Circuit Court for Charles County
Case No. C-08-CR-18-000694

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2279

September Term, 2019

KEITH KRIKSTAN

v.

STATE OF MARYLAND

Kehoe,
Zic,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.
Concurring Opinion by Kehoe, J.

Filed: April 29, 2022

Appellant Keith Krikstan was convicted, by a jury in the Circuit Court for Charles County, of sexual abuse of a minor. He presents the following questions, slightly rephrased, for our review:

> 1. Was the evidence sufficient to support appellant's conviction?
> 2. Did the circuit court err in declining to instruct the jury on the identification of the defendant and to give Maryland Criminal Pattern Jury Instruction 3:30?

We shall hold that the evidence was not sufficient to support the judgment of conviction for sexual abuse of a minor under Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CR"), § 3-602 and shall reverse.

I.

On September 7, 2018, appellant was indicted by the Grand Jury for Charles County for sexual abuse of a minor; he proceeded to trial in April 2019, before a jury and was convicted. The court imposed a term of incarceration of twenty-five years, all but nine years suspended, five years supervised probation. The State accused appellant of sexually exploiting N[1] over a period of several months when he served occasionally as a substitute teacher at Middle School[2] located in Charles County, Maryland.

On January 11, 2018, a boy at Middle School informed Corporal Sheila Cook, an officer assigned to the school, that he had heard about inappropriate messages exchanged

[1] Because this case involves a minor and for privacy considerations, we will not use her actual name or initials. We refer to her as "N."

[2] To protect the victim's privacy, we refer to the school only as "Middle School."

between appellant and N, a student at the school. Officer Cook took the boy to the vice principal's office and told the principal. The school officer contacted her sergeant, collected the phones belonging to appellant and N, and gave the phones to detectives.

N was thirteen years old at the time of trial and twelve years old in January 2018, when she was in the seventh grade. She recalled first meeting appellant when he was a substitute teacher in her science class in late November 2017. She remembered that appellant approached her and asked what her best friend had told her about him. She testified that after that class, she started communicating with appellant via text messages.[3] She explained that they first texted for about a week before they started using Snapchat, which is a mobile application that lets users send text, picture, and video messages that disappear. Sometimes, they used the mobile application Facetime for video discussions. N remembered that appellant asked her for her school schedule and that she sent it to him.

N testified that, at first, her conversations with appellant were "normal" and that she considered appellant to be a friend. They communicated typically late at night, when she was at home.[4] N testified that eventually they expressed love for each other and that they started discussing the possibility of dating when she turned eighteen. She asserted that

[3] N testified that her friend had given her phone number to appellant.

[4] Detective George Higgs of the Charles County Sherriff's Office testified that, as part of the investigation, he went to N's home. He testified that N's mother told him that photos on N's phone appeared to be taken in N's bedroom.

appellant told her that he wanted to wait to date her because he did not want to jeopardize his goal of becoming a police officer. She testified that appellant asked for photos of her "butt," clothed or unclothed. N recalled hesitating at first, but ultimately sent appellant ten to fifteen photos because she was afraid of losing contact with him if she did not do so. She remembered that after sending photos to him, she asked him for photos in return. Appellant sent to her a photo of the "part of his penis connected to the body." She testified that appellant proceeded to send her twenty to twenty-five photos of his "lower body part" and she told detectives that she could not see what was "underneath" in those photos.

During N's testimony, the State introduced screenshots of Snapchat text-message exchanges between N and appellant, and photos that N identified as photos, which she sent to appellant, of her "butt." She testified that in some of the Snapchat messages, appellant instructed her on masturbation. N recalled that several of the conversations were about sex. N testified also that they used a mobile calculator app that could be used to secretly store media. These text communications continued from late November 2017, until January 2018, when appellant was arrested.

N testified that, in December 2017, appellant became upset when he learned that she had a crush on a different man (who was in his early twenties). N recalled that, in December 2017, she and appellant discussed, at night and electronically, whether he should substitute for her math teacher the next day. Appellant did so. She remembered that when

appellant was the substitute teacher for that math class,[5] she stayed after class to discuss the other man that she had a crush on with appellant. She did not specify what they discussed about this other man. N recalled that appellant refused to speak with her for three days after this conversation. On cross-examination, N verified that none of the messaging with appellant occurred when she was in class.

