Circuit Court for Washington County
Case No. 21-K-16-052397

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 277

September Term, 2022

DAVID PAUL BICKFORD

v.

STATE OF MARYLAND

Zic,
Ripken,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: October 11, 2022

In 2017, David Paul Bickford, Appellant, was convicted of twenty counts of visual surveillance with prurient intent and one count of sexual abuse of a minor. *Bickford v. State*, No. 95, 2018 WL 2215485, at *1 (Md. Ct. Spec. App., May 15, 2018). On appeal, this court held that the evidence was insufficient to sustain the convictions for visual surveillance with prurient intent, and we vacated those convictions but otherwise affirmed the judgment. *Id.* at *15–16.

In 2022, Bickford filed a motion in the Circuit Court for Washington County, alleging that the charging document failed to show jurisdiction or otherwise was so defective that it failed to charge a cognizable offense. This appeal is from the denial of that motion.

Before us, Bickford raises two issues:

I. Whether "[t]he State failed to establish jurisdiction for the court to decide Mr. Bickford's guilt for the crime of sexual abuse of a minor with respect to the filming of his minor child"; and

II. Whether "[t]he trial court's denial of Mr. Bickford's motion to dismiss conviction renders the sex abuse of a minor law both overbroad and underinclusive."

For the reasons that follow, we shall affirm.

BACKGROUND

We quote our unreported opinion in Bickford's direct appeal for factual background:

> On December 14, 2015, Bickford's daughter -- fifteen-year-old ["M." or "the victim"][1] -- went to the Hagerstown Police Department. She told police officers that she had been doing homework on her father's laptop computer and found several photos of herself in the bathroom of her home in

[1] To protect the privacy of the victim, we will refer to her as "M." Neither the victim's first name nor surname begins with this letter.

Hagerstown, where she lived with her father. Some of the photos captured her partially or completely nude. Police questioned Bickford and ultimately confiscated several electronic devices, including Bickford's laptop, iPhone, and two external hard drives.

In February of 2016, after police completed a forensic analysis of files stored on Bickford's electronic devices, Bickford was arrested and charged with (1) sexual abuse of a minor under Md. Code (2012 Repl. Vol., 2015 Supp.), Criminal Law Art. ("CL") § 3-602(b)(1); (2) sexual solicitation of a minor; (3) possession of child pornography; and (4) twenty-three counts of visual surveillance with prurient intent ("private place") under CL § 3-902(c). At trial, the State introduced into evidence several videos and other files recovered from Bickford's laptop computer, iPhone, and two external hard drives, as well as witness testimony from [M.] and the detectives and analysts who investigated [M.]'s case. Bickford also testified on his own behalf.

At trial, [M.] testified that she had moved with her father from Martinsville, West Virginia to Hagerstown, Maryland sometime in August of 2015 and began attending high school there. She explained that her father decided to renovate parts of the house, including the family's only bathroom, where parts of the drywall were damaged. Sometime in October, [M.] noticed activity on her father's computer and TV. She testified that the TV appeared to show a "live-feed" video of the family's bathroom. [M.] entered the bathroom and found a small device in a hole in the wall between the shower and toilet. [M.] said that she went to her father and told him about the device, and that he told her that it was a "pipe alarm," which he had obtained from work, and that he would get rid of it.

Both [M.] and Bickford testified that Bickford had often disciplined [M.] by taking away her iPhone. Bickford said that after they moved to Hagerstown, he had taken her phone from her multiple times and put it in an unlocked cupboard, but that he believed [M.] continued to use her phone when she was not supposed to have it. He testified that, during one of the times he had taken [M.]'s iPhone, he went through her messages and found that [M.] was messaging a boy named John on an application called SnapChat. Although he could not find any inappropriate pictures on [M.]'s phone, Bickford testified that he found an ongoing, sexual text conversation between [M.] and John that indicated to Bickford that John had been asking [M.] to send nude pictures of herself to him. According to Bickford, the content of the messages indicated that [M.] had complied and sent inappropriate pictures to John. [M.] conceded during her testimony that she sent John "partially clothed" pictures and that her father had punished her by

taking her phone away from her again. Bickford's primary contention at trial was that his daughter indicated to him that she took the pictures of herself in the family's bathroom. He testified that he set up a camera in the bathroom in order to catch her on her phone.

