Circuit Court for Montgomery County
Case No. 122857

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 131

September Term, 2017

DAVID GLENN SEAL

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: December 8, 2017

David Seal, appellant, was convicted by a jury sitting in the Circuit Court for Montgomery County of child sexual abuse and sentenced to 15 years of imprisonment.[1] Appellant raises three questions on appeal, which we have slightly rephrased:

I. Did the trial court err when defense counsel declined the trial court's offers to rephrase its compound voir dire questions asking whether any prospective juror had such strong feelings about the charged offenses that they could not be fair and impartial?

II. Did the sentencing court err when it allegedly considered appellant's unlawfully intercepted telephonic communication in which he admitted to sexually assaulting the victim?[2]

III. Did the trial court err in denying appellant's motion for judgment of acquittal because the State failed to prove that appellant had "permanent or temporary care or custody or responsibility for the supervision" of the victim?

We answer the first and third questions in the negative and the second in the affirmative. Accordingly, we shall affirm appellant's conviction but remand for re-sentencing.

FACTS

D.W., who at the time of trial was a 46-year-old married man living in West Virginia, had lived as a child with his mother and stepfather in Rockville, Maryland. D.W.

[1] The jury was unable to reach a verdict on ten counts: six counts of second-degree sex offense and four counts of third-degree sex offense. The trial court declared a mistrial on those counts.

[2] In 2014, a jury convicted appellant of child sexual abuse, six counts of second-degree sex offense, and four counts of third-degree sex offense. On appeal, the Court of Appeals reversed appellant's convictions and remanded for retrial, holding that a telephone call between appellant and D.W. in which appellant admitted to sexually abusing D.W. was inadmissible at trial because it was unlawfully intercepted under the Maryland Wiretapping and Electronic Surveillance Act. *See Seal v. State*, 447 Md. 64 (2016). The instant appeal is from appellant's second trial.

had known appellant, who is his stepfather's brother and whom he called Uncle David, since he was three. Appellant lived with his elderly mother in a farmhouse in Gaithersburg. The house sat on about 10 acres, and included several outbuildings and a barn with animals. D.W. saw appellant and his step-grandmother often, at least twice a week, and he sometimes visited the farm during the week and weekend.

The sexual abuse began the summer of 1981, when D.W. was approximately nine years old. D.W. spent several weeks that summer at the farm so he could help out, spend time with his step-grandmother, and learn to play softball from appellant. Appellant worked during the weekday but made the meals. The step-grandmother walked with crutches or a walker and was mostly confined to a chair in the front of the house or her bed near the middle of the house. D.W. usually put himself to bed in the guest bedroom at the back of the house.

Early one morning while asleep that summer, D.W. awoke to someone touching his penis. When he fully awoke, he saw appellant leaving the bedroom. Appellant returned a couple of minutes later and fondled D.W.'s penis. D.W. was scared and did not know what to do. D.W. testified that the abuse escalated quickly to include digital penetration of D.W.'s anus and forced oral and anal sex. The abuse occurred in D.W.'s bedroom, the unfinished basement, and in a barn on the property.

D.W. testified that once, after appellant had sexually abused him in the basement, D.W. asked appellant if he did this to anyone else. Appellant responded that he did not, but if D.W. told anyone about the abuse, he would kill D.W.'s mother and younger brother. The abuse continued for about three years. D.W. believed it stopped because he and his

immediate family moved to Virginia and he no longer had to go to the farm, and because appellant had a girlfriend.

The abuse loomed large over D.W.'s life, but because of his guilt and shame, D.W. told few persons about it. When he turned 21 years old, he told his mother and stepfather that appellant had molested him but it appears that they did nothing with this information. Years later, D.W. revealed the abuse to Stacey W., his then girlfriend and now his wife. A few years after they were married, his wife confronted appellant about the abuse in a parking lot following D.W.'s niece's funeral. D.W. testified that his wife told appellant that "he should be ashamed of himself" for what he did to D.W. Appellant responded, "I'm sorry for what I did, the devil got a hold of me."

