Circuit Court for Charles County
Case No. C-08-CR-18-000276

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2382

September Term, 2018

CALVIN JULIUS BURGESS

v.

STATE OF MARYLAND

Meredith,*
Kehoe,
Reed,

JJ.

Opinion by Meredith, J.

Filed: November 6, 2020

*Meredith, Timothy E., J., now retired, participated in the hearing of this case while an active member of this Court, and after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

Following a jury trial in the Circuit Court for Charles County, Calvin Julius Burgess, appellant, was convicted of sexual abuse of a minor child in his household, in violation of Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 3-602(b)(2). The court sentenced Burgess to twenty-five years' incarceration.

On appeal, Burgess presents the following questions for our review.

1. Did the circuit court err in permitting the State to elicit evidence for which the defense was not on notice [because the facts were not included in the State's bill of particulars]?

2. Did the circuit court err in admitting irrelevant and unfairly prejudicial evidence [of the child's lack of prior sexual experience]?

With respect to question 1, Burgess relies upon *Dzikowski v. State*, 436 Md. 430 (2013), a case in which the Court of Appeals held the trial court had committed reversible error in permitting the prosecution to rely on facts that had not been detailed in the bill of particulars to support a charge of reckless endangerment. Burgess contends that the bill of particulars provided by the State in his case did not say that the charge against him was based in part upon an act of sexual intercourse with the minor, and he asserts that the trial court erred in permitting the minor to testify that an act of sexual intercourse had occurred before her 18th birthday. The State responds that "the act of intercourse . . . did not form the basis for Burgess's sexual abuse of a minor charge," and therefore, "if the court erred in allowing the complained-about testimony, the error was harmless beyond a reasonable doubt." Although we agree that there was ample *other* evidence to support the jury's verdict of "guilty," we are unable to declare our belief beyond a reasonable doubt that the error in permitting testimony about an act of intercourse that was not identified in the bill

of particulars did not in any way influence the jury's verdict. *See Dorsey v. State,* 276 Md. 638, 659 (1976). As a consequence, "such error cannot be deemed 'harmless' and a reversal is mandated." *Id*. We shall reverse the conviction and remand the case for a new trial. As a consequence, we need not address the second question.

BACKGROUND

Burgess was the "boyfriend" of the mother of a minor teenager we shall refer to as "J." At some point prior to April 2014, Burgess, who was in his early 30s, moved into the home where the mother resided with J. and an older daughter and son. Burgess and the mother slept together in the master bedroom. Burgess considered himself a parental figure for J.

When J. was 16, she and Burgess began to spend long periods of time together almost daily after J. came home from school. They would lie in bed together in the master bedroom watching television while the mother was at work. At some point, the relationship between Burgess and J. became more physical, and included hugging, cuddling, kissing, and eventually, two acts of fellatio. Burgess and J. also exchanged numerous text messages, some of which included sexual references. Around the time of J.'s 18th birthday, her mother discovered some of the text messages on Burgess's phone, and she confronted him and J. about the relationship. The mother also reported her concerns to the Charles County Sheriff's Office, and the ensuing investigation led to criminal charges being filed against Burgess.

The State charged Burgess, in a three-count indictment, with one count of sexual abuse of a minor (Count 1), and two counts of sexual offense in the third degree (Counts 2

and 3). Count 1 of the indictment alleged that, during a three-year period between April 10, 2014 and April 9, 2017, Burgess, "being a household member of [J.], a minor, did cause sexual abuse to said minor, in violation of Criminal Law Article, Section 3-602(b)(2) of the Annotated Code of Maryland[.]" The period of April 10, 2014 to April 9, 2017, covered the day that J. turned 15 through the day before she turned 18. Counts 2 and 3 alleged that two acts of fellatio had occurred within specified time frames in late 2015 and early 2016, when J. was 16 years old.