[M.] testified that, the following December, while she was using her father's laptop computer to do her homework, she came across a photo album of pictures of herself in the family's bathroom, some of which showed her completely nude. She was able to locate the folder (labeled "CHIDE") where at least some of the images were stored. She said that after discovering the photos, she "tried to stay calm" and called her mother. They made plans for her mother to pick her up to go to lunch the following day. [M.] said that after she got off of the phone, she felt awkward and tense toward her father, and that he asked her what was wrong. [M.] said she confronted her father about the photos, and that he told her that he was no longer satisfied with pornography and wanted to see a virgin. According to [M.], her father acted nervous prior to [M.] leaving to go to lunch with her mother and that he asked her not to tell her mother about his reason for setting up the camera. [M.] said that, at some point while she was in her mother's car, Bickford told her mother that he had set up a camera in their bathroom because he believed [M.]'s older brother, who had recently moved in with them, was doing drugs in the bathroom and that he was not trying to monitor [M.]

The prosecutor asked [M.] a number of questions related to Bickford's conduct and remarks during the few years prior to [M.]'s discovery of the hidden camera. She testified that when she was approximately eleven or twelve years old and she and her father still lived in West Virginia, "He'd ask me if I'd ever . . . If I would ever have sex with him." [M.] said that, around that same time period, after she would get into the shower, Bickford often got into the shower with her. She explained that, when she was around the age of thirteen, she started telling Bickford no when he would ask to shower with her and that she wanted to shower alone.

[M.] also described two other interactions with Bickford of a sexual nature. One such instance occurred after her mother had taken her shopping for new clothes. [M.] testified that she showed Bickford her new outfits and he told her that watching her try on clothes gave him a "boner," which she interpreted to mean "erection." During Bickford's direct examination testimony, he denied ever making that statement to [M.] and said that, at most, he would sometimes tell [M.] that she looked nice or "sexy," because he wanted her to feel good about her appearance. In addition, [M.] said that she asked Bickford for her iPhone back after he had taken it away, and that he said that he would return the phone to her if she gave him a "blow job."

Bickford testified that he never requested that [M.] perform oral sex on him. He explained that, in one instance, he became irritated after [M.] repeatedly asked for her iPhone back, and that he told her to "suck it" as a way of saying no.

During the State's presentation of its case, Sergeant Howard testified as an expert witness in data recovery and computer forensics. He stated that he had recovered the remnants of a folder entitled "CHIDE" on Bickford's laptop, which included numerous "bathroom videos." He located both short and long clips cut from several original videos, and that all of the clips featured the same young girl while she was getting in and out of the shower and sitting on the toilet. He testified that the videos appeared to have been originally recorded on Bickford's iPhone, which was, in turn, recording a screen of another devices, such as a TV displaying a "live feed." He explained that the "bathroom videos" appeared to have been created between October and December of 2015, and that the editing of the videos caused a temporary file to remain on the computer even after someone had attempted to delete the CHIDE folder. Although the camera appeared to be positioned near the floor, pointing upward, and at an angle that often did not show the person's face captured in the video, [M.] identified herself in most of the videos shown to her at trial. Regarding one video in which a "Tinkerbell" blanket covered the body of the person in the shot, [M.] explained that she started bringing the blanket with her to cover herself while getting in and out of the shower in case there was a camera.

Detective Duffy, who was admitted as an expert in cellular analysis and data recovery, testified that he recovered the online browsing history from Bickford's iPhone. He indicated that Bickford had viewed numerous pornographic websites and videos relating to father-daughter sex and incest. Further, he recovered evidence that Bickford had searched for sites of this nature, and that he had performed Google searches using search terms such as "Do girls want to have sex with their dad?" During his testimony, Bickford's explanation for his searches and online activity related to father-daughter sex was that it was the fastest way to get to "Japanese pornography."

Sergeant Howard also testified regarding a video he recovered from Bickford's external hard drives that were originally recorded on Bickford's iPhone. The forty-eight second video showed what appeared to be an adult male rubbing lotion or cream on a female child's buttocks from behind her. He testified that the video prominently featured the girl's buttocks, anus, and vagina, and that, at one point, she covers her vagina with her hand and then subsequently removes it. [M.] testified that, when she still living with her

> father in West Virginia, Bickford told her to undress after they arrived home from visiting family in New Jersey so that he could put cream on flea bites on her body caused by being around her uncle's dogs. [M.] said that Bickford told her that he was using the flashlight on his phone and that she did not know that he was recording. She denied asking Bickford to put cream on her and testified that she was thirteen years old at the time and old enough to apply the cream herself. When Bickford testified, he claimed that the reason he had the video was that he was unfamiliar with how to use the flashlight function on his new iPhone, and that he knew the light would come on in the video function. He said that he deleted the video a week or so later when he realized it was still on his phone and that the video had been transferred to his hard drives during a data recovery of his devices.

Bickford, 2018 WL 2215485, at *2–3.

