowingly, voluntarily, and intelligently?
>
> [APPELLANT]: Yes, ma'am.

The court then continued examining Appellant and explaining to him the mechanics of discharging his counsel, as discussed in Section I.A., *supra*. Just as the court was preparing to adjourn for the day, the court asked Appellant if he had any questions. Appellant replied, "Yes, ma'am. I wanted to waive the jury trial. Just the Judge, have a Judge trial." The court,

in granting the request, replied that the case would proceed with a bench trial the following day. The court again inquired of Appellant, asking, "And I want to make sure that you know and understand that [you] do have a right to a jury trial[?]" Appellant replied in the affirmative. The case proceeded the following day as a bench trial.[7]

B. Party Contentions

Appellant argues that the circuit court violated his constitutional rights in finding that he waived his right to a jury trial because the waiver was not knowing or voluntary, as is required by the U.S. Constitution and the Maryland Declaration of Rights.[8] Appellant asserts that his waiver did not amount to an intentional relinquishment of a known right or

[7] We note that Appellant was charged with sexual offenses, and during the approximately eighty percent of *voir dire* that occurred, Appellant heard the court ask the venire questions related to their opinions regarding allegations of sexual offenses. The circuit court asked the venire, "is there anyone in this courtroom who believes that because this case involves an allegation, and I'll reiterate the term 'allegation' of sexual offense, [they] would be unable to render a fair and impartial [verdict] in this matter?" Appellant also heard the court ask the venire whether there was "anyone here or their immediate family[,] or [a] close personal friend," who has worked in a "hospital[,] . . . a doctor's offices, a mental health facility, or other office that provides care, guidance, or counseling to alleged victims of sexual abuse and assault[.]" Appellant was able to consider the responses of the prospective jurors in the jury trial waiver determination.

[8] There are two ways for a criminal appellant to challenge the waiver of a jury trial: either procedurally, by alleging a failure to comply with the process set out in Maryland Rule 4-246(b); or constitutionally, by asserting that the defendant did not intentionally relinquish the right, knowingly and voluntarily. *Hammond*, 257 Md. App. at 119–21. When raising a procedural challenge, the Appellate Court of Maryland will only "review the issue of a trial judge's compliance with Rule 4-246(b) provided [that] a contemporaneous objection is raised in the trial court to preserve the issue for appellate review." *Nalls v. State*, 437 Md. 674, 693 (2014). Appellant concedes his failure to object to the court's lack of compliance with Rule 4-246(b) and does not request that we exercise our plain error discretion. Accordingly, we limit our examination to whether the circuit court violated his constitutional rights.

privilege, and hence was deficient in two regards. First, Appellant asserts that his waiver was not knowing because he was not provided with sufficient information concerning the nature and benefits of a jury trial. Second, Appellant contends that the court was required, but failed, to conduct an inquiry into the voluntariness of the waiver. Appellant concludes that as a result, reversal of his convictions is required because his constitutional rights were violated.

The State contends that the circuit court's acceptance of Appellant's jury trial waiver was constitutionally sound because the waiver was knowing and voluntary.[9] The State asserts that the waiver was knowing because Appellant had "some knowledge" of his right to a jury trial—given the interchange the court had with Appellant, minutes prior during *voir dire*—and because Appellant's counsel stated that he had spoken with Appellant regarding the right. The State contends that Appellant's waiver was voluntary because the court had ample opportunity to observe Appellant, because the court had just conducted a similar inquiry during Appellant's request to discharge his attorney, and because there is nothing in the record to suggest that Appellant's decision was a product of duress or coercion. The State contends that the court's acceptance of Appellant's waiver of his right to a jury trial was constitutional.

[9] The State also notes that Appellant failed to object to the circuit court's acceptance of his jury trial waiver, regarding the circuit court's compliance with Maryland Rule 4-246(b). The State contends that this issue is unpreserved.

C. Standard of Review

"[A] claim of a constitutional violation of the right to a jury trial does not require an objection to preserve the claim." *Hammond v. State*, 257 Md. App. 99, 121 (2023); *see also Robinson v. State*, 410 Md. 91, 107 (2009). Accordingly, we will address this claim on the merits, despite Appellant's failure to object at trial. *Hammond*, 257 Md. App. at 121. When determining whether a criminal defendant's waiver of the right to a jury trial was constitutionally valid, we look at the totality of the circumstances. *Abeokuto v. State*, 391 Md. 289, 318 (2006) (referencing *State v. Hall*, 321 Md. 178, 182 (1990)).

D. Analysis

"The right to a jury trial is guaranteed by the Sixth Amendment of the United States Constitution and the Maryland Declaration of Rights." *See Hammond v. State*, 257 Md. at 117 (referencing U.S. Const. amend. VI, XIV § 1; Md. Decl. of Rts. art. 5, 21, 24). A defendant can waive the right to a jury trial, "and elect to be tried by the court." *Id.* (citing *Boulden v. State*, 414 Md. 284, 294 (2010)). A valid waiver of the right to a jury trial must satisfy due process. *Smith v. State*, 375 Md. 365, 377 (2003). To satisfy due process, the waiver must be knowing and voluntary. *Abeokuto*, 391 Md. at 316. For a waiver to be knowing and voluntary, the "trial judge must be satisfied that there has been an intentional relinquishment or abandonment of a known right or privilege[,]" because the trial court "bears the ultimate responsibility for ensuring that the accused has tendered a valid waiver." *Smith*, 375 Md. at 379 (internal quotation marks and citations omitted). "If the record 'does not disclose a knowledgeable and voluntary waiver of a jury trial, a new trial is required.'" *Hammond*, 257 Md. App. at 121 (quoting *Smith v. State*, 375 Md. at 381).