Detective John Long went to Middle School on January 11, 2018. At Det. Long's request, appellant followed him to the police station for an interview. Appellant told Det. Long that he met N at the school, and that N was friends with the daughter of an employee at a local roller rink owned by appellant's father. Appellant also told Det. Long that the photos exchanged on Snapchat were not inappropriate and were just selfies using filters. Appellant told him the passcode to his phone and his Snapchat username.

Appellant knew Corporal David Benthin, who worked part-time as security at the roller rink. Over the years, Corporal Benthin became friends with appellant, hung out with him, and felt like a mentor to him because appellant wanted to become a police officer. On January 11, 2018, appellant called Corporal Benthin and told him he wanted to talk because he (appellant) was having an emergency. That night they met outside the roller rink around 10:30 p.m., when Corporal Benthin was on duty.

Corporal Benthin remembered asking appellant whether he had been arrested and

[5] A school system employee testified that appellant was a substitute teacher for a math class at Middle School in November 2017.

recalled that, in response, appellant said "not yet." At that point, Corporal Benthin told him that anything he said could be used against him and, therefore, he should not speak with him.

Appellant told Corporal Benthin that he would tell him what he had told detectives. According to Corporal Benthin, appellant told him that an eleven-year-old daughter of a roller rink employee had used his phone because her phone was missing or taken away, that the eleven-year-old used his phone to text her twelve-year-old friend, and that then he started communicating with the twelve-year-old friend. Appellant told him that "pictures [were] exchanged through Snapchat" with the twelve-year-old and that police might find problematic photos on his phone. Corporal Benthin told appellant not to contact the eleven-year-old or twelve-year-old, to stay away from the roller rink, and to not contact him again. On January 13, Corporal Benthin asked appellant to meet him at his house to speak with detectives. When appellant arrived, the detectives arrested him.

Tanya Miles-Carvana, Supervisor of Employee Services at Charles County Public Schools, testified for the defense. She supervises the employee who manages the school district's substitute teaching sign-up system. She explained that when vacancies appear on the school district's official website, substitutes sign up for spots on that website. She verified that appellant was a temporary substitute teacher and that he was ineligible to be a long-term substitute because he did not have a Bachelor of Arts degree. She testified that between September 2017 and January 2018, appellant served as a substitute teacher at

schools throughout Charles County and at Middle School twice in October 2017, once in November 2017, and once in January 2018.

As noted above, appellant was convicted and sentenced. This timely appeal followed.

II.

Appellant presents two issues for our review: the sufficiency of the evidence, and the trial court's failure to give a requested jury instruction as to the identification of the defendant. As to the sufficiency of the evidence, appellant argues that he never had responsibility for the supervision of N, a minor child, nor did he have temporary care, custody, or responsibility for the supervision of her *at the time of the alleged electronic communications.* "Appellant does not dispute that, in the light most favorable to the State, the State presented evidence of inappropriate communications," but he maintains the statute and case law require that the offender have supervisory responsibility over the minor *at the same time* that any sexually exploitive communications were made. As authority for his position, appellant relies upon *Wicomico County Dept. of Social Services v. B.A.*, 449 Md. 122, 141 A.3d 208 (2016), a case of judicial review of an administrative proceeding

involving a martial arts instructor.[6] He relies on the *B.A.* holding that the evidence presented in that case was insufficient because the instructor's sexually exploitive communications took place when he had neither care, custody, nor responsibility for the supervision of a minor *at the time of* the sexually exploitive communications.

The State maintains that the evidence was sufficient to support the conviction of sexual abuse of a minor. The State's argument is two-fold: that appellant's conduct in and of itself at school was sufficient to support the conviction, and, second, that appellant was "grooming" the minor for exploitive sexual activity. The State points to evidence that appellant made sexual in nature comments during and immediately following the classes when he was a substitute teacher, while on school grounds, and in the classroom. A little harder to follow, the State argues that "there was sufficient evidence to conclude that even [appellant]'s choice to be physically present as the substitute teacher in N's classes had, in context, a sexual and romantic aspect or underpinning." The State points out that as such, "[t]he jury was also entitled to conclude that doing so brought a benefit to [appellant] in terms of pleasure, power and allowing him to continue or facilitate the exploitive relationship."