At the time of the events that are the subject of the indictment, CL § 3-602 provided:

> (a) Definitions. — (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.
>
> (ii) "Sexual abuse" includes:
>
> 1. incest;
> 2. rape;
> 3. sexual offense in any degree;
> 4. sodomy; and
> 5. unnatural or perverted sexual practices.
>
> (b) *Prohibited*. — (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) *Penalty*. — A person who violates this section is guilty of a felony and on conviction is subject to imprisonment not exceeding 25 years.
>
> (d) *Sentencing*. —A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for:
>
> (1) any crime based on the act establishing the violation of this section; or
>
> (2) a violation of § 3-601 of this subtitle involving an act of abuse separate from sexual abuse under this section.

After the indictment was issued, Burgess filed, pursuant to Maryland Rule 4-241(a), a demand for a bill of particulars in which he requested that the State provide the following details regarding the charge of violating CL § 3-602: "As to Count 1 of the indictment, *provide a list of each separate act that the State intends to introduce to support the charge of a sexual offense of a minor*, the date each act occurred and the location where it occurred." (Emphasis added.)

The State responded to the demand as follows:

> 1. Sexual abuse means an act that involves sexual molestation or exploitation of a minor. CR.3.602. *The discovery already provided supports the State's theory that the Defendant is guilty of Sexual Abuse of a Minor* ***based on acts of sexual exploitation and fellatio***.
>
> 2. Sexual Abuse of a Minor can be based on a continuous course of conduct, as the facts in this case support. This is evident from the jury instruction which instructs the jury that they need not agree on which act occurred as long as they are unanimous that an act occurred.

(Emphasis added.)

At a motions hearing on May 18, 2018, defense counsel argued that the State had not provided a sufficient response because it did not specify the acts that constituted sexual exploitation or the dates that the acts allegedly occurred. Defense counsel acknowledged

that the discovery provided by the State included two acts of fellatio, but pointed out that the State had identified no other acts that would constitute sexual exploitation. Defense counsel stated that he was aware of sexual intercourse between Burgess and J., but it was his understanding that the intercourse had occurred after J.'s 18th birthday. The prosecutor predicted a disagreement between the State and the defense as to what conduct amounted to sexual exploitation, and maintained that the "basis for the sexual exploitation is all in [d]iscovery[,]" which, she represented, was "a voluminous amount of photos with text messages and everything else[.]" The prosecutor did not contradict defense counsel's assertion (which was apparently based upon the recorded statement Mr. Burgess had given the detective) that sexual intercourse had occurred only *after* J.'s 18th birthday (which would not be covered by CL § 3-602).

The motions court surmised that there were "things in [d]iscovery that [the State] believes may not be as . . . obvious as fellatio that amount to exploitation[,]" but noted that, "if there is behavior reported in [d]iscovery that the State believes amounts to exploitation, that probably goes to the theory of the case more so than bill of particulars." Defense counsel continued to assert that the bill of particulars was deficient and requested a list of text messages or photos that would support the State's theory of sexual exploitation. The court implicitly overruled the objection, stating, "[w]e've covered that ground," and then moved on to other matters.

On the first day of trial, before jury selection, the State nol prossed Counts 2 and 3, and Burgess was tried on the sole remaining charge of sexual abuse of a minor pursuant to CL § 3-602(b)(2), which provides that "[a] household member or family member may not

cause sexual abuse to a minor," with "[s]exual abuse" being defined in § 3-602(a)(4) as follows:

> (i) "Sexual abuse" means an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not.
>
> (ii) "Sexual abuse" includes:
> 1. incest;
> 2. rape;
> 3. sexual offense in any degree;
> 4. sodomy; and
> 5. unnatural or perverted sexual practices.

At trial, J. testified that, in 2014, when she was a 15-year-old freshman in high school, Burgess, who was then her mother's boyfriend, moved into the home where J. lived with her mother and two older siblings. At that time, Burgess would have been 31 years old.

J. related that she had been bullied "all [her] life" "because of [her] skin condition and the state of [her] teeth[,]" and she suffered from depression as a result. In the summer of 2015, when J. was 16 years old, she attempted to commit suicide by ingesting a combination of pills that she found in the medicine cabinet, including Tylenol and Advil. Burgess, who was the only other person home at the time, noticed that she "wasn't really responsive" and asked her what happened. She told him about the pills she had taken, and he stayed with her to provide aid. He told her to drink water to "flush it out," and they did not go to the hospital.