i. Knowing waiver

"There is no 'fixed incantation' required, but the court must 'satisfy itself that . . . the defendant has *some knowledge* of the jury trial right before being allowed to waive it.'" *Hammond*, 257 Md. App. at 121 (quoting *Hall*, 321 Md. at 182–83) (further citation omitted) (emphasis added). In making this determination, the circuit court should

> seek to ensure that the defendant understands that: (1) the defendant has the right to a trial by jury; (2) unless the defendant waives a trial by jury, the case will be tried by a jury; (3) a jury consists of 12 individuals who reside in the county where the court is sitting, selected at random from a list that includes registered voters, licensed drivers, and holders of identification cards issued by the Motor Vehicle Administration, seated as jurors at the conclusion of a selection process in which the defendant, the defendant's attorney, and the State participate; (4) all 12 jurors must agree on whether the defendant is guilty or not guilty and may only convict upon proof beyond a reasonable doubt; (5) if the jury is unable to reach a unanimous decision, a mistrial will be declared and the State will then have the option of retrying the defendant; and (6) if the defendant waives a jury trial, the court will not permit the defendant to change the election unless the court finds good cause to permit the change.

Boulden, 414 Md. at 295 n.5 (quoting Md. Rule 4-246(b), committee note (2009)). The court is not required to mechanically ensure that the defendant understands each of these criteria, because "[w]hether the waiver is valid depends upon the facts and totality of the circumstances of each case." *Abeokuto*, 391 Md. at 318; *Boulden*, 414 at 295 (same); *see also Hall*, 321 Md. at 183 (holding that, under the totality of the circumstances, the trial court was not required to ask the defendant whether he understood what he had been told regarding the jury trial process); *State v. Bell*, 351 Md. 709, 720 (1998) (referring to the knowing requirement as "flexible"); *but see Tibbs v. State*, 323 Md. 28, 31 (1991) (holding

that a waiver was not knowing when the record demonstrated that the defendant failed to receive any information at all concerning the nature of a jury trial).

Considering the totality of the circumstances, we conclude that the record demonstrates that Appellant's waiver was knowing. The record supports the contention that Appellant had "some knowledge" of what a jury trial entailed. Prior to Appellant's request to discharge his counsel, Appellant was present during pretrial motions, and during the eighty percent of *voir dire* that was conducted. Appellant heard the circuit court explain to the venire the hallmark standards that they would be entrusted with completing as part of serving on a jury. Specifically, Appellant heard: the court instruct the venire that it had to go through a process to select twelve jurors plus two alternates; the court ask every person of the venire whether they were capable of being a fair and impartial juror; and the court instruct the venire that as a defendant, Appellant had a legal right to the presumption of innocence until proven guilty beyond a reasonable doubt. Regarding the presumption of innocence, the court inquired of the venire if there was "any person who believes that a person is more likely to be guilty just because that person has been accused of committing a crime?" The court noted no affirmative response. Moreover, although the court did not explicitly state a verdict must be unanimous, the court asked the venire a series of questions related to this point and noted no affirmative response to each of those questions. The court asked the venire whether: there was anyone who would have difficulty considering the views of their fellow jurors; there was anyone who would attempt to bully or intimidate another juror if they did not share the same views; there was anyone who would allow themselves to bullied or intimidated, if called to deliberate; and whether anyone would

allow another jury member to change their opinion regarding what they believed is just and proper, merely to reach a verdict with one or more of their fellow jurors.

Further, not only does a presumption exist under the law that criminal defendants who are represented by counsel have been informed of the "advantages and disadvantages of having the case evaluated by a judge instead of a jury[,]" *Hammond*, 257 Md. App. at 123, but also, Appellant's counsel informed the court, "Judge. I just did advise him that he has a right to have a bench trial, should he choose. That's never been an issue." The court asked Appellant about his understanding of the difference between a bench trial and a jury trial, explaining that "a bench trial is a trial that is held where only a judge makes the determination and not a jury." Appellant acknowledged his understanding and indicated that he was "familiar." Finally, at the end of the proceeding when Appellant reiterated his waiver of the right to a trial by jury, the circuit court explicitly asked Appellant, "[a]nd I want to make sure that you know and understand that you do have a right to a jury trial." Appellant replied in the affirmative. Therefore, the record reflects that Appellant had, at a minimum, some knowledge of his right to a jury trial and what that right entailed.

Appellant argues that his presence in the courtroom alone—without further explanation from the court of his right to a jury trial—does not qualify as him having knowledge of his rights. We disagree for two reasons. First, in addition to Appellant's knowledge gained through his presence at trial, Appellant was represented by counsel up to the date of trial. *See Hammond*, 257 Md. App. at 123 ("We may presume, when an attorney states in court that the defendant wants to waive the right to a jury trial, that the attorney has advised of the advantages and disadvantages of having the case evaluated by

a judge instead of a jury."); *see also Kang v. State*, 163 Md. App. 22, 36 (2005) ("[W]e may presume that criminal defendants represented by counsel have been informed of their constitutional rights[,]" including the right to a jury trial), *aff'd*, 393 Md. 97 (2006).

