

**THIRD DIVISION
ELLINGTON, P. J.,
BETHEL and GOBEIL, JJ.**

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June 29, 2018

**NOT TO BE OFFICIALLY
REPORTED**

In the Court of Appeals of Georgia

A18A0751. SCOTT v. THE STATE.

GOBEIL, Judge.

Following a jury trial, Akeem Scott was convicted in Fulton County Superior Court of four counts of child molestation. Scott now appeals from the denial of his motion for a new trial, arguing that the trial court erred when it partially closed the courtroom during the testimony of the child victim. He further contends that the evidence was insufficient to support his conviction for child molestation as charged in Count 5 of the indictment. Scott also asserts a claim of ineffective assistance of counsel, and he argues that the trial court erred in refusing to allow him to pierce the Rape Shield Statute (OCGA § 24-4-412) because the victim's sexual history (including any history of prior molestation) was relevant to his defense. Finally, Scott contends that the trial court erred in failing to merge his convictions on counts 2, 3,

and 4 of the indictment and in failing to sentence him in accordance with OCGA § 17-10-6.2. For reasons explained more fully below, we find no merit in Scott's first four enumerations of error, and we therefore affirm his convictions. Additionally, we find no error by the trial court in failing to merge Scott's convictions. We further find, however, that the trial court failed to sentence Scott in compliance with the relevant statute. Accordingly, we vacate Scott's sentence and remand for re-sentencing.

“On appeal from a criminal conviction, the defendant is no longer entitled to a presumption of innocence and we therefore construe the evidence in the light most favorable to the jury's guilty verdict.” *Marriott v. State*, 320 Ga. App. 58, 58 (739 SE2d 68) (2013) (citation omitted). So viewed, the record shows that at the time of the charged crimes, the victim, E. W., was 11 years old. In February 2011, E. W. was spending a Saturday night at the home of her cousin. Also present in the home was Scott, who was the cousin's boyfriend. The cousin left for work early Sunday morning and sometime thereafter, E. W. woke up because she “felt something . . . crawling” on her. E. W. looked up, and after seeing Scott standing next to her bed, she put her head back down to go back to sleep. Scott then reached under her clothes and fondled her breasts, her buttocks and anal area, and her vagina. According to E. W., Scott inserted his finger in both her vagina and her anus.

After Scott left the bedroom, E. W. got out of bed and went into the bathroom, locking the door. Scott picked the lock on the bathroom door and opened it to find E. W. using the restroom. E. W. told Scott three times to get out of the restroom, and each time he responded by telling her to “shut up.” Scott left the restroom only when E. W. was through using it.

Later that day, after E. W. was able to locate a working cell phone, she called her mother and told her about the incident. E. W.’s mother contacted the police. After interviewing E. W. at her mother’s home, police advised E. W.’s mother to take her for a physical exam. E. W. and her mother went to the children’s hospital later that day, where E. W. was examined by Martha Cargill, a pediatric nurse practitioner. The examination showed a laceration between E. W.’s buttocks, in the anal area. According to Cargill, the laceration was no more than 48 hours old, and based on her training and experience, Cargill opined that the injury could have been caused by a fingernail. E. W.’s physical exam also showed that she had bacterial vaginosis, which occurs when the healthy bacteria in the vaginal area are disrupted. Cargill explained that bacterial vaginosis is an infection that girls sometimes get, but there is no way to tell when or how E. W. got such an infection.

Police also arranged for E. W. to undergo a forensic interview, and a video recording of that interview was introduced into evidence and played at trial. After observing E. W.'s forensic interview, police obtained a warrant for Scott's arrest. Scott was subsequently indicted on one count of aggravated sexual battery and four counts of child molestation.

E. W. was the first witness to testify at trial. Before she took the stand, the State asked that the courtroom be partially closed. When the court asked defense counsel if he had any objection, the lawyer noted that the statute providing for such closures allowed the press and family members of the defendant to remain in the courtroom. Defense counsel also stated that he had a "constitutional objection" to the closure. The trial court thereafter clarified that Scott's constitutional objection was based on cases involving a complete closure of the courtroom where child victims were not involved. Trial counsel then asserted that the statute allowing partial closure of the courtroom during the testimony of a child victim allowed the defendant's immediate family to remain in the courtroom, and informed the court that Scott's fiancée, mother, brother, sister, aunt, and cousin were present and wished to remain. . When the trial court stated that an aunt and cousin did not qualify as immediate family, defense counsel conceded that "probably [they do] not." Defense counsel further

conceded that a fiancée was not an immediate family member. The court then ruled that the aunt, cousin, and fiancée would need to leave the courtroom during E. W.'s testimony, and defense counsel offered no further objection.

