UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0860

September Term, 2013

ALVIN WRIGHT

v.

STATE OF MARYLAND

Meredith,
Graeff,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: February 13, 2015

A 13-year-old girl was abducted off the street on her way home from a friend's house, and thrown into the dark basement of an abandoned row house where she was brutally and repeatedly raped and beaten. A jury, sitting in the Circuit Court for Baltimore City, held Alvin Wright ("Appellant") accountable for the crimes. Appellant was convicted of three counts of first-degree rape, three counts of first-degree sexual offense, and one count of first-degree assault. Appellant was indicted seven separate times: once for each rape charge, once for each sexual offense charge, and once for the assault charge. The circuit court sentenced Appellant separately for each offense.[1]

Appellant presents the following questions for our review, which we have rephrased and reordered as follows:

> I. Did the circuit court abuse its discretion in not permitting defense counsel to ask follow-up questions for the purpose of peremptory challenges during voir dire?
>
> II. Did the circuit court err in admitting hearsay testimony from a forensic nurse and from a redacted medical report?
>
> III. Did the circuit court err in permitting the State to elicit from the forensic nurse her opinion as to whether her findings were consistent with what the victim told her?

---

[1] The court sentenced Appellant as follows:
Rape in the first degree (Case No. 041): life, consecutive. – Rape in the first degree (Case No. 042): life, consecutive. – Sexual offense in the first degree (Case No. 044): life, consecutive to Case No. 042. – Sexual offense in the first degree (Case No. 045): life, consecutive to Case No. 044. – Rape in the first degree (Case No. 043): 20 years incarceration, consecutive to Case No. 045. – Sexual Offense in the first degree (Case No. 046): 20 years incarceration, concurrent to Case No. 043, but consecutive to Case No. 045. – Assault in the first degree (Case No. 047): 25 years incarceration, concurrent to Case No. 043 and 046 but consecutive to Case No. 045.

IV. Did the circuit court err in admitting hearsay testimony from the detective assigned to the case?

V. Did the trial court err in permitting portions of the State's rebuttal closing argument over defense counsel's objection?

VI. Did the circuit court err in imposing three separate sentences for each first-degree rape conviction and for each first-degree sex offense conviction?

For the reasons that follow, we shall affirm the judgment of the circuit court.

BACKGROUND

A.

The Attack

On October 17, 2011, M., a thirteen year-old girl and high school student, finished school for the day and returned to her East Baltimore home, located off North Caroline Street. After receiving a text message from her friend Justin, M. left her home to walk the ten minutes to Justin's home, which was also located on Caroline Street, near the Church Square Shopping Center. M. took her cellphone with her, but traveled alone.

While visiting with Justin, the two teens sat outside and ate chips. At approximately 8:30 p.m., Justin walked with M. to Church Square, about half-way to M.'s home. Continuing the walk home alone, M. crossed Caroline Street to avoid walking by the vacant homes aligned on the opposite side of the street.

Near one of the vacant buildings, M. saw a dark-skinned man with a large nose, who was only "a little taller" than herself, later identified by M. and through DNA evidence as the Appellant. He was wearing an Adidas sweatshirt and a hat. M. began walking toward

the street to avoid the man. As she reached the curb the man grabbed her, lifted her up by the neck, and threw her into the vacant home at 825 North Caroline Street. The vacant home had no flooring on the first level; so when M. was thrown into the home, she fell into the basement, which was a concrete covered lower level. M. landed on top of a wooden door, loosening one of her front teeth and bruising her left knee.

Inside, the vacant home was dark, but M. could see by the light of the nearby streetlights shining into the home. As M. stood up and started screaming, the man jumped on her and told her to "shut up." To cease her calls for help he choked her, shoved her against a wall, and told her "[s]hut up or I'll kill you with the gun I got." From her testimony it is clear that M. understood that if she did not do as instructed, she was going to die.

Next, the assailant made M. pull down her pants and turn around with her back facing him. He then raped her. Next, he forced M. to turn back around facing him and shoved his penis into M.'s mouth. He hit M. over the head, and taunted her regarding her level of sexual experience.

The man then pulled up his pants, told M. to keep her pants down, and pushed M. from the bottom level up to the upper level of the vacant home. Once on the upper level, he raped her a second time and then made her turn around and open her mouth again. M. was forced to fellate her assailant once more. And then yet again, he forced the child to turn around with her back facing him and get on her hands and knees so he could rape her

a third time. At some point while the two were on the upper deck of the vacant home, the man hit M. on the head for a second time and punched her, hitting her ribs. Finally, the assailant forced his penis into the child's mouth for a third time. The attack ended approximately 30 minutes after M. was thrown into the vacant building. The assailant pushed M. back down to the lower level, returned her cell phone to her, and left.

Nearby, sometime between 8:30 p.m. and 9:00 p.m. on October 17, 2011, Patricia Ann Toliver was watching television at her 1502 Madison Street home near the intersection of Madison Street and Caroline Street. Ms. Toliver testified: "I heard a scream. It didn't last long, maybe two or three seconds. It was a real loud touching scream. It was like somebody was really hurt [and] in pain." When Ms. Toliver looked out her back window toward the direction from which the scream originated, it was dark, and she did not see or hear anything else out of the ordinary.

Around the same time that evening, Crisenda Chung, who resided at 1428 Ashland Avenue near Ashland Avenue's intersection with Caroline Street, was preparing dinner and talking to her sister on the telephone. Ms. Chung testified that she heard screams, but assuming it was nothing, continued to chat with her sister. However, when the screams got louder Ms. Chung decided to step outside to see what was causing all of the commotion. Upon opening her front door, Ms. Chung realized that there were children playing in front of abandoned houses across the street. Assuming that the screams were from the children

playing, Ms. Chung went back inside her home and resumed talking to her sister on the telephone.

When Ms. Chung got back on the phone, she heard screams again; this time, Ms. Chung heard, "Help!" Ms. Chung hung up the telephone and headed outside. She crossed the street and began yelling, "Who are you? Where are you? What can I do? Where are you? Can you tell me, where you're at?" By the time Ms. Chung walked down the block near some vacant houses where she heard the screams originally, the screams had ceased.

After the attack, M. ran out searching for help. She came across Lashonda Whiting who was on the 800 block of North Caroline Street that evening visiting her grandmother, Shirley Price, who lived at 807 North Caroline Street. Ms. Whiting had just left a nearby store and was heading back to her grandmother's home when she saw M., whom she recognized from the neighborhood, on the street dirty, shaking, and crying with blood dripping from her mouth. Ms. Whiting brought M. to her grandmother's house, and the grandmother immediately directed Ms. Whiting to take M. home to her parents.

B.