Second, Appellant was properly informed of his rights under the totality of the circumstances. A court is not required to verbally explain to a defendant the metes and bounds of the right to a jury trial. *See Ray v. State*, 206 Md. App. 309, 353 (2012) (where, despite the absence of verbal instructions on the jury trial benefits, defendant's affirmative marks on an advice of rights form was sufficient for a knowing waiver); *see also Smith,* 375 Md. at 382–84, 387 (holding that a defendant's waiver was knowing when he was informed of his rights during plea negotiations, even though the judge never directly stated to the defendant his rights on the record). Thus, Appellant's waiver was knowing.

ii. Voluntary waiver

When determining whether a waiver is voluntary, a trial court seeks to ascertain whether a defendant is waiving the right to a jury trial "with intention and without duress or coercion." *Abeokuto*, 391 Md. at 317. However, "absent a factual trigger bringing into question the voluntariness of the waiver[,]" the court is not required to ask questions regarding the defendant's waiver, and "the court is permitted to make its voluntariness determination based on the defendant's demeanor." *Aguilera v. State*, 193 Md. App. 426, 442 (2010); *see also Hall*, 321 Md. at 183–84 (holding that the defendant's "demeanor, tone, facial expressions, gestures, or other indicia" could be indicative of voluntariness). If a voluntariness inquiry is triggered, the circuit court may:

> consider the defendant's responses to questions such as: (1) Are you making this decision of your own free will?; (2) Has anyone offered or promised you anything in exchange for giving up your right to a jury trial?; (3) Has anyone threatened or coerced you in any way regarding your decision?; and (4) Are you presently under the influence of any medications, drugs, or alcohol?

Boulden, 414 Md. at 295 n.5 (quoting Md. Rule 4-246(b), committee note (2009)). Again, however, we emphasize that the "trial court is not required to engage in a fixed litany or boilerplate colloquy with a defendant." *Kang v. State*, 393 Md. 97, 108 (2006) (quoting *Abeokuto*, 391 Md. at 320).

Appellant's waiver was voluntary. A voluntariness inquiry may have been triggered, as Appellant's counsel raised the issue of Appellant's competency after the court began to address Appellant's request to discharge counsel. Counsel for Appellant raised the issue of Appellant's competency related to whether Appellant understood that if he discharged his counsel, his counsel would no longer be sitting with him at the trial table.

In response, the court performed the voluntariness inquiry. The court observed that there was a competency hearing in May of 2023—approximately one month before trial—and noted that the court had read and reviewed the competency evaluation, which found Appellant competent. In addition, as discussed in *Aguilera*, the court considered Appellant's temperament, his actions, and his behavior in the courtroom. The court inquired, as quoted above in Section II.A., *supra*, whether Appellant was under the influence of drugs or alcohol, including prescription drugs; whether Appellant had any mental health concerns or diagnoses that would interfere with his understanding of the events; and whether Appellant had been coerced or threatened into making the decision to discharge his counsel. Only this last question specifically referenced Appellant's request

to discharge his counsel; thus, this voluntariness inquiry was also applicable to the decision to waive his right to a jury trial.

An instructive case is *Abeokuto v. State*. In *Abeokuto*, the Supreme Court of Maryland concluded that the evidence and statements adduced from a competency hearing that was "literally a minute" prior to the jury trial waiver could also suffice for the jury trial waiver. *Abeokuto*, 391 Md. at 323–24. The Court held that the short time between the competency hearing "and Appellant's election to waive a jury trial suggests that the court remained aware, for the jury trial waiver proceedings, of what it learned of Appellant's mental status and medication and that the two decisions were virtually contemporaneously considered." *Id.* at 324. The Court noted the "ground plowed at the competency hearing, therefore, need not be replowed at the jury trial waiver proceeding." *Id.*

Here, although the circuit court's questioning regarding duress or coercion was related to Appellant's request to discharge his counsel, the remainder of the court's questions were generic. Appellant's answers to those questions were in close temporal proximity to his request to proceed with a bench trial. Moreover, just as in *Abeokuto*, here too, the record does not "reveal evidence of outward symptoms or reluctance on Appellant's part when waiving his jury trial right." *Abeokuto*, 391 Md. at 324. Therefore, considering the totality of the circumstances, Appellant's waiver was voluntary, and the circuit court did not violate Appellant's constitutional rights when it allowed him to proceed with a bench trial. We affirm the circuit court's determination.

III. THERE WAS SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF THIRD- AND FOURTH-DEGREE SEXUAL OFFENSES.

A. Additional Facts

E. testified that on July 21, 2022, the date Appellant committed the offenses, she was eleven years old. E. recounted, in detail, the events that occurred, specifically, the two instances that Appellant touched E.'s buttocks.

E. stated that the first time Appellant touched her buttocks, the interaction began when Appellant showed her, Q., and Y. the photographs of marijuana on his cellphone. E. testified that after Appellant took out his phone, he grabbed E.'s left hand, pulled E. down the steps so that she was standing directly next to him, and touched and squeezed the right side of her buttocks near the hip area. E. testified that Appellant also gave her an "unwilling hug" during this interaction. E. did not say anything to Appellant, but kept "tugging," trying to pull away from Appellant to get further up the steps and resume standing next to Q. and Y. While this was happening, Appellant continued to show E., Q., and Y. the photographs of marijuana on his phone. Appellant then smiled at E. and stated to her, "I like you but not in that way." Appellant let go of E.'s hand, and E. instantly "rushed up the steps" to create some distance between herself and Appellant.

Although E. indicated that she wanted to leave immediately, and despite telling Y. "let's go," Y. continued speaking with Appellant.[10] Then, Appellant told E. "[c]ome here," to which she replied, "[n]o." Y.—the ten-year-old friend—stated, "[d]on't be scared, just

[10] Q. testified that she and her sister did not leave because they did not want to leave Y. alone with Appellant, out of fear that something would happen to her.

go down there." Appellant "pulled" E. back down a couple of steps for a second time, grabbing the right side of her buttocks, "but this time, like more." E. testified that after this second interaction, she "got frustrated" and "felt scared." At the end of her testimony E. stood up from the witness box and, using her hands, provided a demonstration of the manners in which Appellant squeezed her buttocks.