At trial, E. W. testified as to Scott's molestation of her. Additionally, the evidence showed that E. W. made consistent outcry statements to her cousin's son, her cousin, and her mother. These outcry statements were also consistent with E. W.'s trial testimony, the statements she made to hospital personnel, and those she made during her forensic interview.

The jury found Scott guilty of the four charged counts of child molestation but not guilty of the single count of aggravated sexual battery. The trial court entered a judgment of conviction based on this verdict and sentenced Scott to a total of 80 years, with 40 years to serve and the remaining 40 years suspended. Following his conviction, Scott filed a motion for a new trial. After holding an evidentiary hearing, the trial court denied that motion. This appeal followed.

1. Scott's fiancée, aunt, and cousin were excluded from the courtroom during E. W.'s testimony pursuant to OCGA § 17-8-54. That statute provides:

In the trial of any criminal case, when any person under the age of 16 is testifying concerning any sexual offense, the court shall clear the

courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, victim assistance coordinators, victims' advocates, and such other victim assistance personnel . . . , jurors, newspaper reporters or broadcasters, and court reporters.

On appeal, Scott contends that the trial court erred in relying solely on the statute to justify its partial closure of the courtroom. Instead, Scott argues, the trial court was required to apply the four-part test for the closure of courtrooms articulated by the United States Supreme Court in *Waller v. Georgia*, 467 U.S. 39 (104 SCt 2210, 81 LE2d 31) (1984).¹ And Scott further contends that the trial court's failure to apply the *Waller* test resulted in a violation of his Sixth Amendment right to a public trial. We find no error.

OCGA § 17-8-54 does not allow a total closure of the courtroom. Instead, it allows only a partial closure, in that the closure is for a limited time, excludes only certain members of the general public, and allows access for the press. See *Jackson*

¹ Under that test, the party seeking the closure of the courtroom must demonstrate: (1) an overriding interest that is likely to be prejudiced if the courtroom remains open; and (2) that the requested closure is no broader than necessary to protect that interest. 467 U.S. at 48 (II) (B). If the party seeking the closure can meet this burden, the trial court must then consider reasonable alternatives to closure and "it must make findings adequate to support the closure." *Id.*

v. State, 339 Ga. App. 313, 316 (2) (a) (793 SE2d 201) (2016). And we have previously concluded that the rigorous test set forth in *Waller* does not apply to partial closures of the courtroom. *Id.* See also *Delgado v. State*, 287 Ga. App. 273, 280 (2) (651 SE2d 201) (2007) (the impact of a partial closure of the courtroom “is not as great [as a total closure], and not as deserving of such a rigorous level of constitutional scrutiny”) (citation and punctuation omitted); *Judd v. Haley*, 250 F3d 1308, 1316-1317 (11th Cir. 2001) (the four-part *Waller* test applies only where there is a complete closure of the courtroom). Accordingly, we have found that the partial closure of the courtroom permitted under OCGA § 17-8-54 “does not violate a defendant’s constitutional right to a public trial.” *Tolbert v. State*, 321 Ga. App. 637, 637 (1) (742 SE2d 152) (2013) (explaining that OCGA § 17-8-54 “is based upon a legislative determination that there is a compelling state interest in protecting children while they are testifying concerning a sex offense”) (citation and punctuation omitted). See also *Pate v. State*, 315 Ga. App. 205, 213 (5) (726 SE2d 691) (2012); *Delgado*, 287 Ga. App. at 279 (2).

In his brief, Scott argues that we should overrule our prior decisions on this issue and find that the trial court may not rely on OCGA § 17-8-54 to order a partial closure of the courtroom without applying the *Waller* test. Specifically, Scott is

asserting that in the absence of the *Waller* test, OCGA § 17-8-54 violates a defendant's Sixth Amendment right to a public trial. Scott, however, failed to raise this constitutional challenge to the statute in the court below, and he has therefore waived this claim of error on appeal. See *Craven v. State*, 292 Ga. App. 592, 594 (1) (b) (664 SE2d 921) (2008) (noting that “[i]t is generally held that the right to a public trial may be waived by a defendant,” and holding that a defendant's failure to challenge the constitutionality of OCGA § 17-8-54 before the closure occurred barred him from raising that challenge on appeal). See also *Robles v. State*, 277 Ga. 415, 421 (9) (589 SE2d 566) (2003) (constitutional challenges to a statute “must be raised at the first opportunity,” and a defendant's failure to raise a timely challenge “waives the issue[] on appeal”).

