Circuit Court for Prince George's County
Case No. CT160747X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2454

September Term, 2017

JAHFAHREE CHESTER

v.

STATE OF MARYLAND

Berger,
Leahy,
Wells,

JJ.

Opinion by Wells, J.

Filed: June 17, 2019

A jury, in the Circuit Court for Prince George's County, convicted Jahfahree Chester, appellant, of first-degree sexual offense, second-degree sexual offense, third-degree sexual offense, second-degree burglary, fourth-degree burglary, and second-degree assault. Chester then filed a motion for a new trial, which was denied. The court sentenced Chester to a term of 50 years' imprisonment, with all but 25 years suspended, on the conviction of first-degree sexual assault and a consecutive term of 15 years' imprisonment, with all but ten years suspended, on the conviction of second-degree burglary. All other convictions were merged for sentencing purposes. In this appeal, Chester presents two questions for our review, which we have rephrased and renumbered as three questions.[1] They are:

1. Did the circuit court err in admitting into evidence an audio and video recording that the State had not disclosed prior to trial?

2. Did the circuit court err in denying Chester's motion for a new trial, which was based on a claim that the State had failed to disclose the existence of a recorded statement made by the victim?

3. Did the sentencing court err in failing to merge, for sentencing purposes, Chester's conviction of second-degree burglary into his conviction of first-degree sexual offense?

[1] Chester phrased his questions as:

1. Did the trial court err when it found that the State's mid-trial disclosure of a surveillance DVD did not constitute a violation of the discovery rule, and did the trial court err when it denied Mr. Chester's motion for a new trial that was based on the State's failure to disclose the existence of a videotaped statement by [A.F.]?

2. Must Mr. Chester's sentence for second-degree burglary be merged into his sentence for first-degree assault?

For reasons to follow, we answer the first two questions in the negative and the third question in the affirmative. Accordingly, we vacate Chester's sentences and remand for resentencing. Otherwise, we affirm.

BACKGROUND

Trial Evidence

Chester was arrested and charged after it was alleged that he sexually assaulted a woman, A.F.[2] At trial, A.F. testified that, at approximately 6:15 a.m. on June 9, 2016, she was walking from the New Carrollton Metro Station to her nearby office building when she observed a man, later identified as Chester, walking behind her. When A.F. reached her office building and opened the front door, Chester "came up to the side and was in the door." A.F. asked Chester why he was there, and Chester responded that he "was looking for the bathroom." The two then entered the building, and A.F. proceeded to the building's elevator. When A.F. got on the elevator, Chester "tried to get on the elevator" as well. After informing Chester that he could not get on the elevator because it was "a secured area," A.F. rode the elevator to her office on the third floor.

A.F. testified that, upon reaching the third floor and entering her office, which was secured by a locked door, she went to the office's break room. A short time later, A.F. heard "the door rattling and pulling like someone's trying to get in." When A.F. opened

[2] To protect the privacy of the victim, we will refer to her by her initials.

the door, she saw Chester "standing there." A.F. testified that she was the only employee in the office at the time and that she had not given Chester permission to be there.

A.F. testified that, upon seeing Chester, she told him that he had to leave. Chester then "started moving towards" A.F., who "kept repeatedly asking him to leave." When Chester reached A.F., he "slammed" her against the wall and tried to "pin" her down and put his hand over her mouth, at which point A.F. "bit his hand." During the ensuing struggle, Chester removed A.F.'s scarf, wrapped it around her neck, put his hands on her neck, and "used the other part of the scarf to try to smother [her]." At some point during the attack, Chester put his hand on the back of A.F.'s neck and pushed "so hard" that A.F. "could feel the vertebrae pop." Chester then lifted up A.F.'s dress, "rubbed" against her, and put his fingers inside of her vagina. After "fighting and wrestling for at least 15, 20 minutes," A.F. pleaded with Chester to "stop" and "give [her] three minutes." Chester then grabbed A.F.'s ankles and "flipped them," and A.F. could "feel the bone pop in [her] knee." A.F. continued to plead for Chester to stop, and, eventually, Chester "just walked away" and left the office. A.F. then shut the office door and called 911.

A recording of A.F.'s 911 call was played for the jury. During that recording, A.F. can be heard sobbing and relaying a description of the attack and her attacker to the 911 operator. During that conversation, the 911 operator asked A.F. if her attacker "penetrate[d] or anything like that," and A.F. responded, "No." A.F. later testified that she had thought the 911 operator was asking whether Chester had penetrated her with his penis. During the 911 call, A.F. can also be heard telling the operator that, at her office, "everything is on

tape;" that her office "has video when they walk in;" that "they'll get him coming in and out;" and that the police could "look at the film."

Later, the State called Prince George's County Detective Patrick Devaney, who testified that he interviewed Chester following the attack on A.F. During that interview, which was recorded and played for the jury, Chester admitted that he and A.F. "tussled" in her office and that she was "screaming" and "yelling." Chester denied sexually assaulting A.F. or putting his fingers in her vagina. Chester claimed, rather, that he initially thought A.F. wanted to have sex with him but that, after A.F. resisted, it did not "go that far because [Chester] was turned off."

Undisclosed Recording

During A.F.'s direct testimony, but after the 911 call was played for the jury, the prosecutor requested a bench conference, at which he informed the court that "something just came up." The prosecutor stated that he had "a disk" that he had been trying "for weeks" to access but had been unsuccessful and that, as a result, he did not believe that the disk contained any information. The prosecutor stated that he had just managed to access the disk, which apparently contained an audio recording "of the incident" that had been captured by surveillance cameras at A.F.'s office. The prosecutor and defense counsel each stated that he had not heard the audio. The court then took a short recess so that the prosecutor and the defense could listen to the recording.

When the court reconvened a short time later, defense counsel proffered that the audio recording depicted A.F. saying, "Get off me. Get off me." Defense counsel then

stated that, although he could not determine whether Chester's voice could be heard in the recording, his "initial reaction" was that the recording was "newly provided evidence in the middle of trial" that should be excluded. Defense counsel explained that, prior to trial, he had been given "disks" that he "thought" were "either inside the bus or the metro station" and that he was never made aware that there was an additional recording. When the court asked the prosecutor whether the recording had been disclosed, the prosecutor stated that "it was provided on a disk;" however, when the court asked the prosecutor whether defense counsel knew "the disk existed," the prosecutor responded that he did not believe that defense counsel knew. The prosecutor added that he "never shared that information" because he thought that the contents of the disk were "lost" and because he was "prepared to go with what [he] had until about half an hour ago," when the contents of the disk were finally uncovered. The court eventually recessed for the day so that defense counsel could examine the contents of the disk more closely and determine whether or not he would be objecting to the admission of the disk.