A few years later, D.W. found appellant's telephone number on the internet and called him to get "some answers." D.W. related the conversation. He testified that he told appellant that the abuse had caused him to struggle his whole life and he asked appellant why he had molested him. Appellant responded that "he was sorry" and offered to pay D.W. D.W. testified that the conversation continued:

> [H]e says I could take care of it for you, it's no problem. And I said, well, what do you mean? He says, oh, I can, I can pay you like a, like I would, like you would be paying for a car or something he said. I said, I don't want your money, buddy, I don't need your money. And we got off the phone and, you know, I still didn't feel anything, like it didn't make me feel better.

Sometime later, appellant left a voicemail message on D.W.'s phone in which appellant said, "the best [he] can do is $7,000." Within several days, and with Stacey's urging, D.W. contacted the police.

Shanda Seal, D.W.'s mother, testified that when D.W. was young he was left in the care of appellant and her mother-in-law at the latter's house sometimes three times a week and sometimes on the weekend. D.W. also stayed overnight. Shanda confirmed that her mother-in-law was elderly, and although she did walk with crutches, she mostly sat in a reclining chair. Stacey, D.W.'s wife, testified that D.W. had told her about the abuse after they began dating, and she confirmed the encounter in substance at the funeral home. She testified that D.W. used to suffer from anxiety attacks and nightmares, and as a result, she encouraged him to not suffer in silence.

Detective Tracey Copeland of the Montgomery County Police Department testified that D.W. and his wife reported the sexual abuse of D.W. by appellant. After interviewing them both, she and another officer went to appellant's home to speak to him. She advised appellant about D.W.'s report and said she wanted to get his "side of the story." She asked if she could record their conversation. Appellant agreed and the tape was played for the jury.

On the tape, appellant said that D.W. had called him and "we talked about different things, and then he says, 'Well, what do you want to do about it?' I said, 'Well, what would you like to do about it?' he said, 'Well, I'd like to be compensated.'" He then told D.W., "Well, give me a week to talk and think about it and see what we come up with." Appellant told the officer that he then spoke to his lawyer and determined that he could give D.W. $7,000. The lawyer called D.W. to offer the money but D.W. refused the money. On the tape, the detective can be heard telling appellant that D.W. had said appellant had "fondled him, that you touched his penis, that you had sex with him, that you had him suck on your

penis, that you sucked on his penis. These are the things that [D.W.] said happened, in addition to physical abuse, being hit and made to –[.]" Appellant interrupts, not denying the sexual abuse but saying, "I never hit [D.W.]"

Appellant testified in his defense. He denied that he molested D.W. and denied that he admitted outside the funeral home to doing so. He testified that when D.W. was at the farm house, his mother watched him and D.W.'s parents never asked him to care for D.W. Appellant had a different interpretation about his and D.W.'s telephone conversation. Appellant testified that D.W. called him and demanded to be compensated for what he did to him. Appellant apologized and told him that he was sorry "if I offended you in any way." Because D.W. told him he could go to jail for what he did, appellant contacted an attorney who advised him to give D.W. money so that "it would be over with." Appellant followed his attorney's advice and offered to pay D.W. $7,000, but D.W. did not want the money.

Several family members and friends testified as character witnesses to appellant's reputation for peacefulness and honesty, and D.W.'s reputation for being dishonest.

We will provide additional facts where necessary in our discussion below.

DISCUSSION

I.

Relying on the line of cases beginning with *Dingle v. State*, 361 Md. 1 (2000), and culminating with *Pearson v. State*, 437 Md. 350 (2014), appellant argues that the trial court abused its discretion during voir dire when it asked compound questions about whether the prospective jurors had "such strong feelings" about the specified offenses that they could

not be fair and impartial in rendering a verdict. The State responds that reversal is inappropriate for two reasons: 1) appellant waived his argument when he declined the trial court's offer to cure the compound questions problem by rephrasing the questions, and 2) "the trial court's voir dire as a whole created a reasonable assurance that any latent bias due to the nature of the charges [] would have been discovered." We agree with appellant that the question asked was in error but we shall affirm the convictions because appellant waived his argument when he declined the trial court's offer to cure the error.

Prior to trial, defense counsel filed written voir dire questions. To determine whether any prospective juror had any bias based on the nature of the sexual charges, the defense's voir dire written questions took the following general form: "This case involves allegations of [sexual abuse by an adult against a child; anal intercourse by an adult against a child; fellatio by an adult against a child; an adult forcing a child to commit fellatio on him; and an adult fondling the penis of a minor child]. Is there any member of the panel who has strong feelings about the crime of [the above allegations]?"

