UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1430

September Term, 2014

DAVID GLENN SEAL

v.

STATE OF MARYLAND

Berger,
Reed,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Berger, J.
Dissenting Opinion by Raker, J.

Filed: May 13, 2015

Following a jury trial in the Circuit Court for Montgomery County, David Glenn Seal ("Seal"), appellant, was convicted of child sexual abuse, four counts of third-degree sex offense, and six counts of second-degree sex offense. Seal was sentenced to fifteen years' incarceration for child sexual abuse. The court sentenced Seal to a consecutive fifteen-year period of incarceration for one count of second-degree sex offense. The court further sentenced Seal to a consecutive fifteen-year period of incarceration for a second count of second-degree sex offense. Concurrent sentences were imposed for the remaining counts.

On appeal, Seal presents three issues for our review, which we have rephrased as follows:

1. Whether the trial court erred by denying Seal's motion to suppress a recorded telephone conversation between Seal and the victim.

2. Whether the trial court erred by declining to propound Seal's requested jury instruction.

3. Whether the evidence was sufficient to sustain Seal's conviction for child sexual abuse.

For the reasons stated herein, we shall affirm the judgment of the Circuit Court for Montgomery County.

FACTS AND PROCEEDINGS

The following evidence was adduced at trial. Donald W. ("Donald") was born on October 10, 1971. He is forty-four years old and currently lives in Charleston, West Virginia. As a child, Donald lived with his mother, Shanda Seal, and his step-father, Mack Henry Seal, Jr. in Montgomery County, Maryland. Seal is the brother of Mack Henry Seal, Jr., and the

step-uncle of Donald. Seal resided with his mother, Pearl Seal, who was also Donald's step-grandmother ("Step-Grandmother").

Donald did not graduate from high school. Donald repeated the fifth-grade once and the ninth-grade multiple times before he dropped out of school. Donald was in the fifth-grade during the 1981-1982 and 1982-1983 school years. During the summer of 1982, when Donald was ten years old, Donald spent multiple nights at Step-Grandmother's house, where Donald would sleep in the guest bedroom. Donald testified that during that summer, he woke one morning at Step-Grandmother's house to "somebody touching" his penis. When Donald woke fully, he saw Seal leaving the guest bedroom. Seal returned approximately five minutes later and began to fondle Donald's penis beneath his underwear. Donald was "scared" and "didn't know what to do."

The sexual abuse continued throughout the summer of 1982 and over the following two years, and became increasingly frequent each time Donald stayed at Step-Grandmother's house. Seal performed anal and oral sex on Donald, and had Donald perform oral sex on him. Donald estimated that the abuse may have occurred between ten and twenty times during the summer of 1982, but explained that he had difficulty remembering the number of times because "[i]t's the kind of thing you want to put out of your mind." The abuse occurred in various locations around Step-Grandmother's home, including the basement,

bathroom, and a barn. While in the bathroom, Seal used the handle of a plunger to penetrate Donald's anus. The abuse continued for multiple years.[1]

The abuse ended at approximately the time that Donald was entering the seventh grade, when Donald began to distance himself from Seal. Donald did not tell anyone about the abuse while it was occurring because he was "scared" and "afraid." Seal told Donald that he would hurt Donald's mother and brother if he reported the abuse. When Donald was twenty-one years old, he told his mother and step-father about the abuse. Donald's mother and step-father were upset, but did not do anything about the abuse. Donald did not contact the police or anyone else because he was embarrassed.

Donald eventually married and had four children with his first wife, whom he divorced in 1999. Donald married his current wife, Stacey W. ("Stacey"), in 2007, and they had one child. Donald told Stacey about the abuse prior to their marriage. In approximately mid-2000, Stacey confronted Seal in the parking lot following a family member's funeral. Stacey asked Seal "why he did that to [Donald]" and told Seal that "he should be ashamed of himself." Seal responded that "the devil had a hold of him" and that he was "sorry for what he did."

Some years later, Donald telephoned Seal because the abuse had "been weighing heavy on" him. The conversation lasted approximately twenty minutes. Donald asked Seal

[1] Testimony regarding the specific dates abuse occurred was somewhat confusing. Any ambiguity regarding the dates the abuse occurred, however, is irrelevant to the issues raised on appeal.

why he had abused him as a child. Seal responded that "the devil got a hold of him." Seal telephoned Donald approximately one week later. Seal apologized to Donald, telling Donald that "he was sorry if he ever did anything to [Donald]" and that he was sorry that he "did anything to [Donald] that hurt" him. Seal told Donald that he "was a changed man and he went to church." Seal offered to "make payments" to Donald, and offered up to $7,000.00. Donald declined the financial offer from Seal.

Several days later, on January 22, 2013, Stacey contacted the police via telephone and inquired about steps to take to begin an investigation into child sexual abuse. Stacey and Donald went to the police station and Donald told Detective Tracey Copeland about the abuse. Donald and Detective Copeland attempted to telephone Seal together, but they were unable to reach him. Donald and Detective Copeland telephoned Seal multiple times from the police station, but Seal did not answer.

Before Donald left the police station, Detective Copeland provided Donald with equipment that would enable Donald to record a telephone conversation. Detective Copeland showed Donald how to use the equipment, which included an ear device and recording device. After Donald returned to his home in West Virginia, Donald used the equipment to record a telephone call with Seal on February 5, 2013. During the recorded call, Seal made multiple incriminating statements. Specifically, Seal admitted to having anal sex with Donald and to performing fellatio on Donald. Seal apologized "for hurting [Donald] back

then" and apologized "if [he] did any harm to [Donald]." Seal explained that he "just wasn't in [his] mind at the time."

The case was tried on March 4, 5, and 6, 2014 in the Circuit Court for Montgomery County. At trial, the recorded telephone conversation was played for the jury over defense counsel's objection. The jury returned a guilty verdict on all counts: one count of child sexual abuse, four counts of third-degree sex offense, and six counts of second-degree sex offense. On July 31, 2014, the circuit court sentenced Seal to fifteen years' incarceration for child sexual abuse, fifteen years consecutive for one count of second-degree sex offense, and fifteen years consecutive for a second count of second-degree sex offense. Concurrent sentences were imposed for the remaining counts.

Additional facts shall be included as necessitated by our discussion of the issues.

DISCUSSION

I.

Seal contends that the trial court erred in denying his motion to suppress recorded telephone calls introduced to his detriment at trial. Seal maintains that one who intercepts a wire communication under a statutory exception to the general prohibition on interceptions of communication under Md. Code (2006, 2013 Repl. Vol., 2014 Suppl.), § 10-402(c)(2) of the Cts. & Jud. Proc. Article ("CJP"), must do so within the territorial limitations of CJP § 10-408(c)(2), and (3) (authorizing judges to issue *ex parte* orders to intercept wire communications). Further, Seal avers that Detective Copeland did not sufficiently supervise

Donald so as to make this recording a permissible interception under CJP § 10-402(c)(2). For the reasons that follow, we reject these arguments and affirm the circuit court's denial of Seal's motion to suppress.