2. Scott asserts that the evidence was insufficient to support his conviction on Count 5 of the indictment, which charged Scott with child molestation based on his entering the bathroom to observe E. W. urinate. With respect to this claim of error,

the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In determining that question, we consider the inferences that can be logically derived from the evidence presented at trial. As long as there is some competent evidence, even though contradicted, to support each

fact necessary to make out the State's case, the jury's verdict will be upheld.

Wade v. State, 305 Ga. App. 819, 821 (701 SE2d 214) (2010) (citation and punctuation omitted).

Under Georgia law, a person commits the offense of child molestation when he or she “[d]oes any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person.” OCGA § 16-6-4 (a) (1). On appeal, Scott claims that the State failed to prove either that E. W. was urinating at the time Scott broke into the bathroom or that in observing the child urinate, Scott acted with the intent to arouse or satisfy his sexual desires. We disagree.

“Intent, which is a mental attitude, is commonly detectable only inferentially, and the law accommodates this [fact].” *Duvall v. State*, 273 Ga. App. 143 (1) (a) (614 SE2d 234) (2005) (citation and punctuation omitted). Thus, the question of intent “is peculiarly a question of fact for determination by the jury,” *Blanton v. State*, 191 Ga. App. 454, 455 (1) (382 SE2d 133) (1989), which may infer a defendant's intent from the evidence presented at trial. *Branam v. State*, 204 Ga. App. 205, 206 (1) (419 SE2d 86) (1992). See also OCGA § 16-2-6 (the trier of fact may find the requisite criminal

intent “upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted”). Where the jury finds the requisite intent, that finding will not be reversed on appeal provided there is some evidence supporting the jury’s inference. *Howard v. State*, 268 Ga. App. 558, 559 (602 SE2d 295) (2004) (“even when a finding that the accused had the intent to commit the crime charged is supported by evidence which is exceedingly weak and unsatisfactory the verdict will not be set aside on that ground”) (citation and punctuation omitted).

In this case, E. W. testified that she went into the bathroom after Scott molested her because she “needed to use it.” E. W. further testified that Scott entered the bathroom while she “was using the restroom,” and stated that “when I finished [using the restroom], [Scott] left” the bathroom. Given the surrounding circumstances at the time Scott broke into the restroom, E. W.’s testimony was sufficient to allow the jury to conclude both that Scott stood and watched E. W. as she urinated and that he did so for the purpose of arousing or satisfying his sexual desires. See *Craft v. State*, 252 Ga. App. 834, 842 (1) (b) (558 SE2d 18) (2001) (evidence showing that defendant took photographs of minor boys urinating sufficed to allow the jury to infer that the defendant engaged in this conduct “for his own sexual gratification”). See also *Brown*

v. State, 324 Ga. App. 718, 720 (1) (751 SE2d 517) (2013) (jury could infer the defendant showed pornography to child for purpose of arousing defendant’s sexual desires); *Duvall*, 273 Ga. App. at 143 (1) (a) (jury could infer from defendant’s conduct in sitting child in chair with him and rubbing her vaginal area that defendant “acted with the intent to arouse or satisfy his sexual desires”).

3. Scott asserts that his trial counsel provided ineffective assistance by failing to: (a) cross-examine the nurse practitioner who examined E. W. regarding the cause, epidemiology, and disease progress of bacterial vaginosis; (b) hire an independent expert to testify as to the cause, epidemiology, and disease progression of bacterial vaginosis; and (c) proffer an appropriate reason for piercing the Rape Shield Statute.

To prevail on a claim of ineffective assistance, Scott bears the burden of proving both that the performance of his lawyer was deficient and that he suffered prejudice as a result of this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (III) (104 SCt 2052, 80 LE2d 674) (1984). If Scott cannot meet his burden of proving either prong of the *Strickland* test, then we need not examine the other prong. *Battles v. State*, 290 Ga. 226, 229 (2) (719 SE2d 423) (2011).

Scott contends that trial counsel should have cross-examined the nurse practitioner and hired an independent expert to establish both the incubation period

for bacterial vaginosis and the fact that bacterial vaginosis “is caused primarily through sexual behavior.” Such evidence, Scott claims, would have established that his alleged digital penetration of E. W.’s vagina could not have caused her infection; that because E. W. had bacterial vaginosis, she probably had been sexually active and/or sexually abused by someone other than Scott; and that this alleged prior sexual activity or abuse provided E. W. with the motive to identify Scott as her molester to explain how she had contracted the infection. Additionally, Scott argues that trial counsel was ineffective because he failed to cite any of the foregoing reasons to the trial court as a basis for piercing the Rape Shield Statute and allowing Scott to question E. W. about her prior sexual activity.