In 2017, a jury sitting in the Circuit Court for Washington County found Bickford guilty of twenty counts of visual surveillance with prurient intent and one count of sexual abuse of a minor. *Id.* at *1. The circuit court sentenced Bickford to 25 years' imprisonment, all but fifteen years suspended, for sexual abuse of a minor, to be followed by five years' probation. *Id.* The court merged the remaining convictions for sentencing purposes. *Id.* On direct appeal, this court held that the evidence was insufficient to sustain the convictions for visual surveillance with prurient intent[2] and vacated those convictions but otherwise affirmed the judgment. *Id.* at *15–16.

[2] Specifically, this court interpreted the relevant statute as including a public place element (that is, the victim must have been in a "private place" *within* a "place of public use or accommodation"), for which there was no evidence, given that Bickford had surreptitiously recorded his daughter in their home. *Bickford*, 2018 WL 2215485, at *9–16.

Bickford subsequently filed *pro se* a postconviction petition, raising a dozen claims of ineffective assistance of trial and appellate counsel.[3] In addition, he filed a supplemental petition, through counsel, alleging ineffective assistance of trial counsel for failing to object to the sentencing judge's reliance upon purportedly impermissible considerations. Following a hearing, the circuit court issued a memorandum opinion and order denying all claims. Bickford's ensuing application for leave to appeal was denied.

In March 2022, Bickford filed a "Motion to Dismiss Conviction," invoking Maryland Rule 4-252(d) and claiming as follows:

> I. The charging document failed to demonstrate jurisdiction for the court to decide whether the crime of sexual abuse of a minor had been committed by Mr. Bickford with respect to the filming of his minor child as it does not characterize an offense.
>
> II. The indictment fails to set forth the essential elements of proscribable expression under the First Amendment which include knowledge, intent, and a specific category of proscribable speech.

The State filed a response contending that Bickford's purported jurisdictional challenge was actually a challenge to the sufficiency of the evidence, an issue which had already been decided adversely to Bickford at trial and on direct appeal; that the circuit court had jurisdiction over the offense; and that "the defendant has no constitutional right to sexually exploit and abuse his minor, biological daughter."[4] Upon receiving the State's

[3] Bickford filed two prior *pro se* petitions, but his third *pro se* petition declared that it was "intended to replace all prior *pro se* petitions." None of the claims raised in Bickford's postconviction petition are relevant to this appeal.

[4] Although the State did not mention it in its response, a sufficiency claim cannot be raised in a motion challenging the jurisdiction of the court; rather, a sufficiency claim is subject to preservation rules. Md. Rule 4-324(a); *Starr v. State*, 405 Md. 293, 301–05 (2008).

response, the circuit court issued an order denying Bickford's "Motion to Dismiss Conviction." This timely appeal followed.

DISCUSSION

As a threshold matter, we address whether this is an appealable order. *See, e.g.*, *Stachowski v. State*, 416 Md. 276, 285 (2010) (observing that an appellate court may, *sua sponte*, consider whether it has jurisdiction and that, if it does not, it is "obligated" to dismiss the appeal). Bickford's unorthodox motion invokes Rule 4-252(d), which provides:

> **(d) Other Motions.** A motion asserting failure of the charging document to show jurisdiction in the court or to charge an offense may be raised and determined at any time. Any other defense, objection, or request capable of determination before trial without trial of the general issue, shall be raised by motion filed at any time before trial.

A motion asserting the failure of a charging document to show jurisdiction or to charge an offense is similar to a motion to correct an illegal sentence in that either motion may be raised "at any time." Moreover, in *State v. Kanaras*, 357 Md. 170, 176–84 (1999), the Court of Appeals rejected a claim that the appeal bar in the Postconviction Procedure Act[5] precludes an appeal from the denial of a motion to correct an illegal sentence. The

[5] The appeal bar currently provides:

(b)(1) In a case in which a person challenges the validity of confinement under a sentence of imprisonment by seeking the writ of habeas corpus or the writ of coram nobis or by invoking a common law or statutory remedy other than this title, a person may not appeal to the Court of Appeals or the Court of Special Appeals.

(2) This subtitle does not bar an appeal to the Court of Special Appeals:

(i) in a habeas corpus proceeding begun under § 9-110 of this article; or

(continued)

Court of Appeals held that a defendant may appeal as of right from a circuit court's denial of a motion to correct an illegal sentence.[6] By parity of reasoning, we conclude that a direct appeal lies from the denial of a motion, under Rule 4-252(d), alleging the failure of a charging document to show jurisdiction or to charge an offense.