A. Standard of Review

In reviewing the denial of a motion to suppress evidence under CJP § 10-405 (the statutory exclusionary rule for the Maryland wiretap statutes), "we view the evidence presented at the hearing, along with any reasonable inferences drawable therefrom, in a light most favorable to the prevailing party." *Davis v. State*, 426 Md. 211, 219 (2012). Moreover, "'we confine ourselves to what occurred at the suppression hearing.'" *Gonzalez v. State*, 429 Md. 632, 647 (2012) (quoting *Lee v. State*, 418 Md. 136, 148 (2011)). "The credibility of the witnesses, the weight to be given to the evidence, and the reasonable inferences that may be drawn from the evidence come within the province of the suppression court." *Id.* at 647-48 (citing *Longshore v. State*, 399 Md. 486, 499 (2007)); *see also Wilkes v. State*, 364 Md. 554, 569 (2001) ("We extend great deference to the fact finding of the suppression court and accept the facts as found by that court unless clearly erroneous."). We review *de novo* the question of whether, based on the facts, the circuit court's decision was in accordance with the law. *See Crosby v. State*, 408 Md. 490, 505 (2009) (describing the standard of review in the context of a constitutional challenge).

B. Overview of the Maryland Wiretap Statute

To properly construe these provisions of the Maryland wiretap statutes, we review the applicable sources of authority and limitations placed on those authorities. Moreover, we also compare the analogous federal authorities to help us interpret the Maryland Act. Long before our Fourth Amendment analysis was affixed to an individual's reasonable expectation of privacy, Justice Taft, writing for the United States Supreme Court, reasoned that wiretapping without trespass could not be a physical intrusion sufficient to constitute a Fourth Amendment violation. *Olmstead v. United States*, 277 U.S. 438, 465 (1928) (vacated by *Katz v. United States*, 389 U.S. 347 (1967) (affixing Fourth Amendment analysis to an individual's reasonable expectation of privacy)). While the reasoning in Justice Taft's opinion is no longer applicable, he aptly observed that "[Legislatures] may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible . . . by direct legislation." *Id.* "Congress soon thereafter, and some say in answer to *Olmstead*, specifically prohibited the interception without authorization and divulging . . . of telephonic communications." *Berger v. New York*, 388 U.S. 41, 51 (1967) (emphasis added); *see* Federal Communications Act of 1934, ch. 652, 48 Stat. 1064, 1103, U.S.C. Tit. 47, § 605 (amended by 47 U.S.C. § 605 (1968)).[2]

[2] Prohibitions on intercepting communications such as this, however, long predate *Olmstead*. Indeed, under the laws of England:

(continued...)

Decades later, partially in response to the more searching Constitutional analysis mandated by *Katz*, *supra*, 389 U.S. 347, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act ("Federal Act") of 1968 which created statutory limitations pertaining to the monitoring of communications at the federal and state levels, as well private communications. Pub. L. No. 90-351, tit. III, 82 Stat. 197, 211 (codified as amended at 18 U.S.C. §§ 2510-22 (2014)). The Federal Act was enacted with the "dual purpose [of] (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." *Gelbard v. United States*, 408 U.S. 41, 48 (1972).

The Federal Act, and its predecessor, have earned a reputation for their ambiguity. *See Steve Jackson Games, Inc. v. U.S. Secret Service*, 36 F.3d 457, 462 (5th Cir. 1944) (explaining the Federal Act "is famous (if not infamous) for its lack of clarity"); *United*

---

[2] (...continued)

> *Eavesdroppers*, or such as listen under walls or windows, or the eaves of a house, to harken after discourse, and thereupon to frame slanderous and mischievous tales, [were] a common nuisance, and presentable at the court-leet, or are indictable at the sessions, and punishable by fine and finding sureties for their good behaviour.

4 W. Blackstone, *Commentaries* 168 (1st ed. 1803). The sort of legislation at issue here is simply the response to significant advancements in eavesdropping technologies. For a comprehensive overview and history of the Maryland's Wiretap and Electronic Surveillance Law authored by a former Court of Appeals judge, see Richard P. Gilbert, *A Diagnosis, Dissection, and Prognosis of Maryland's New Wiretap and Electronic Surveillance Law*, 8 U. Balt. L. Rev. 183 (1979).

States v. Smith, 155 F.3d 1051, 1055 (9th Cir. 1998) (observing the Fifth Circuit's observation that the Federal Act lacks clarity "might have put the matter too mildly"). We can discern from the Federal Act, however, that the interception, disclosure, or use of wire, oral, or electronic communications is generally prohibited. 18 U.S.C. § 2511(1). Section 2511(2) of that statute, however, contains a myriad of exceptions to the general prohibitions of § 2511(1). For example, the Federal Act does not prohibit a person from intercepting a communication where "such person is a party to the communication or where one of the parties to the communication has given prior consent." *Id.* § 2511(2)(c) and (d). Additionally, the Federal Act contains exceptions which permit the interception of communications made pursuant to court order, *id.* § 2511(2)(a)(ii)(A), and any oral communication "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." *Id.* § 2510(2); *Brown v. Waddell*, 50 F.3d 285, 289-90 (4th Cir. 1995) (observing this exception "in general[,] parallel[s] . . . constitutional search warrant requirements."). Indeed, these broad exceptions significantly undermine the strength of the prohibitions in the Federal Act.

We pause briefly at this juncture to observe that Seal has not been aggrieved under the Federal Act. Here, the intercepted communications between Seal and Donald fit squarely within the exception contained in 18 U.S.C. § 2511(2)(c) and (d), which permit the interception of communications when the person intercepting the communication is a party to the communication or with the consent of one of the parties to the conversation. Although

the applicability of the Federal Act is helpful for comparative purposes, our analysis does not end with our observation that the State's conduct was permissible under that act. The Federal Act has the preemptive effect of creating a ceiling, above which no jurisdiction may create more lenient wiretapping standards. *Davis*, *supra*, 426 Md. at 219 ("Each state was required to enact a responsive statute that was at least as protective of private citizens' rights as Title III."). States remain free, however, to impose more restrictive protections against the interception of communications by "direct legislation" as observed by Justice Taft in *Olmstead*, *supra*, 277 U.S. at 465.

Accordingly, "[i]n 1977, the Maryland Legislature responded by enacting the Wiretapping and Electronic Surveillance Law [("Maryland Act")]. 1977 Md. Laws 693." *Davis*, *supra*, 426 Md. at 219. Similar to the Federal Act, the Maryland Act aims to "deter law enforcement officers from violating personal privacy rights by ensuring that the courts do not become partners in illegal police conduct." *Sanders v. State*, 57 Md. App. 156, 167 (1984). Indeed, CJP § 10-402, and 18 U.S.C. § 2511, are substantially similar in many respects. *Wood v. State*, 290 Md. 579, 583 (1981) (explaining that the Maryland Act "is modeled upon the federal act . . . and extensively tracks its provisions"). The first subsection in both statutes begins with general prohibitions on the interception, disclosure, and use of certain communications, whereas subsequent subsections provide exceptions to each respective statute. *Compare* CJP § 10-402 (prohibiting "any other person to intercept or endeavor to intercept, any wire, oral or electronic communication"), *with* 18 U.S.C. § 2511.