Q., who witnessed the entire incident, also testified at trial. Q. stated that she watched her sister get "groped on her butt[ocks]." She provided a description of the events that was consistent with E.'s description. Q. testified that during the incident with Appellant, "the tension in the air felt uncomfortable and I felt uncomfortable." When questioned further regarding this statement, Q. explained, "[l]ike I can sense that [E.] was uncomfortable . . . . You [could] see that her face was uneasy." Q. testified that because there was no phone service in the apartment complex, she could not call anybody. Q. testified that after the incident was over, E. "ran in the house and started crying to" their eldest sister; "[h]er facial expression showed that she knew what happened and she felt -- her facial expression showed that it made her uncomfortable and that she didn't feel right with what happened." Appellant testified in his own defense and contended this was a case of misidentification.

B. Party Contentions

Appellant concedes that the evidence was sufficient to sustain a conviction for second-degree assault because E. did not consent to being touched. However, Appellant contends that the evidence was insufficient to sustain his convictions for third- and fourth-degree sexual offenses. Appellant bases this contention on the specific intent requirement

for third- and fourth-degree sexual offenses, and further contends that there was insufficient evidence to show that he carried the specific intent—as opposed to a more general intent to carry out the act itself.[11]

The State argues the opposite: that a factfinder could infer that Appellant's actions were done for any of the three stated purposes under Maryland Code, (2002, 2021 Repl. Vol.), section 3-301(e) of the Criminal Law Article ("CL") (i.e., for sexual arousal, gratification, or the abuse of either party). The State contends that there was sufficient evidence to sustain Appellant's convictions for third- and fourth-degree sexual offenses because the State demonstrated at trial that Appellant had the requisite specific intent.

C. Standard of Review

"When reviewing the sufficiency of the evidence to support a conviction, we view the evidence in the light most favorable to the State and assess whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Krikstan*, 483 Md. 43, 63 (2023) (quoting *Walker v. State*, 432 Md. 587, 614 (2013)). As we recently reiterated:

> Our role is not to review the record in a manner that would constitute a figurative retrial of the case. This results from the unique position of the factfinder to view firsthand the evidence, hear the witnesses, and assess credibility. As such, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence. Our deference to reasonable

[11] At argument and in his brief, Appellant asserted that the circuit court was required to have made a finding that Appellant squeezed E.'s buttocks with one of three specific purposes under the statute. *See* Maryland Code, (2002, 2021 Repl. Vol.), § 3-301(e) of the Criminal Law Article ("CL") (for the purpose of sexual arousal, sexual gratification, or with the intent to abuse). Neither at argument nor in his brief did Appellant cite to a case supporting that proposition; neither can we find one. Accordingly, we conclude that no such finding was required of the court and will not address this contention further.

> inferences drawn by the fact[]finder means we resolve conflicting possible inferences in the State's favor, because we do not second-guess the [factfinder's] determination where there are competing rational inferences available.

Turenne v. State, 258 Md. App. 224, 236 (2023) (quoting *Krikstan*, 483 Md. at 63–64). "Such deference is accorded, in part, because it is the trier of fact, and not the appellate court, that possesses a better opportunity to view the evidence presented first-hand, including the demeanor-based evidence of the witnesses, which weighs on their credibility." *State v. Manion*, 442 Md. 419, 431 (2015). "In other words, when evaluating the sufficiency of the evidence in a non-jury trial, the judgment of the trial court will not be set aside on the evidence unless clearly erroneous." *Id.* (internal quotation marks and citation omitted). This standard applies "to all criminal cases, including those resting upon circumstantial evidence, since, generally, proof of guilt . . . based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts." *Id.* at 431–32 (quoting *State v. Smith*, 374 Md. 527, 534 (2003)).

D. Analysis

We begin our analysis by first reviewing the statutes under which Appellant was convicted. For the charge of sexual offense in the third degree, "[a] person may not engage in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim." CL § 3-307(a)(3). For the charge of sexual offense in the fourth degree, "[a] person may not engage in sexual contact with another without the consent of the other[.]" CL § 3-308(b)(1). The phrase "sexual contact," as used in both CL sections 3-307 and 3-308, "means an intentional

touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." CL § 3-301(e)(1).[12]

There are two applicable cases that interpret the language of the above statutes, *Bible v. State*, 411 Md. 138 (2009) (plurality opinion) and *Lapin v. State*, 188 Md. App. 57 (2009), and we address each case in turn.

In *Bible*, the Supreme Court of Maryland further defined the phrase "intimate area" under Criminal Law section 3-307(a)(3). *See generally*, *Bible* 411 Md. at 152–56. The Court held that the buttocks constitute an "intimate area" under Maryland law, and that the "touching of the buttocks is, therefore, proscribed by CL sections 3-307 and 3-308." *Id.* at 156.[13] The Court also determined that the portion of the statute prohibiting contact for sexual arousal or gratification, or for the abuse of either party "*establishes a specific intent requirement*." *Id.* at 157 (internal quotation marks and citations omitted) (emphasis added). Expounding upon the specific intent point, the Court noted, "the State must prove two

[12] The statute also provides that the phrase "'[s]exual contact' does not include: (i) a common expression of familial or friendly affection; or (ii) an act for an accepted medical purpose." CL § 3-301(e)(2). At trial, E. testified that when these events happened, she was not friends with Appellant, Appellant was not a family member, she had never seen Appellant around before, and that prior to this day, she did not know his name. Thus, Appellant's actions do not fall under any of the aforementioned categories of acts that are not sexual contact under CL section 3-301(e)(2). Appellant does not contend that his conduct in this matter falls within either of these exceptions.