This brief digression into appealability helps to illuminate the narrow scope of a claim under Rule 4-252(d) alleging the failure of a charging document to show jurisdiction or to allege a cognizable offense. As we shall see, many of Bickford's arguments do not fall within that narrow scope and, therefore, are not properly raised in this appeal.

I. THE CIRCUIT COURT HAD JURISDICTION.

Bickford contends that the "State failed to establish jurisdiction for the Court to decide [his] guilt for the crime of sexual abuse of a minor with respect to the filming of his minor child." However, none of the authorities Bickford cites in his brief support his

(ii) in any other proceeding in which a writ of habeas corpus is sought for a purpose other than to challenge the legality of a conviction of a crime or sentence of imprisonment for the conviction of the crime, including confinement as a result of a proceeding under Title 4 of the Correctional Services Article.
Md. Code, Crim. Pro. Art. ("CP"), § 7-107(b) (2013).

The statute at issue in *Kanaras* was Maryland Code, Article 27, § 645A(e), which is substantially similar to the present statute.

[6] The Court of Appeals did not specify the statute that authorizes an appeal from the denial of a motion to correct an illegal sentence. *Kanaras*, 357 Md. at 176–84. Presumably, that authorization comes from the general appeal provision in Courts & Judicial Proceedings Article ("CJ"), § 12-301. *See*, *e.g.*, *Douglas v. State*, 423 Md. 156, 170–77 (2011) (rejecting the State's argument that CP § 7-107(b) bars an appeal from the denial of a petition for writ of actual innocence and holding that CJ § 12-301 authorizes such an appeal); *Skok v. State*, 361 Md. 52, 62–66 (2000) (rejecting the State's argument that Article 27, § 645A(e) bars an appeal from the denial of a petition for writ of error coram nobis and holding that CJ § 12-301 authorizes such an appeal).

contention that the charging document failed to confer subject matter jurisdiction on the circuit court.[7] As such, rather than engage in a point-by-point refutation of each argument, we will briefly explain why Bickford's claim must fail, guided by our previous observation that the scope of a jurisdictional claim is narrow.

"It is fundamental that a court is without power to render a verdict or impose a sentence under a charging document which does not charge an offense within its

[7]See *Schmitt v. State*, 210 Md. App. 488 (2013), which addresses only whether the evidence in that case was sufficient to sustain a conviction of sexual abuse of a minor (we held that it was). *Id.* at 489–90. *Ayre v. State*, 291 Md. 155 (1981), did address the sufficiency of an indictment and held that it was fatally defective because it failed to allege two essential elements of the offense charged (knowledge and obscenity). *Id.* at 165–69. However, *Ayre* does not compel the result Bickford seeks here; in *Ayre*, as the Court of Appeals subsequently would explain in *Williams v. State*, 302 Md. 787, 794 (1985), "averments essential to characterizing a statutory crime were completely omitted from the charging documents," whereas here, as we explain *infra*, that is not the case. Moreover, in *Ayre*, a different offense was charged than was charged here; Bickford is wrong in asserting that it was necessary to aver "the elements of child pornography" in the count charging him with child sexual abuse. *See Tribbitt v. State*, 403 Md. 638, 645 (2008) (rejecting the contention "that, in order to be convicted of a violation of [CL § 3-602], a defendant's particular acts as found by the trial court must be 'otherwise criminal' in nature").

None of the other authorities Bickford cites, such as *Outmezguine v. State*, 335 Md. 20 (1994) (child pornography by photographing a minor engaging in sexual conduct), *In re S.K.*, 466 Md. 31 (2019) (distribution of child pornography via texting), and *New York v. Ferber*, 458 U.S. 747 (1982) (holding that child pornography is not entitled to First Amendment protection provided the conduct to be prohibited is adequately defined by applicable state law), requires a different result in this case. Distilled to its essence, Bickford appears to argue that the count charging child sexual abuse did not confer subject matter jurisdiction on the circuit court because it did not allege that Bickford's videos depicted his daughter "engaged as a subject in sexual conduct," nor that he "had knowledge of what runs the risk of being obscene." That contention misconstrues the elements of the crime charged. *See Cooksey v. State*, 359 Md. 1, 24 (2000) (observing that "a charge of sexual child abuse may be sustained on evidence that would not support a conviction under the sexual offense, rape, sodomy, or perverted practice laws") (interpreting Art. 27, § 35C, the predecessor statute to CL § 3-602).

jurisdiction prescribed by common law or by statute." *Williams v. State*, 302 Md. 787, 791 (1985) (citations omitted). "Manifestly, where no cognizable crime is charged, the court lacks fundamental subject matter jurisdiction to render a judgment of conviction, i.e., it is powerless in such circumstances to inquire into the facts, to apply the law, and to declare the punishment for an offense." *Id.* at 792 (citations omitted). However, "[i]f an indictment or other charging document 'sufficiently characterize[s]' a crime, it is not jurisdictionally defective, even if the charging document does not 'aver [the] essential elements' of the crime." *McMillan v. State*, 181 Md. App. 298, 348 (2008) (quoting *Williams*, 302 Md. at 793), *rev'd on other grounds*, 428 Md. 333 (2012).