Emergency Medical Treatment and Investigation

M. arrived at Mercy Hospital's emergency department around 10:15 p.m. on the night of October 17, 2011. Upon her arrival, the child was sent to the triage section, per standard procedure. There doctors checked her basic vital signs, such as blood pressure and pulse, and looked for any medically concerning injuries. While M. was undergoing

this standard procedure, Nurse Olivia Lawrence, a Sexual Assault Forensic Examination ("SAFE") Nurse, introduced herself and got M.'s recitation of the attack to determine which type of examination to administer. Ultimately, Ms. Lawrence conducted a complete sexual assault exam, which included a general physical and genital examination. Ms. Lawrence also collected evidence for use in the anticipated criminal investigation.

During Ms. Lawrence's physical exam of M., she noticed that M.'s voice was raspy; she had swelling to her upper lip; there was dried blood in the creases of her lip and along her lips; she had some bruising below the lower lip to the cheek area; and M. had an abrasion and dried blood on the inside of her upper lip. M.'s right front tooth was loose with blood and inflammation around the gum line. M.'s left knee, which was very tender to the touch, had an abrasion, which, at the time of the examination, was starting to swell and develop bruising. M.'s right shin was also bruised, swollen, and tender to the touch.

Detective Raynard Johnson of the Baltimore City Police Department, Special Investigations Unit, was assigned to investigate the attack on M. He compiled a photographic array of possible suspects based on the physical description that M. provided to detectives on the night of October 17th into the morning hours of October 18, 2011. The array contained six photos, one of which was of the Appellant. When presented with the array M. pointed to Appellant and said, "he's close."

Candra Johnson, a DNA analyst for the Baltimore City Police Department and expert witness in DNA analysis, testified that she analyzed a vaginal swab and an oral swab

from M., a portion of a stain located on the interior crotch area of M.'s underwear, a fingernail swabbing from M., a portion of unknown blood sample from M., and an oral swab from the Appellant. Ms. Johnson's DNA analysis revealed that the sperm found in the vaginal swab from M. contained Appellant's DNA. Ms. Johnson's report stated:

> The chances of selecting an unrelated individual from a random population as a possible contributor to the evidence samples at the tested loci [were] approximately: 1 in 217 million (217,000,000) individuals in the American Caucasian population[;] 1 in 4.07 million (4,070,000) individuals in the African American population[; and] 1 in 98.0 million (98,000,000) individuals in the SE Hispanic American population[.]

The non-sperm fragments of the vaginal swab contained M.'s DNA only. On M.'s underwear, the sperm fragment of the sample yielded a DNA profile consistent with a mixture of Appellant, M., and an "additional allele from an unknown individual." The fingernail swabbings from M. also yielded a DNA profile consistent with a mixture of M. and "additional allele from an unknown individual." The "major profile identified in the sperm fraction" of the underwear stain was consistent with Appellant such that:

> [t]he chances of selecting an unrelated individual from a random population possessing the same profile as the major contributor in the evidence sample at the tested loci [were] approximately: 1 in 6.05 quintillion (6,050,000,000,000,000,000) individuals in the American Caucasian population [;] 1 in 27.2 quadrillion (27,200,000,000,000,000) individuals in the African American population[; and] 1 in 867 quadrillion (867,000,000,000,000,000) individuals in the SE Hispanic American population[.]

Ms. Johnson's findings were reviewed by two other DNA analysts to ensure that she followed protocol and made conclusions within standard operating procedures.

Additional facts will be presented as they pertain to the individual issues discussed.

DISCUSSION

I.

Voir Dire for the Purpose of Peremptory Strikes

Appellant's first allegation of error is that the circuit court erred by preventing defense counsel from asking certain prospective jurors follow-up questions regarding their employment status. Appellant does not posit that receiving answers to these follow-up questions would have provided a basis for striking a particular juror for cause. Instead, Appellant urges this Court to hold that the circuit court abused its discretion by refusing to permit follow-up questions that would have aided the Appellant "in the intelligent use of peremptory strikes." The State counters that the court was not required to ask any employment status questions beyond those "reasonable likely to reveal cause for disqualification," *Boyd v. State* 341 Md. 431, 436 (1996), and the court did not abuse its broad discretion is refusing to allow follow-up questions to aid in the intelligent use of peremptory strikes.

Appellant points to three occasions where he attempted to ask jurors follow-up questions, but was precluded by the court's ruling. All three occasions involved prospective jurors who, in response to the court's inquiry, indicated that they or a member of their immediate family had been a victim of a crime or committed a crime. All three prospective jurors approached the bench individually and responded that, despite their experiences, they could be fair and impartial arbiters. Defense counsel attempted to ask

these specific jurors about their employment statuses because such information was missing from their juror information sheets. Noting each objection, the court stated:

> Let the record reflect [defense counsel] is repeatedly asking to inquire of people who are unemployed more information about their employed [sic] and the Court is declining the opportunity for him to do so. The only reason that these jurors are at the bench at all is because they answered the question victim of a crime, convicted of a crime and it is a personal question, personal in nature. And I'm allowing these jurors to give their explanations at the bench. Normally in voir dire, a general voir dire, I would not *sua sponte* allow a general question, "What do you do for a living," of all jurors. The information, as indicated on the jury sheet, gives attorneys some basic information about each juror. But in some instances where it says occupation the occupation is that the juror is unemployed. I'm not going to inquire of all of these jurors of what their employment is nor am I going to allow any further questioning unless that employment is something that would affect the juror's ability to serve. For example, we asked a question about jurors who have legal background and training. There was no other employment like question that was either posed by the State or the defense for that matter other than legal in nature. And so for that reason I'm declining to ask anything about their employment.

Appellant notes one occasion on which the court permitted a follow-up question concerning the juror's employment status. Indeed, upon defense counsel's remark that he had a follow-up question, the court asked the juror whether she was unemployed. Appellant posits that the circuit court abused its discretion by "selectively" permitting follow-up questions to this one juror but not others.

"An appellate court reviews for abuse of discretion a trial court's decision as to whether to ask a voir dire question." *Pearson v. State*, 437 Md. 350, 356 (2014) (citing *Washington v. State*, 425 Md. 306, 314 (2012)). While it is true that a defendant has a constitutional right to an "impartial jury," U.S. CONST. amend. VI; Md. Decl. of Rts. Art.