[6] Although that case was based upon a different statute, Maryland Code (1984, 2006 Repl. Vol.) § 5-701(x) of the Family Law Article, appellant argues that the statutory language is the same as CR § 3-602 and that the facts are on all fours.

The second basis for the State's argument is that appellant's conduct in and immediately after class, and his choosing to substitute teach in N's classes, constituted "grooming." In the State's view, an adult "grooming" a minor for sexual abuse, while that adult has care, custody, or responsibility for the supervision of that minor, falls within the ambit of CR § 3-602. By "grooming," the State means a "specific action," by an adult, performed "with the specific intention of facilitating sexual exploitation."

The State argues that the actions of appellant in and immediately after N's classes had a romantic underpinning, brought a benefit to appellant, and were undertaken with the intention of facilitating the sexual exploitation of N outside of class. In addition, the State argues that appellant's interest in N, in, while he was serving as a substitute for her teacher, asking her what she had heard about him, discussing whether he should substitute for her math teacher, substituting for that math teacher, and talking with her after that class about how he did not like her crush on another man, is evidence of grooming.

III.

In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *State v. Morrison*, 470 Md. 86, 105, 233 A.3d 136, 147 (2020). We give due regard to the trial court's finding of facts, its resolution of conflicting evidence, and its opportunity to observe and assess the credibility of witnesses. *State v. Albrecht*, 336 Md. 475, 478, 649

A.2d 336, 337 (1994). This deferential standard recognizes the better position of the trier of fact to assess witness credibility and the evidence. *Smith v. State*, 415 Md. 174, 185, 999 A.2d 986, 992 (2010). We neither re-weigh witness credibility nor the evidence, nor attempt to resolve conflicts in the evidence. *Id*. Our concern "is only with whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts that could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Albrecht*, 336 Md. at 479, 649 A.2d at 337. The verdict must rest on more than conjecture or speculation. *Smith*, 415 Md. at 185, 999 A.2d at 992.

Appellant was convicted under CR § 3–602(b)(1) of sexual abuse of a minor by an individual who was a caretaker of the minor. "Sexual abuse" is defined, in CR § 3–602(a)(4)(i), as "an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not." At the time of the acts giving rise to this case, "sexual abuse" included, but was not limited to, incest, rape, sexual offense in any degree, sodomy, and unnatural or perverted sexual practices.[7] CR § 3–602(a)(4)(ii). This list is not exhaustive. "To constitute sexual abuse, the conduct underlying the charge need not be among the exemplars listed in CR § 3–602(a)(4)(ii), or even criminal in nature." *Schmitt v. State*, 210 Md. App. 488, 497, 63 A.3d 638, 643 (2013). A caretaker of a minor is a

[7] In October 2020, the Legislature removed "sodomy" from that list. *See* 2020 Md. Laws, Chap. 45.

"parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor" or a "household member or family member" of a minor. CR § 3-602(b). The State's theory in this case is that appellant was a caretaker of the minor because he was in a position of "temporary . . . responsibility for the supervision of" N.

The interpretation of a statute is a question of law, which we review *de novo*. *Shealer v. Straka*, 459 Md. 68, 80, 184 A.3d 391, 398 (2018). In *Schlick v. State*, 238 Md. App. 681, 194 A.3d 49 (2018), this court noted:

> "In construing a statute, our primary goal is to ascertain and effectuate the intent of the Legislature. We have often stated that our primary goal is always to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision, be it statutory, constitutional or part of the Rules. We look first to the plain language of the statute, viewed in the context of the statutory scheme to which it belongs. We presume, moreover, that the General Assembly intends its enactments to operate together as a consistent and harmonious body of law, and, thus, we seek to reconcile and harmonize the parts of a statute, to the extent possible consistent with the statute's object and scope. We do that by first looking to the normal plain meaning of the language of the statute, reading the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory. When a statute's language is clear and unambiguous, we need not look beyond the statute's provisions and our analysis ends. Yet it is also settled that the purpose of the plain meaning rule is to ascertain and carry out the real legislative intent."

Id. at 691-22, 194 A.3d at 55 (2018) (internal quotation marks and citations omitted).