On the first day of trial and prior to voir dire, the trial court advised the parties that it may not ask either parties submitted voir dire questions verbatim, but would "try and capture the gist" of the questions. During voir dire, the trial court asked, among other things, the following five questions:

> [T]his case involves allegations, as I indicated, of sexual abuse by an adult against a child. Is there any member of the panel who has such strong feelings about the crime of sexual child abuse that they believe that they would not be able to be fair to the defense and the State?
>
> (No affirmative response.)

> This case involves allegations of anal intercourse by an adult against a child which we refer to as a second offense, I mean, excuse me, a sex offense in the second degree. Is there any member of the panel who has such strong feelings about the crime of anal intercourse by an adult against a child that they would not be able to be fair and impartial in listening to the evidence and attempting to render a verdict?
>
> (No affirmative response.)
>
> This case involves allegations of an adult forcing a child to commit fellatio on him which we, again, refer to as a sex offense in the second degree. Is there any member of the panel who has such strong feelings about the crime of an adult forcing a child to commit fellatio on him that you could not be fair and impartial in assessing the evidence, that is, fair and impartial to both the defense and the State?
>
> (No affirmative response.)
>
> This case involves allegations of an adult fondling the penis of a minor child which we'll refer to as sex offense in the third degree. Is there any member of the panel who has such strong feelings about the crime of an adult fondling the penis of a child who would not be able to sit and be fair and impartial in assessing the evidence and rendering a verdict?
>
> (No affirmative response.)
>
> This case involves allegations of an adult digitally penetrating the rectum of a minor child which we'll refer to as sex offense in the third degree. Is there any member of the panel who has such strong feelings about that crime of an adult digitally penetrating the rectum of a child that you would not be able to be fair and impartial in assessing the evidence and rendering a fair and impartial verdict?
>
> (No affirmative response.)

After voir dire but prior to jury selection, defense counsel objected to the above questions on the grounds that the trial court's language improperly asked the jurors to make a self-assessment about whether they could be fair and impartial. The following colloquy occurred:

THE COURT: I added strong feelings about the offense that would cause you not to be able to be fair and impartial to either side. You figure that, that is improper and the reason is why?

[DEFENSE COUNSEL]: Because –

THE COURT: Isn't that what we're trying to seek?

[DEFENSE COUNSEL]: It calls upon the jurors, potential jurors to make a self-assessment of their bias and it's the job of the Court to make the assessment of their bias. And we believe that the proper question is worded like we did and if a person does have strong feeling about a particular crime, they will be called up and asked what their feeling are and why they should be, whether they would interfere with their ability to be fair and impartial.

THE COURT: *All right. I'll, I'll, I'll ask a general question. I'm not going to go through each question with each offense –*

[DEFENSE COUNSEL]: I, I don't think that –

THE COURT: -- *over your objection. But, hang on, I'll ask if, if you want, and just leave it with, I'll tell them before, just does anybody have any strong feelings about the nature of the charges or the charges in this case, period. Are you satisfied with that*?

[DEFENSE COUNSEL]: And I think also number –

THE COURT: You didn't answer, [defense counsel].

[DEFENSE COUNSEL]: I'm sorry.

THE COURT: Are you satisfied if I do that?

[DEFENSE COUNSEL]: That you have, ask does anybody have strong feelings about each of –

THE COURT: I'm not going to, no, I'm not going to go through each one again.

[DEFENSE COUNSEL]: Yes.

THE COURT: I think they understand the nature of the charge by now. If not –

[DEFENSE COUNSEL]: By now.