[13] *See Georges v. State*, 252 Md. App. 523, 539–41 (2021) (discussing *Bible* and reiterating that the buttocks is an intimate area under the statute); *see also Travis v. State*, 218 Md. App. 410, 465 (2014) (defining "sexual contact" as "sexually-oriented groping, caressing, feeling or touching[.]").

elements beyond a reasonable doubt: (1) the fact of the touching, and (2) the intent to do so for sexual arousal[,]" gratification, or the abuse of either party. *Id.*

Where a party asserts that there was insufficient evidence that the touching meets the specific intent requirement, as Appellant asserts here, evidence of the specific intent "may be deduced from the circumstances surrounding the touching, or from the character of the touching itself." *Id.* at 158. This is "[b]ecause 'intent is subjective and, without the cooperation of the accused, cannot be directly and objectively proven,'" and therefore "its presence must be shown by established facts which permit a proper inference of its existence.'" *Id.* at 157 (quoting *Smith,* 374 Md. at 536). Although "not exhaustive," types of circumstantial evidence that may be relevant are:

> whether the defendant and victim were strangers or knew each other; whether either party was undressed; whether anything was spoken between them; whether the touching occurred in public or in a secluded area; whether the defendant displayed any signs of sexual arousal; or whether the defendant behaved in nervous or guilty manner when another person came upon the scene. With respect to the touching itself, the force of the touching, the motion (was it a pat, a rub back and forth, a circular motion, a brush), the duration, and the frequency are all important.

Id. at 158.

In *Lapin v. State*, this Court explained the definition of "abuse" in CL section 3-308, stating that "a touching for the purpose of 'abuse' refers to a wrongful touching, a touching of another person's intimate area for a purpose that is harmful, injurious[,] or offensive." 188 Md. App. at 74. Not every touching constitutes "sexual contact"; the definition of "abuse" adopted in *Lapin* "requires a sexually oriented touching committed for the purpose of inflicting harm on another, physical or otherwise." *Id.*

Here, there is sufficient evidence by which a rational factfinder could have found the essential elements of the crime beyond a reasonable doubt. *See Krikstan*, 483 Md. at 63. Regarding the charge of sexual offense in the third degree there was evidence that on the date of the offenses E. was eleven years old and Appellant was nineteen years old. Thus, there is sufficient evidence that the victim, E. was under the age of fourteen, and that Appellant was more than four years older than her. *See* CL § 3-307(a)(3). There is also sufficient evidence for the charge of sexual offense in the fourth degree, that Appellant engaged in sexual contact with E. without her consent. *See* CL § 3-308(b)(1). Initially, we note that Appellant, in conceding that there is sufficient evidence to sustain a conviction for second-degree assault, acknowledges that E. did not consent to the touching. Therefore, the only issue before us for both sexual offenses, is whether there was sufficient evidence that Appellant had the necessary specific intent to touch E. for either sexual arousal, sexual gratification, or for abuse.

Because Appellant presented a misidentification defense, and his intent could not be directly and objectively proven, under *Bible*, Appellant's specific intent may be established circumstantially by facts which permit a proper inference of such intent. *See Bible*, 411 Md. at 157–58. Applying the non-exhaustive list of relevant circumstantial evidence from *Bible*, such facts are gleaned from E.'s and Q.'s testimony: the rubbing and squeezing that Appellant did upon E.'s buttocks; that the rubbing and squeezing made E. visibly uncomfortable; that Appellant had to "grab" E.'s hands and pull her down the stairs to get her to stand next to him for both incidents; that Appellant told E. "[o]h, you're the shy one, huh[]. You look shy. Just standing in the corner not talking, huh"; and that during

the second incident, Appellant smiled at E. and stated to her, "I like you but not in that way[.]" These facts are demonstrative that Appellant carried the specific intent to touch E. either for sexual arousal or sexual gratification.

In support of his contention that he lacked the requisite specific intent, Appellant alleges that the facts here are analogous to *Bible*. In *Bible*, the Court held that there was sufficient evidence that Bible touched the victim on her buttocks, but that there was insufficient evidence that Bible touched the victim for the purposes of sexual arousal or gratification. 411 Md. at 160. Here, in alleging that the evidence was insufficient, Appellant argues that the evidence constituted only a "general intent to do the immediate act with no particular, clear, or undifferentiated end in mind,"[14] and that the "additional deliberate and conscious purpose or design of accomplishing a very specific and more remote result[,]" was not proven. *Thornton v. State*, 397 Md. 704, 730 (2007) (quoting *Fisher v. State*, 367 Md. 218, 274 (2001)). This assertion ignores the analysis in *Bible* and the non-exhaustive list of circumstantial factors therein, which are analogous and demonstrative of the sufficient evidence evaluated in this case by the circuit court.

Additionally, the facts here are distinct from those in *Bible*. In *Bible*, the victim stated that Bible touched her for approximately "two seconds" on two occasions; however, beyond that she was not able to recall or articulate any additional information regarding the touching. 411 Md. at 159. Contrastingly, E. described the events in detail, including the ways in which Appellant touched her, how uncomfortable it made her, and the statements

[14] *Bible*, 411 Md. at 159 (internal citation and quotation marks omitted).

Appellant made to her. Q. also testified consistently with E.'s testimony regarding what she witnessed. Appellant's actions combined with his statements demonstrate that there was sufficient evidence that Appellant had the requisite intent to touch E. for the purpose of sexual arousal or gratification. *Lapin*, 188 Md. App. at 78.

Moreover, just as in *Lapin*, where Lapin testified that he did not touch the victim for sexual arousal or gratification, or for abuse, and the trier of fact was free to disbelieve Lapin's testimony, here too, the circuit court was free to disbelieve the testimony of the witnesses or Appellant's misidentification defense. *Id.* at 77. Accordingly, we affirm Appellant's convictions for third- and fourth-degree sexual assault.