The statutes, however, differ substantially in the substantive exceptions provided for under each authority. Most notably, the Maryland statute limits its one party consent exception to circumstances outlined in CJP 10-402(c)(2), which are significantly more limiting than the analogous provision under the Federal Act. *Contra* 18 U.S.C. § 2511(2)(c) and (d) (Federal Act's much broader one party consent provisions). Indeed, Maryland once attempted to include a one party consent provision nearly as broad as the federal statute, but that attempt was met with an executive veto. *Perry v. State*, 357 Md. 37, 61 (1999) ("[O]ne attempt by the Legislature, in 1973, to modify [the one consent] provision met with a veto in which the Governor expressed his deep concern that the 'opportunity for unwarranted spying and intrusions on people's privacy authorized by this bill is frightening." (quoting 1973 Md. Laws, Vol. II, at 1925)). Therefore, in many respects, "[t]he Maryland Legislature . . . has made some of the provisions of the State act more restrictive than the federal law." *Wood*, *supra*, 290 Md. at 583.

While the Federal Act contains much broader exceptions than the Maryland Act, Maryland has promulgated some exceptions that are absent from the Federal Act. Notably, § 10-402(c)(2)(ii)(1)(A)-(T) of the Maryland Act provides an exception for the investigation of a number of specifically enumerated crimes. Among these specific exceptions, investigations of "[a] sexual offense in the first or second degree;" "[c]hild abuse in the first or second degree;" or "[s]exual abuse of a minor under § 3-602 of the Criminal Law Article" are permitted instances when the prohibitions of CJP § 10-402(a) are inapplicable.

CJP § 10-402(c)(2)(ii)(1)(D),(E), and (R). The aforementioned exceptions to the Maryland Act, however, are only available when "[t]he investigative or law enforcement officer or other person is a party to the communication" or "[o]ne of the parties to the communication has given prior consent to the interception." CJP § 10-402(c)(2)(i). Accordingly, rather than abolish the Federal Act's one-party consent provision, the Maryland Act merely restricts, albeit significantly, the applicability of a one-party consent exception.

If the conditions of § 10-402(c)(2)(i) are not satisfied, the provisions of §§ 10-406 and 10-408 govern, which mandate that a judge "grant an order authorizing the interception of wire, oral, or electronic communications." CJP § 10-406(a). Notably, § 10-406 expressly provides that "[n]o application or order shall be required if the interception is lawful under the provisions of § 10-402(c)." CJP § 10-406(b). If an order is required, however, § 10-408 sets forth the procedural requirements that must be satisfied in order to obtain an *ex parte* order authorizing interception. *See* CJP § 10-408. If an order is issued under CJP § 10-408, this section limits the scope of the order to "wire, oral, or electronic communications only within the territorial jurisdiction of the court in which the application was filed," or under some circumstances "anywhere within the State[.]" CJP § 10-408(c)(2), and (3).

C. Territorial Limitations

Seal does not argue that an *ex parte* order must have been issued prior to the recording of this conversation. Indeed, a cursory reading of the statute unambiguously shows us that one need not have been issued. Rather, Seal argues the territorial limitations imposed by

§ 10-408(c)(2) and (3) should be read into § 10-402(c)(2). In support of his argument, Seal cites *Davis*, *supra*, for the proposition that the Maryland Act limits any lawful interception of wire, oral, or electronic communications to within the territorial limitations provided for in § 10-408(c)(2), and (3). For the reasons that follow, we are unpersuaded.

In *Davis*, *supra*, law enforcement officers established a listening post from which they monitored calls pursuant to an *ex parte* order under CJP § 10-408. 426 Md. at 215. From Maryland, officers listened to a call between two individuals, both of whom were outside the state of Maryland. *Id.* at 215-16. In *Davis*, the question before the Court of Appeals was whether the territorial limitations imposed by CJP § 10-408 were observed when both the caller and recipient were outside Maryland, but the listening post was located in Maryland. *Id.* at 213-14. The *Davis* court held that the interception took place "where law enforcement officers first heard the communications." *Id.* at 231.

Seal's reliance on *Davis* is misplaced. Regardless of the physical location where the interception took place, CJP § 10-402(c)(2) imposes no territorial limitations such as those contained in CJP § 10-408.[3] First, we rely on general principals of statutory construction which mandate that we begin "by looking first at the plain language of a statute, giving the words their natural and ordinary meaning." *Davis*, *supra*, 426 Md. at 218. We also bear in mind that our goal is "to discern the legislative purpose, the ends to be accomplished, or the

[3] At the suppression hearing, the judge aptly observed that if we apply *Davis* here, "not only are we not in the right pew, we're in the wrong church" and that *Davis* had "basically nothing to do with this case. [It is] not even close."

evils to be remedied." *Ray v. State*, 410 Md. 384, 404 (2009). If the language of the statute is ambiguous, we look to the "legislative history, case law, statutory purpose, as well as the structure of the statute" to help us discern the intent of the legislature. *Id.* at 405. Furthermore, we "attempt to harmonize provisions dealing with the same subject so that each may be given effect." *Id.* Finally, "a statute is to be given a reasonable interpretation, not one that is illogical or incompatible with common sense." *Whiting-Turner Contracting Co. v. Fitzpatrick*, 366 Md. 295, 302 (2001).

Employing a textual reading of the Maryland Act leads us to conclude that the territorial limitations of CJP § 10-408 apply only to a judge's authority to issue an *ex parte* order, and not to investigations within the confines of CJP § 10-402(c)(2). The Court of Appeals has explained that this act "sets up a strict procedure that must be followed and we will not abide any deviation, no matter how slight, from the prescribed path." *State v. Siegel*, 266 Md. 256, 274 (1972). We reject Seal's invitation to read a limitation into the permissible interception communications outlined in § 10-402(c)(2).

Additionally, the construction proposed by Seal would defy logic. Indeed, the territorial limitations in the *ex parte* section read:

> (2) Except as provided in paragraphs (3) and (4) of this subsection, an ex parte order issued under paragraph (1) of this subsection may authorize the interception of wire, oral, or electronic communications only within the territorial jurisdiction of the court in which the application was filed.
>
> (3) If an application for an ex parte order is made by the Attorney General, the State Prosecutor, or a State's Attorney, an

> order issued under paragraph (1) of this subsection may authorize the interception of communications received or sent by a communication device anywhere within the State so as to permit the interception of communications regardless of whether the communication device is physically located within the jurisdiction of the court in which the application was filed at the time of the interception. The application must allege that the offense being investigated may transpire in the jurisdiction of the court in which the application is filed.