At the start of trial the next day, defense counsel informed the court that he had reviewed the recording and that the recording contained not only audio from the incident but also video of Chester entering and leaving A.F.'s office. Defense counsel then moved to exclude the recording because it "was not provided to the defense prior to trial." Defense counsel explained that "there were some disks that were provided, but they were not labeled as such indicating … that it would have been one of these." Defense counsel added that the disks that were disclosed prior to trial "appear[ed] to be recordings regarding videos of

[Chester] either at the bus – bus stop or going to the – or walking along." Although defense counsel did not dispute the prosecutor's proffer that he was unaware of the recording's existence until trial, defense counsel argued that a discovery violation had occurred. Defense counsel further argued that the discovery violation prejudiced the defense because, had the recording been disclosed, defense counsel could have used it in preparing his opening statement. In that opening statement, defense counsel had admitted that Chester was in A.F.'s office at the time of the incident but had claimed that Chester did not sexually assault A.F. or digitally penetrate her vagina.

When the court asked defense counsel to explain how the defense had been prejudiced by the late disclosure, the following colloquy ensued:

> [DEFENSE]: Well, there may be some things that I could have said. And this is all happening rather quickly, of course. You know, this was, what, four o'clock in the afternoon or 3:30 in the afternoon yesterday when this was brought to our attention. It was in the afternoon – later part of the afternoon.
>
> Normally I would have an opportunity, hopefully, to review it and try to incorporate it in my preparation for trial. I might be able to discuss it with my client. There might be information on it that would be helpful or not helpful that I could discuss with him.
>
> * * *
>
> Also, I would – so there are two – basically two arguments. One is that the State has not timely provided the discovery, certainly not in the middle of trial. Frankly, it's a huge distraction that I have to overcome, but it's a distraction in this case in the ordinary course of trying a case. But Rule 4-263 is quite clear that the

State should be providing discovery 30 days after – after the –

THE COURT: And what does the Rule say with respect to –

[DEFENSE]: But I have to say that they do have a duty to disclose it subsequent to that once it comes to their attention, and I would submit to you that disclosing it in the middle of trial is –

THE COURT: But it's as … soon as it came to his attention. Are you disputing that what he said yesterday, that he could never open it until yesterday afternoon?

[DEFENSE]: I'm guessing – he said that, and I don't dispute [the prosecutor's] integrity here. I'm guessing he might not even have had it to open, but I agree he did not see it or open it prior to yesterday … when it did first come to his attention. But the problem is, is that this is – this is something I should have been able to factor into preparing this trial, in preparing my opening statement and just preparing overall for this case. This is one piece of the puzzle that I should have been made aware of, and it's –

THE COURT: I don't know how you were not aware of that piece of the puzzle, because in her statement she describes what happened in the office, and what the video does is just again repeat what she says happened in the office. Unless there was something different – because I heard a little bit of the tape yesterday – from what she said happened, then I can understand.

* * *

There's nothing different that that tape would have said for you in terms of – or different that you could have said to that jury in your opening, because what you said to them was that she never stated in her 911 call he digitally penetrated her vagina, nor is that in video. I heard what you – I listened to your opening[.]

[DEFENSE]: That was very important, because that is a key element in this case. So – and quite accurately, the 911 call she does not say that. In fact, she specifically says he did not penetrate her.

THE COURT: That's exactly what your point was. I understood that in your opening.

[DEFENSE]: So that's been borne out by that. That was helpful. But I – this – I still maintain that the State – I don't fault [the prosecutor] for purposely doing this. I do say that this is – because I don't believe he purposefully did this, sandbagged me. But I do – what I would say, that is has prejudiced the Defense, it has reduced my ability to prepare for trial, and it's affected the scope of my opening statement. And, furthermore, there's a discovery violation argument.

The prosecutor responded that he did not intentionally fail to disclose the recording, and he reiterated that neither he nor defense counsel were able to access the recording prior to trial. The prosecutor argued that any discovery violation had been resolved by the fact that both he and defense counsel had a chance to review the recording at the same time. The prosecutor further argued that the late disclosure did not prejudice the defense, as defense counsel's theory during opening was that Chester "didn't do what she said he did."

In rebuttal, defense counsel argued that admitting the recording would set "a bad precedent" because it was "an important piece of evidence that the State should have been aware of, and they should have provided it to the defense." The court responded by noting that "this [was] not going to be the first or last time that this ever happens in terms of … the State or the Defense coming into possession of evidence that they want to use at trial, and always the Court has to make a decision as to whether or not to allow it." The court

further stated that there was "nothing new in that video" that would have altered defense counsel's opening remarks because defense counsel's opening statement focused "on the fact that there was a misunderstanding and no penetration."

When defense counsel reiterated that the State "didn't provide [the recording] in discovery," the prosecutor interjected, and the following colloquy ensued:

[STATE]:	[J]ust for the record, it was provided on disk. He wasn't able to open it, but it was provided to them.
THE COURT:	Oh. Prior to yesterday?
[DEFENSE]:	Okay. If we're going to go here –
[STATE]:	Yes.
[DEFENSE]:	If we're going to go here, Your Honor, I brought the disk that I have. [The prosecutor] has made a representation. I don't know if it's in any of these disks. I will note to the Court that there is a disk that says, "New Carrollton Assault."[3]
THE COURT:	Did he provide you the disk, and you can't open it, and he couldn't open it?
[DEFENSE]:	I don't know if he provided me the disk.
THE COURT:	Well, he just said on the record as an officer of the court he did, so let's move on.
[DEFENSE]:	I and [the prosecutor] inherited the case.
THE COURT:	But he couldn't open it, you didn't open it. We'll all agree to that.
[DEFENSE]:	Did [the prosecutor] have a disk that he did not open? Did he actually have it –

[3] A.F. testified that her office was located "in the New Carrollton business district."

[STATE]: Am I a witness now?

THE COURT: What are you – no, you're not a witness.

[DEFENSE]: My understanding is that the tech – someone from tech informed [the prosecutor] about this recording yesterday. I don't know –

THE COURT: Informed him that they could open it.