J. testified that, after this attempt at suicide, Burgess "was more affectionate." He "hugged her more" and would "rub on [her] leg and [her] feet," and that attention made her

feel "really good." She shared with Burgess her feelings about being bullied, and he responded by hugging her and telling her that she was beautiful.

J. said she did not participate in after school activities and she had no friends. After school, she would usually lie in bed and watch television or play on her phone. Burgess, who was home during the day, would lie in bed with her watching television while her mother was at work.

One day in 2015, as Burgess and J. were lying in bed together, Burgess began touching J.'s leg and asked her if it was okay for him to do so. Burgess told J. that he loved her and that "he was attracted to [her] in a way that . . . he never felt before." This made J. feel "good."

J. and Burgess then started "spending a whole lot more time together" and "started to share kisses." J. was aware that her mother was still in a relationship with Burgess, but she continued her own relationship with Burgess because it "[j]ust felt good" "having someone there for [her] to actually care about how [she] felt" and who was "aware of what was going on" with her.

From time to time, Burgess and J.'s mother argued about how much time Burgess spent with J. When J.'s mother would ask J. about the relationship, J. would deny that anything was going on between her and Burgess because, she explained, she "could never rely on her [mother] because of past situations" and she felt that her mother would "blame [her] for the situation." J. said that she and Burgess started "being more sneaky" about their relationship because J. "didn't want to lose [Burgess] as a person in [her] life." J. stated that she "felt like [she] had nobody really there for [her]" and that she did not have

anyone with whom to discuss her feelings about the bullying. She felt that she "couldn't go to [her] siblings or [her] mom and wasn't really close to [her] other family so [she] couldn't rely on them." But Burgess "made [J.] feel like he actually wanted [her] presence," which was "new" to her because "people never cared to talk to [her] or hang out with [her]."

In J.'s junior year of high school, sometime prior to her 17th birthday, J. engaged in fellatio with Burgess on two occasions. J. also testified, over objection, that, in her senior year of high school, prior to her 18th birthday, Burgess had vaginal intercourse with her. Defense counsel objected that this had not been included in the bill of particulars, but the trial court overruled the objection after the prosecutor assured the court that intercourse had been disclosed in discovery. J. also testified, again over defense counsel's objection, that she had not had sexual encounters with anyone else before those with Burgess.

J. expressed confusion about the fact that Burgess was continuing to have a relationship with her mother even after talking with J. about how much they loved each other. J. testified: "I just kind of questioned it a little bit because it never made sense to me how he would say that he's in love with me but also in love with my mom."

In June 2017, J.'s mother contacted the Charles County Sheriff's Office after she discovered, on Burgess's phone, a string of sexually explicit text messages between J. and Burgess. Burgess gave a recorded statement to a detective from the Sheriff's Office on June 21, 2017, in which Burgess admitted to engaging in fellatio with J. on two occasions prior to her 18th birthday. Burgess also told the detective that he had had sexual intercourse with J., but he insisted that that had occurred after J.'s 18th birthday. The audio-video recording of the interview was played for the jury at trial.

After the close of evidence, the court instructed the jury on the elements of sexual abuse of a minor as follows:

> In order to convict the defendant of [ ] child sexual abuse the State must prove that the defendant sexually abused [J.] by engaging in fellatio or sexual exploitation. . . . In order to convict the defendant you must all agree that the defendant sexually abused [J.] but you do not have to all agree on which specific act or acts constituted the abuse. . . . Exploitation means Calvin Burgess took advantage of or unjustly or improperly used the child, [J.], for his [ ] own benefit.