CJP § 10-408(c). Subsection (c)(2), and (3) of this section expressly limit its application to "an *ex parte* order issued under paragraph (1) of this subsection." CJP § 10-408(c)(2), and (3) (emphasis added). Were we were to adopt Seal's proposed construction of this statute, we would render this language superfluous. "[W]henever possible, the statute should be read so that no word, clause, sentence or phrase is rendered superfluous or nugatory." *Whiting-Turner Contracting Co.*, *supra*, 366 Md. at 302. Additionally, when reading § 10-408(c)(2) and (3) together, we observe that a court must limit the effect of its order to within its territorial jurisdiction unless subsection (c)(3) applies, in which case, the boundaries are extended to anywhere within the state of Maryland. If these limitations were intended to be superimposed on § 10-402(c)(2), we are uncertain what the territorial limitations would be, because none of the preconditions of either section are remotely relevant to the provisions of § 10-402(c)(2). Accordingly, Seal's proposed reading of this statute requires us to adopt an illogical construction of CJP § 10-402(c)(2).

Moreover, Seal cites to federal authority regarding why we should impose the territorial limitations here. Seal relies on *United States v. Rodriguez*, 968 F.2d 130 (2d Cir.

1992), to support the position that communications obtained outside the territorial jurisdiction where "the place where the redirected contents are first heard" should be suppressed. *Id.* at 135. Again, Seal fails to distinguish between the situation where the government eavesdrops on a conversation, the participants of which are oblivious of their clandestine observer, with the facts *sub judice* when one party has affirmatively instigated the ongoing investigation. Surely the questions presented in neither *Davis* nor *Rodriguez* would have been legitimate if their co-conspirator, rather than the court, had approved the interception of their respective communications. *Compare* 18 U.S.C. § 2511(2)(c), and (d) (Federal Act's one party consent exceptions), *with* CJP § 10-402(c)(2) (outlining Maryland's more restrictive yet operative one party consent exception).

Finally, Seal contends that as a matter of policy, law enforcement's authority to intercept private communications should not exceed that of a court. Critically, the language used by the General Assembly does not reflect that it is equally or more egregious for law enforcement to monitor a conversation upon the consent of one party in circumstances such as this, than it is for a court to permit monitoring communications outside their jurisdiction.

We have not declared open season on individual rights with this holding. Indeed, our laws offer multiple levels of protection in the form of the Maryland Act, the Federal Act, and the Federal and State Constitutions. *See generally*, CJP § 10-402; 18 U.S.C. § 2511; *accord Hoffa v. United* States, 387 U.S. 231 (1967); *Lopez v. United States*, 373 U.S. 427 (1963) (articulating the Fourth Amendment standard for permissible government eavesdropping).

The interception of communications such as those in this case are only permissible if they are in compliance with all the authorities outlined herein. Critically, Seal has failed to demonstrate that the interception here runs afoul of any of these authorities.

D. Donald was under Copeland's Supervision

Seal further argues that CJP § 10-402(c)(2) is inapplicable because Donald was not acting under Detective Copeland's supervision. CJP § 10-402(c)(2)(ii) provides:

> It is lawful under this subtitle for an investigative or law enforcement officer acting in a criminal investigation or any other person **acting at the prior direction and under the supervision** of an of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication in order to provide evidence . . . .

CJP § 10-402(c)(2)(ii) (emphasis added). Seal suggests that the phrase "acting at the prior direction and under the supervision of" constitute two distinct elements, only one of which is satisfied here. *Id.* To be sure, "we are acutely aware that the wiretap law procedures must be strictly followed." *Sanders*, *supra*, 57 Md. App. at 167. We reject Seal's contention, however, that conduct must satisfy an exceedingly narrow interpretation of the word supervision to be in order to be in strict compliance with this statute.

"The Maryland Wiretapping and Electronic Surveillance Act is modeled upon the federal act . . . and extensively tracks its provisions." *Wood*, *supra*, 290 Md. at 583. The analogous provision to CJP § 10-402(c)(2)(ii) in the Federal Act declares "[i]t shall not be unlawful under this chapter for a person *acting under color of law* to intercept a wire, oral,

or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(c) (emphasis added).

Interestingly, the original draft to what is now CJP 10-402(c) did mimic the comparable federal statute and contained the "color of law" language found in the federal statute. 1977 Md. Laws, Chap. 692 at 2807-08. This language, however, was removed in favor of the language found in the statute's present form. *Id.* The comment to amendment number three, which made this modification, provided that this alteration was intended to change the "rather vague reference from 'person acting under color of law' to more concrete references to investigative or law enforcement officers or their agents."

The changes made to the Maryland Act evidences an intent to clarify the actors who may engage in wiretapping under this statute. Indeed, unlike the Federal Act which permits wiretapping upon consent of one of the parties by anyone so long as they were acting under color of law and regardless of the crime under investigation, the Maryland Act limits this exception to a more specific class of persons for the investigation of specifically enumerated crimes. *Compare* 18 U.S.C. § 2511(2)(c), *with* CJP § 10-402(c)(2). *See also* Marianne B. Davis & Laurie R. Bortz, Comment, *Legislation: The 1977 Maryland Wiretapping and Electronic Surveillance Act*, 7 U. Balt. L. Rev. 374, 386-87 (1978) (hypothesizing that Maryland's language was intended to avoid ambiguity because it "clearly delineates those

persons who may intercept under such circumstances, limiting the scope of such interceptions to the enumerated felonies in section 10-402(c)(2).").

Notwithstanding the differing language employed by each authority, the Court of Appeals has observed the similarities between one who is "acting at the prior direction and under the supervision of," CJP § 10-408(c)(2)(ii), and one who is "acting under color of law," 18 U.S.C. § 2511 (2)(c). *Davis*, *supra*, 426 Md. at 220 n.3 (using the standard addressed in CJP § 10-408(c)(2)(ii) synonymously with "acting under color of law"); *Kassap v. Seitz*, 315 Md. 155, 166 (1989) (observing that notwithstanding differing language, it is nevertheless appropriate to "look to federal case law to observe the role of the one-party consent provision in relation to the statutory scheme"). Indeed, the analogous federal statute has been expressly interpreted to allow recorded conversations to be admitted into evidence where the entirety of the conversation took place outside the presence of the government. *United States v. Haimowitz*, 725 F.2d 1561, 1582 (11th Cir. 1984) ("[A]lthough the FBI was not present when [the informant] recorded conversations, [the informant] was still acting under color of law.").

We find persuasive various federal authorities that demonstrate just how little oversight is required by law enforcement to constitute a permissible interception under this exception. In *Archer Daniels Midland Co. v. Whitacre*, 60 F. Supp. 2d 819 (C.D. Ill. 1999), an FBI agent gave an informant, who failed two polygraph tests and was later indicted for embezzlement, "discretion to decide which conversations to tape and did not follow FBI

policy on recording." *Id.* at 829. Furthermore, "there were often long gaps of time between when the conversations were recorded and the time when the FBI took possession of the recordings." *Id.* Additionally, "a tape expert testified that the tapes showed signs of tampering and erasure." *Id.* Notwithstanding these egregious facts, where even the government conceded this "was not the FBI's finest hour," the court found the evidence "is not sufficient to show, as a matter of law, that [the informant] was not acting 'under color of law' when the recordings were made." *Id.*; *accord United States v. Andreas*, 216 F.3d 645, 660-661 (7th Cir. 2000); *In re High Fructose Corn Syrup Antitrust Litigation*, 216 F.3d 621, 623 (7th Cir. 2000) (concurring with the district court's analysis in *Whitacre*).