(a) Scott contends that because the incubation period for bacterial vaginosis is between 24 and 48 hours, evidence of that fact would have supported Scott’s defense, as it would have demonstrated that his alleged digital penetration of E. W. could not have caused the child’s infection. Scott, however, was acquitted of aggravated sexual battery, which was the sole count of the indictment based on his alleged digital penetration of E. W. Thus, assuming *arguendo* that trial counsel’s failure to establish the incubation period for bacterial vaginosis was deficient performance, Scott cannot show that he suffered prejudice as a result.

(b) Nor can Scott show that he suffered prejudice as a result of trial counsel's failure to show that bacterial vaginosis can result from sexual activity. To demonstrate that he suffered prejudice as a result of his attorney's deficient performance, a defendant must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694 (III) (B). "This burden, though not impossible to carry, is a heavy one." *Arnold v. State*, 292 Ga. 268, 270 (2), (737 SE2d 98) (2013), citing *Kimmelman v. Morrison*, 477 U.S. 365, 382 (II) (C) (106 SCt 2574, 91 LEd2d 305) (1986).

The evidence at the hearing on Scott's motion for a new trial, including the testimony of the expert Scott retained for that hearing, established that the majority of cases of bacterial vaginosis are associated with sexual activity. The expert, however, could not offer an exact percentage of bacterial vaginosis cases linked to sexual activity. Moreover, the evidence also showed that girls who were not sexually active could develop the infection from doing things such as wearing a wet bathing suit or clothing that was too tight. Given this testimony, Scott failed to show a reasonable probability that the result of his trial would have been different had trial

counsel presented additional evidence regarding the causes of bacterial vaginosis. See *Crapps v. State*, 329 Ga. App. 820, 827 (3) (a) (766 SE2d 178) (2014) (defendant failed to prove his ineffective assistance claim where the record showed that even if trial counsel had presented the omitted evidence it was “unlikely that such evidence would have resulted in [defendant’s] acquittal”).

(c) We find no merit in Scott’s claim that trial counsel performed deficiently by failing to articulate the need for evidence of bacterial vaginosis when seeking to pierce the Rape Shield Statute.² In cases involving the prosecution of sexual offenses, that statute generally prohibits evidence relating to the past sexual behavior of the complaining witness. OCGA § 24-4-412 (a). Subsection (b) of the statute provides the only exception to this rule; such evidence may be introduced if

² The record shows that trial counsel sought to pierce the Rape Shield Statute because he wanted to show that E. W. had previously engaged in sexually inappropriate behavior with a younger child; that Scott had reprimanded her for that conduct; and that E. W. therefore had a motive to accuse Scott falsely of child molestation.

the court, following the procedure described in subsection (c)³ of this Code section, finds that the past sexual behavior directly involved the participation of the accused and finds that the evidence expected to be introduced supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution.

OCGA § 24-4-412 (b).

In this case, Scott was not seeking to introduce evidence regarding how E. W. contracted bacterial vaginosis to establish his reasonable belief that E. W. consented to his molestation of her. Thus, trial counsel could not have prevailed on an argument that the need for evidence showing the potential causes of E. W.'s infection permitted the piercing of the Rape Shield Statute. Counsel's failure to make that argument, therefore, did not constitute ineffective assistance. See *Causey v. State*, 319 Ga. App. 841, 844 (738 SE2d 672) (2013) (failure to pursue a futile motion does not constitute deficient representation and therefore cannot support a claim for ineffective assistance).

³ Under subsection (c), the trial court must hold an in camera hearing and make an express finding that the evidence in question “is so highly material that it will substantially support a conclusion that the accused reasonably believed that the complaining witness consented to the conduct complained of and that justice mandates the admission of such evidence” OCGA § 24-4-412 (c) (2).

4. Scott also claims that the trial court erred in refusing to allow him to pierce the Rape Shield Statute and question E. W. about her sexual activity (including any prior sexual molestation she had suffered). To the extent Scott is arguing that such evidence was necessary to show that something other than his alleged digital penetration of E. W. caused the infection, he cannot show he was harmed by the trial court's ruling, as the jury found Scott not guilty of aggravated sexual battery. See *Valle v. State*, 282 Ga. App. 223, 226 (3) (638 SE2d 394) (2006) (“[i]t is axiomatic that a defendant must show harm as well as error before reversal is warranted”). Moreover, as discussed in Division 3 (c), Scott was not seeking to pierce the Rape Shield Statute to show his reasonable belief that E. W. consented to his conduct. Given that the sole exception to the Rape Shield Statute did not apply in this case, the trial court did not abuse its discretion in refusing to allow Scott to introduce evidence in violation of that statute. See *Johnson v. State*, 322 Ga. App. 612, 615 (2) (744 SE2d 903) (2013) (whether to allow a defendant to pierce the Rape Shield Statute falls within the sound discretion of the trial court).