[DEFENSE]: Well, that's what I'm trying – that's why I'm trying to inquire.

THE COURT: Obviously they had it before yesterday. They never opened it.

[DEFENSE]: The State represented that I have it, and I'm not quite clear I have that because of the way these items are identified, the multiple disks were provided, and –

THE COURT: Let me ask you this: Did you play all those disks?

[DEFENSE]: I was not able to open all of the disks, that's correct.

THE COURT: All right. Then there you go.

[DEFENSE]: There is a –

THE COURT: Just like he couldn't open them, you couldn't open them.

[DEFENSE]: But the State hasn't represented that they have the disk that they didn't open.

THE COURT: They couldn't open it. Big difference.

[DEFENSE]: I move, Your Honor – respectfully, I move that the State mark for identification the disk that they had prior to trial –

THE COURT: Okay. Well, I'm not going to do all of that. Okay. If you – no, no, no. You just, on the record, said you didn't

open them all because you couldn't. Now let's move on.

* * *

[DEFENSE]: There's nothing identified as being this video.

THE COURT: I got you, [defense counsel].

[DEFENSE]: I really – I respect [the prosecutor], but I'm not sure he has the disk that he said he opened – tried to open.

THE COURT: Well, look, the bottom line is you at least agree he did not have the ability, nor has he ever viewed it before yesterday –

[DEFENSE]: Correct.

THE COURT: - yes or no?

[DEFENSE]: Yes.

THE COURT: Then we're going to move on with that agreement only.

[DEFENSE]: But, now, what I was saying to the Court was that the precedent that you would be setting is that the State can come and produce, not some innocuous exhibit that they didn't provide in discovery, but this is a recording – a video recording of the event itself, not in the room where it happened, but you can hear all the sounds. So this is an actual recording of –

THE COURT: And you're saying I would allow the State to do that, and that would set a bad precedent for what?

[DEFENSE]: I think it would set a bad precedent –

THE COURT: It would if I thought that they intentionally hid it from you, yes –

[DEFENSE]: I'm not saying that.

THE COURT: - but if I don't, then there's no bad precedent being –

[DEFENSE]: I'm clearly not saying it was intentional.

THE COURT: Okay. Then what is the bad precedent?

[DEFENSE]: It's such an important tape that the State should have identified it, opened it and provided it to the Defense.

THE COURT: They didn't have – he tried – he just said the first time they ever got to open it was yesterday. … Are you saying he opened it before yesterday?

[DEFENSE]: No, I'm not, but I'm saying he should have.

THE COURT: Okay. Then thank you.

[DEFENSE]: He should have. If he had –

THE COURT: If he had the ability – he said they tried and tried; finally, they were successful yesterday in opening it. Are you believing there's some subterfuge here that they're not telling the truth about that?

[DEFENSE]: I'm not saying that.

THE COURT: Then I'm going to move on from there.

[DEFENSE]: I'm saying they should have made an effort to open it prior to that.

THE COURT: I heard him say they made an effort, they couldn't open it until yesterday.

[DEFENSE]: Thank you, Your Honor. Appreciate it.

THE COURT: And so we're going to proceed, right, because it has nothing in terms of your opening statement that would have changed in terms of your defense of your client. It has nothing new with respect to the testimony of the victim in this case. I'm going to allow it.

[DEFENSE]: Your Honor, it has to do with overall trial preparation.

THE COURT: It has to do with overall what?

[DEFENSE]: Trial preparation. I should have been made aware that this tape existed.

THE COURT: That's why I gave you 24 hours. Review it, look at it, and you can ask whatever questions you want of her when she takes the stand.

[DEFENSE]: Thank you, Your Honor. Appreciate it.

Ultimately, A.F. was called back to the stand to resume her direct testimony, and the State played portions of the recording of the incident. In the recording, Chester can be seen walking through A.F.'s office at approximately 6:45 a.m. on the day of the incident. After Chester proceeds through the office and goes off-camera, A.F. can be heard screaming "get out" and "get off of me." Several other sounds indicative of some sort of commotion can also be heard. At approximately 6:48 a.m., Chester can be seen walking quickly through A.F.'s office in the opposite direction from which he came when he first showed up on camera. A short time later, A.F. can be heard sobbing and speaking to the 911 operator.

On cross-examination, defense counsel questioned A.F. at length about the fact that she initially failed to inform the police that Chester had digitally penetrated her during the attack. A.F. admitted that she did not initially inform the police about the digital penetration, explaining that she felt "guilty, shameful, dirty and violated." Defense counsel also questioned A.F. about certain discrepancies between her direct testimony and the audio and video recording of the attack. On redirect, A.F. testified that, on the day of the

incident, she provided a written statement to the police in which she indicated that Chester had digitally penetrated her vagina.

Verdict and Sentencing

At the close of all evidence, the court instructed the jury on, among other things, the elements of first-degree sexual offense:

> In order to convict the Defendant, the State must prove all of the elements of forcible second-degree sexual offense and also must prove one or more of the following circumstances: one, that the Defendant inflicted suffocation, strangulation, disfigurement or serious physical injury against [A.F.] in the course of committing the offense; or two, that the Defendant committed the offense in connection with a burglary in the second degree.

As noted, Chester was ultimately convicted of both second-degree burglary and first-degree sexual offense and was sentenced to a term of 50 years imprisonment, with all but 25 years suspended, on the conviction of first-degree sexual offense and a consecutive term of 15 years' imprisonment, with all but ten years suspended, on the conviction of second-degree burglary.

Motion for a New Trial

Following the jury's verdict, but before sentencing, Chester filed a motion for a new trial pursuant to Maryland Rule 4-331(a).[4] At the hearing on Chester's motion, defense counsel informed the court that the previously undisclosed surveillance recording from A.F.'s office, which depicted Chester entering and exiting A.F.'s office at the time of the attack, included additional audio and video footage that the State had also failed to disclose.

[4] Maryland Rule 4-331(a) provides that "[o]n motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial."