The federal "under the color of law" standard and Maryland's "at the prior direction and under the supervision of an of" standard have often been viewed as synonymous. *See e.g.*, *Davis*, *supra*, 426 Md. at 220 n.3 (using the CJP § 10-408(c)(2)(ii) standard synonymously with "acting under color of law"). Notwithstanding the apparent interchangeable uses of these standards, we recognize the "color of law" language of the Federal Act may carry a boarder connotation than the language used in the Maryland Act. *See e.g.*, *Benford v. Am. Broad. Cos., Inc.*, 502 F. Supp. 1159, 1162 (D. Md. 1980) (noting private organization's recording "to aid the congressional subcommittee" may be under color of law, but perhaps not under prior direction and supervision of law enforcement). Additionally, we recognize that had the General Assembly intended these standards to be synonymous it might not have passed amendment number three to 1977 Md. Laws, Chap.

692 at 2807-08. Accordingly, we do not go so far as to say that these standards are in fact synonymous. The substantial similarities of these acts, however, lead us to conclude that the legislature did not intend to so severely constrict the interpretation of the word supervision in the manner Seal suggests.

Seal maintains the position that CJP § 10-402(c)(2) requires significantly more oversight and participation that was exhibited by Detective Copeland in the case *sub judice*. Indeed, CJP § 10-402(c)(2) requires that any wiretapping be done at the "prior direction *and* under the supervision of an of an investigative or law enforcement officer." CJP § 10-402(c)(2) (emphasis added). Accordingly, both direction and supervision are conditions that must be satisfied if the interception is permissible under this statute. In order to strictly construe this statute, we read both of these conditions so that neither is rendered superfluous.

Much of the authority cited by Seal is not necessarily inconsistent with the circuit court's determination of the applicability of CJP § 10-402(c)(2)(ii). Seal concedes that the word supervision "has a range of meanings from a general or expansive definition of directing and watching over, to a more narrow definition that requires an element of control and authority." To the extent Seal's assertion is inconsistent with a more broad understanding of the word supervision, we are unpersuaded by his attempt to confine the definition of that word to such an unrealistically narrow degree, to the exclusion of all other reasonable usages. In short, the degree of oversight Seal purports will satisfy CJP

§ 10-402(c)(2)(ii) is merely a sufficient, rather then necessary, condition constituting a permissible interception under that statute.

We recognize that by applying a more expansive view of the word supervision, some conduct that is "at the direction of" might also qualify as "supervision." These conditions are not superfluous so long as conduct exists that will satisfy one element of the statute but not the other. The phrase "acting at the prior direction and under the supervision," however, is not superfluous simply because the definitions overlap, that is, the same conduct might satisfy both conditions. CJP § 10-402(c)(2)(ii). Indeed, there are numerous instances where a supervisor may not directly oversee a supervisee, and yet supervision does not cease to exist. For example, the age of the internet has ushered in the institution of telecommuting where employees work independently from their homes with little to no oversight from their supervisors, yet supervision is maintained. Additionally, probationers and parolees are said to be "under supervision" notwithstanding the fact that many probationers and parolees go for much longer durations without communicating with their supervisors than Detective Copeland and Donald did here.

The fallacy in Seal's reasoning is that supervision is not properly assessed in a dichotomy, but is rather observed in varying degrees. Seal suggests "supervision' means 'to coordinate, direct and inspect continuously." *People v. Feller*, 978 N.E.2d 1103, 1107 (Ill. 2012). We do not disagree with Seal that such attentive, direct, and compulsive oversight falls within the universe of permissible conduct that satisfies the definition of the word

supervision. We also observe, however, that Seal's construction of supervision does not exist to the exclusion of all other reasonable interpretations of that word.

Here, the trial judge's findings were supported by Detective Copeland who, on February 20, 2014, testified that she showed Donald the equipment and "gave him the process with respect to what we normally did" and proceeded to make a phone call to Seal. Critically, Detective Copeland's call to Seal occurred in the presence of Donald. Only after the attempted phone calls by Detective Copeland (in the presence of Donald) were unsuccessful did Detective Copeland "provide[Donald] with the equipment to conduct the recording himself . . . ." Two weeks after the initial meeting with Detective Copeland, Donald used the equipment to record a conversation with Seal. Shortly thereafter, Detective Copeland and Donald met in Frederick, Maryland, where Donald returned the digital recorder which contained the audio recording.

After the hearing of Seal's motion to suppress, the trial judge held the motion *sub curia*. Thereafter, the trial judge concluded that the State satisfied the requirements of CJP § 10-402(c)(2). In denying Seal's motion to suppress, the court found:

> [T]he victim was acting at the direction of the officer – the officer had set up the equipment, told him what to do – and that the supervision of the investigative law enforcement officer . . . was still in existence. It would remain in supervision until the officer said no more calls and took the equipment away. There's no requirement under the statute that the officer be present during the call.

We hold that Donald was acting at the prior direction and under the supervision of Detective Copeland when he recorded the telephone conversation between Seal and himself. The circuit court accurately articulated the elements that must be satisfied to comply with CJP § 10-402(c)(2), and applied the proffered facts to those elements. The circuit court applied the appropriate standard with regard to whether Donald acted under the prior direction and supervision of Detective Copeland. In short, we reject Seal's impermissibly narrow definition of the word "supervision." We refuse to alter the definition of "supervision" beyond a reasonable, everyday, commonsense understanding of that word. Accordingly, we hold that the circuit court's finding that Donald was acting under the supervision of Detective Copeland was not clearly erroneous. We, therefore, affirm the circuit court's finding that the prerequisites of CJP § 10-402(c)(2) were satisfied, and hold that the circuit court did not err by denying Seal's motion to suppress.

II.

Seal's second contention is that the trial court erred by declining to instruct the jury on the definition of "a person who has permanent or temporary care or custody or responsibility for supervision of a child," which is an element of the then-existing child abuse statute. *See* Md. Code (1957, 1987 Repl. Vol.), Art. 27, § 35A (repealed). We are unpersuaded.

The child abuse statute in effect when the events giving rise to this case occurred provided the following:

> (a) Definitions. -- (1) In this section the following words have the meanings indicated.
>
> (2) "Abuse" means:
>
> (i) The sustaining of physical injury by a child as a result of cruel or inhumane treatment or as a result of a malicious act by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child under circumstances that indicate that the child's health or welfare is harmed or threatened thereby; or
>
> (ii) Sexual abuse of a child, whether physical injuries are sustained or not.
>
> (3) "Child" means any individual under the age of 18 years.
>
> (4)(i) "Sexual abuse" means any act that involves sexual molestation or exploitation of a child by a parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child.
>
> (ii) "Sexual abuse" includes, but is not limited to:
>
> 1. Incest, rape, or sexual offense in any degree;
>
> 2. Sodomy; and
>
> 3. Unnatural or perverted sexual practices.
>
> (b) *Violation constitutes felony; penalty.* -- A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a child who causes abuse to the child is guilty of a felony and on conviction is subject to imprisonment in the penitentiary not exceeding 15 years.