> THE COURT: -- they don't belong on the panel anyway.
>
> [DEFENSE COUNSEL]: Right. Right.
>
> THE COURT: And it's not going to cure it.
>
> [DEFENSE COUNSEL]: All right.
>
> THE COURT: But I'll ask them if they have, as you put it, I'll use your word, strong feelings. What I try to avoid is I would hope that most people aren't in favor of, of these types of offenses, but –
>
> [DEFENSE COUNSEL]: As you said, Your Honor, I don't think anybody is in favor of these kind of offenses.
>
> THE COURT: Right. So we're going to get everybody that's going to come up and say, you know what, I have strong feelings.
>
> [THE STATE]: Uh-huh.
>
> THE COURT: I don't think. I don't think little kids should be abused. The more I think about it, I don't think I'm going to ask any more questions because that's not going to accomplish anything. We assume, unless, unless the defense is okay, if you're not, I won't say that we understand everybody is opposed to children being abused by adults. But the question is, *do you have any strong feelings other than a total disapproval*? But if you don't want me to do that, then I'm not going to, I'm not going to ask any more questions because I think, I think I've covered it with what I did and it satisfies it and the jury had every opportunity to come up if they had strong feelings which made them think they couldn't be fair to one side or the other, and they certainly knew they could approach the bench because they've been doing that all morning. Do you, if you don't object to me saying we know everybody is opposed to it, but is there some specific or particular reason that you have the strong feelings, other than just being opposed to it, I'll do that. But if you don't want me to do that, I won't.

(Emphasis added). Defense counsel stated that it would not "recommend that" and made clear it objected to the voir dire questions that were asked. Defense counsel also renewed his objection after the jury was empaneled.

Clearly the trial court's compound voir dire questions that permitted the prospective jurors to determine if they had strong feelings about the enumerated offenses and, if they did, whether they could be fair and impartial was in contravention of *Pearson v. State*, 437 Md. 350 (2014). As the Court of Appeals stated in *Pearson*, a trial court abuses its discretion in asking a compound question in that format because it shifts the responsibility for deciding a prospective juror's bias from the trial court to the juror. *Id*. at 361-62.

When the error was brought to the trial court's attention, however, the trial court offered to rephrase its questions by asking the prospective jurors a single, general, non-compound question about whether they had strong feelings about the charged offenses. Because the trial court had already clearly informed the prospective jurors of the charged offenses, this question would have cured the earlier compound questions. Defense counsel, however, essentially declined the court's offer to rephrase when he twice failed to respond to the trial court's query. Appellant's lack of response amounted to a waiver. "Defendants . . . will ordinarily not be permitted to 'sandbag' trial judges . . . nor will they freely be allowed to assert one position at trial and another, inconsistent position on appeal." *Burch v. State*, 346 Md. 253, 289, *cert. denied*, 522 U.S. 1001 (1997).

Only after defense counsel essentially declined the trial court's offer to rephrase did the trial court offer a second solution - to ask the venire whether they had "strong feelings other than a total disapproval?" Defense counsel objected to that question, and we believe rightly so. Contrary to the State's argument, that question was improperly phrased for it failed to bring to the trial court's attention a potential juror who had bias. We understand the trial court's dilemma. It is hard to imagine that anyone would approve of sexual child

abuse, but the wording of the proposed question could have allowed a prospective juror, who totally disapproved of child abuse and who could not render a fair and impartial verdict, to sit on the jury panel. However, because defense counsel sat on the fence when the trial court earlier offered a proper cure, he cannot be heard to complain on appeal. Accordingly, we are persuaded that appellant has waived his argument on appeal.

II.

Following appellant's conviction for child sexual abuse, the court sentenced him to 15 years of imprisonment.[3] Appellant argues that the sentencing court erred in fashioning its sentence because it took into consideration the illegally wiretapped conversation between D.W. and himself in which he admitted to sexually abusing D.W. The State responds that a new sentencing hearing is not warranted for three reasons: 1) the sentencing court did not consider the illegally recorded telephone call in fashioning its sentence; 2) the sentencing court did not "disclose" or "admit" the recorded call at the sentencing hearing in contravention of the wiretap statute; and 3) even if the sentencing court erred, the error was harmless because the court would have fashioned the same sentence regardless of appellant's confession on the illegally recorded call. We agree with appellant and reject the State's three arguments.

At appellant's first trial, the trial court admitted into evidence a recorded telephone conversation between D.W. and appellant in which appellant admitted to sexually abusing

[3] It is unclear whether the sentence imposed was above the sentencing guidelines. The Maryland Sentencing Guidelines Worksheet shows the sentence to be within the guidelines, but at sentencing the parties and court appear to believe that the guidelines were between five and ten years.

D.W. Appellant's subsequent convictions were reversed on appeal when the Court of Appeals held that the recorded conversation should not have been admitted into evidence because D.W. was not acting "under the supervision" of a law enforcement officer when he recorded the call, even though the police had given D.W. the recording equipment and instructed him on how to use it. *Seal v. State*, 447 Md. 64, 84 (2016).