21, and voir dire is a critical aspect of implementing that right, "Maryland employs 'limited voir dire,'" *Pearson*, 437 Md. at 356 (quoting *Washington v. State*, 425 Md. 306, 313 (2012)). "[T]he sole purpose of voir dire 'is to ensure a fair and impartial jury by determining the existence of' specific 'cause for disqualification.'" *Id.* (quoting *Washington*, 425 Md. at 312). Contrary to Appellant's contention, "[u]nlike in many other jurisdictions, facilitating 'the intelligent exercise of peremptory challenges is not a purpose of voir dire in Maryland.'" *Id.* at 356-57 (quoting *Washington*, 425 Md. at 312). Thus, "the trial court has broad discretion in the conduct of voir dire, most especially with regard to the scope and the form of the questions propounded, and . . . it need not make any particular inquiry of the prospective jurors unless that inquiry is directed toward revealing cause for disqualification." *Washington*, 425 Md. at 313 (quoting *Dingle v. State*, 361 Md. 1, 13-14 (2000)). Accordingly, a circuit court does not abuse its discretion by failing to ask a voir dire question that is "'not directed at a specific' cause 'for disqualification' or is 'merely fishing for information to assist in the exercise of peremptory challenges.'" *Pearson*, 437 Md. at 357 (quoting *Washington*, 425 Md. at 315).

Returning to the case at bar, whether any of the prospective jurors was unemployed or recently obtained new employment that was not noted on their juror information sheets would not foreseeably lead to specific cause for striking a prospective juror in this case and

Appellant has conceded this fact.[2] The court inquired whether any of the jurors, their immediate family members, or close friends had law enforcement or legal training and if so, whether that would impair their ability to be fair in this case. Not one of the jurors of whom Appellant's counsel sought to ask follow up employment questions indicated that they had law enforcement or legal training.[3] That was the only employment question potentially required here, given the fact that police officers and other law enforcement personnel would testify at the trial. *See Bowie v. State*, 324 Md. 1, 7-8 (1991) (holding that the trial court erred in refusing to propound voir dire questions designed to identify jurors who would give more weight to testimony of police officers than civilians or to State's witnesses and defense witnesses). For an employment-based voir dire question to be mandated, "'there must be a qualifying witness, one, who, because of occupation or category may be favored, or disfavored, simply on the basis of that status or affiliation.'" *Washington*, 425 Md. at 320 (quoting *Moore v. State*, 412 Md. 635, 655 (2010)). The witnesses who testified for the State were law enforcement and medical personnel.

---

[2] In *Curtin v. State*, 393 Md. 593, 609 n.8 (2006), the Court of Appeals concluded that when directly related to the case at hand, the court is required to inquire during voir dire whether strong feelings about race, ethnicity, cultural heritage, religious bias, sexual assault against a minor, controlled dangerous substances, the ability of a juror in a capital case to convict based upon circumstantial evidence, and placement of undue weight on police officer credibility, would affect the venireman's impartiality.

[3] The Court did inquire, upon objection, into the employment status of juror 2112 who indicated that she was unemployed at the time she was the victim of a crime but that she now works for Giant Food Grocery stores.

Appellant urges this Court to expand the limited nature of voir dire and require questioning that would assist in the exercise of peremptory challenges. The Court of Appeals recently declined to expand voir dire for this purpose, and explained:

> [I]t would be imprudent for us to address this far-reaching issue without the benefit of study regarding the possible ramifications. We are unaware of any such study, and, in response to questions from the Honorable Glenn T. Harrell, Jr. at oral argument, both parties stated that they were unaware of any such study, aside from anecdotal evidence regarding California's transition to limited voir dire in criminal cases. To gather more information on the important issue of whether to maintain limited voir dire, we would refer the issue to the Standing Committee on Rules of Practice and Procedure for its consideration and recommendation.

Pearson, 437 Md. at 357 n.1.

Accordingly, we hold that the circuit court did not abuse its discretion by refusing to ask questions in voir dire regarding the employment status of certain jurors.

II.

Hearsay Within the SAFE Report

At trial, Nurse Olivia Lawrence was accepted as an expert witness in sexual assault forensic examinations ("SAFE") and testified on behalf of the State. Appellant contends that the circuit court erred in permitting certain hearsay statements through the testimony of Nurse Lawrence, and by admitting a redacted copy of the SAFE report which she prepared.

Ms. Lawrence testified that a SAFE nurse is a nurse specially trained in forensic evidence collection including photographing injuries. She explained the standard

procedure at Mercy Hospital, where she worked on October 17, 2011, and where M. was treated:

> When a patient [arrives in] the emergency department and they state that they have been assaulted, they are first triaged to get basic blood pressure, pulse. And then they are seen by a[n] emergency room physician to be medically cleared or treated for any medically concerning injuries at that time. And when the patient is stable and cleared medically from the emergency department, a forensic nurse is called in, in order to do the forensic exam and any evidence collection that is needed.

Ms. Lawrence testified that when conducting the SAFE exam on M., as with all patients, she first asked M. to describe the attack in her own words to determine what type of exam to perform. Based on M.'s recitation of the events that evening, Ms. Lawrence decided to do a full sexual assault exam.

Ms. Lawrence testified that during a full sexual assault exam, the SAFE nurse obtains a urine sample and blood samples that are sent to a lab for processing. The nurse also takes the patient's medical history; does a head to toe physical exam, looking and feeling for any injuries or tender areas; and then conducts a genital exam. After the genital exam, the patient is "allowed to get dressed and medications are offered for STD protection, prophylaxis and also pregnancy prophylaxis."

During trial, the court allowed the SAFE Report to be marked for identification purposes only, until the parties had redacted information that was not germane to treatment or diagnosis. After the State rested its case, the court returned to the issue of the SAFE Report's admissibility. Defense counsel objected to the entire report on the basis that it

was prepared in anticipation of litigation and it was not prepared with medical treatment as its sole purpose. The State responded that this was a report completed as part of a medical examination, and "this collection of information from the victim is germane to treatment, [and] [i]t's to determine what's wrong with the victim, how the injuries occurred, what tests to administer, [and] what medicines to administer." The State pointed out that Ms. Lawrence testified that she took medical actions based on the information in the report. The circuit court then determined that SAFE Report would be allowed to come in with appropriate redactions. The following colloquy resulted:

> THE COURT: Starting with the first redaction, with the understanding that the report is going to come in, Mr. [Defense Counsel], do you have any further redactions to Page 1?
>
> [DEFENSE COUNSE]: No, Your Honor.
>
> THE COURT: Page 2?
>
> STATE: Your Honor, what we agreed would come in, "He hit me again. It went in. He made me turn around and open my mouth, so I did. Then, he turned me around. It hurt." That's it on Page 2.
>
> THE COURT: Any objection?
>
> [DEFENSE COUNSEL]: Yes, Your Honor. I did want the statement "It went in," to be redacted because I don't - -
>
> * * *
>
> THE COURT: "It went it."
>
> STATE: - - Yes, Your Honor.

THE COURT: So, we're talking about penetration. And wasn't there testimony from the nurse that they gave her a pill for in the event that sperm had resulted and a possible pregnancy?

And wouldn't it be relevant whether or not there was actual penetration in her vagina to the extent that there could be sperm that could result in a pregnancy?

They had to give her medication for that. I believe the witness testified that they actually gave her the "morning after," as they call it, pill. Isn't that right?