Maryland Rule 4-325(c) provides that "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law[.]" We review "a trial court's refusal or giving of a jury instruction under the abuse of discretion standard." *Stabb v. State*, 423 Md. 454, 465 (2011). The Court of Appeals has explained:

> We consider the following factors when deciding whether a trial court abused its discretion in deciding whether to grant or deny a request for a particular jury instruction: (1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given.

Id. (citing *Gunning v. State*, 347 Md. 332, 351 (1997)). "The burden is on the complaining party to show both prejudice and error." *Tharp v. State*, 129 Md. App. 319, 329 (1999), *aff'd*, 362 Md. 77 (2000).

When determining whether the trial court abused its discretion by declining to give a particular jury instruction, we consider the following:

> 'Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order [of the trial court] is a matter of discretion it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'

Bazzle v. State, 426 Md. 541, 549 (2012) (alterations in origional) (quoting *Stabb, supra*, 423 Md. at 465).

At trial, Seal requested that the court propound the following non-pattern jury instruction, drawn from *Harrison v. State*, 198 Md. App. 236, 243-44 (2011) (quoting *Pope v. State*, 284 Md. 309 (1979)):

> '[R]esponsibility for supervision of a minor child may be obtained only upon the mutual consent, expressed or implied, by the one legally charged with the care of the child and by the one assuming the responsibility. In other words, a parent may not impose responsibility for the supervision of his or her minor child on a third person unless that person accepts the responsibility, and a third person may not assume such responsibility unless the parent grants it.'

The State objected to defense counsel's proposed instruction, and the following exchange occurred:

> [THE PROSECUTOR]: Your Honor, we would object.
>
> THE COURT: Seem like it -- it's a fair statement of the law.
>
> [THE PROSECUTOR]: I think it's -- the problem that the State has is it doesn't have to be responsibility for supervision. It can be temporary care or custody or responsibility and I think defining responsibility for supervision --
>
> THE COURT: Yeah I see your -- and there's no, back then and now, there's no definition of --
>
> [THE PROSECUTOR]: Right. Temporary care or temporary custody.
>
> THE COURT: Because it's self-explanatory and it's a jury question.
>
> [THE PROSECUTOR]: And we would just argue that responsibility is the same thing. That it should be a question for the jury of, you know, whether they believe that he had responsibility, [I am] just concerned that it gives undue weight to something that is not necessary to convict the defendant under that statute.
>
> * * *

> THE COURT: I think it's a jury issue. I think it's self-explanatory [and] I don't think it needs a definition. It's not like sexual abuse which clearly does, and the type of people, so I'll deny your request. But you can -- I think it gets into a little bit -- it's more esoteric for a trial judge or an appellate court. Because you get into express or implied consent, [those are] law school terms which are going to cause a lot of problems with the jury.

The trial court further commented that the terms "temporary care" and "temporary custody" were "self-explanatory," "pretty clear," and "not tricky."

We hold that the trial court acted within its discretion in declining to propound Seal's proposed jury instruction. The non-pattern instruction proposed by Seal defined the phrase "responsibility for the supervision of a minor child." The relevant statute, however, refers to a person "who has permanent or temporary care or custody or responsibility for supervision of a child." Art. 27, § 35A. Pursuant to the statute, a person could be found guilty of child abuse if the State proved that the person had permanent or temporary **care** of a child, *or* if the State proved the person had permanent or temporary **custody** of a child, *or* if the State proved the person had permanent or temporary **responsibility for supervision of a child**. As such, Seal's proposed instruction -- which defined "responsibility for the supervision of a child" but did not define "care of a child" or "custody of a child" -- was not a complete statement of the law.[4]

[4] In this case, the record indicates that all parties conflated the disjunctive requirements of Art. 27, § 35A. We take no position on whether the trial court would have been required to propound the requested instruction in a case in which the State proceeded (continued...)

Critically, the trial court clearly instructed the jury as to the elements of the offense of child sexual abuse. The court instructed the jury as follows:

> In order to convict the defendant of child sexual abuse, the State must prove the following: one, that the defendant sexually abused [Donald]. Two. At the time of the abuse [Donald] was under the age of 18. Three. At the time of the abuse the defendant was one of these -- it could be one or more, but it has to be at least one -- a parent, adoptive parent, or person who had the permanent or temporary care, custody, or responsibility for the supervision of [Donald].[5]

The trial court reasonably concluded that the defense counsel's proposed instruction was an incomplete statement of the law that would serve to confuse the jury. Moreover, the elements of the offense of child abuse were "fairly covered in the instructions actually given." *Stabb*, supra 423 Md. at 465. Accordingly, we hold that the trial court did not abuse its discretion by declining to give the instruction requested by Seal.

---

[4] (...continued)
solely on the theory that a defendant had "responsibility for the supervision of a child."

Furthermore, the specific issue raised by Seal on appeal is whether the trial court erred by failing to propound the particular jury instruction requested. We need not address whether it was incumbent upon the trial judge to craft a more complete definition of a person "who has permanent or temporary care or custody or responsibility for supervision of a child" pursuant to Art. 27, § 35A, or whether the trial judge would have been required to give a more complete definition upon counsel's request.

[5] This jury instruction was a nearly verbatim reading of Maryland Criminal Pattern Jury Instruction No. 4:07:2 (2nd ed. 2012), with minor modifications to ensure consistency with the statute in effect at the relevant time.

III.

Seal's final contention is that the evidence was insufficient to sustain his conviction for child sexual abuse. As we shall explain, we are persuaded that a rational jury could have reasonably concluded that the elements of child sexual abuse were satisfied by the evidence presented at trial.[6]

"'[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . 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.'" *Smith v. State*, 415 Md. 174, 184 (2010) (emphasis omitted) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The Court of Appeals has explained:

> It is not our role to retry the case. Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the

[6] The State asserts that the sufficiency issue is not preserved for this Court's review because defense counsel failed to argue the sufficiency issue with specificity when the motion for judgment of acquittal was renewed at the close of all evidence. We are unpersuaded. The motion for judgment of acquittal was argued with specificity at the close of the State's case-in-chief, and the sufficiency issue is not waived simply because defense counsel failed to reiterate the specific reasons for a second time. By renewing the motion for judgment of acquittal, defense counsel incorporated her earlier argument with respect to the sufficiency of the evidence. *Warfield v. State*, 315 Md. 474, 487-88 (1989) ("When a party makes anew a motion for judgment at the conclusion of all the evidence and states that the motion is based upon the same reasons given at the time the original motion was made, or when a party 'renews' a motion for judgment and thereby implicitly incorporates by reference the reasons previously given, the reasons supporting the motion are before the trial judge.").

> evidence. We defer to the jury's inferences and determine whether they are supported by the evidence.

Id. at 185 (internal citations omitted).