In closing argument, the prosecutor echoed the court's instructions, telling the jury that the State had the burden of proving that Burgess "either sexually exploited or engaged in fellatio with [J.]" The prosecutor then discussed the facts that supported the State's theory that Burgess sexually exploited J.:

> [T]he Judge gave you the definition of exploitation; that the Defendant unjustly or improperly took advantage of [J.] for [his own] benefit.
>
> Well let's look at that. Let's look at what the law says and look at the facts you have.
>
> * * *
>
> [H]e knew she was having trouble in school.
>
> He knew about the bullying.
>
> He knew about the depression.
>
> * * *
>
> . . . [He] started to take advantage of [J.] at that point and he told you why in the interview with the detective.
>
> . . . He says the relationship with [J.'s mother] went stagnant. He wasn't getting what he wanted from [J.'s mother] so he sought it from a 15, 16, 17 year old minor child in his home when he was 33 years of age.

The cuddling, the rubbing the leg. Sure he talked her up. Sure he built her confidence up.

But you know from [J.] she never felt that affection from anyone.

She didn't have friends.

She didn't do any after school activities.

She was constantly bullied because of [her] skin condition and the disfigurement of her teeth.

And that affected her social life.

And [Burgess] told the detective he knew that.

In fact at one point he said I've lived in that house for six years. . . . I saw no one paid attention to her. I was the only one that did. For his own sexual benefit and gratification.

* * *

So yes, [J.] wanted to be around him cause she liked the attention but he also knew that and he continued for his own benefit and gratification.

* * *

. . . [H]e denies it was anything but love. . . . [H]e even denies it was a boyfriend, girlfriend relationship.

He never saw it that way.

He never saw her like that.

That is sexual exploitation cause then what did he use it for, exactly what he told Detective Feldman earlier, his relationship with [J.'s mother] was failing, it was stagnant was one of his words when he described it.

And [J.] was giving him the attention and he took it.

And he continued to cuddle with her, to lay with her, kiss her, engage in oral sex **and ultimately sexual intercourse**, all for his own benefit.

> And yes, she did like it, she told you, yes it felt good.
>
> Did her grades go up?
>
> Confidence go up?
>
> Sure.
>
> But that doesn't mean he didn't exploit or commit the engaging of [sic] fellatio.
>
> * * *
>
> No, he took advantage of a vulnerable minor child and he knew; he knew her state of mind.

(Emphasis added.)

After defense counsel gave his closing argument, the prosecutor addressed the jury in rebuttal, reminding the jury that the court had instructed them that they "do not all have to agree whether it was sexual exploitation or engaging in fellatio." The prosecutor continued:

> So some[ ] of you may say it was sexual exploitation.
>
> Some of you may say the fellatio cause she was under 18.
>
> That's fine. As long as you all agree something whether it was one of the two, either exploitation or fellatio, you don't have to agree it was both, . . . As long as the twelve of you agree it was one or the other.
>
> * * *
>
> **In February, March of 2007** [sic] she confronted him and said we need to talk about what's going on here. Is it me or my mom?
>
> He said okay. We'll talk today.
>
> And you know that **whatever was said in that talk led to sexual intercourse**.

> But you know from his interview it wasn't a boyfriend and girlfriend in his mind. He was the parent. He was the adult.
>
> He even said to her in the text messages, no I'm your father. I see you as my daughter.
>
> * * *
>
> **The exploitation is** a communitive [sic] event of acts from **the getting close all the way through sexual intercourse.**
>
> And that is the Defendant unjustly or improperly taking advantage of [J.]

Ten minutes after being excused to begin their deliberations, the jury reached a verdict, finding Burgess guilty of sexual abuse of a minor.

DISCUSSION

During J.'s direct examination, she was asked whether there was any sexual contact between her and Burgess prior to her 18th birthday. J. responded in the affirmative, stating, "[w]e were laying [sic] in the bed, he was rubbing my leg, his hand moved closer and I think we both just agreed that we wanted to try to have sex." Defense counsel objected, and the following colloquy ensued at a bench conference:

> [DEFENSE COUNSEL]: At this point I'm going to have to object. I have not been put on notice that intercourse is part of the sexual acts that are [forming] the child sexual abuse claim. I was told that it was going to be fellatio. And so if [the State is] now going to introduce testimony that they had intercourse before she was 18 I'm not on notice as to that in the Bill of Particulars.
>
> [PROSECUTOR]: And Your Honor, that's fine but it's still in [d]iscovery that (unintelligible) the Bill of Particulars is fellatio and sexual exploitation. The sexual intercourse further goes to how he; of the exploitation [sic].
>
> THE COURT: Can; can be a part of that.