Defense counsel explained that when the State revealed the contents of the surveillance recording at trial, it gave "the clear impression" that the entirety of the recording encompassed the portion depicting the attack, which was played for the jury, and the subsequent portion depicting A.F.'s 911 call. Defense counsel further explained that, when he "decided to look" at the recording "more carefully" after trial, he discovered, to his "complete surprise," that the recording "kept on going" beyond A.F.'s 911 call. During that portion, A.F. can be seen talking with the police for several minutes following the attack and can be heard telling the police about the attack and providing a description of her attacker. The statements provided by A.F. to the police in that recording were substantially similar to the statements she made during her 911 call and trial testimony.

Defense counsel argued that the State's failure to disclose A.F.'s recorded statement violated the discovery rules. Defense counsel further claimed that the State's discovery violation was prejudicial because, in her taped statement, A.F. never told the police that she had been digitally penetrated during the attack.

The court ultimately denied Chester's motion for a new trial:

> I don't think that [defense counsel] had a duty – that you shirked your responsibilities to your client in viewing the rest of the tape. It's clear on both sides that this particular video is very hard to open, but because it's so hard to open, I can't find that there's a discovery violation either, because the reason I ruled and allowed it in was I did not believe that [the prosecutor] intentionally withheld that evidence from you, and that's why I gave you the opportunity to view it.
>
> Moreover, [defense counsel], the portion that you're referring to with respect to the tape when the officers responded to the scene, [A.F.] was clear over and over again – because I thought you did a thorough job in asking her or reiterating to the jury as well as asking her – that she never initially stated

> that he digitally penetrated her at all. And that was one of your strong arguments with the jury … and it was a question for them, because your position was always that she never said it and that's not what happened. And she did give an explanation on the stand as to why she never mentioned it, because of shame. They either believed it or they didn't, but she never denied that she didn't initially say it at all. And so in terms of this portion where the officers respond to the scene and she doesn't say it to them, to me would not change the outcome of this trial at all, because I think it was thoroughly, thoroughly questioned during the course of the trial, and, therefore, your motion is denied.

DISCUSSION

I.

Chester first contends that the circuit court erred "when it found that the State's mid-trial disclosure of a surveillance DVD did not constitute a violation of the discovery rule." Chester maintains that, although the record is "admittedly unclear" as to whether the court found, at trial, that a discovery violation had occurred, the court "cleared up that uncertainty" when, at the hearing on his motion for a new trial, the court "ruled unequivocally that it did not believe that the discovery rule had been violated." Chester further maintains that, even if the surveillance DVD had been disclosed to the defense prior to trial, the plain language of Maryland Rule 4-263(d)(9), which governs the State's obligations to disclose evidence it intends to use at trial, "compels the conclusion" that a discovery violation occurred because "providing a DVD that cannot be opened or played does not constitute compliance." Because, Chester argues, the court erroneously found that the State complied with the discovery rule, we must assess whether that error was harmless beyond a reasonable doubt. Under that standard, Chester contends, reversal is required because "this Court cannot say that the court's error in finding that the State complied with

the discovery rule in no way influenced the verdict." Finally, Chester asserts that reversal would be still warranted even under an abuse of discretion standard because "the failure to provide a readable copy of the DVD was attributable to a lack of diligence on the part of the prosecutor;" because Chester "suffered a great deal of prejudice from the introduction of the DVD into evidence;" and because "the overnight recess was an insufficient remedy," as it left defense counsel "without the opportunity to address the DVD in his opening statement."

The State counters that the circuit court's handling of the matter at trial, *i.e.* its granting of a continuance and its extensive discussion of the prejudicial impact of the evidence and timing of the disclosure, supports the conclusion that the court "implicitly determined" that a discovery violation had in fact occurred. The State also rejects Chester's reliance on comments made by the court during the hearing on Chester's motion for a new trial, as those comments "were made more than two months after trial in ruling on a different alleged discovery violation pertaining to different evidence on the recording." The State maintains, therefore, that the appropriate standard of review is abuse of discretion and that, under that standard, the court did not err in ruling that exclusion of the recording was not a proper sanction for the State's discovery violation. The State further maintains that, even under a harmless error standard, reversal is not required because the admission of the recording in no way contributed to the guilty verdict.

Maryland Rule 4-263(d)(9) provides that, "[w]ithout the necessity of a request, the State's Attorney shall provide to the defense … [t]he opportunity to inspect, copy, and

photograph all documents, computer-generated evidence as defined in Rule 2-504.3(a), recordings, photographs, or other tangible things that the State's Attorney intends to use at a hearing or at trial." Such evidence must be provided "within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213(c)[.]" Md. Rule 4-263(h)(1). Moreover, the Rules provide that the State "is under a continuing obligation to produce discoverable material" and that, when further material information is obtained, such material must be disclosed "promptly." Md. Rule 4-263(j). "[T]he purpose of the discovery rules 'is to give a defendant the necessary time to prepare a full and adequate defense.'" *Raynor v. State*, 201 Md. App. 209, 228 (2011) (quoting *Ross v. State*, 78 Md. App. 275, 286 (1989)).

In the event that a court finds that a party failed to comply with its discovery obligations, "the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances." Md. Rule 4-263(n). Under that Rule, "the presiding judge has the discretion to select an appropriate sanction, but also has the discretion to decide whether any sanction is at all necessary." *Thomas v. State*, 397 Md. 557, 570 (2007). "[I]n exercising its discretion regarding sanctions for discovery violations, 'a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any

other relevant circumstances.'" *Raynor*, 201 Md. App. at 228 (quoting *Thomas*, 397 Md. at 570-71).

"The most accepted view of discovery sanctions is that in fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Thomas*, 397 Md. at 571. When a court is faced with a discovery violation, "the proper focus and inquiry is whether [the other party] was prejudiced, and if so, whether he was entitled to have the evidence excluded." *Id.* at 572. "Under Rule 4-263, a defendant is prejudiced only when he is unduly surprised and lacks adequate opportunity to prepare a defense, or when the violation substantially influences the jury. The prejudice that is contemplated is the harm resulting from the nondisclosure." *Id.* at 574.

In cases involving bad faith on the part of the prosecution or a discovery violation that irreparably prejudices a defendant, an extreme sanction, such as the exclusion of evidence, may be justified, or even required. *Raynor*, 201 Md. App. at 228. Because, however, "the exclusion of prosecution evidence as a discovery sanction may result in a windfall to the defense, exclusion of evidence should be ordered only in extreme cases." *Thomas*, 397 Md. at 573. "Where remedial measures are warranted, a continuance is most often the appropriate remedy." *Id.* "And the Court of Appeals has warned that, if a defendant declines a limited remedy that would serve the purpose of the discovery rules and instead seeks the greater windfall of an excessive sanction, 'the double or nothing

gamble almost always yields nothing.'" *Raynor*, 301 Md. App. at 228 (citing *Thomas*, 397 Md. at 575).