* * *

And so, I'm saying to you, based on the evidence in this case, you would agree that the witness testified that as a result of what [M.] told her, she administered the [morning] after pill?

[DEFENSE COUNSEL]: Yes, Your Honor. And I don't mean to be too technical, but she didn't say that she administered it because of that particular statement that [M.] said.

The statement, "It went in," can be vague because it could have - - she could have been referring to, whether it was her vagina or whether it was her mouth. And I don't mean to be graphic, but that's vague, Your Honor, so as to what the respondent [sic] said at the time.

And this doctor didn't get - - or the nurse didn't indicate that there was a different medical treatment for vaginal penetration or oral penetration. So, the statement by itself, "It went in," is too vague to come in under this exception, Your Honor.

THE COURT: Thank you very much. It will be redacted as indicated. "It went in," will remain. And "He made me turn around and open my mouth."

STATE: Thank you, Your Honor.

THE COURT: I would note that the statement, "He hit me again. It went in," is before the statement "He made me turn around and open

> my mouth." And so, consistent with the type of information that may be required for treatment, I will allow it.

Upon another objection from defense counsel, the court reiterated its reasoning for permitting the "It went in" language:

> . . . [T]his type of information was gathered to determine what areas of her body needed or required treatment.
>
> There's also STD's [sic] and HIV, and other things that may be implicated. It was testified by the victim that no condom was used, therefore, any of these sexual contacts could result in injuries that she may need to receive treatment.
>
> And there was testimony given that she did receive an antibiotic, in addition to other things. So, over your objection, that page will remain as-is, intact.

Appellant contends the trial court erred in submitting the redacted SAFE report to the jury because: (1) the statements that M. made to Ms. Lawrence during her the SAFE examination were inadmissible hearsay because they were not statements made for diagnosis or treatment, as Ms. Lawrence's duties were strictly to collect evidence; and (2) even if Ms. Lawrence had a dual propose—to collect evidence and evaluate patient for treatment—M. did not testify specifically to her awareness of the medical purpose of the exam.

While appellate courts generally review rulings concerning the admissibility of evidence for abuse of discretion, the admissibility of hearsay evidence is different. *Bernadyn v. State,* 390 Md. 1, 7-8 (2005). This is because, under our rules, a trial "court has no discretion to admit hearsay evidence in the absence of a provision providing for its

admissibility." *Id.* at 8. Accordingly, "[w]hether evidence is hearsay is an issue of law reviewed *de novo*." *Id.*

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Unless specifically permitted within the rules, hearsay is not admissible. Md. Rule 5-802. Ms. Lawrence's SAFE Report and the included medical records, involve two layers of hearsay evidence. First, the actual written report itself, and second the statements from M. to the medical staff during examination.

"Ordinarily, 'hospital records may be admitted under the business records exception to the hearsay rule, Rule 5–803(b)(6).'" *Hall v. Univ. of Maryland Med. Sys. Corp.*, 398 Md. 67, 86 (2007) (quoting *State v. Bryant*, 361 Md. 420, 430 n.5 (2000)); *see also Dietz v. Moore*, 277 Md. 1, 7 (1976) ("As we have held in numerous cases, hospital records are not inadmissible as hearsay in Maryland because they fall within the statutory business record exception now codified in Code, Courts and Judicial Proceedings Article, § 10-101."). However, the statements contained in the hospital record must be "'pathologically germane' to the physical condition which caused the patient to go to the hospital in the first place." *Id.* at 92 (quoting *Yellow Cab Co. v. Hicks*, 224 Md. 563, 570 (1961)). Those entries in hospital records which are relevant to the diagnosis or treatment of the patient's condition fall within the business records exception to the hearsay rule. *Id.* Where there

is hearsay within hearsay, such as the quoted statement of a patient contained in the hospital record, that statement may be admitted under Rule 5-803(b)(4).

The circuit court admitted the statements that M. made to Ms. Lawrence under the "Statements for Purposes of Medical Diagnosis or Treatment" exception to the hearsay prohibition, codified in Rule 5-803(b)(4). The rule provides an exception for:

> Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

"The rationale behind this exception is that the patient's statements are apt to be sincere and reliable because the patient knows that the quality and success of the treatment depends upon the accuracy of the information presented to the physician.'" *Webster v. State*, 151 Md. App. 527, 536 (2003) (citing *In re Rachel T.*, 77 Md. App. 20, 33 (1988)). The exception applies only to treating medical personnel and not to non-treating medical personnel, such as an expert preparing for trial. *Id.* "For this reason, courts must separately examine both the reason that a medical provider asked the sexual assault victim to describe the assault, and the victim's subjective purpose in making the statement." *Id.* at 537 (citing *In re Rachel T.*, 77 Md. App. 20, 33-34 (1988)). "Only statements that are both taken and given in contemplation of medical treatment or medical diagnosis for treatment purposes fit within the Rule 5-803(b)(4) hearsay exception." *Id.* (emphasis omitted) (citing *In re Rachel T.*, 77 Md. App. at 33-34).

Appellant maintains that M.'s statements to her SAFE Nurse, Ms. Lawrence, which were indicated on the SAFE Report, could not have been taken and given for the purpose of medical diagnosis or treatment because, based on Ms. Lawrence's own testimony describing the duties of a SAFE Nurse, she was not examining M. for diagnosis or treatment, but only to collect evidence. Moreover, Appellant claims that, even if Ms. Lawrence had a dual-purpose and M. knew of that purpose, statements contained in the report such as, "It went in" were "too vague" to constitute statements for the purposes of diagnosis or treatment, and therefore, was inadmissible.

In *Webster,* this Court held that a victim's description of a sexual assault to a SAFE nurse was admissible as a statement made for purposes of medical diagnosis or treatment because such description "may be critically important in deciding where to examine her, what range of medical problems to look for, and, ultimately, how to treat her." *Id.* at 546. We determined that the rationale behind the hearsay exception for medical diagnosis or treatment—that the statements made are sincere—was applicable in a context where "a hospital nurse trained in both emergency care and sexual assault forensic examination treats and forensically examines a child immediately following a sexual assault, and in doing so solicits a description of the incident." *Id.* (citing *Marlow v. Cerino,* 19 Md. App. 619, 635 (1974)).

In the present case, Nurse Lawrence ordered lab work and testified that she examined M. from "head to toe . . . feeling, visually looking, palpating for any injuries,

tender areas, painful areas, and it's from head to toe. And then from there we go into the genital exam." M.'s statement that, "[i]t went in" when giving a description of the sexual attack to Ms. Lawrence, was germane to her treatment. As Ms. Lawrence's testimony illustrates, the nurse asked for a description of the attack in order to determine what type of exam to conduct. Whether Appellant's penis penetrated M.'s vagina is obviously pertinent to the treatment M. received and the medication administered in treatment. Additionally, the statement is not vague, as Appellant suggests, when interpreted in the context of the redacted SAFE Report, which provided:

> He grabbed me. I tried to scream but couldn't. He had his arms around my neck. I fell in this big ditch. I hit my left knee and my head real hard[.] He told me to turn around and bend over and I did. He said "take it." I told him it hurt. He hit me on the head and grabbed my neck with his hand. He told me to give him oral sex, so I did and started crying again. He hit me in the head twice. So I have him oral sex again. He then made me get on my knees and bend over. He hit me again. **It went in**. He made me turn around and open my mouth. So I did. Then turned me back around. It hurt.