[DEFENSE COUNSEL]: But I'm not on notice [of] that. I specifically asked for the acts and the events and I was told that it was gonna be sexual exploitation.

[PROSECUTOR]: Um hum.

[DEFENSE COUNSEL]: And fellatio.

[PROSECUTOR]: Um hum.

[DEFENSE COUNSEL]: If it was going to be intercourse [the prosecutor] simply could have added intercourse.

THE COURT: Why wasn't it added in the Bill of Particulars?

[PROSECUTOR]: In the Bill of Particulars because honestly Judge I missed it. But the Bill of Particulars is to the charges. He's on notice that this exists in [d]iscovery.

THE COURT: It is in [d]iscovery?

[PROSECUTOR]: Yes, absolutely.

[DEFENSE COUNSEL]: That's irrelevant.

[PROSECUTOR]: It [is] not. It goes to further sexual exploitation which [] was in the Bill of Particulars. He further exploited her.

THE COURT: Well, it is in [d]iscovery?

[PROSECUTOR]: Um hum.

[DEFENSE COUNSEL]: I understand it's in [d]iscovery but it wasn't in the Bill of Particulars. And saying that she missed it is kind of like missing the ocean. I mean that.

[PROSECUTOR]: It doesn't have to be in the Bill of Particulars to not be relevant [sic].

THE COURT: But it's still one method. There can be multiple methods of the sexual exploitation under the [s]tatute.

The court overruled the objection, stating, "[i]f it's in the discovery [ ] it wasn't like this is a surprise." But the court also said: "I'll allow continuing objection to this area." The direct examination of J. then continued:

> [PROSECUTOR]: I'm sorry, [J.], you may continue about how the relationship changed in your senior year for the sexual contact.
>
> A: Like I was saying we both just agreed that we wanted to give sex a try so we went into the bathroom, closed the door slightly and I sat on; well he sat me on the sink and spread my legs, moved my panties to the side.
>
> He put a condom on and proceeded to have sex.
>
> And when he was ready to ejaculate he pulled out.
>
> He ejaculated into the condom and then flushed the condom and the wrapper in the toilet.
>
> Q: Okay. Now you say that that was prior to your 18th birthday.
>
> A: Yes.

Burgess asserts that the court erred in permitting the State to introduce evidence that he engaged in sexual intercourse with J. because the State's response to the demand for a bill of particulars "did not put the defense on notice that the State would be eliciting such evidence at trial." Burgess contends that the error was not harmless because, had defense counsel known that the State would elicit evidence that sexual intercourse occurred, he may have altered his trial preparation and/or trial strategy. The State neither challenges nor concedes that the court erred in admitting evidence of intercourse but, instead, cites *Fields v. State*, 395 Md. 758, 763-64 (2006), as precedent for deciding that an alleged error was harmless without deciding the underlying legal issue. *Id*. at 759. The State points out that, in *Fields*, the Court of Appeals reasoned: "The collective effect of the other evidence

in this case so outweighs any possible prejudice resulting from the admission of the questioned evidence that there is no reasonable possibility that the jury would have reached a different result had that evidence been excluded." *Id.* at 764. But, in *Fields*, the challenged evidence was the fact that the defendant's nickname appeared on a monitor at the bowling alley where a shooting occurred. As the Court of Appeals pointed out, there was so much other evidence supporting the conviction the Court could not conclude that the admission of the evidence about the monitor influenced the verdict.

Here, the charge was sexual abuse of a minor by a member of her household. Evidence of an act of sexual intercourse between the minor and the adult member of that household would have been nearly impossible for jurors to put out of their minds even if the trial court had instructed them to do so, which it did not.