"A fact-finder is free to believe part of a witness's testimony, disbelieve other parts of a witness's testimony, or to completely discount a witness's testimony." *Pryor v. State*, 195 Md. App. 311, 329 (2010). Moreover, we recognize that "the finder of fact has the ability to choose among differing inferences that might possibly be made from a factual situation." *Smith*, *supra*, 415 Md. at 183 (internal quotations omitted). As such, we "defer to any possible reasonable inferences the [trier of fact] could have drawn from the admitted evidence." *State v. Mayers*, 417 Md. 449, 466 (2010) (citing State v. Smith, 374 Md. 527, 557 (2003)). We "need not decide whether the [trier of fact] could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *Id*.

Seal contends that the evidence to support his conviction for child sexual abuse is insufficient because the State failed to produce evidence from which a rational fact-finder could conclude beyond a reasonable doubt that he was a "person who had temporary care or custody or responsibility for supervision" of Donald. *See* Article 27, § 35A.

Whether a person is responsible for the care, custody, or supervision of a minor for the purposes of Article 27, § 35A "is a question of fact for the jury." *Newman v. State*, 65 Md. App. 85, 99 (1985). In *Newman*, we held that there was sufficient evidence for the jury

to conclude that the defendant was a person to whom the child abuse statute applied when the victim had babysat in the defendant's home, the defendant had driven the victim to and from the babysitting job, and had paid the victim for babysitting. *Id.* Similarly, in *Tapscott v. State*, 106 Md. App. 109, 142 (1995), we held that a defendant fell within the class of persons to whom the child abuse statute applied when the defendant, who was the victim's half-uncle, previously babysat the victim and drove the victim to and from various places.

In the present case, Donald's mother, Shanda Seal, testified that, during the time period that the abuse occurred, Donald frequently spent weekends at Step-Grandmother's house with both Step-Grandmother and Seal. Shanda Seal testified as follows:

> Q. And did there come times when you would leave [Donald] in the care of his grandmother and his --
>
> [DEFENSE COUNSEL]: Objection your honor.
>
> [THE PROSECUTOR]: -- step uncle.
>
> THE COURT: Overruled.
>
> A. Yes. He was -- stayed there with them.

Furthermore, Donald testified that Step-Grandmother had physical impairments which required the use of a walker or cane. Step-Grandmother "mostly stayed in the front room" of the house and "sat in the chair a lot during the day." When asked who was "in charge of

watching" him during visits, Donald testified, "Well she [Step-Grandmother] would and the defendant [Seal] would."

The issue of whether Seal had temporary care or custody or responsibility for the supervision of Donald was discussed by both parties in closing argument. The prosecutor argued to the jury that Seal had been implicitly granted care, custody, or responsibility of Donald, commenting as follows:

> The final prong, number three, we have to show that the defendant was a person with temporary care, custody, or responsibility for the supervision of [Donald]. Don't let that bog you down. What does that mean? If you drop your son or your daughter, or your niece or nephew, or even a friend off at daycare, you're not explicitly -- you don't go and explicitly say to that person, "Hey, you're in charge of my kid if anything happens. You're taking care, custody, and responsibility for that." It is implied that that person is taking custody and control of your niece, nephew, daughter, [or] son. The same thing -- you take your son or daughter, niece or nephew over to someone's house and they're there for a play date and you leave. You're going to say, "I'm going to pick up my son in two hours." It is understood that that person has control. And it is understood in this case that when his parents left him in control of his grandmother and the defendant, David Seal, and they were the only adults there, that they had care, custody, and control, at least temporarily, of the victim.

The defense attorney also discussed the issue in closing, arguing as follows:

> The child abuse count in this case will rise and fall on whether you think that dropping [Donald] off at his grandmother's where his uncle lives but goes to work every day, as [Grandmother] said, is putting him in the temporary care and

> custody of -- such that those people -- such that my client would be liable for child abuse.
>
> * * *
>
> That the defendant, my client, sexually abused [Donald]. That at the time of the abuse [Donald] was under 18 years of age, and at the time of the abuse the defendant was a parent, adoptive parent, or person who had the permanent or temporary care, custody, or responsibility for the supervision of [Donald]. Like his teachers, like the daycare worker, like a babysitter. Not like [Seal]. Not like [Seal] who lived with [Grandmother]. The state is absolutely charging my client with something that they cannot beyond a reasonable doubt prove. You heard [Grandmother] say, "Oh, no, he didn't get custody. He was just over there visiting. All the kids were there." So you must find my client not guilty on that charge because of that.

To be sure, whether Seal had temporary care, custody, or responsibility for Donald was strongly disputed at trial. Viewing the evidence in the light most favorable to the State, however, we hold that a rational jury could have reasonably concluded that the State proved the elements of child sexual abuse. The jury was not required to find, based upon the evidence presented, Seal had "temporary care or custody or responsibility for the supervision" of Donald. Nevertheless, there was sufficient evidence adduced to allow the jury to make such an inference. Here, a jury could reasonably infer that a parent who permitted her child to stay in a home in which two adult family members lived consented to

both adults exercising supervisory responsibility over the child. Accordingly, we hold that there is sufficient evidence to support Seal's child sexual abuse conviction.

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

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1430

September Term, 2014

DAVID GLENN SEAL

v.

STATE OF MARYLAND

Berger,
Reed,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Dissenting Opinion by Raker, J.

Filed: May 13, 2015

Raker, J., dissenting:

I respectfully dissent. I would hold that the circuit court erred in denying appellant's motion to suppress the wiretapped recording because the victim was not acting "under the supervision" of Detective Copeland pursuant to Maryland Code (1973, Repl. Vol. 2013) § 10-402(c)(2) of the Courts and Judicial Proceedings Article.[1] Although direct or immediate supervision does not appear to be required under the statute, *some* supervision is necessary to satisfy the statutory exception.

The majority concedes that § 10-402(c)(2) is significantly more restrictive than its federal counterpart. Maj. op. at 11. Because of the overall similarity between the Federal and Maryland Wiretapping Acts, however, the majority finds persuasive federal authorities to arrive at its conclusion that the term "supervision" in the Maryland statute was intended to be interpreted broadly and that the level of oversight in the instant matter was sufficient to meet that standard. Maj. op. at 19-21. I disagree. Inasmuch as the federal authorities are instructive to interpret § 10-402(c)(2), they support the conclusion that the victim in this case was not acting "under the supervision" of Detective Copeland. The majority fails to identify

[1] Unless otherwise indicated, all subsequent statutory references herein shall be to the Courts and Judicial Proceedings Article. Maryland Code (1973, Repl. Vol. 2013) § 10-402(c)(2) provides, in pertinent part, as follows:

> "It is lawful under this subtitle for an investigative or law enforcement officer acting in a criminal investigation or any other person acting *at the prior direction and under the supervision* of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication in order to provide evidence . . . ." (Emphasis added).

any form of supervision exercised by law enforcement and seems to suggest that because Detective Copeland provided the recording equipment to the victim and that the Detective instructed him how to use the equipment (and indeed tried unsuccessfully to record a conversation), that conduct constitutes "supervision."