IV. THE ISSUE OF WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION BY IMPERMISSIBLY CONSIDERING APPELLANT'S EXERCISE OF HIS RIGHT TO TRIAL IN SENTENCING IS NOT PRESERVED, AND WE DECLINE TO EXERCISE PLAIN ERROR REVIEW.

A. Additional Facts

In September of 2023, Appellant was sentenced. At the outset of the hearing, the court heard a victim impact statement from E.'s mother on behalf of E., sentencing recommendations from the State, and statements from Appellant, in which he expressed remorse. Subsequently, the court stated on the record the considerations from which it would fashion a sentence. The court stated:

> The Court can't, though, ignore the fact that, first, the incident happened. And then despite the fact that you're focusing on if you knew there was a warrant, you would have been here, just the regular and ongoing denial. *And the fact that this young girl not only had to go through what she went through, but then she had to come to court, and she had to testify, and go with all of the stress that comes along that.*

> And I believe her mother when she says it affected the whole family. Particularly, since it did happen in front of her sister, *and that both of them had to come in here and face you as you repeatedly denied and tried to shift blame with respect to what had happened on that particular day.*

(emphasis added). The trial court subsequently asked Appellant to stand and imposed the sentence.

B. Preservation

Appellant asserts that the circuit court sentenced him based on impermissible considerations. Specifically, Appellant takes issue with the statements the court made concerning E.'s and Q.'s testimony, contending that these comments implicated his election to go to trial. Appellant further contends that because the circuit court gave weight to these "impermissible sentencing considerations," we must vacate the sentence and remand the case for a new sentencing hearing. Appellant concedes that this challenge was not preserved but argues that he was not provided an opportunity to object to the court's sentence at the time it was handed down, and therefore the absence of an objection does not constitute a waiver. The State asserts that this issue is unpreserved because Appellant failed to object to these allegedly impermissible considerations at sentencing, thereby waiving this issue for appellate review.

"Ordinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). For an issue to have been raised in or decided by the trial court, "a party, at the time the ruling or order is made or sought, [must] make[] known to the court the action that the party desires the court to take or the objection to the action of the court." Md. Rule 4-

323(c). Failure to make known to the court the action that a party desires the court to take or to note an objection, results in an unpreserved claim or issue. *Lopez-Villa v. State*, 478 Md. 1, 12 (2022). The only way an appellate court may address an unpreserved issue, is through exercising its discretion under plain error review, which is quite a rare phenomenon. *Newton v. State*, 455 Md. 341, 364 (2017).

"[W]e have consistently recognized that allegations of impermissible considerations at sentencing are not illegal sentences subject to collateral or belated review and must ordinarily be raised in or decided by the trial court." *Abdul-Maleek v. State*, 426 Md. 59, 69 (2012) (internal citations and quotation marks omitted). Thus, the failure to object at sentencing results in a waiver of the claim that the court relied upon improper considerations when imposing a sentence. *Wilkins v. State*, 253 Md. App. 528, 540–41 (2022). Here, Appellant failed to object at his sentencing hearing to the court's allegedly improper considerations. Accordingly, Appellant waived this issue, and it is not preserved for our review. *See Abdul-Maleek*, 426 Md. at 69 (Appellant "is not excused from having to raise a timely objection in the trial court.") (internal citation and quotation marks omitted).

Appellant argues that he had no opportunity to object because he was immediately directed to stand while the sentence was imposed; citing Maryland Rule 4-323, Appellant contends that because there was no opportunity, there was no waiver.[15] The thrust of

[15] *See* Md. Rule 4-323(c) ("If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute waiver of the objection.").

Appellant's argument is that it would have been improper for Appellant to interrupt the circuit court.[16] We disagree. Our case law says the opposite of Appellant's assertion:

> When, as in this case, a judge's statement from the bench about the reasons for the sentence gives rise to the claim of impermissible sentencing considerations, defense counsel has good reason to speak up. A timely objection serves an important purpose in this context. Specifically, it gives the court opportunity to reconsider the sentence in light of the defendant's complaint that it is premised upon improper factors, or otherwise to clarify the reasons for the sentence in order to alleviate such concerns . . . Simply stated, when there is time to object, there is opportunity to correct.

Reiger v. State, 170 Md. App. 693, 701 (2006) (footnote omitted). Here, the record reflects that Appellant did have an opportunity to object. Appellant could have noted his objection when he stood prior to the trial judge imposing the sentence. There were multiple instances throughout the sentencing hearing where the court asked Appellant if he understood what the court was stating, to which Appellant responded affirmatively. As demonstrated by the record, Appellant had an opportunity to object and, thus, this case does not fall within the ambit of the Rule 4-323(c) exception. Therefore, because Appellant failed to note an objection, we agree with the State that Appellant's argument is not preserved.

C. Plain Error

Appellant requests that, were we to find that Appellant had an opportunity to object, we exercise our discretion and review Appellant's challenge under Maryland Rule 8-131 for plain error. The State argues that even if we were to choose to exercise plain error

[16] Nor do we agree with the subtext of Appellant's argument, that the interruption could have come across as improper. This is because "[w]e do not accept the argument that fear of reprisal is a sufficient excuse for [Appellant's failure] to raise a timely objection. In the overwhelming majority of instances, a professionally lodged objection will not be met with hostility." *Horton v. State*, 226 Md. App. 382, 420 (2016) (internal citations omitted).

review, that the court's remarks when considered in full, were not impermissible considerations.