(Emphasis supplied). Moreover, Ms. Lawrence's testimony indicates that when she began examining M. at 11:53 p.m., less than three hours after M. escaped the vacant home where she was attacked, M. was still being treated by emergency personnel and was clearly offering her rendition of the attack for treatment or diagnosis purposes.

Here, the SAFE report was presented along with a certification from the hospital custodian of records during the testimony of its author Ms. Lawrence. The SAFE report was properly authenticated by Ms. Lawrence, and upon objection by the defense, portions

of the document not germane to diagnosis or treatment were redacted. The statements of M. contained within the record were made for the purpose of treatment. Therefore, both the document and the statements contained therein fall within the exceptions to the rule against hearsay.

We note that Appellant did not object to the admissibility of the SAFE report based on the contention that M.'s failed to demonstrate her subjective believe about the medical purpose of the exam. Accordingly, Appellant has not preserved his contention for our review. Md. Rule 8-131(a); *Collins v. State*, 164 Md. App. 582, 602 (2005) (citing *Richmond v. State,* 330 Md. 223, 235 (1993)) ("[A]n appellate court will not decide any issue not raised in and decided by the trial court.").[4]

Given the circumstances, where M. was hospitalized within approximately an hour after the attack, received emergency treatment, met with the SAFE nurse while undergoing emergency treatment, and gave a description of the attack so that the nurse could determine which type of examination and care to provide, we conclude that M.'s statements to the

[4] We acknowledge that Ms. Lawrence's testimony divulges a dual-purpose in performing her examination of M.: medical and evidentiary. "A sexual assault victim's statement describing the assault[,]" however, "may be admissible under Rule 8-503(b)(4), even though it was taken and given for dual medical and forensic purposes." *Webster,* 151 Md. App. at 545 (citing *In re Rachel T*., Md. App. at 33). "If the challenged statement has some value in diagnosis and treatment, the patient would still have the requisite motive for providing the type of 'sincere and reliable' information that is important to that diagnosis and treatment.'" *Id.* at 545-46 (quoting *In re Rachel T.*, 77 Md. App. at 33). It stretches the imagination to believe that M., a thirteen year old girl who went to the hospital to seek medical treatment, did not appreciate that the exam given by the SAFE nurse had a medical purpose.

SAFE nurse were germane to medical treatment and diagnosis. The circuit court did not err when it admitted Ms. Lawrence's testimony and the redacted SAFE Report.

III.

Nurse Lawrence's Opinion Testimony

Following up on M.'s testimony that Appellant choked her during the attack, the State asked Ms. Lawrence whether she noticed any injuries to M.'s neck. Nurse Lawrence testified that "[t]he patient did report that she had had both forearms wrapped around her neck and also his hands." She proceeded to explain that she examined M.'s neck with a handheld device that provides an alternate light source in an effort to see if any injury was visible. Ms. Lawrence indicated that she did not see any injuries to M.'s neck, and then answered "no" over defense counsel's objection, to the State's question: "Are your findings inconsistent with what she told you?". Ms. Lawrence specified that "[j]ust because an act is reported does not always mean you always find an injury," and "[d]epending on the timing of the assault or how the assault happened, there may not be any bruising or injuries developed yet." Also over defense counsel's objection, the court permitted the State to ask Ms. Lawrence: "Based on your examination of M[.], were her injuries consistent with vaginal penetration?" to which she responded, "Yes."

"'Whether a witness on the stand personally believes or disbelieves testimony of a previous witness is irrelevant, and questions to that effect are improper, either on direct or cross-examination.'" *Bohnert v. State*, 312 Md. 266, 277 (1988) (quoting *Mutyambizi v.*

State, 33 Md. App. 55, 61 (1976), *cert. denied*, 279 Md. 684 (1977)). Testimony eliciting opinions about another witness's credibility "invades the province of the jury as the finder of facts." *Id.* at 278 (citing *Kruszewski v. Holz*, 265 Md. 434, 445 (1972)). Thus, relying on *Bohnert v. State*, 312 Md. 266 (1988) and *Hunter v. State*, 397 Md. 580 (2007) Appellant contends that the State's questions to Ms. Lawrence constituted "were-they-lying" questions probed to bolster M.'s credibility. We, however, find those cases to be markedly distinct from the one *sub judice*.

In *Bohnert*, the controversy was not merely asking a witness to bolster the credibility of another, but the introduction of an expert opinion based entirely on information provided by another witness. 312 Md. at 279. Because the lynchpin of that case was whether the jury believed testimony of the child victim, permitting a Protective Service Investigator to offer an expert opinion that the victim was indeed abused, based solely on the information provided through statements from the victim was error. *Id.* The Court of Appeals noted that the opinion resulted from what the investigator considered "a certain sense about children," *id.* at 272, and concluded that the investigator's opinion was not based on facts sufficient to form a basis for an expert opinion, *id.* at 276. Further, the Court stated, "[w]e have never indicated that a person can qualify as an 'expert in credibility' no matter what his experience or expertise." *Id.* at 278.

In the present case, Ms. Lawrence offered no expert opinion that M.'s allegations were true. Her opinion testimony, based on her physical examination of M. merely

provided that the injuries observed were consistent with M.'s description of what happened to her having been the victim of the alleged criminal violations. Additionally, this is not a case where the "lynchpin" is the credibility of the victim. The State presented solid DNA evidence connecting Appellant to the crimes.

Most recently, the Court of Appeals in *Brooks v. State*, presented with an almost identical exchange between the prosecutor and a SAFE Nurse specifically distinguished that situation from *Bohnert* stating:

> [T] he prosecutor asked Nurse Harden an open-ended question—whether the account that Laura B. had given the nurse during the examination was "consistent or inconsistent with" the injuries she observed on Laura B. Unlike the question posed to the social worker in *Bohnert*, this question did not ask Nurse Harden to reflect generally on Laura B.'s credibility. Rather, the question asked the nurse to compare Laura B.'s statement to other evidence directly observed by the nurse—Laura B.'s injuries. Given that a person's physical condition might be "consistent with" several versions of the past, the question did not require Nurse Harden necessarily to endorse any particular version of the truth.