When interpreting a Maryland statute, it is proper to consider its relationship to other

statutes. *See Westley v. State*, 251 Md. App. 365, 387, 254 A.3d 106, 118 (2021). Legislative enactments treating the same subject matter should generally be construed harmoniously. *Chen v. State*, 370 Md. 99, 106, 803 A.2d 518, 522 (2002). Md. Code (1984, 2006 Repl. Vol.) § 5-701(x) of the Family Law Article ("FL") contains language very similar to CR § 3-602. Inasmuch as the language in FL § 5-701(x)(1) is so similar to CR § 3-602, we shall interpret them the same. *See B.A.*, 449 Md. at 152, 141 A.3d at 226 (Watts, J., dissenting).

Because *Wicomico County Dept. of Social Services v. B.A.* is the centerpiece of appellant's defense, we address that case first. There, the Department of Social Services (DSS) determined that a martial arts instructor (B.A.) had engaged in sexually explicit communications, by email and telephone, with a teenage student of his. *Id*. at 129-30, 141 A.3d at 212-3. Based on that determination, DSS concluded that that defendant had committed "child abuse" in violation of FL § 5-701(x)(1), the applicable statute. *Id.* at 127, 141 A.3d at 211. The Administrative Law Judge (ALJ) reversed, finding that the instructor had neither care, custody, nor responsibility for the supervision of the student when she was not in his class and that there was no evidence of inappropriate behavior on the instructor's part when the student was in the instructor's presence. *Id*. at 124, 141 A.3d at 210.

Significantly, the ALJ found that none of the exploitive communications occurred during class and that although B.A. had sexually exploitive communications with the minor

child, there "was a clear temporal break between the instructor-student relationship . . . and the inappropriate sexually explicit communications that took place when they were not physically together." The ALJ instructed DSS to change its finding and to rule out child abuse. *Id*. at 131, 141 A.3d at 214.

The Court of Appeals endorsed the ALJ's finding. The Court held that, although B.A. had responsibility for the supervision of [the minor child] when she was in his class . . . that responsibility ended when she departed the martial arts studio and her parents resumed their responsibility—thereby terminating the implied consent of the parents [for B.A. to care for their child] and [his] duty to supervise." *Id*. at 136, 141 A.3d at 216.

The Court of Appeals discussed the phenomenon of "grooming" in *B.A.* The Court characterized "grooming" as a systematic pattern of behavior by an adult towards a minor "designed to make [that minor] susceptible to sexual exploitation." *Id.* at 137, 141 A.3d at 217. As in *B.A.*, the question in this case revolves around whether appellant falls within the definition of 'caretaker' as set out in CR § 3–602(b). The pertinent question is whether appellant fell within the class of persons covered by the statute *at the time of his inappropriate behavior—i.e.*, whether he was a parent, household or family member, or other person who has permanent or temporary care or custody or responsibility for the supervision of a child. The key point, however, is a temporal one—whether appellant had the care or custody or responsibility for the supervision of N *at the time of* sexually exploitive behavior.

Appellant was neither N's parent, household or family member, nor did he have any *permanent* responsibility for her. As in *B.A.*, the only possibility is that he was an "other person who ha[d] . . . temporary care or custody or responsibility for supervision of" N when he was her substitute teacher. *See* CR § 3-602(b). Both parties seem to agree that appellant did have temporary responsibility for the supervision of N when she was in his class. The key question, however, is whether he occupied that status, in relation to N, when he engaged in sexually exploitive conduct.

Here, however, the evidence of sexually exploitive conduct took place when appellant was neither at school nor serving as N's substitute teacher. Appellant did not have a custodial position over N once the school day ended. After school ended, appellant did not have N's parent's consent to continue to act as her custodian, nor did he consent to act as her custodian. That appellant was a substitute rather than permanent teacher makes this conclusion even clearer because he ceased being N's teacher once the school bell rang on the days he was substituting.[8]

We turn to the State's first argument. The State argues the evidence presented shows that appellant made sexual-in-nature comments when he talked with N personally during and immediately following the classes when he was a substitute teacher, while on

[8] The requisite implied mutual consent for teachers can extend beyond the end of the school day if they remain on campus with a student, engage in extra-curricular activities, or do something like give a student a ride home. *See Ellis v. State*, 185 Md. App. 522, 549-50, 971 A.2d 379, 395 (2009). But no such evidence is present in this case.

school grounds and in the classroom. In addition, the State points to evidence that appellant's choice to substitute teach N's class on January 11, 2018, took place following emotional electronic exchanges between appellant and N on January 8-10, 2018, and following a Facetime discussion, on the night of January 10, 2018, about whether he should substitute teach that class.