As an infrequent exception to Rule 8-131(a)'s preservation requirement, appellate courts may review unpreserved issues under a discretionary option—plain error review. *Newton*, 455 Md. at 364. Plain error review is "reserved for those errors that are compelling, extraordinary, exceptional[,] or fundamental to assure the defendant of a fair trial." *Id.* (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)). For us to exercise our discretion to engage in plain error review, four conditions must first be met:

> (1) there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

Id. "[E]ach one of the four conditions is, in itself, a necessary condition for plain error review[.]" *Winston v. State*, 235 Md. App. 540, 568 (2018). Accordingly, we cannot review "the unpreserved error if any one of the four has not been met." *Id.*

Our discretion to consider unpreserved issues is one that we "should rarely exercise," because fairness and judicial efficiency require challenges to the trial court's ruling, action, or conduct be "presented in the first instance to the trial court[.]" *Kelly v. State*, 195 Md. App. 403, 431 (2010) (quoting *Chaney v. State*, 397 Md. 460, 468 (2007)). This is so that "(1) a proper record can be made with respect to the challenge, and (2) the

other parties and the trial judge are given an opportunity to consider and respond to the challenge." *Id.* (quoting *Chaney*, 397 Md. at 468).

We discern no error or defect in the trial court's sentencing considerations because "a trial judge has very broad discretion in sentencing."[17] *See Jones v. State*, 414 Md. 686, 693 (2010) (internal quotation marks and citations omitted). We do not agree with Appellant that the trial judge's statements reflect that the court impermissibly considered Appellant's decision to exercise his right to a trial, as opposed to taking a plea, when the court imposed the sentence. Therefore, we decline to exercise plain error review.

In urging us to engage in plain error review, Appellant cites *Abdul-Maleek*, in which the Supreme Court of Maryland exercised plain error discretion to review a trial judge's statements at sentencing because the circuit court made an explicit reference to Abdul-Maleek's right to go to trial. *See* 426 Md. at 66–67 ("You have every right to go to trial in this case, which you did—not once, but twice."). *Abdul-Maleek* is distinguishable from the case before us. Here, the sentencing judge did not make any explicit statements regarding

[17] In *Johnson v. State*, the Maryland Supreme Court held that in exercising its discretion, a trial court may base its sentence on

> perceptions . . . derived from the evidence presented at the trial, the demeanor and veracity of the defendant gleaned from his various court appearances, as well as the data acquired from such other sources as the presentence investigation[,] or any personal knowledge the judge may have gained from living in the same community as the offender.

274 Md. 536, 540 (1975) (footnote omitted). *See also Poe v. State*, 341 Md. 523, 532 (1996) (holding that a trial judge can consider "facts and circumstances of the crime committed and the background of the defendant, including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background.") (internal citations omitted).

Appellant's exercise of his right to a trial. In reviewing the sentencing judge's statements in the context of the entire proceeding, rather than piecemeal, we read the trial judge's statements as commentary on the burden that E., Q., and their family carried because of Appellant's crimes and their having to face him in court. *See Sharp v. State*, 446 Md. 669, 689 (2016) (requiring a reviewing court to read statements made at a sentencing hearing in the context of the entire proceeding). Therefore, we decline to exercise plain error review.

V. APPELLANT'S SENTENCES FOR FOURTH-DEGREE SEXUAL OFFENSE AND SECOND-DEGREE ASSAULT MERGE INTO THE SENTENCE FOR THIRD-DEGREE SEXUAL OFFENSE.

A. Additional Facts

At Appellant's sentencing hearing, the court initially imposed one sentence: ten years of incarceration with five years suspended, followed by five years of probation with special conditions. After engaging in a colloquy with Appellant to ensure he understood the sentence, the State asked the court if it could "indicate for each count," the sentence for the record. The court then engaged in a brief interchange with the State regarding the State's recommendations for sentencing per each count. The court restated its sentence, reiterating that the ten-year sentence was for third-degree sex offense conviction, and adding, "in addition to that, for the fourth-degree sex offense, I'll sentence you to one year, suspend all but one year . . ." and for second-degree assault conviction, "ten years, suspend all but 18 months[.]" Both sentences were set to run concurrently with the sentence for the third-degree sex offense conviction.

B. Party Contentions

Appellant and the State agree that the sentences for the three convictions should merge; however, they arrive at this conclusion via different routes. Appellant alleges that that same act(s) supported all three convictions because the criminal information sheet did not identify the act or acts which constituted each crime, and because the State did not argue that the two incidents of sexual contact were separate and distinct crimes. Appellant contends that the second-degree assault conviction merges into both the third- and fourth-degree sexual offense convictions under the required evidence test. Appellant asserts that under either the rule of lenity or the fundamental fairness test, his convictions for his third- and fourth-degree sexual offenses should merge.

The State asserts that Appellant's sentences for second-degree assault and fourth-degree sexual offenses should merge under the required evidence test. The State also contends that Appellant's sentences for third- and fourth-degree sexual offenses should merge under the rule of lenity, but not under the required evidence test, nor the principle of fundamental fairness.

C. Standard of Review

"Whether a conviction merges for sentencing purposes is a question of law that is assessed under a de novo standard of review." *Koushall v. State*, 479 Md. 124, 148 (2022). "The failure to merge a conviction for sentencing purposes is reversible error, and as a matter of law, the sentence is illegal." *Id.* Pursuant to Maryland Rule 4-345(a) a court may correct an illegal sentence "at any time." "[B]ecause of the inherent illegality of the

sentence, the normal preservation requirements do not apply in this context." *Latray v. State*, 221 Md. App. 544, 555 (2015).