In *Dionas v. State*, 436 Md. 97, 109 (2013), the Court of Appeals discussed at length the fact that the harmless error standard "'is the standard of review most favorable to the defendant short of an automatic reversal.'" (Quoting *Bellamy v. State*, 403 Md. 308, 333 (2008).) As the *Dionas* Court explained, the proper application of the harmless error standard does not assess the evidence on an "'otherwise sufficient' basis: [*i.e.*, it is not enough to say that] if the evidence is sufficient without the improper evidence, if the jury could have convicted without it, harm could not have resulted." 436 Md. at 116-17. The test is *not* limited to asking "[w]hether the petitioner suffered prejudice." *Dzikowski*, 436 Md. at 455. "The proper test is one of harmless error." *Id.*

Similarly, the Court of Appeals explained in *DeVincentz v. State*, 460 Md. 518, 560–61 (2018):

> ["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.**["]

[Quoting *Dorsey v. State*, 276 Md. 638, 659 (1976).]

"[O]nce error is established, the burden falls upon the State . . . to exclude this possibility beyond a reasonable doubt." *Dionas v. State*, 436 Md. 97, 108, 80 A.3d 1058 (2013).

We apply the harmless error standard without encroaching on the jury's domain. *Id.* at 109, 80 A.3d 1058. In a criminal case, the jury is the trier of fact and bears the responsibility "for weighing the evidence and rendering the final verdict." *Id.* Assessing a witness's credibility and deciding the weight to be assigned to that witness's testimony are tasks solely delegated to the jury. *Fallin v. State*, 460 Md. at 153–55, 188 A.3d 988, 2018 WL 3410022, at *12; *Bohnert v. State*, 312 Md. 266, 277, 539 A.2d 657 (1988).

Maryland courts have recognized that "where credibility is an issue and, thus, the jury's assessment of who is telling the truth is critical, an error affecting the jury's ability to assess a witness'[s] credibility is not harmless error." *Dionas*, 436 Md. at 110, 80 A.3d 1058; *see also Martin v. State*, 364 Md. 692, 703, 775 A.2d 385 (2001); *Howard v. State*, 324 Md. 505, 517, 597 A.2d 964 (1991); *Wallace-Bey v. State*, 234 Md. App. 501, 546, 172 A.3d 1006 (2017).

The proper inquiry in applying the harmless error test is not to consider the sufficiency of the State's evidence, excluding [the challenged evidence], but "whether the trial court's error was unimportant in relation to everything else the jury considered in reaching its verdict." *Dionas*, 436 Md. at 118, 80 A.3d 1058.

(Emphasis added.)

When we consider whether the evidence regarding sexual intercourse was "unimportant in relation to everything else the jury considered," *id*., we note that the prosecutor deemed the evidence sufficiently important to the case that she fought for admission of the testimony despite acknowledging that she had not included it in the bill of particulars, and then mentioned sexual intercourse multiple times during the closing argument.

Here, there was indeed other evidence which, if believed, supported the guilty verdict. But, because there is a reasonable possibility that the evidence complained of—*i.e*., the minor's testimony regarding an incident of sexual intercourse before her 18th birthday—may have contributed to the rendition of the guilty verdict, we are unable to declare a belief beyond a reasonable doubt that the error in no way influenced the verdict.

And, based upon the holding of the Court of Appeals in *Dzikowski*, we agree with Burgess that the trial court erred in permitting testimony about a sex act that was not identified in the bill of particulars.

Maryland Rule 4-241 provides for bills of particulars in circuit court. "[B]ills of particulars are intended to guard against the taking of an accused by surprise by limiting the scope of the *proof*." *Hadder v. State*, 238 Md. 341, 351 (1965) (emphasis in original). *See also Cropper v. State*, 233 Md. 384, 389 (1964) ("[T]he bill of particulars gratifies its function if it sufficiently enables the defendant to prepare his defense and so protects him from surprise by limiting the scope of the proof at the trial.").