There was no evidence that appellant said or implied anything sexual in the conversations at school. "Sexual abuse" is "sexual molestation," "sexual . . . exploitation," or both. CR § 3-602(a)(4)(i). Although acts need not involve physical touching to satisfy this definition, they must, under the language of the statute, be "sexual." CR § 3-602(a)(4)(i); *see also Walker v. State*, 432 Md. 587, 625, 69 A.3d 1066, 1089 (2013). "Sexual . . . exploitation" does include non-physical acts that are not explicitly sexual, but merely have a "sexual undertone." *Walker*, 432 Md. at 624, 69 A.3d at 1088 (2013). There was no evidence that appellant said or implied anything sexual in these conversations. Indeed, while questioning N at trial, the State focused on the after-class conversation and tried to elicit from N any testimony of sexual comments from appellant, but N testified that appellant expressed only the feeling of being "mad" about her crush on another man and said she could not recall anything else. The discussion about N's feelings toward another man does not, without more, qualify as a sexual conversation. Moreover, we reject the State's argument that appellant's *choice* to act as a substitute teacher in N's class is sexual-in-nature and can satisfy any element of the statute.

We turn to the State's "grooming" argument. In Maryland, we have defined "grooming," in the context of child sexual abuse, as a process "in which a perpetrator subtly persuades or manipulates the child not to disclose the abuse," *Walter v. State*, 239 Md. App. 168, 181, 196 A.3d 49, 57 (2018), and by which "an abuser gains a child's trust through special attentiveness." *Coates v. State*, 175 Md. App. 588, 607, 930 A.2d 1140, 1151 (2007). Compared to some of our sister states, our jurisprudence regarding the phenomenon of "grooming," particularly as it relates to child abuse, is not very well developed. Some of our sister states have enacted a statute criminalizing "grooming."[9] In *People v. Vara*, 68 N.E.3d 1018 (Ill. App. Ct., 2d 2016), Illinois's intermediate appellate court defined "grooming," in the context of sexual abuse of a child, "as a method of building trust with a child or an adult around the child in an effort to gain access to the child, make the child a cooperative participant in the abuse, and reduce the chance that the abuse is detected or disclosed."[10] *Id.* at 1025 (citing Common Questions, National Sex

[9] Illinois has enacted a statute outlawing "grooming" a child for sexual abuse. *See* § 11-25 of the Criminal Code of 2012 (Code) (720 ILCS 5/11-25 (West 2012). Oregon's child abuse statute encompasses "grooming." *See State v. King*, 373 P.3d 1205 (Ore. 2016) ("The legislative history of House Bill (HB) 2843 (2007) [ORS 167.057] shows that the legislature had two distinct but related goals in enacting the statute: (1) to prevent sex offenders from grooming minors and (2) to prevent grooming at the earliest possible stages.").

[10] The Illinois court noted that many other states share this understanding of "grooming" as a method used by sexual abusers to facilitate sexual abuse of children, citing as follows:

> "*See, e.g., State v. Coleman*, 152 Idaho 872, 276 P.3d 744, 749 (Idaho 2012) (in the context of a sexual abuse [footnote continued . . .]

Offender Public Website, https://www.nsopw.gov/en-US/Education/CommonQuestions (last visited Nov. 2, 2016); *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/groom (last visited Nov. 7, 2016)).