Brooks v. State, 439 Md. 698, 732-33 (2014). Further, the Court in *Brooks* recognized that even where the nurse's answers went beyond the simple question asked by the prosecutor and "stated that the physical injuries she observed 'would verify' what [the victim] had told her," the testimony "was based on a comparison of her observations of the complaining witness's physical condition with the statements of that witness and not simply an assessment of the witness's general credibility based on an interview." *Id.* at 734-35. Accordingly, the circuit court did not err in admitting the Ms. Lawrence's opinions, based

on her examination of M. and her knowledge and experience as a SAFE nurse, that M.'s physical injuries were consistent with her description of the attack.

IV.

Hearsay Testimony During Photo Array

Appellant next complains that the circuit court erred in admitting Detective Johnson's testimony that, when identifying Appellant in a photo array, M. indicated that Appellant did not have permission to have sex with her. Defense counsel first objected to the statement, written on the photo array form, during M.'s testimony about her identification of Appellant as her assailant in the photo array. Defense counsel stated: "Your Honor, I'm just going to object to the question, did he have permission to have sex with her." The Court then asked, "[b]ecause the witness didn't write it is what you're saying?" To which counsel responded: "Yes. Yes, Your Honor." At that time, the court sustained defense counsel's objection, indicating that the detective who actually wrote the statement on the photo array would have to set a foundation before the statement could come into evidence.

During his testimony, Detective Johnson stated: "after [M.] pointed out the picture of [the Appellant], she stated he's close and pointed to his picture… I asked her if he had permission to have sex with her and she said no." When questioned as to who wrote the statement on the photo array, Detective Johnson indicated that he had written it himself.

The statement, as part of the photo array, was then entered into evidence over the objection by defense counsel. At a bench conference, the following transpired:

> THE COURT: Let the record reflect that ***the defense was objecting to the foundation questions*** regarding the manner in which the writing was placed on the rear side of the photo array. That had to be verified by a witness who observed the writing to occur. The court allowed that to be done, in that it was the victim's statement being made in the presence of the officer, and he observed the writing being placed on the exhibit. Over the Defense objection, the court allowed it. ***Anything else?***
>
> DEFENSE COUNSEL: *No, Your Honor.*
>
> THE COURT: *No. Is that what you were objecting to?*
>
> DEFENSE COUNSEL: *Yes.*
>
> THE COURT: Very well. And we're incorporating herein by reference this argument and objection by the Defense. The court's basis for allowing it is that this was all done in the Detective's presence and in the presence of the victim who [has] previously identified this exhibit number 4 for identification.

(Emphasis added). Finally, when the court asked whether defense counsel had any additional objection, counsel responded: "The objection we made before."

Maryland Rule 8-131(a) governs our scope of review. The Rule instructs that, other than jurisdictional issues, we "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" This includes grounds for objections when given. *Anderson v. Litzenberg*, 115 Md. App. 549, 569 (1997). While a general objection preserves for appeal all grounds upon which the objection could have been made, "[i]f counsel provides the trial judge with specific grounds for an

objection, the litigant may raise on appeal only those grounds actually presented to the trial judge. All other grounds for the objection, including those appearing for the first time in a party's appellate brief, are deemed waived." *Id.* (citations omitted).

While initially, defense counsel's objection to the detective's statement that Appellant did not have permission to have sex with M. was lodged as a general objection, when the court attempted to clarify counsel's reasons for making the objection, counsel agreed that his only basis for the objection was the result of the lack of foundation regarding the manner in which the writing was placed on the photo array. Upon the State's request to admit the photo array into evidence, the court again asked counsel whether he had any objections to the admission of the photo array, and counsel indicated that his objection was the same. Accordingly, Appellant has not preserved his contention that the statement was inadmissible hearsay for our review. Md. Rule 8-131(a).

Moreover, the actual testimony from the Detective on this issue—stating that he asked M. whether Appellant had permission to have sex with her and she said no, and then he wrote the statement—was presented before the jury. "Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon v. State*, 407 Md. 16, 31 (2008) (citing *Peisner v. State*, 236 Md. 137, 145–46 (1964), *cert. denied*, 379 U.S. 1001 (1965). Defense counsel failed to object to the photo array on the ground that it contained a hearsay statement; nor did counsel seek redaction of the photo array to prevent the hearsay statement from coming before the jury.

Accordingly, Appellant's hearsay contention was waived when he failed to make that particular objection upon the admission of the photo array bearing M.'s statement and we decline to address Appellant's complaints concerning the admission of the detective's testimony.[5]

V.

Golden Rule Argument

Appellant contends that the circuit court erred in permitting the State to make the following comment during rebuttal closing argument:

> STATE: Yes, we want you to get the right person. The right person sits before you today. It's his DNA. Baltimore City so often gets the rap, bad rap in this **stop snitching culture. In this stop snitching culture people don't want to come forward**[;] people don't want to talk to police[;] people don't want to testify.

---

[5] Even assuming *arguendo* that the court erred in admitting the hearsay statement on the photo array, such error was harmless. An error is harmless when "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." *Dorsey v. State*, 276 Md. 638, 659 (1976). Evidence that is cumulative is harmless. *Id.* at 652. The Court of Appeals "'has long approved the proposition that [it] will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury without objection through the prior testimony of other witnesses.'" *Yates v. State*, 429 Md. 112, 120 (2012) (quoting *Grandison v. State*, 341 Md. 175, 218-19 (1995)) (emphasis omitted). The fact that the officer was allowed to testify to what M. had told him during the identification procedure was cumulative to the fact that the photo array itself contained the hearsay statement. Further, Appellant never presented a defense of consent or raised that issue in any form. M.'s testimony belies any notion that "permission" was ever an issue. When questioned on redirect examination "[w]hy did you obey him," M. responded, "Because he said if I didn't, he was going to kill me."

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

STATE: However, **the community came together**. Ms. Whiting who found her on the street bloody, shaken and beat up and battered from just being raped. Ms. Shirley Mandy Price, Ms. Tolliver, Ms. Chung.

* * *

When I came before you in Opening I said I was going to, I'm here for justice for [M.], seeking justice for [M.]. **Citizens of Baltimore, it takes a village. The village came together in this courtroom**. There are citizens of Baltimore saw you [sic]. **It takes a village**. Hold this man accountable for the repeated rapes, repeated blow jobs, the beatings and everything that she suffered. And I'm asking you to find justice for [M.] Find justice for [M.]! Thank you.

(Emphasis supplied).

Specifically, Appellant complains that the "stop snitching culture" comment was improper for two reasons. First, "the general subject of snitching played no role whatsoever in the State's case against [Appellant.]" According to Appellant, the comment appealed to the passions of the jury "by invoking emotional themes having nothing to do with the determination of guilt or innocence." Second, Appellant contends that the comment "obviously segued into the prosecutor's concluding comments that the community 'came together' generally and that 'Citizens of Baltimore, it takes a village. The village came together in this courtroom. There are citizens of Baltimore saw you [sic]. It takes a village.'" Appellant contends that these comments suggested to jurors that by convicting Appellant, they would be coming together to protect their community and that acquitting Appellant would tarnish the community's reputation.