D. Analysis

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, protects against multiple punishments for the same offense. *State v. Frazier*, 469 Md. 627, 640–41 (2020). "Even though the Maryland Constitution has no express double jeopardy provision, there is protection against it under Maryland common law[,]" which allows for merger of a defendant's convictions in sentencing. *Koushall*, 479 Md. at 157 (quoting *Ware v. State*, 360 Md. 650, 708 (2000)). "Maryland recognizes three grounds for merging a defendant's convictions . . . : '(1) the required evidence test; (2) the rule of lenity; and (3) the principle of fundamental fairness.'" *Koushall*, 479 Md. at 156 (quoting *Carroll v. State*, 428 Md. 679, 694 (2012)). Only the required evidence test and the rule of lenity are applicable here.[18]

i. The required evidence test

"Sentences for two convictions must be merged when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are

[18] Application of the fundamental fairness principle is not preserved for our review. "Although a defendant may attack an illegal sentence by way of direct appeal, the fundamental fairness test does not enjoy the same procedural dispensation of [Maryland] Rule 4–345(a)[,] [which] permits correction of an illegal sentence without a contemporaneous objection." *Potts v. State*, 231 Md. App. 398, 414 (2016) (internal quotation marks and citation omitted). Appellant did not make a contemporaneous objection during sentencing. Thus, we cannot review Appellant's sentences for merger under the fundamental fairness principle, and it will not be addressed further.

deemed to be the same, or one offense is deemed to be the lesser included offense of the other." *Brooks v. State*, 439 Md. 698, 737 (2014). The "same act" element "often turns on whether the defendant's conduct was 'one single and continuous course of conduct,' without a 'break in conduct' or 'time between the acts.'" *Morris v. State*, 192 Md. App. 1, 39 (2010) (quoting *Purnell v. State*, 375 Md. 678, 698 (2003)). Any ambiguity in the charging document or as to how the factfinder understood the charges must be resolved in the defendant's favor. *Morris v. State*, 192 Md. App. 1, 43 (2010) (referencing *Gerald v. State*, 137 Md. App. 295, 312 (2001)). The "two offenses" element of the required evidence test "focuses on the elements of each crime in an effort to determine whether all the elements of one crime are *necessarily* in evidence to support a finding of the other, such that the first subsumed as a lesser included offense of the second." *Koushall*, 479 Md. at 157 (quoting *Monoker v. State*, 321 Md. 214, 220 (1990) (emphasis in *Koushall*)).

Here, Appellant twice pulled E. towards him and squeezed her buttocks, and neither the criminal information sheet, nor the State's argument, nor the court, when announcing the verdicts or at sentencing, delineated these incidents as separate acts. Therefore, Appellant's grabbing E.'s hand, pulling her down the stairs, and twice squeezing her buttocks, were all the same act as a continuous course of conduct.[19]

Turning to the elements of the second-degree assault and fourth-degree sexual offense, the Supreme Court of Maryland previously held in *State v. Frazier*: "the elements of second-degree assault are identical to those required for fourth-degree sexual offense,

[19] This is limited in scope to the manner in which Appellant was charged, and the specifics of this particular verdict.

with the exception of one element—that the assaultive conduct be sexual in nature. In other words, the sexual contact element is what distinguishes fourth-degree [] sexual offense from any other 'touching' sufficient for second-degree [] assault." 469 Md. at 645. The Court then continued, "the second-degree assault conviction is subsumed by the fourth-degree sexual offense." *Id.* Accordingly, Appellant's sentence for second-degree assault is subsumed into his conviction for fourth-degree sexual offense, and they merge for sentencing purposes.

ii. The rule of lenity

The rule of lenity may compel merger when the required evidence test does not. *Latray*, 221 Md. App. at 555. "As it is a principle of statutory construction, the rule of lenity applies where both offenses are statutory in nature or where one offense is statutory and the other is a derivative of common law." *Koushall*, 479 Md. at 161 (quoting *Khalifa v. State*, 382 Md. 400, 434 (2004)). "Under the rule of lenity, convictions are merged for sentencing when there is an unresolvable ambiguity as to whether the General Assembly intended to allow or to prohibit sentences for multiple offenses based on the same acts." *Clark v. State*, 473 Md. 607, 621–22 (2021). "If we are unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, we, in effect, give the defendant the benefit of the doubt and hold that the crimes do merge." *Koushall*, 479 Md. at 161 (quoting *Monoker*, 321 Md. at 222).

Here, Appellant's convictions for third- and fourth-degree sexual offense are both statutory in nature. *See* CL §§ 3-307, 3-308. At the time Appellant committed the offenses, there was an unresolvable ambiguity as to whether the General Assembly intended to allow

or prohibit multiple punishments where the same act constituted both third- and fourth-degree sexual offense because the language of the statute did not indicate whether punishment could be cumulative. *Cf. Jones v. State*, 357 Md. 141, 163 (1999) ("The Supreme Court has held that states may impose cumulative punishment if it is clearly the intent of the legislature to do so."). Indeed, as the State indicates, effective October 1, 2023, the General Assembly added a non-merger provision to fourth-degree sexual offense, which was not a part of the statute at the time Appellant committed these offenses. *See* 2023 Md. Laws ch. 730 § 1.[20] Although the General Assembly's intent is now unambiguous, at the time Appellant committed the offense, it was not clear. Thus, we give Appellant the benefit of the doubt and merge his sentences for third- and fourth-degree sexual offense. *See Koushall*, 479 Md. at 161. Appellant's sentence for third-degree sexual offense remains in place.

[20] This portion of the statute revised states:

> (1) Unless specifically charged by the State, a violation of this section may not be considered a lesser included crime of any other crime.
>
> (2) A sentence imposed under this section may be imposed separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation of this section.

CL § 3-308(e).

CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR THAT COURT TO ISSUE AN AMENDED COMMITMENT RECORD CONSISTENT WITH THIS OPINION. JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID BY APPELLANT.