We have been unable to find any Maryland case holding that the conduct of "grooming" satisfies the statutory element of exploitive conduct, or that conduct that may be considered "grooming," but that did not take place while the adult had temporary care or custody or responsibility for the supervision of the minor, is sufficient to satisfy the statute. Additionally, Maryland jurisprudence is not developed as to how, if "grooming" would satisfy the Maryland statute, the issue must be raised—*i.e.*, may it be argued to the jury as a fair inference from the testimony, or is expert testimony necessary to raise the issue. In *B.A.*, the Court did not embrace, although it did not reject, the "grooming"

> case, 'grooming' meant 'conduct intended to foster trust and remove defenses over time through a pattern of seduction and preparation, resulting in the child being willing and compliant to the defendant's sexual abuse'); *In re K.H.*, 119 Ohio St. 3d 538, 2008-Ohio-4825, 895 N.E.2d 809, at 24 (expert testified that the defendant was grooming the minor to be his victim, that is, planning and preparing her for sexual abuse); *see also State v. Swinney*, 269 Ore. App. 548, 553-54, 345 P.3d 509 (Or. Ct. App. 2015) (testimony that defendant groomed the victim, by increasing touching over time in order to sexually abuse the victim, was admissible); *State v. Akins*, 298 Kan. 592, 315 P.3d 868, 878 (Kan. 2014) ('Grooming is a well-known phenomenon in the context of sexual abuse.')."

People v. Vara, 68 N.E.3d 1018, 1025 (Ill. App. Ct., 2d 2016).

concept.[11]

The State relies on the following evidence to support its "grooming" argument. First, the State points to the testimony that, on the day appellant met N, as her substitute

[11] Although *Crutchfield v. State*, 2019 WL 3974067 (Md. Ct. Spec. App. Aug. 22, 2019), an unreported Maryland opinion, held that expert testimony is not required, and the subject of "grooming" is within the common understanding of jurors, *see id.*, 2019 WL 3974067 at *14, most of the reported cases on "grooming" around the country, addressing whether expert testimony is required before evidence of "grooming" is admissible, hold that expert testimony is necessary for admissibility. In *In re Pers. Restraint of Phelps*, 410 P.3d 1142 (Wash. 2018), then Chief Justice Mary Fairhurst of the Washington Supreme Court noted as follows:

> "Courts in other states and federal circuits recognize that grooming testimony requires specialized knowledge and falls within the scope of ER 702, governing the admissibility of expert testimony. *See, e.g.*, *State v. Berosik*, 2009 MT 260, 352 Mont. 16, 23, 214 P.3d 776; *State v. Sorabella*, 277 Conn. 155, 211-14, 891 A.2d 897 (2006); *Morris v. State*, 361 S.W.3d 649, 659-62 (Tex. Crim. App. 2011); *State v. Akins*, 298 Kan. 592, 315 P.3d 868 (2014); Shields, *supra* § 4 (explaining that expert testimony on grooming has been ruled admissible by the Third, Fifth, Seventh, Ninth, and Tenth United States Circuit Courts of Appeals and the courts of 15 different states plus the District of Columbia). Because grooming testimony requires specialized knowledge and falls within the scope of ER 702, it necessarily falls outside the scope of ER 701, precluding its introduction through lay testimony. *See* ER 701. Thus, grooming testimony, if admissible under ER 403, may be introduced only through an expert witness. *See* ER 701, 702."

Id. at 1155 (Fairhurst, C.J., concurring); *see also* George L. Blum, Annotation, *Necessity of Expert Testimony on Grooming Behavior Involving Sexual Conduct with Child*, 53 A.L.R.7th 3.

The issue of the necessity of expert testimony is not before us, as there was no objection below to the prosecutor's reference to "grooming" in his closing argument. *See State v. Raskie*, 269 P.3d 1268 (Kan. 2012) (footnote continued . . .)
(holding that because there was no objection below to the necessity of an expert as to "grooming," issue not preserved for appellate review.); *State v. Mosley*, 526 S.W.3d 361 (Mo. Ct. App. E. Dist., Div. 3 2017) (same).

teacher, he asked her what she had heard about him. Second, the State points to evidence that appellant served as a teacher after he had started an "exploitive relationship" with her. Third, the State points to testimony that appellant spoke privately with N after her math class, where he served as a substitute teacher in December 2017, to discuss her crush on another man.

We need not decide whether "grooming" can ever satisfy CR § 3-602(a)(4)(i) because we reject the State's argument that appellant's choice to serve as N's substitute teacher constitutes "grooming." Additionally, we reject the State's argument that appellant's conduct in or after school satisfies the phenomenon of "grooming."