Pursuant to the less restrictive federal statute, "[i]t shall not be unlawful under this chapter for a person acting *under color of law* to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(c) (emphasis added). To determine whether one is acting "under color of law," the "question is whether the witness was acting under the government's direction when making the recording." *United States v. Andreas*, 216 F.3d 645, 660 (7th Cir. 2000); *see United States v. Haimowitz*, 725 F.2d 1561, 1582 (11th Cir. 1984) (noting that the question is "whether [the informant] was acting at the direction of the government when he recorded the conversations"). The government's "supervision" need not be flawless, but it is essential "that the government requested or authorized the taping with the intent of using it in an investigation and that they *monitored the progress* of the covert surveillance activities." *Andreas*, 216 F.3d at 661 (emphasis added).

Although one acting "under color of law" may conduct a wiretap outside the presence of law enforcement, even the federal authorities would require more oversight than that demonstrated by Detective Copeland in the case *sub judice*. In *United States v. Andreas*, the

United States Court of Appeals for the Seventh Circuit found the following facts sufficient to constitute surveillance "at the direction" of the FBI:

> "FBI agents requested [the informant] begin taping his coconspirators, instructed him on what type of conversation to record, supplied him with taping equipment and tapes, instructed him on the proper use of the equipment and *met with him regularly* to discuss developments in the conspiracy and collect the tapes. When possible, the *FBI itself monitored* the conversations by setting up remote-controlled video recorders to tape the face-to-face meetings of the conspirators and having FBI agents act as hotel staff to infiltrate the meetings."

Andreas, 216 F.3d at 661 (emphasis added). Similarly, in *Obron Atlantic Corp. v. Barr*, 990 F.2d 861, 865 (6th Cir. 1993), the United States Court of Appeals for the Sixth Circuit excused a lack of direct supervision by the government over the wiretapped recordings noting as follows:

> "The compelling and undisputed evidence of *continuous, albeit irregular, contact between Owen and the DOJ attorneys*, following their explicit request that he assist them in this very way and their instructions on how to conduct the calls, outweighs the lack of direct DOJ supervision over the recording process and Owen's failure to comply with certain directives." (Emphasis added)

In both *Andreas* and *Obron Atlantic Corp.*, although law enforcement officers were not present at the time of the recordings, they were in continuous contact with the individual conducting the wiretapped surveillance. Because the government was monitoring the progress of the surveillance, in some form or another, the federal courts held that the

individual was acting at the direction of the government and hence, "under color of law." *Andreas*, 216 F.3d at 661; *Obron Atlantic Corp*., 990 F.2d at 865. In the instant case, we need not determine whether the quantum of contact was sufficient because there was absolutely no law enforcement contact with the victim after the recording equipment was turned over to him.

The majority cites *Archer Daniels Midland Co. v. Whitacre*, 60 F. Supp. 2d 819 (C.D. Ill. 1999), to demonstrate the minimal governmental oversight necessary to constitute a permissible interception under the federal statute. Maj. op. at 19. The circumstances in *Whitacre*, however, demonstrate that the government exercised a greater degree of supervision than that in the case at bar. In *Whitacre*, the court held that the informant was acting "under color of law" and found compelling that the informant "*met frequently* with FBI agents and turned the tape recordings over to the FBI." *Id*. at 829 (emphasis added). As such, there was some level of persisting oversight by the government, despite the fact that the FBI did not exhibit the model standard in directing the informant to conduct the wiretapped recording. *See id*.

In the instant matter, the victim was not acting "under the supervision" of Detective Copeland because there was no oversight over the surveillance after the victim took the equipment home. The evidence adduced at the suppression hearing demonstrates that Detective Copeland showed the victim the equipment, gave him the normal process and proceeded to have the victim call appellant in her presence. After the attempted phone calls

proved unsuccessful, the Detective provided the equipment to the victim to conduct the recording himself.[2] From that point, however, there was no contact between Detective Copeland and the victim for at least two weeks. It is not until after the victim used the equipment to record a conversation with appellant that Detective Copeland came into contact with the victim to retrieve the recording. This can hardly constitute "under the supervision of an investigative or law enforcement officer" pursuant to the Maryland single-party consent exception for wiretaps. Section 10-402(c)(2). As indicated *supra*, even under the less restrictive federal statute, the federal authorities require some form of contact between law enforcement and the individual conducting the recording to be sufficient to constitute surveillance "at the direction" of the government. *See Andreas*, 216 F.3d at 661 (noting that, for one to be acting under "color of law," it is "essential" that the government "monitored the progress of the covert surveillance activities"). Here, after Detective Copeland gave the recording equipment to the victim, she failed to take any action to monitor the progress of the covert surveillance. Even under a broad definition of "supervision," Detective Copeland's actions, or lack thereof, failed to meet the standard required by § 10-402(c)(2).

Moreover, I disagree with the majority that the trial court applied the appropriate standard with regard to whether the victim acted under the supervision of Detective Copeland. The trial court ruled as follows:

[2] I agree that the victim was acting "at the prior direction" of law enforcement, but the Maryland single-party consent exception requires more than mere prior instruction.

> "[T]he victim was acting at the direction of the officer — the officer had set up the equipment, told him what to do — and that the supervision of the investigative law enforcement officer . . . was still in existence. *It would remain in supervision until the officer said no more calls and took the equipment away*. There's no requirement under the statute that the officer be present during the call." (Emphasis added).

Under the trial court's standard, law enforcement officers would have no obligation to follow-up or monitor the progress of the surveillance so long as the police set up the equipment, instruct the victim or informant on how to conduct the recording and give the individual the equipment to conduct the recording on his or her own. And how long could a private citizen retain recording equipment supplied by law enforcement and record private conversations deemed to be under "the supervision" of law enforcement? Two weeks? Three weeks? Two months?

According to the trial court, the surveillance is under the supervision of law enforcement until the officer instructs to cease the calls or takes the equipment away. It is nonsensical to conclude that this is the standard envisioned by the Legislature in enacting Maryland's single-party consent exception, which is patently more restrictive than the federal standard.[3] Although direct supervision is not required by § 10-402(c)(2), the statute requires,

[3] As the majority notes, the Legislature once attempted to adopt a single-party consent exception as broad as the federal standard, but the attempt was met with an executive veto. Maj op. at 11; *see Perry v. State,* 357 Md. 37, 61 (1999) (noting that "one attempt by the Legislature, in 1973, to modify [the single-party consent] provision met with a veto in which the Governor expressed his deep concern that the 'opportunity for unwarranted spying and intrusions on peoples' privacy authorized by this bill is frightening").

at the very least, *some* action establishing that law enforcement is monitoring the progress of the surveillance. *See Andreas*, 216 F.3d at 661; Black's Law Dictionary 1667 (10th ed. 2014) (defining "supervision" as "[t]he series of acts involved in managing, directing, or overseeing persons or projects"). It is not enough to reject appellant's suggested definition of "supervision" as too narrow, without providing for an alternative definition that is consistent with the restrictive nature of Maryland's single-party consent exception.

Because Detective Copeland failed to take any action whatsoever to monitor the progress of the ongoing surveillance after she gave the equipment to the victim or to maintain any contact at all with the victim, I would hold that the victim was not acting "under the supervision" of an investigative or law enforcement officer at the time of the recording and hence, the court erred in denying appellant's motion to suppress.