The State contends that the "stop snitching" comment was not prejudicial to Appellant and that the following comments, claiming that "it takes a village" were not objected to and therefore, not preserved. While we agree with the State, that any issue regarding the "it takes a village" comments was not preserved,[6] in the interest of dispelling Appellant's contentions of error, we address Appellant's complaints together as if fully preserved.[7]

The scope of permissible closing argument is quite broad, and as a "general rule [] attorneys are afforded great leeway in presenting closing arguments to the jury." *Degren v. State,* 352 Md. 400, 429 (1999)). Recognizing this the Court of Appeals stated in *Smith v. State,* that "[w]hat exceeds the limits of permissible comment or argument by counsel

---

[6] Appellant maintains that his objection to the "stop snitching" comment extended to comments following his objection, including the "it takes a village" comment. Citing *Johnson v. State,* 325 Md. 511, 514 (1992), Appellant points to the Court's holding that, "the objection went not only to what was said but also to what was obviously to come." In *Johnson,* however, the "objection interrupted the prosecutor in midsentence, and it was perfectly clear what would follow if the objection were not sustained." *Id.* In that case, the judge, by overruling the objection, "demonstrated that he was permitting the prosecutor to continue along the same line. It was apparent that his ruling on further objection would be unfavorable to the defense" such that "[p]ersistent objections would only spotlight for the jury the remarks of the prosecutor." *Id.* at 515.

That is not the case here. Defense counsel objected only to the State's "stop snitching culture" comment. This Court does not follow how the community coming together and the "it takes a village" comments predictably follow the "stop snitching culture" comment, and this is not an instance, as in *Johnson,* where the objection interrupted the prosecutor mid-sentence.

[7] Maryland Rule 8-131(a) affords us the discretion to review unpreserved claims on appeal.

depends on the facts of each case." 388 Md. 468, 488 (2005). Because the propriety such statements in closing must be judged contextually, on a case-by-case basis, the trial judge is in the best position to gauge the propriety of argument in light of such facts. *Mitchell*, 408 Md. at 381. Accordingly, "[a]n appellate court should not disturb the trial court's judgment absent a clear abuse of discretion by the trial court of a character likely to have injured the complaining party." *Grandison v. State,* 341 Md. 175, 225 (1995) (citing *Booth v. State,* 327 Md. 142, 193, *cert. denied,* 506 U.S. 988 (1992)).

Nevertheless, it is improper for counsel to appeal to the prejudices or passions of the jurors, *Wood v. State,* 192 Md. 643, 652 (1949), or invite the jurors to abandon the objectivity that their oaths require, *Lawson v. State,* 389 Md. 570, 594 (2005). However, we have held that a prosecutor, "within proper limits, may argue for law and order and remind the jury of the danger to the community posed by persons prone to resort to violence." *Walker v. State,* 121 Md. App. 364, 375-76 (1998) (quoting *Wilhelm v. State,* 272 Md. 404, 433 (1974)). Recognizing the important interests to be balanced here, the courts of Maryland have been careful in defining the bounds of such permissible arguments.

In *Lawson v. State*, 389 Md. 570 (2005), and *Hill v. State*, 355 Md. 206 (1999), the Court of Appeals addressed improper "golden rule" arguments, in which counsel asked the jury to place themselves in the shoes of the victim, *Lawson,* 389 Md. at 593 n.11, or in which counsel appealed to the jury's own interests, *Hill,* 355 Md. at 214–15. In *Lawson,*

the Court held that prosecutors should not implore jurors to consider their own interests or feelings were they in the place of the victim. *See Lawson*, 389 Md. at 597 ("When a jury is asked to place themselves in the shoes of the victim, the attorney improperly appeals to their prejudices and asks them to abandon their neutral fact finding role.").

A different "golden rule" scenario was present in *Hill*, where during opening argument, the prosecutor told the jury that they were "chosen to send a message to protect [the] community" and to "keep [ ][the] community safe." In closing the prosecutor again charged the jury "to convict petitioner in order to preserve the quality of their own communities." 355 Md. at 216, 219–20. The Court found these remarks, appealing to jurors to convict a defendant in order to preserve their own safety, to be wholly improper and prejudicial. *Id.* at 225. Following similar closing remarks by a prosecutor in *Lee v. State*, the Court of Appeals stated:

> In asserting that the jurors should consider their own interests and those of their fellow Baltimoreans, and should clean up the streets to protect the safety of their community, the State clearly invoked the prohibited "golden rule" argument. Essentially, the State was calling for the jury to indulge itself in a form of *vigilante justice* rather than engaging in a deliberative process of evaluating the evidence. Even if the prosecutor's comments were directed such that the jurors were asked to teach Lee a lesson, and not to send a message to the entire community, these comments were improper because they asked the jury to view the evidence in this case, not objectively, but consonant with the juror's personal interests.

405 Md. 148, 172-73 (2008).

In the case *sub judice*, there was no entreaty from the prosecutor that the jury protect its own self-interest by excluding the Appellant from their community. There was no call

to vigilante justice, or plea to ignore the facts in evidence in favor of personal feelings. Nor did the prosecutor ask the jury to place themselves in the victim's shoes. Rather, reading the closing argument in its entirety, it is clear that the prosecutor was indicating that, in this case, a number of witnesses in the community came forward to testify, despite the perceived reluctance of the citizens of Baltimore to do so, and that their testimony and the evidence before the jury established Appellant's guilt.

We are convinced that these comments were neither prejudicial nor improper. They were mere rhetorical flourish, which the court was free to permit for the sake of argument. *Degren*, 352 Md. at 430-31. Accordingly, the court did not abuse its discretion in allowing the comments.

VI.

Unit of Prosecution and Sentencing

Finally, Appellant contends that the circuit court erred when it imposed separate sentences for each first-degree rape conviction and each first-degree sexual offense conviction. Appellant posits that the court should have imposed only one sentence for first-degree rape and one sentence for first-degree sex offense. Appellant argues that his three convictions for first-degree rape should have merged for sentencing purposes and his three first-degree sexual offense convictions should have merged for sentencing purposes.

Usually, our first step in discerning whether offenses stemming from the same transaction merge for double jeopardy purposes involves applying the required evidence

test. *Simpson v. State*, 121 Md. App. 263, 290 (1998). However, because the required evidence test is used to determine when two different offenses based on a single act or transaction must be merged for sentencing, and not whether the unit of prosecution for an offense supports multiple charges for the same crime in a continuing transaction, it is not dispositive here. *See Alexis v. State*, 209 Md. App. 630, 678 (quoting *Purnell v. State*, 375 Md. 678, 694–95 (2003) ("[The required evidence test] does not end the inquiry, however, because the focus is upon the intent of the Legislature. [T]he *Blockburger* [*v. United States*, 284 U.S. 299 (1932)] rule does not provide the final answer in cases involving multiple punishment because, when specifically authorized by the legislature, cumulative sentences for the same offense may under some circumstances be imposed after a single trial[ ]."")), *cert. granted*, 432 Md. 211 (2013), *aff'd*, 437 Md. 457 (2014).