Against that backdrop, we hold that the circuit court did not err in admitting into evidence the audio and video recording depicting the moments leading up to and immediately following Chester's attack on A.F. To begin with, we disagree with Chester's assertion that the court "ruled unequivocally" that the prosecutor did not violate the rules of discovery in failing to disclose the recording. At no point, either at trial or at the hearing on Chester's motion for a new trial, did the court affirmatively state that no discovery violation had occurred, and we could find nothing of substance in the record to support that position. When the existence of the recording was first brought to the court's attention at trial, the prosecutor did not dispute that he had an obligation to disclose that evidence but instead maintained that he did not disclose the evidence sooner because he could not access it and, as a result, had not intended to use it at trial. Then, after the court granted a recess so that the prosecutor and defense counsel could view the recording for the first time, the court, upon learning that the recording contained audio from the time of the attack, granted a continuance so that defense counsel could view the recording in greater detail. The following day, when defense counsel sought exclusion of the evidence and insisted that a discovery violation had occurred, the court did not contradict defense counsel's assertion. To the contrary, the court recognized that it was not "the first or last time that … the State or the Defense [came] into possession of evidence that they want to use at trial" and that, in those situations, the court "has to make a decision as to whether or not to allow it." In

determining whether to admit the recording, the court discussed, in great detail, the reasons why the State did not disclose the recording sooner and any prejudice inherent in the untimely disclosure and nature of the evidence itself. In the end, the court admitted the evidence "because it [had] nothing in terms of [defense counsel's] opening statement that would have changed [the defense]" and because "it [had] nothing new with respect to the testimony of the victim."

In light of the above facts, we are persuaded that the court implicitly determined that the State had in fact violated the rules of discovery in failing to disclose the recording. As noted by the State, it would be incongruous for the court to grant a continuance and then engage in such a lengthy discussion of the circumstances of the disclosure and the nature of the evidence if the court had ruled that no discovery violation had actually occurred. In other words, the only reasonable explanation for the court's handling of the matter is that the court did find a discovery violation but determined that the sanction of exclusion was not appropriate under the circumstances. *See State v. Chaney*, 375 Md. 168, 181 (2003) (noting that judges are presumed to know the law and apply it properly). Moreover, the court's subsequent remarks at the hearing on Chester's motion for a new trial do not alter our conclusions, as the court's comments were made well after the fact and in reference to the State's disclosure of a different piece of evidence. In any event, the court did not state, or even suggest, that it had found no discovery violation at trial; rather, the court simply stated that it "did not believe that [the prosecutor] intentionally withheld that evidence." That comment can hardly be considered "unequivocal," much less

sufficient to substantiate Chester's assertion that the court had determined at trial that no discovery violation had occurred.

We are likewise persuaded that the court did not abuse its discretion in refusing to grant defense counsel's request for the extreme sanction of exclusion. First, it is undisputed that there was no bad faith on the part of the prosecutor in failing to disclose the recording earlier, as the prosecutor was unable to access the recording, and thus was unaware of its substance, until trial. Moreover, the court granted a limited remedy in the form of a short continuance, which allowed defense counsel the opportunity to view the recording in greater detail and to prepare an appropriate defense. When the parties returned to court the next day, defense counsel, rather than asking for more time to review the material, sought the windfall of exclusion.

In denying that request, the court correctly determined that Chester was not prejudiced by the late disclosure. At the time of the disclosure, Chester had yet to cross-examine A.F.; consequently, Chester had a full and fair opportunity to use the recordings to impeach A.F.'s testimony. *See Francis v. State*, 208 Md. App. 1, 26-27 (2012) (holding that the defendant's case was not irreparably prejudiced by the State's late disclosure of a witness's statements where, "once the defense was fully aware of the statements, they used them to impeach [the witness's] testimony and obtained a 'full and adequate defense.'") (citing *Raynor*, 201 Md. App. at 227-28). And, although Chester may have been surprised to learn of the recording's existence, we cannot say that he was unduly surprised or denied adequate opportunity to prepare a defense. Aside from the discrepancy between the length

of the attack as shown on the video (approximately three minutes) and the length of the attack according to A.F.'s testimony (approximately 15 to 20 minutes), the content of the recording was consistent with A.F.'s 911 call, her statement to police, and her trial testimony.

Importantly, nothing in the recording contradicted, in any meaningful way, Chester's defense, in which he claimed that his altercation with A.F. was a misunderstanding and that he did not digitally penetrate her vagina. In some respects, the recording actually aided the defense, as defense counsel used the recording during his cross-examination of A.F. to highlight discrepancies between the recording and A.F.'s direct testimony. The recording was also consistent with Chester's pretrial statements to the police, in which he admitted that he "tussled" with A.F. and that A.F. was "screaming" and "yelling" during the altercation. Accordingly, Chester was not prejudiced by the State's late disclosure of the recording, and the court did not abuse its discretion in admitting it into evidence.

Even if the court had concluded that no discovery violation had occurred, our independent review of the record supports that conclusion. *See generally, Thomas v. State*, 213 Md. App. 388, 402 (2013) ("[T]he question whether a discovery violation occurred under the Maryland Rules is reviewed *de novo*."). Maryland Rule 4-263 expressly identifies certain material and information that must be disclosed by the State prior to trial. Md. Rule 4-263(d). The Rule also expressly identifies certain material and information that the State is not required to disclose. Md. Rule 4-263(g). It is axiomatic, therefore, that

in order for the State to determine whether material and information are "discoverable," the material and information must be identifiable. *See Cole v. State*, 378 Md. 42, 57 (2003) ("[T]he right to pre-trial discovery is strictly limited to that which is permitted by statute or court rule or mandated by constitutional guarantees.") (citations and quotations omitted); *See also Williams v. State*, 364 Md. 160, 171 (2001) ("[W]hen determining whether a discovery violation exists, we first look to the plain meaning of the rule.").