In *Dzikowski*, 436 Md. at 446, the Court of Appeals observed that a bill of particulars is "'a formal, detailed statement of the claims or charges brought by a . . . prosecutor,

usu[ally] filed in response to the defendant's request for a more specific complaint.'" (Quoting Black's Law Dictionary 189 (9th ed. 2009).) "'Its functions are to give the defendant notice of the essential facts supporting the crimes alleged in the indictment or information, and also to avoid prejudicial surprise to the defense at trial.'" *Id.* (quoting 1 Charles Alan Wright et al., Fed. Prac. & Proc. Crim. § 130 (4th ed., April 2012 Update)). Further, the Court of Appeals observed in *Dzikowski*, 436 Md. at 447: "The bill of particulars functions as a limit on the factual scope of the charge, rather than its legal scope." Accordingly, "at the very least," a bill of particulars must "provide the defendant with 'a means of ascertaining the exact factual situation upon which [he or she] was charged.'" *Id.* at 448 (quoting *McMorris v. State*, 277 Md. 62, 70 n.40 (1976)).

Although the statutory offense under consideration in *Dzikowski*—reckless endangerment—included a statutory requirement for the State to supplement a short form indictment with a bill of particulars upon demand, *id*. at 449, the Court of Appeals spoke generally about responses to a request for particulars pursuant to Rule 4-241, stating:

> [T]he State switched the burden to the petitioner to identify the facts underlying the indictment. Because a charging document must inform the defendant "of the specific conduct with which he is charged," *Ayre* [*v. State*], [291 Md. 155,] 163, 433 A.2d at 1155 [(1981),] *supra*, logically, and by Rule, *see* Rule 4–241, a bill of particulars, in supplementation of a short form indictment that fails to so inform, must specify the alleged conduct to which the subject charge relates. **Discovery, even open-file discovery, that includes police reports and witness statements, is not the same and cannot substitute for a legally sufficient bill of particulars**. **While such discovery may contain the full facts of the case, when a defendant is charged using a short form indictment, it is not, and cannot be, a substitute, or satisfy a demand, for a bill of particulars.** Discovery does not particularize or relate, from the perspective of the State, the factual information contained therein to the offense charged. It is this perspective

> and relation of factual information to the offense charged that satisfies the form and substance of a bill of particulars.

436 Md. at 449-50 (emphasis added).

Here, Burgess was generally charged with committing, over a three-year period, sexual abuse of a minor, an offense which, as the Court of Appeals has observed, is not limited to the acts enumerated in subsection (ii) of the statute [incest, rape, sexual offense in any degree, sodomy, and unnatural or perverted sexual practices] but includes a "wide range of behavior." *Walker v. State*, 432 Md. 587, 616-17 (2013). Upon Burgess's timely demand for a bill of particulars, the State did not furnish a "means of ascertaining the exact factual situation" upon which he was charged, but simply informed Burgess that the "discovery already provided supports the State's theory that the Defendant is guilty of Sexual Abuse of a Minor based on acts of sexual exploitation and fellatio." As the prosecutor conceded, the reason the bill of particulars did not inform Burgess that the charge of sexual abuse of a minor included an act of intercourse was because the State had "missed it."

We conclude that the court erred in ruling that the State's discovery production was sufficient to notify Burgess that the State intended to introduce evidence of sexual intercourse before the minor's 18th birthday as part of the proof that he sexually exploited J. Under *Dzikowski*, even <u>if</u> the "voluminous amount" of discovery provided by the State included evidence that an act of sexual intercourse occurred before J. reached the age of 18—and the State did not identify that discovery material either during the trial or in its brief in this Court—that would not be sufficient to inform Burgess that the charge against

him was based on such conduct. And, because the purpose of a bill of particulars is "to guard against the taking of an accused by surprise by limiting the scope of proof[,]" *Dzikowski*, 436 Md. at 447 (internal quotation marks and citation omitted), we conclude that, under the circumstances of this case, the court erred in allowing the State to introduce evidence of conduct that was not included in the bill of particulars.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY REVERSED. CASE REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY CHARLES COUNTY.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/2382s18cn.pdf