Following re-trial and conviction, the State recommended at appellant's second sentencing hearing that the sentencing court sentence appellant to 15 years of imprisonment. The State explained that it was seeking a 15 year sentence because, among other things, appellant "flat out denied any conduct when he took the stand" yet admitted guilt in the presentence report that was submitted at his first sentencing hearing.[4] The court agreed and added:

> I agree with the State. You were not candid with the jurors. Basically felt that you lied. You don't have a right because you are defending yourself to lie to the jury. What you told them is totally inconsistent with what you had said to [D.W.] over the phone and other times. So the Court has considered that.

In fashioning its sentence, the court relied on the following considerations: the devastating impact on the victim; that appellant testified "totally inconsistent[ly] with what you had said to [D.W.] over the phone and other times"; deterrence; and rehabilitation.

The court then turned to the family members and stated:

> Now we heard from a lot of your family members, wonderful people, and they know you and knew you. And they speak highly of you and they love you. And there is no doubt that you have a lot of good qualities. And there is no doubt that you have done a lot of good things in your life. A lot

[4] Appellant admitted to abusing D.W. to the physician who interviewed him for the presentence report that was prepared for the 2014 sentencing hearing.

of people like you and support you. And you are going to need that support when you get out.

But when I heard the tape recording – it was excluded on a procedural ground. It wasn't excluded because it was not reliable. And then I read from what you said to the doctor when he evaluated you. And you basically said you masturbated each other. That didn't come into evidence. And then I hear that you basically apologize for anything you might have done when you told the police. And no reasonable person, I believe, would react that way. And I ask your family members to think about that.

If in fact you were taking on the role of a grandfather or an uncle and you had a little boy that came and visited you on a regular basis and then you heard he turned on you and said, you made me perform fellatio on him. You did all these nasty things to me. You would be so enraged. The first thing you would s[ay], you stayed at our house. I taught you how to throw the football – the baseball—I forgot what it was. Softball. We went to places together. We fed you. You stayed at our house, you watched television. We had wonderful times together and this is what you turn on me? You would be so incensed at that accusation.

I ask your family members to look at the doctor's report who did the psychosexual evaluation and look at what the defendant said to him. I ask the family members to listen to the tape from the first trial when D.W. called him when he was in, I believe, Virginia, called [appellant] and discussed the case with him.

[DEFENSE COUNSEL]: Your Honor, I just want to register my objection to the consideration of wiretapped evidence.

THE COURT: Okay. Wiretapped evidence is not forbidden fruit for any reason. It is forbidden from admissibility in trial. And I am not asking you to agree with me. But there was a ruling that there wasn't adequate supervision by the police during the recording. There was no finding, as I said, that that wasn't [appellant] talking to [D.W.]. There has been no evidence brought to this Court that that wasn't his voice or that it was doctored in any way. And it was consistent with the evidence from [D.W.], which the jury accepted.

I also think the jury had and it was reliable – so I ask the family, not because I am trying to get you to turn on [appellant], but I am asking you to understand that this isn't a conspiracy to get [appellant]. There was a side of him that is disturbing and uncomfortable to accept. It doesn't mean he isn't a human being incapable of redemption. It doesn't mean he doesn't have a

> lot of good qualities. And I am sure there [are] a lot of other things that you could have said favorable about him that you didn't have the opportunity.

"[A] trial judge has very broad discretion in sentencing." *Jones v. State*, 414 Md. 686, 693 (2010) (quotation marks and citations omitted). A sentencing court "is accorded this broad latitude to best accomplish the objectives of sentencing - punishment, deterrence and rehabilitation." *Abdul-Maleek v. State*, 426 Md. 59, 71 (2012) (quotation marks and citation omitted). Nonetheless, we consider on direct appeal whether the trial judge was "motivated by ill-will, prejudice, or other impermissible considerations in imposing sentence[.]" *Randall Book Corp. v. State*, 316 Md. 315, 322–23 (1989) (citations omitted).