Here, it is clear from the record that the State, despite exercising due diligence in trying to access the surveillance DVD, had no knowledge as to what the surveillance DVD actually contained. *See generally* Md. Rule 4-263(c)(1) (requiring that the State "exercise due diligence to identify all of the material and information that must be disclosed[.]"). When it did finally access the DVD at trial, the State discovered the audio/video recording of the attack, at which point the State disclosed the recording to the defense in conformance with its obligations under the Maryland Rules. *See* Md. Rule 4-263(j) ("A party who has responded to a request or order for discovery and who obtains further material information shall supplement the response promptly."). Thus, even though the State technically had the recording of the attack in its possession and control prior to trial, it cannot be said that the State failed to disclose discoverable material, given that the State could not identify the recording, and thus could not determine whether the recording was discoverable, until after the State managed to access the surveillance DVD at trial.[5]

[5] Chester, citing *Bailey v. State*, 303 Md. 650 (1985), argues that the State's lack of knowledge as to the contents of the surveillance DVD did not relieve the State of its discovery obligation. Chester's reliance on *Bailey* is misplaced. There, the Court of Appeals held that the State violated the rules of discovery in failing to disclose pre-trial

Assuming, *arguendo*, that the circuit court did make a specific finding of no discovery violation and that that finding was erroneous, we are convinced that the court's error was harmless. *See generally Williams*, 364 Md. at 169 ("If the trial judge erred because the State did in fact violate the discovery rule, we consider the prejudice to the defendant in evaluating whether such error was harmless."). For such an error to be harmless, an appellate court "must be able to declare, beyond a reasonable doubt, that the error in no way influenced the verdict; otherwise, reversal is required." *Id.* at 179.

As previously discussed, the content of recording, which was more or less identical to other evidence already admitted, added little to the State's case-in-chief and likely had no effect on Chester's defense. *Compare to Williams*, 364 Md. at 179-81 (holding that the State's failure to disclose a pretrial identification was not harmless error where the only other evidence placing the defendant at the scene of the crime was the testimony of an accomplice). The recording provided virtually no insight into the primary fact in issue, namely, whether Chester sexually assaulted A.F. by digitally penetrating her vagina. As for the recording being "inflammatory" because, according to Chester, A.F. was "highly emotional," we remain convinced that any resulting impact on the jury was minimal. A.F. was sobbing, at times hysterically, during her 911 call to the police, and the transcript of her trial testimony reveals that she was at times quite emotional. Accordingly, we can

statements made by the defendant to an out-of-state police officer. *Id.* at 655-57. That holding was based on the Court's determination that the out-of-state police officer was a "State agent" within the meaning of the discovery rules. *Id.*

declare, beyond a reasonable doubt, that the admission of the recording in no way influenced the jury's verdict.

II.

Chester next argues that the circuit court erred in denying his motion for a new trial, which was based on his post-trial discovery that the surveillance recording "not only contained audio of the incident but also contained video of [A.F.] being questioned by the police" immediately following the attack. According to Chester, the State's failure to disclose that evidence prior to trial constituted "error" subject to "a harmless error analysis, notwithstanding that the matter under review is the denial of a motion for new trial."[6] Under that standard, Chester asserts, reversal is required because it cannot be said that the State's error in no way influenced the verdict. Chester maintains that "at no point" during A.F.'s recorded statement to police did she say that Chester digitally penetrated her, a fact that would have supported Chester's defense and "would have provided yet another example of an inconsistency between [A.F.'s] testimony and her prior statements." Chester also maintains that, in contrast to A.F.'s 911 call, her recorded statement shows her to be "calm and in control of her emotions," which "makes the failure to disclose the penetration all the more striking." Finally, Chester contends that, even if the court's denial of his motion for a new trial is reviewed under an abuse of discretion standard, reversal is still

[6] Chester maintained that the State violated Maryland Rule 4-263(d)(3), which provides, in relevant part, that the State must disclose, as to each witness the State intends to call to prove its case-in-chief, "all written statements of the witness that relate to the offense charged[.]" The Rule defines "written statement" to include "the substance of a statement of any kind made by that person that is embodied or summarized in a writing or recording, whether or not signed or adopted by the person[.]" Md. Rule 4-263(b)(6)(B).

required. Chester maintains that the court abused its discretion in part because the court erroneously ruled that the State's failure to disclose A.F.'s recorded statement was not a discovery violation. Chester further maintains that the court abused its discretion because it "misunderstood" the potential impact of A.F.'s recorded statement and because the court based its decision on whether the undisclosed statement would have changed the outcome of trial rather than the more appropriate "interest of justice" standard.

The State responds that the proper standard under which to review the court's denial of Chester's motion is abuse of discretion. Under that standard, the State maintains, the court did not err in denying Chester's motion because Chester did not exercise due diligence in discovering A.F.'s recorded statement; because the statement was merely cumulative of other evidence; and because any benefit that Chester may have derived from the recording was minimal given that defense counsel cross-examined A.F. at length about her failure to disclose the digital penetration following the attack. For the same reasons, the State maintains that, even under the harmless error standard, a new trial is inappropriate.

Maryland Rule 4-331(a) provides that, "[o]n a motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial." "The list of possible grounds for the granting of a new trial by the trial judge within ten days of the verdict is virtually open-ended." *Love v. State*, 95 Md. App. 420, 427 (1993). "The court's discretion in ruling on such a motion is broad, and the bases on which a criminal defendant may seek to have the court exercise its wide discretion are not limited." *Folk v.*

State, 142 Md. App. 590, 603 (2002). The burden of proving that a new trial is warranted rests with the moving party. *Jackson v. State*, 164 Md. App. 679, 686 (2005).