We turn now to the charging document in this case. On April 14, 2016, Bickford was charged, by criminal information, with 26 counts alleging violations of Criminal Law Article, §§ 3-324, 3-602(b)(1), 3-902(c), and 11-208. Given that this court vacated all but one conviction in Bickford's direct appeal, we confine our attention to Count One of the information[8] because that is the only charge for which Bickford stands convicted. Count One states:

> I, Charles P. Strong, Jr., State's Attorney for Washington County, Maryland, upon information charge that David Paul Bickford, between the 29th day of October, 2015 and the 27th day of November, 2015, in Washington County, did cause sexual abuse to [M.], a minor, the defendant being a parent who

[8] We note, however, that every count of the information was in substantially the same form, alleging as follows:

I, Charles P. Strong, Jr., State's Attorney for Washington County, Maryland, upon information charge that David Paul Bickford, on or about [a date in 2015, which varied from count to count], in Washington County, did [commit the crime charged], against the peace, government, and dignity of the State.

> has permanent custody of [M.], against the peace, government, and dignity of the State.
>
> (Criminal Law Article, Section 3-602(b)(1))
> CJIS Code 1 0322

Plainly, this count "sufficiently characterized" the crime of sexual abuse of a minor. *Williams*, 302 Md. at 793. It alleged who committed the crime (Bickford), who the victim was (his daughter), that she was a minor, when the offense occurred, where it occurred (in Washington County, Maryland), and what crime was alleged. The charging document also cited the subsection of the statute that was violated, Criminal Law Article, § 3-602(b)(1), which states (and therefore is incorporated by reference): "A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor." CL § 3-602(b)(1). Another subsection of the same statute defines the term "sexual abuse" as "an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not." CL § 3-602(a)(4)(i); *see, e.g., Tribbitt v. State*, 403 Md. 638, 645 (2008) (rejecting the contention "that, in order to be convicted of a violation of [CL § 3-602], a defendant's particular acts as found by the trial court must be 'otherwise criminal' in nature"); *Cooksey v. State*, 359 Md. 1, 24 (2000) (observing that "a charge of sexual child abuse may be sustained on evidence that would not support a conviction under the sexual offense, rape, sodomy, or perverted practice laws") (interpreting Art. 27, § 35C, the predecessor statute to CL § 3-602). Any additional specificity is not required to confer subject matter jurisdiction on the circuit court, *Williams*, 302 Md. at 793, and, in any event, Bickford was

provided a bill of particulars upon his demand. This count clearly invoked the subject matter jurisdiction of the circuit court.

In passing, we reject Bickford's apparent assertion that the offense charged was not a cognizable crime because filming his minor daughter in her bathroom was "protected by the First Amendment." As the State aptly replied in the circuit court, Bickford "has no [First Amendment] constitutional right to sexually exploit and abuse his minor, biological daughter."

II. WHETHER THE CHILD SEXUAL ABUSE STATUTE IS "OVERBROAD AND UNDERINCLUSIVE" IS BEYOND THE SCOPE OF THE RULE 4-252(D) MOTION.

Bickford contends that the circuit court's "denial of [his] motion to dismiss conviction renders the sex abuse of a minor law both overbroad and underinclusive." The short answer is that Bickford's contention neither implicates the subject matter jurisdiction of the circuit court, nor that of any other claim within the scope of a Rule 4-252(d) motion alleging the failure of a charging document to show jurisdiction or to charge an offense. Bickford's claim would imply that a court having subject matter jurisdiction over a criminal cause, which subsequently denies a defense motion to dismiss a charging document, somehow could be divested of jurisdiction in doing so.

But even if we were to interpret his claim as an assertion that the child sexual abuse statute is unconstitutional because it is "both overbroad and underinclusive," we would reject that claim. Such a claim is distinct from a jurisdictional claim, and it is time-barred because it was not "raised by motion filed at any time before trial." *See* Md. Rule 4-252(d) (stating in relevant part: "Any other defense, objection, or request capable of determination

before trial without trial of the general issue, shall be raised by motion filed at any time before trial.").

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.