The Maryland Wiretapping and Electronic Surveillance Act (the "Maryland Wiretap Act"), codified at Md. Code Ann., Courts and Judicial Proceedings (Cts. & Jud. Proc.) Art., §§ 10-400 *et. seq.*, prohibits any person from willfully intercepting a telephonic communication without the consent of both parties to the communication, unless one of the parties is acting "at the prior direction and under the supervision of an investigative or law enforcement officer[.]" *See* Cts. & Jud. Proc. Art., § 10-402(c)(2)(ii). The procedures underlying the statute are to be strictly followed. *See State v. Siegel*, 266 Md. 256, 274 (1972)(The Maryland Wiretap 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."). The Act contains its own exclusionary provision that states, subject to an exception not applicable here:

> [W]henever any wire, oral, or electronic communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer,

> agency, regulatory body, legislative committee, or other authority of this State, or a political subdivision there of if the disclosure of that information would be in violation of this subtitle.

Cts. & Jud. Proc. Art., § 10-405(a).

The State concedes that the above exclusionary language applies to sentencing hearings but argues that the above lengthy transcribed passage by the court in which the court discusses the illegally obtained telephone conversation was directed solely to appellant's family members to explain why the jury found appellant guilty and played no part in the court's sentence. We disagree with the State's argument. The sentencing court said it "considered" the illegally recorded telephone call in fashioning its sentence. Moreover, although the lengthy above quoted passage by the sentencing court may have been ostensibly directed at appellant's family members, and although "judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions[,]" the two passages combined make clear that the sentencing court fashioned its sentence, in part, on appellant's admission in the wiretapped call. *See Lopez v. State*, 231 Md. App. 457, 487 (quoting *Williams v. Illinois*, 567 U.S. 50 (2012)), *cert. granted*, 453 Md. 8 (2017).

The State's next argument is one of statutory construction. The State argues that the sentencing court did not "admit" or "disclose" the recorded call at the sentencing hearing and therefore, the sentencing court's actions did not fall within the conduct proscribed by the exclusionary rule in the Wiretap Act. We disagree with the State's illogical interpretation of the exclusionary provision in the Wiretap Act.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [Maryland] General Assembly." *Bellard v. State*, 452 Md. 467, 481 (2017)

(quotation marks and citation omitted). The Court of Appeals has recently summarized the law of statutory construction, stating:

> As this Court has explained, to determine that purpose or policy, we look first to the language of the statute, giving it its natural and ordinary meaning. We do so on the tacit theory that the General Assembly is presumed to have meant what it said and said what it meant. When the statutory language is clear, we need not look beyond the statutory language to determine the General Assembly's intent. If the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, we will give effect to the statute as it is written. In addition, we neither add nor delete words to a clear and unambiguous statute to give it a meaning not reflected by the words that the General Assembly used or engage in forced or subtle interpretation in an attempt to extend or limit the statute's meaning. If there is no ambiguity in the language, either inherently or by reference to other relevant laws or circumstances, the inquiry as to legislative intent ends.
>
> If the language of the statute is ambiguous, however, then courts consider not only the literal or usual meaning of the words, but their meaning and effect in light of the setting, the objectives, and the purpose of the enactment under consideration. We have said that there is an ambiguity within a statute when there exist two or more reasonable alternative interpretations of the statute. When a statute can be interpreted in more than one way, the job of this Court is to resolve that ambiguity in light of the legislative intent, using all the resources and tools of statutory construction at our disposal.
>
> If the true legislative intent cannot be readily determined from the statutory language alone, however, we may, and often must, resort to other recognized indicia—among other things, the structure of the statute, including its title; how the statute relates to other laws; the legislative history, including the derivation of the statute, comments and explanations regarding it by authoritative sources during the legislative process, and amendments proposed or added to it; the general purpose behind the statute; and the relative rationality and legal effect of various competing constructions.
>
> In construing a statute, we avoid a construction of the statute that is unreasonable, illogical, or inconsistent with common sense.
>
> In addition, the meaning of the plainest language is controlled by the context in which i[t] appears. As this Court has stated, because it is part of the context, related statutes or a statutory scheme that fairly bears on the

> fundamental issue of legislative purpose or goal must also be considered. Thus, not only are we required to interpret the statute as a whole, but, if appropriate, in the context of the entire statutory scheme of which it is a part.

Bellard, 452 Md. at 481–82 (quoting *Wagner v. State*, 445 Md. 404, 417-19 (2015) (citation and brackets omitted in *Bellard*).