A court's decision to grant a new trial pursuant to Rule 4-331(a) is ordinarily reviewed for abuse of discretion. *Williams v. State*, 462 Md. 335, 344 (2019). "Generally, abuse of discretion is the appropriate standard because the decision … 'depends so heavily upon the unique opportunity the trial judge has to closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record.'" *Id.* at 344-45 (citing *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 57 (1992)). Moreover, "[a] trial court has wide latitude in considering a motion for new trial and may consider a number of factors[.]" *Argyrou v. State*, 349 Md. 587, 599 (1998). Thus, "a trial judge's discretion to grant or deny a new trial is not fixed and immutable[.]" *Id.* at 600. That is, a trial judge's discretion "will expand or contract depending upon the nature of the factors being considered, and the extent to which its exercised depends upon the opportunity the trial judge had to feel the pulse of the trial, and to rely on his or her own impressions in determining questions of fairness and justice." *Id.*

That said, the abuse of discretion standard is not applicable in every case involving a court's decision pursuant to Rule 4-331(a). In *Merritt v. State*, 367 Md. 17 (2001), the Court of Appeals noted that "under some circumstances a trial judge's discretion to deny a motion for a new trial is much more limited than under other circumstances" and that "there are situations in which there is virtually no discretion to deny a new trial." *Id.* at 29. The Court explained that, "when an alleged error is committed during the trial, when the losing

party or that party's counsel, without fault, does not discover the alleged error during the trial, and when the issue is then raised by a motion for a new trial, we have reviewed the denial for the new trial motion under of standard of whether the denial was erroneous." *Id.* at 30-31. That standard was later reaffirmed by the Court in *Williams*, 462 Md. at 349, in which the Court held that, for a denial of a new trial motion to be reviewed under the harmless error standard rather than for abuse of discretion, "[t]hree elements must be present: an alleged error occurred during trial that was not discovery during trial, the losing party was without fault for not discovering the error during the trial, and the error is raised in writing." *Id.*

As noted, Chester contends that the denial of his motion for a new trial should be reviewed for harmless error, whereas the State contends that the appropriate standard is abuse of discretion. We agree with the State.

For the harmless standard to be applicable, the losing party must be without fault in failing to discover the error during trial. In *Merritt v. State*, for example, the parties discovered after trial that the courtroom clerk had, without their knowledge, mistakenly submitted an exhibit to the jury during deliberations that had not been admitted into evidence. *Merritt*, 367 Md. at 32. When the defendant raised the issue in a motion for new trial, the court denied the motion, and this Court affirmed. *Id.* at 22-23. The Court of Appeals later reversed, holding, in part, that the court's denial should be reviewed for harmless error. *Id.* at 32-35. The Court explained that the harmless error standard was appropriate because there was "no doubt that error was committed during [the defendant's]

trial" and because the defendant was not at fault for not discovering the error at trial. *Id.* at 32. The Court further explained that the clerk's action in submitting the exhibit to the jury "was essentially the same as the action of a trial judge in erroneously admitting an exhibit into evidence" but that the only real difference was that "in the latter situation, defense counsel would have been aware of the action and would have had an opportunity to object." *Id.*

More recently, in *Williams v. State*, the Court of Appeals again reviewed a denial of a motion for new trial under the harmless error standard. *Williams*, 462 Md. at 353. There, the trial court, at the behest of both parties, read to the jury a pattern jury instruction that the defendant, after trial, asserted was "incorrect." *Id.* at 341-42. After the defendant's motion for a new trial was denied and this Court affirmed, the Court of Appeals reversed. *Id.* at 342, 359. In holding that the harmless error standard was the appropriate standard under which to review the court's denial of the defendant's motion for a new trial, the Court, citing *Merritt*, stated that there was "no debate that an error, the delivery of the faulty jury instruction, occurred during trial[.]" *Id.* at 348. The Court also noted that the responsibility for avoiding the giving of a faulty jury instruction "rests with the trial judge who must advise the jury on every matter stemming from the evidence which is vital to its determination of the issues before them." *Id.* The Court concluded, therefore, that it could "not ascribe any fault to either [party]." *Id.*

Here, the "error" at issue was the State's failure to disclose the existence of A.F's recorded statement. According to the record, A.F.'s recorded statement was part of the

previously undisclosed surveillance recording, which also featured the audio recording of the attack, the video recording of Chester entering and leaving A.F.'s office, and A.F.'s 911 call. The entire surveillance recording lasted approximately one hour – from 6:30 a.m. until 7:30 a.m. – with the recording of the attack starting at approximately 6:45 a.m. and ending at approximately 6:48 a.m. Immediately thereafter, A.F. can be seen and heard talking with the 911 operator, which lasts until approximately 7:03 a.m. Toward the end of that 911 call, A.F. can be heard telling the operator, "We see the police officer now." That exact same comment can also be heard during the audio recording of A.F.'s 911 call, which was properly disclosed to the defense and admitted into evidence. In that audio recording, after A.F. makes the comment about seeing the police, the 911 operator can be heard telling A.F. to "go ahead and talk with them." At that point, according to the surveillance video, the police show up and begin interviewing A.F. That interview lasts until approximately 7:09 a.m. It is that approximately six-minute interview that Chester claims should have been disclosed by the State.

We cannot say, based on the record before us, that Chester, or at least defense counsel, was "without fault" in failing to discover at trial the existence of A.F.'s recorded statement. This is not the type of situation where, like in *Merritt*, defense counsel could not have known about the error, nor is this the type of situation where, like in *Williams*, the court is ultimately responsible for avoiding the error. Rather, defense counsel was well-aware that the surveillance video contained a recording of the attack and a recording of A.F.'s 911 call to the police, and he was given ample time during trial to view the entire

recording. Had defense counsel simply watched the entire surveillance video, which was only one-hour long, he would have discovered A.F.'s recorded statement. In any event, once the existence and contents of the surveillance video came to light, defense counsel should have known that the surveillance video may have captured A.F.'s interview with the police immediately after the attack. In the audio portion of A.F.'s 911 call, which was properly disclosed by the State, A.F. can be heard telling the operator that the police were there, and the operator can be heard telling A.F. to "go ahead and talk with them." Given that A.F.'s recorded statement immediately followed that exchange, and given that the surveillance recording had also captured A.F.'s 911 call, defense counsel should have been aware of the existence of A.F.'s recorded statement. At the very least, a reasonably prudent person in defense counsel's position would have watched the remaining 30 minutes of footage to ascertain whether any such recording existed.

Chester argues that he was not at fault for failing to discover at trial the existence of A.F.'s recorded statement because the prosecutor gave defense counsel "the clear impression" that the only thing on the recording was the audio and video of the attack and because "the prosecutor did not retract his pre-trial representations that there were no videotaped statements by the victim." Chester also argues that he was not at fault because A.F.'s recorded statement "does not immediately follow the clip that the prosecutor showed defense counsel and then later played at trial." Chester maintains that "there was no reason,

therefore, for defense counsel to assume that the DVD contained anything other than what was played in court by the prosecutor."[7]

We remain unconvinced. As discussed, there were several plausible reasons for defense counsel to suspect that the surveillance recording contained something other than what was played in court. And, although we do not dispute that the prosecutor may share some of the blame for the parties' failure to discover at trial A.F.'s recorded statement, any "impression" exhibited by the prosecutor as to the content of the surveillance recording did not relieve Chester and defense counsel of their responsibility in discovering A.F.'s recorded statement. In other words, irrespective of the prosecutor's actions, and for the reasons previously stated, defense counsel was not "without fault" in failing to discover the recording at trial. Thus, we review for abuse of discretion the court's denial of Chester's motion for a new trial.