Because there is no evidence that appellant *engaged in any acts of "sexual abuse" while he was a caretaker of N, i.e.,* that he was a "parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor" or a "household member or family member" of a minor, we hold the evidence is not sufficient to support the judgment of conviction.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY REVERSED. COSTS TO BE PAID BY CHARLES COUNTY.

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Concurring Opinion by Kehoe, J.

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The Majority has concluded that Mr. Krikstan's otherwise fully-warranted conviction for sexual abuse of a minor must be reversed because the State did not prove that Mr. Krikstan had "permanent or temporary care or custody or responsibility for the supervision" of the victim when he abused her.[12]

I agree with the Majority's analysis and conclusions. I am writing separately because I believe that the inclusion of the requirement of "permanent or temporary care, custody, or responsibility for the supervision" of the victim as an element of the crime of sexual abuse of a minor is a matter of historical accident that poses a problem in cases in which the abuser does not have "permanent or temporary care or custody or responsibility for the supervision" of the victim. Crim. Law § 3-602(b)(1). Explaining why this is so requires a summary of the complicated legislative history of Crim. Law § 3-602.

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[12] Md. Code, Crim. Law § 3-602 states in pertinent part (emphasis added):

> (a)(1) In this section the following words have the meanings indicated.
>
> (2) "Family member" has the meaning stated in § 3-601 of this subtitle.
>
> (3) "Household member" has the meaning stated in § 3-601 of this subtitle.
>
> (4)(i) "Sexual abuse" means an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not.
>
> * * *
>
> (b)(1) 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*.
>
> (2) A household member or family member may not cause sexual abuse to a minor.
>
> (c) A person who violates this section is guilty of a felony and on conviction is subject to imprisonment not exceeding 25 years.
>
> * * *

At common law, assault and battery were misdemeanors, regardless of the age of the victim. However, parents and those *in loco parentis*, were:

> justified in using a reasonable amount of force upon a child for the purpose of safeguarding or promoting the child's welfare. So long as the chastisement was moderate and reasonable, in light of the age, condition and disposition of the child, and other surrounding circumstances, the parent or custodian would not incur criminal liability for assault and battery or a similar offense.

Bowers v. State, 283 Md. 115, 126 (1978) (citations omitted).

In the 1950s and early 1960s a consensus emerged among pediatricians and other professionals concerned with the welfare of children that "the incidence and violence of parental attacks on children were far greater than anyone had ever anticipated." *Id*. at 117–18. This realization—completely at odds with the sunny and optimistic zeitgeist of mainstream America at the time—spurred the legislatures of each of the fifty states to enact laws providing various forms of additional protections for abused children. *Id.* at 118.

As part of this trend, the General Assembly enacted Chapter 743 of the Laws of 1963, originally codified as Md. Code, Article 27A § 11A. This statute "made it a felony for any 'parent . . . or other person' having 'permanent or temporary care or custody of a minor child' to maliciously beat, strike or mistreat the child to such a degree 'as to require medical treatment.'" *Bowers*, 283 Md. at 126.[13] In 1973, the statute was amended to expand the scope of the statute to include

> physical injury or injuries sustained by a child as a result of cruel or inhumane treatment or as a result of malicious act or acts by any parent, adoptive parent

[13] As originally enacted, the statute protected only children under the age of 14. By 1973, the statute had been amended to apply to children under the age of 18. *See Walker v. State*, 432 Md. 587, 616 n.20 (2013).

> or other person who has the permanent or temporary care or custody or responsibility for supervision of a minor child.

Bowers, 283 Md. at 119 (quoting Laws of 1973, ch. 835).

At the risk of pointing out the obvious, the effect of the child abuse statute was not to decriminalize assaults and batteries on children by individuals who were neither parents nor custodians; rather the statute established enhanced penalties for those who had a duty to care for and protect children. *See Anderson v. State*, 61 Md. App. 436, 445 n.10 (1985) ("[T]he enactment of the Child Abuse Statute has not even arguably displaced the common law crime of assault and battery. It represents, rather, an aggravated, statutory version of the common law crime.").