Clearly, the legislative intent of the Wiretap Act is to prohibit the use of illegally recorded calls at, among other situations, sentencing hearings. Sentencing courts are given broad discretion in fashioning sentences and are permitted to consider evidence that is inadmissible at trial. However, to allow a sentencing court to "consider" an illegally obtained recorded call in fashioning its sentence even though the court never technically received the call into evidence would be illogical and violate the spirit of the statute and its encompassing exclusionary rule. Accordingly, we hold that the sentencing court erred in fashioning its sentence, when it considered the illegally obtained wiretap evidence.

Lastly, the State argues that even if the sentencing court considered the illegal call, the error was harmless. We disagree. The "well established, and relatively stringent" harmless error test enunciated in *Dorsey v State*, 276 Md. 638, 659 (1976) (footnote omitted), provides:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Dionas v. State, 436 Md. 97, 108 (2013). Once error is established, the State bears the burden of proving that the error was harmless beyond a reasonable doubt. *Id*. at 108-09.

The Court of Appeals has stated that harmless error review "is the standard of review most favorable to the defendant short of an automatic reversal." *Bellamy v. State*, 403 Md. 308, 333 (2008). The harmless error doctrine of *Dorsey* applies to sentencing. *King v. State*, 300 Md. 218, 224 (1984).

It is possible that the sentencing court would have imposed a 15 year sentence regardless of the wiretapped evidence because of appellant's less than truthful trial testimony, which was clearly inconsistent with his statements in his mental health report; his questionable responses to the police when confronted about the allegations of abuse; and his questionable responses to D.W. when D.W. confronted him over the telephone. However, whether it is possible is not sufficient to prove that the error was harmless. We are mindful that an error is not deemed harmless where the record "lead[s] a reasonable person to infer that [the court] might have been motivated by an impermissible consideration," and any doubt about the effect of the error must be resolved in favor of the defendant. *Abdul-Maleek*, 426 Md. at 74 (quotation marks and citation omitted). Accordingly, we shall vacate appellant's sentence and remand for a new sentencing hearing.

III.

Appellant argues that the evidence was insufficient to sustain his conviction for child sexual abuse because the State failed to prove that he had "permanent or temporary care or custody or responsibility for the supervision of" D.W. within the meaning of Art.

27, § 35A.[5] Appellant acknowledges that D.W.'s mother testified that during the relevant time period D.W. was left "in the care" of himself and his mother. Appellant argues, however, that the State failed to elicit sufficient evidence that he agreed, either expressly or implicitly, to care for D.W. The State disagrees, as do we.

The standard of appellate review of whether the evidence was sufficient 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) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original). "That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Id*. at 185 (citation omitted). "Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence." *State v. Suddith*, 379 Md. 425, 447 (2004) (quotation marks and citation omitted). This is because weighing "the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact." *In re Heather B.*, 369 Md. 257, 270 (2002) (quotation marks and citations omitted).

[5] Effective October 1, 2002, § 35A of Art. 27 was repealed and recodified, without substantive change, to §3-602 of the Md. Code Ann., Criminal Law (Crim. Law) Art.

During the summer appellant spent at his step-grandmother's farm house, she was elderly and largely infirm, and as a result, she was unable to do many household chores, such as preparing meals, washing D.W.'s clothes, and cleaning the house. Appellant, who was only 19 years older than D.W., was able-bodied and made most of the meals. Additionally, appellant helped D.W. with his softball skills, watched television with D.W., and took D.W. with him to feed the animals. Appellant suggests that because he worked long hours, he did not supervise D.W. This fact, however, in no way undercuts the inferences a rational juror could have drawn from the evidence that appellant was co-responsible with his mother for the care of D.W. while D.W. stayed at the farmhouse. *Cf. Tapscott v. State*, 106 Md. App. 109, 141–42 (1995) (child's half-uncle could be found "responsible for the supervision" where child's mother entrusted him with the child's care on numerous occasions and considered him to be child's supervisor whenever he and the child were together).

CONVICTION AFFIRMED. SENTENCE VACATED.

CASE REMANDED FOR RE-SENTENCING.

COSTS TO BE PAID 2/3 BY APPELLANT AND 1/3 BY MONTGOMERY COUNTY.