Under that standard, we hold that the court did not err in denying Chester's motion. "To reverse the denial of a new trial on appeal, when utilizing the abuse of discretion standard, the reviewing court must find that the 'degree of probable prejudice was so great that it was an abuse of discretion to deny a new trial.'" *Williams*, 462 Md. at 345 (citing *Merritt*, 367 Md. at 29)). "'Abuse occurs when a trial judge exercises discretion in an

[7] Chester also notes that the court, in denying his motion for a new trial, stated that defense counsel had not "shirked [his] responsibilities to [his] client" in failing to discover A.F.'s recorded statement during trial. To the extent that that finding can be construed as a definitive ruling that defense counsel was "without fault for not discovering the error during the trial," *Williams*, 462 Md. at 349, and to the extent that we are bound by that finding, we conclude that the court's finding was erroneous, as it was not supported by any competent evidence, for the reasons discussed herein. *See generally Bontempo v. Lare*, 444 Md. 344, 363 (2015) (discussing the clearly erroneous standard of review).

arbitrary or capricious manner or when he or she acts beyond the letter or reason of law.'" *Id.* (citing *Campbell v. State*, 373 Md. 637, 666 (2003)).

Here, the court determined that the State did not violate its discovery obligations in failing to disclose A.F.'s recorded statement. For the reasons previously discussed regarding the State's failure to disclose the recording of the attack, we cannot say that the court erred in making that determination. Nevertheless, it does not appear that the court denied Chester's motion for that reason. Rather, the court denied Chester's motion because the purported import of A.F.'s recorded statement, namely, that A.F. did not immediately disclose to the police that Chester had digitally penetrated her during the attack, had been thoroughly vetted during defense counsel's cross-examination. The court also stated that A.F. had admitted "over and over again" that she "never initially stated that [Chester] digitally penetrated her at all" and that, as a result, exposing the jury to A.F.'s recorded statement "would not change the outcome of this trial at all." Although the court did not indicate that it was denying Chester's motion "in the interest of justice," it is clear that the court considered several appropriate factors in making its decision. *See Ross v. State*, 232 Md. App. 72, 103-04 (2017) (holding that the court did not err in denying the defendant's Rule 4-331(a) motion for new trial where alleged exculpatory evidence was not newly discovered and was cumulative of other evidence). We are convinced, therefore, that the court properly exercised it discretion in determining that a new trial was unwarranted.

Finally, even under the harmless error standard, Chester's claim would still fail. As noted by the court in denying Chester's motion for new trial, admitting A.F.'s recorded

statement into evidence would have been redundant given that A.F. had already acknowledged "over and over" that she did not immediately disclose the digital penetration to the police. Besides, defense counsel probed the issue at length during his cross-examination of A.F., and any added benefit he may have gleaned in confronting A.F. with her recorded statement would almost certainly have been minimal. Accordingly, we are persuaded beyond a reasonable doubt that the "error" in no way influenced the verdict.

III.

Chester next contends, and the State concedes, that the sentencing court should have merged, for sentencing purposes, his conviction of second-degree burglary into his conviction of first-degree sex offense. We agree.

Ordinarily, the "required evidence test" dictates whether two offenses merge for sentencing purposes. *Coleman v. State*, 237 Md. App. 83, 99 (2018), *cert. dismissed* 461 Md. 488. Under that test, if one of the offenses contains all of the elements of the other offense, that is, if only one of the offenses has a distinct element, the two offenses are deemed to be the same and merger is required. *Potts v. State*, 231 Md. App. 398, 413 (2016). In some instances, even where two offenses do not merge under the required evidence test, merger may still be appropriate. *Alexis v. State*, 437 Md. 457, 490-91 (2014).

Here, for example, the court instructed the jury that, in order to convict Chester of second-degree burglary, the jury needed to find that Chester broke into and entered someone else's building with the intent to commit first-degree sex offense and/or second-degree sex offense. The court also instructed the jury that, in order to find Chester guilty

of first-degree sexual offense, the jury needed to find that Chester committed a second-degree sexual offense and that he either 1) inflicted suffocation, strangulation, disfigurement, or serious physical injury against A.F. in the course of committing the offense; or 2) committed the offense in connection with a burglary in the second-degree. Based on those instructions, it is possible that the jury found Chester guilty of first-degree sexual offense because it determined that he had committed a second-degree sexual offense while inflicting suffocation, strangulation, disfigurement, or serious physical injury against A.F. It is equally possible, however, that the jury found Chester guilty of first-degree sexual offense because it determined that he committed a second-degree sexual offense while committing burglary in the second-degree. In the former scenario, the two offenses at issue – second-degree burglary and first-degree sexual offense – each have a distinct element that the other does not and, therefore, would not merge under the required evidence test. In the latter scenario, the two offenses would merge under the required evidence test because, in order to find Chester guilty of first-degree sexual offense, the jury would necessarily have to find him guilty of second-degree burglary.

When such a situation occurs, we look to the record to identify the bases for the jury's findings of guilt. *Snowden v. State*, 321 Md. 612, 618-19 (1991). Where, as here, the record is ambiguous on that point, "fundamental fairness" dictates that we resolve the ambiguity in the defendant's favor. *Id.* Accordingly, we hold that Chester's conviction of second-degree burglary should have merged for sentencing purposes into his conviction of first-degree sexual offense. Pursuant to *Twigg v. State*, 447 Md. 1, 27-30 (2014), we vacate

Chester's sentences and remand for resentencing. On remand, the sentencing court may impose a new sentence on the conviction of first-degree sexual offense, provided that the new sentence does not exceed the aggregate sentence previously imposed (a total term of 65 years' imprisonment, with all but 35 years suspended). *Id.* at 30.

SENTENCES VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR RESENTENCING CONSISTENT WITH THIS OPINION; JUDGMENTS OF THE CIRCUIT COURT OTHERWISE AFFIRMED; COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY PRINCE GEORGE'S COUNTY.