5. Counts 2, 3, and 4 of the indictment each charged Scott with child molestation. Count 2 was based on Scott's touching of E. W.'s breasts; Count 3 was based on his touching of E. W.'s buttocks; and Count 4 was based on his touching of

E. W.'s vagina. Scott contends that the trial court erred in failing to merge his convictions on counts 2, 3, and 4, arguing that all of those counts arose out of the same conduct. We disagree.

Under Georgia law, when the same conduct of an accused establishes “the commission of more than one crime, the accused may be prosecuted for each crime,” unless “[o]ne crime is included in the other.” OCGA § 16-1-7(a)(1). To determine if one crime is included in and therefore merges with another, we apply the “required evidence” test set forth in *Drinkard v. Walker*, 281 Ga. 211 (636 SE2d 530) (2006). Under that test, we examine “whether each offense requires proof of a fact which the other does not.” *Lucky v. State*, 286 Ga. 478, 481 (2) (689 SE2d 825) (2010). Here, each of the charged acts of child molestation required “proof of a fact which the other [did] not,” *Drinkard*, 281 Ga. at 215, – i. e., to secure a conviction on all three counts, the State had to prove that Scott touched three different and distinct parts of E. W.’s body. The trial court, therefore did not err in refusing to merge Scott’s child molestation convictions. See *Daniel v. State*, 292 Ga. App. 560, 565-566 (5) (665 SE2d 696) (2008) (where each count of the indictment charged separate acts that “were neither factually nor legally contained” in any other count of the indictment, the offenses did not merge); *Frazier v. State*, 241 Ga. App. 125, 126 (2) (524 SE2d

768) (1999) (defendant’s convictions for child molestation did not merge where one count charged him with his exposing his penis and another count charged him with placing his penis in the victim’s hand).

6. OCGA § 17-10-6.2 provides that “[a]ny person convicted of a sexual offense⁴] shall be sentenced to a split sentence which shall include” both “the minimum term of imprisonment specified in the code section applicable to such sexual offense” and “an additional probated sentence of at least one year.” OCGA § 17-10-6.2 (b). This plain and unambiguous statutory language requires that Scott receive a split sentence as to each count of child molestation for which he was convicted. See *New v. State*, 327 Ga. App. 87, 108-109 (5) (755 SE2d 568) (2014). As the State concedes, however, the trial court failed to impose such a sentence, as the sentence did not include “an additional probated sentence of at least one year.” Accordingly, the sentence is void, and we therefore vacate Scott’s sentence and remand this case for Scott to be re-sentenced in accordance with OCGA § 17-10-6.2 (b). See *Jackson v. State*, 338 Ga. App. 509, 511 (790 SE2d 295) (2016); *New*, 327 Ga. App. at 108-109 (5).

⁴ The statute defines “sexual offense” as including child molestation. OCGA § 17-10-6.2 (a) (5).

For the reasons set forth above, we affirm Scott's convictions for child molestation, but we vacate Scott's sentence and remand the case to the trial court with specific instructions to re-sentence Scott in accordance with OCGA § 17-10-6.2 (b).

Judgment affirmed in part and vacated in part, and case remanded with direction. Ellington, P. J., concurs. Bethel, J., concurs dubitante.

A18A0751. SCOTT v. THE STATE.

BETHEL, Judge, concurring dubitante.

I concur dubitante¹ with the majority's faithful application of the law in accordance with the relevant statutes and precedent. I write separately to emphasize the need in our case law for more clarity regarding the interplay between the Confrontation Clause and the Rape Shield.

¹ A concurrence dubitante is a concurrence that is given doubtfully. Unlike a concurrence in the judgment only or a special concurrence without a statement of agreement with all that is said — which, according to our Rule 33 (a), renders a decision physical precedent only — a concurrence dubitante is a full concurrence, albeit one with reservations. *See Martin-Agraw v. State*, 343 Ga. App. 864, 871 n.1 (806 SE2d 247) (2017) (Bethel, J., concurring dubitante) (citing *Benefield v. Tominich*, 308 Ga. App. 605, 611 n.28 (708 SE2d 563) (2011) (Blackwell, J., concurring dubitante)).