The Legislature enacted chapter 554 of the Acts of 1974 to provide that child abuse included the "exploitation" of children. *Walker v. State*, 432 Md. 587, 616 (2013). Next, in 1976, the statute's definition of "abuse" was amended to include "any sexual abuse of a child, whether physical injuries are sustained or not." *Id.* at 617.

Finally, in 2002, and as part of Maryland's recodification process, the General Assembly repealed Article 27. *Id.* In this process, Maryland's child abuse statute, then codified as Article 27 § 35A, was recodified as Crim. Law § 3-601, which pertains to child abuse generally, and Crim. Law § 3-602, which is exclusively focused on child sexual abuse. *Walker*, 432 Md. at 617.

In summary, the Legislature's decision in 1963 to limit the child abuse statute to those who had "permanent or temporary care, custody, or responsibility for the supervision" of the victim operated to enhance protections to children because it did not

displace the common law crimes of assault and battery. However, there is not, and never has been, a common law counterpart to the statutory offense of sexual abuse of a minor child. Because of this, Crim. Law § 3-602 operates in a way that is fundamentally different from Crim. Law § 3-601. Section 3-602 does not enhance penalties for those who have a special duty to protect children in their care. Instead, the statute's scope is limited to those individuals. The statute does not protect children against the sort of sexual exploitation and abuse practiced by Mr. Krikstan in this case.

My point is that language that was intended to expand protection to children in 1963 and in 1976, now operates to limit the protections that the law affords to children from forms of sexual abuse and exploitation that no one could have possibly foreseen at the times when Crim. Law § 3-602 and its predecessor statutes were enacted. I respectfully suggest that the General Assembly should consider addressing this anomaly by enacting appropriate legislation.[14]

[14] In addition to the authorities cited in the Majority's opinion, the following sources contain useful insights into one or more aspects of the grooming issue:

- Andriy Pazuniak, *A Better Way to Stop Online Predators: Encouraging a More Appealing Approach to § 2422(B)*, 40 SETON HALL L. REV. 691 (2010).
- Richard A. Podvin, *Constitutional Law: Protecting Our Youth: A Necessary Limit on the First Amendment* – State v. Muccio, 44 MITCHELL HAMLINE L. REV. 321 (2018).
- Kelsey K. Chetosky, Minnesota v. Muccio: *The Constitutionality of Minnesota's Sexual Grooming Law*, 114 NW. U. L. REV. ONLINE 1 (2019).
- CLIFFORD S. FISHMAN & ANNE TOOMEY MCKENNA, *Lay Witness Testimony Describing Defendant's "Grooming" Activity*, JONES ON EVIDENCE § 57:70 (7th ed. 2022).

- Sana Loue, J.D., Ph.D., M.P.H., *Legal and Epidemiological Aspects of Child Maltreatment*, 19 J. LEGAL MED. 471 (1998).
- Ann Wolbert Burgess & Carol R. Hartman, *On the Origin of Grooming*, 33 J. OF INTERPERSONAL VIOLENCE 17, 17-23 (2017).
- Elana T. Jacobs, *Online Sexual Solicitation of Minors: An Analysis of the Average Predator, His Victims, What Is Being Done and Can Be Done to Decrease Occurrences of Victimization*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 505 (2012).
- Federica Casarosa, *Protection of Minors Online: Available Regulatory Approaches*, 14 NO. 9 J. INTERNET L. 25 (2011) (discussing approaches to protecting children from on-line sexual exploitation in the United States, Australia, the United Kingdom, and the European Union).
- Anne-Marie McAlinden, *'Setting 'Em Up': Personal, Familial and Institutional Grooming in the Sexual Abuse of Children*, 15 SOC. & LEGAL STUDIES, 339, 339-362 (2006).
- Natalie Bennett & William O'Donohue, *The Construct of Grooming in Child Sexual Abuse: Conceptual and Measurement Issues*, 23 J. OF CHILD SEXUAL ABUSE 957, 957-976 (2014).
- Julie A. Herward, *To Catch All Predators: Toward a Uniform Interpretation of "Sexual Activity" in the Federal Child Enticement Statute*, 63 AM. U. L. REV. 879 (2014).
- Marilyn M. McMahon & Elizabeth A. Kirley, *When Cute Becomes Criminal: Emoji, Threats and Online Grooming*, 21 MINN. J.L. SCI. & TECH. 37 (2019).

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