"Under the Double Jeopardy Clause [of the Fifth Amendment to the United States Constitution] a defendant is protected against multiple punishment for the same conduct, unless the legislature clearly intended to impose multiple punishments." *Jones v. State*, 357 Md. 141, 156 (1999) (citations omitted). "A criminal defendant may raise a double jeopardy challenge, alleging multiple punishment, generally in 'two different sets of circumstances: those involving two separate statutes embracing the same criminal conduct, and those involving a single statute creating multiple units of prosecution for conduct occurring as a part of the same criminal transaction.'" *Purnell v. State*, 375 Md. 678, 692

(2003) (quoting *Richmond v. State,* 326 Md. 257, 261 (1992)). In the case *sub judice* we are presented with the latter scenario.

"When a criminal defendant challenges 'multiple indictments, multiple convictions, or multiple sentences, the unit of prosecution reflected in the statute controls whether multiple sentences ultimately may be imposed.'" *Handy v. State,* 175 Md. App. 538, 576 (2007) (quoting *Moore v. State,* 163 Md. App. 305, 320 (2005)). Therefore, when determining the appropriate unit of prosecution the central question is one of legislative intent. *Huffman v. State*, 356 Md. 622, 627 (1999). "[W]hether a particular course of conduct constitutes one or more violations of a single statutory offense depends upon the appropriate unit of prosecution of the offense and this is ordinarily determined by reference to the legislative intent." *Richmond v. State*, 326 Md. 257, 261 (1992) (citing *Brown v. State*, 311 Md. 426, 432 (1988). Additionally, in *Randall Book Corporation v. State*, the Court of Appeals stated: "As helpful as the various rules of statutory construction may be in determining legislative intent, perhaps the soundest guidance comes from the Supreme Court's admonition that we give the language of a statute a 'commonsensical meaning.'" 316 Md. 315, 324 (1989) (quoting *United States v. Universal Corp.*, 344 U.S. 218, 221 (1952)). With that principle in mind the courts generally look to the gravamen of the criminal offense when determining what the legislature intended as the unit of prosecution. *Trindle v. State*, 326 Md. 25, 48 (1992).

Maryland Code (2002, 2012 Repl. Vol.), Criminal Law ("CL"), § 3-303(a) provides:

(a) A person may not:

(1) engage in vaginal intercourse with another by force, or the threat of force, without the consent of the other; and

(2)(i) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;

(ii) suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;

(iii) threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping;

(iv) commit the crime while aided and abetted by another; or

(v) commit the crime in connection with a burglary in the first, second, or third degree.

First-degree sexual offense prohibits the same actions in the context of a "sexual act" in lieu of vaginal penetration. CL § 3-305(a)[8] Sexual act, as defined by Section 3-301 of the Criminal Law Article, includes the act of fellatio. "The proscribed harmful physical contact in rape—the gravamen of the crime—is the unlawful 'vaginal intercourse.'"

[8] Section 3-305(a) provides:

A person may not:

(1) engage in a sexual act with another by force, or the threat of force, without the consent of the other; and

(2)(i) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;

(ii) suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;

(iii) threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping;

(iv) commit the crime while aided and abetted by another; or

(v) commit the crime in connection with a burglary in the first, second, or third degree.

West v. State, 369 Md. 150, 162 (2002). "The proscribed and harmful contact in a first-degree sexual offense is the coerced 'sexual act.'" *Id*.

Although a defendant may not be ordinarily be convicted of two counts of rape or criminal sexual conduct on the basis of a single act, many courts have held that separate and distinct acts of rape or criminal sexual conduct occurring at different times and places will constitute separate offenses, even where they occur as one ongoing course of events. *See, e.g.*, *Bryant v. State*, 377 S.W.3d 152, 158 (Ark. 2010) (stating that "[w]here the victim testifies to multiple acts of rape of a different nature, separated in a point of time, there is no continuing offense, as a separate impulse was necessary for the commission of each offense." (citing *Tarry v. State*,710 S.W.2d 202, 203 (Ark. 1986))); *State v. Rabago*, 81 P.3d 1151, 1167 (Haw. 2003) (stating that "the continuous sexual assault of minor under age 14, which conduct constituted three or more acts of sexual assault committed over period of time, was not 'continuing offense' arising from continuous course of conduct; rather, each assault constituted separate distinct and punishable offense"); *State v. Lancaster*, 527 S.E.2d 61, 66 (N.C. Ct. App. 2000) (holding that each act of forcible vaginal penetration constitutes a separate rape).

In *State v. Boozer*, 304 Md. 98 (1985), the Court of Appeals considered an argument, in the context of fourth-degree sex offense, similar to that articulated by Appellant. In *Boozer*, the defendant was charged, convicted, and sentenced for fourth-degree sexual offense and then prosecuted a second time for attempted fourth-degree

sexual offense. The Court of Appeals held that such double prosecution did not infringe upon the criminal defendant's double jeopardy guarantee, noting that:

> The courts of this country have had little difficulty in concluding that separate acts resulting in separate insults to the person of the victim may be separately charged and punished even though they occur in very close proximity to each other and even though they are part of a single criminal episode or transaction.

Id. at 105.

In the case *sub judice*, although this was one criminal episode of 30 minutes in duration, Appellant forced vaginal penetration on three separate occasions and forced fellatio on three separate occasions. The testimony of the victim reveals that after forcing M. into the vacant building, the Appellant engaged in vaginal intercourse by force. After an unspecified amount of time Appellant forced M. to turn around and engage in fellatio. During this time he also beat her about the head and ribs. After beating M., Appellant forced her to move to another location in the vacant building and engaged in forced vaginal intercourse for a second time. Again, after an unspecified amount of time Appellant forced M. to turn around and engage in fellatio. Thereafter, Appellant beat M. a second time, striking her again in the head and ribs. Forcing M. onto her hands and knees, Appellant engaged in forcible vaginal intercourse for a third time. Appellant then forced M. to turn around and to engage in fellatio a final time.

It is clear that, consistent with the statute and the Maryland court's interpretation of the gravamen of these sexual offenses, that the victim was raped three separate times and

sexually assaulted three separate times, punctuated by vicious beatings and being forced to move about the vacant building. Appellant's sentences were properly imposed consistent with the unit of prosecution for each offense and we find no merit to Appellant's merger argument.

CONCLUSION

Finding no error in the circuit court's actions, we affirm the judgments of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.