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SUPREME COURT OF MARYLAND

Damien Gary Clark v. State of Maryland, No. 25, September Term 2022, filed August 31, 2023. Opinion by Watts, J.

Biran, J., concurs.

Fader, C.J., Booth and Gould, JJ., dissent.

<https://www.courts.state.md.us/data/opinions/coa/2023/25a22.pdf>

RIGHT TO COUNSEL – NO-COMMUNICATION ORDER – ACTUAL DENIAL OF ASSISTANCE OF COUNSEL – PREJUDICE

Facts:

In the Circuit Court for Howard County, the State, Respondent, charged Damien Gary Clark, Petitioner, with second-degree murder and related offenses. On the fourth day of trial, Mr. Clark began testifying. Mr. Clark's direct examination concluded at the end of the day, and he was due to return to the witness stand the following day for cross-examination. Before adjourning, the trial judge instructed Mr. Clark that he could not to speak to anyone about the case, including his own lawyers, prior to resumption of his testimony. Mr. Clark's trial counsel failed to object to the no-communication order. The next day, Mr. Clark underwent cross-examination, and the defense rested.

The jury found Mr. Clark guilty of some offenses, including voluntary manslaughter, and acquitted him of other offenses, including second-degree murder. Mr. Clark appealed, and the Appellate Court of Maryland affirmed. Because of the lack of a developed record on the matter, the Court declined to hold on direct appeal that Mr. Clark's failure to object to the no-communication order constituted ineffective assistance of counsel, though the Appellate Court stated that it could not think of a valid reason for the failure to object.

Mr. Clark filed a petition for postconviction relief and reiterated the argument that the circuit court's instruction and his trial counsel's failure to object violated his Sixth Amendment right to counsel. The circuit court conducted a hearing, at which Mr. Clark's trial counsel testified that, at the end of each day of trial, he would always ask Mr. Clark whether he had any questions. The circuit court granted the petition for postconviction relief and ordered a new trial, concluding that Mr. Clark's trial counsel did not indicate that there was a legitimate strategic or tactical reason for his failure to object, that Mr. Clark's counsel essentially conceded that he

should have objected, and that Mr. Clark was prejudiced because he could not speak with his counsel during the overnight recess and because the issue as to the no-communication order was unpreserved for appellate review.

The State filed an application for leave to appeal, which the Appellate Court granted. A majority of a panel of the Court reversed, holding that Mr. Clark was required to show an actual deprivation of counsel—i.e., that he actually wanted to speak with his counsel during the overnight recess—and that Mr. Clark was not entitled to a presumption of prejudice. The Honorable Douglas R. M. Nazarian dissented, opining that Mr. Clark’s Sixth Amendment rights were violated because those rights were his, not his counsel’s to waive or neglect away.

Mr. Clark filed a petition for a writ of *certiorari*, which the Supreme Court of Maryland granted.

Held: Reversed.

The Supreme Court of Maryland held that, given the length and scope of the no-communication order, preventing communication between Mr. Clark and trial counsel about the case, and trial counsel’s lack of objection, which permitted the order to go into effect, the order presented a serious impediment to Mr. Clark’s right to consult with counsel in violation of the Sixth Amendment and Articles 21 and 24 of the Maryland Declaration of Rights and, under the framework set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), prejudice was presumed. The Court concluded that Mr. Clark did not need to show or demonstrate that he wanted to confer or would have conferred with his counsel during the overnight recess but for the circuit court’s order as a condition precedent to the presumption of prejudice due to an actual denial of the assistance of counsel. The Court explained that, given the duration of the order (which covered a lengthy overnight recess) and the scope of the order (which applied to all communications about the case), the order prevented communication between Mr. Clark and trial counsel and constituted the actual denial of the assistance of counsel in violation of the Sixth Amendment and the Maryland Declaration of Rights. Thus, prejudice was presumed.

The Court determined that the record showed no strategic or other value to trial counsel’s failure to object, and the failure to safeguard Mr. Clark’s right to consult with counsel for such an extended period of time during such a critical stage of the trial was error. The Court held that, as such, the circuit court correctly concluded that trial counsel’s failure to object was objectively unreasonable and that counsel’s performance was deficient. Accordingly, the Court reversed the Appellate Court’s judgment and upheld the circuit court’s order of a new trial for Mr. Clark, as trial counsel’s performance was deficient and Mr. Clark was prejudiced.

APPELLATE COURT OF MARYLAND

Douglas Ford Bey, II v. State of Maryland, No. 745, September Term 2022, filed October 25, 2023. Opinion by Nazarian, J.

<https://mdcourts.gov/data/opinions/cosa/2023/0745s22.pdf>

DOUBLE JEOPARDY – SEPARATE STATUTORY OFFENSES

Facts:

After trial before a jury in the Circuit Court for Frederick County, Douglas Ford Bey, II was found guilty of seventeen counts, including five counts of sexual abuse under Maryland Code (2002, 2003 Repl. Vol.), § 3-602 of the Criminal Law Article (“CR”). The circuit court sentenced him to twenty-five years of incarceration for each of the five counts under CR § 3-602, to be served consecutively. Mr. Bey filed a motion to correct an illegal sentence, arguing that the separate sentences for each count violated the constitutional prohibition against double jeopardy by imposing multiple punishments on him for one continuing offense. The circuit denied the motion on the basis that multiple acts of abuse occurred within the different time periods charged.

Held: Affirmed.

The Appellate Court of Maryland affirmed, holding that Mr. Bey did not receive multiple sentences for the same offense in violation of double jeopardy protections. The unit of prosecution for sexual abuse of a minor is an act of abuse, regardless of whether a defendant commits one or more acts continuously. Md. Code (2002, 2003 Repl. Vol.), § 3-602 of the Criminal Law Article. Thus, a defendant may be convicted of multiple counts of sexual abuse of a minor for continuous conduct where the counts charge different acts or time periods of abuse.

Gardener Green v. State of Maryland, No. 854, September Term 2022, filed October 25, 2023. Opinion by Ripken, J.

<https://mdcourts.gov/data/opinions/cosa/2023/0854s22.pdf>

CRIMINAL LAW – EVIDENCE – SEXUALLY ASSAULTIVE BEHAVIOR – FABRICATION

CRIMINAL LAW – EVIDENCE – SEXUALLY ASSAULTIVE BEHAVIOR – BALANCING PROBATIVE VALUE AND PREJUDICIAL EFFECT

CRIMINAL LAW – EVIDENCE – PRIOR BAD ACTS

CRIMINAL LAW – SUFFICIENCY OF THE EVIDENCE

Facts:

Gardener Green (“Green”) was charged in the Circuit Court for Wicomico County with offenses stemming from allegations of sexual abuse of a minor child who resided in his home. At trial, the State introduced evidence that Green, while in the same living room as his 8-year-old step-granddaughter, had masturbated in her presence and made eye contact with her while doing so. Green admitted to routinely masturbating in the living room but denied ever staring at his step-granddaughter. After witness testimony concluded, the State submitted evidence of Green’s prior conviction for sexual abuse of a minor. The prior conviction established that Green had digitally penetrated a different minor step-granddaughter who was residing in his home at the time of that assault. At the close of evidence, the court instructed the jury that evidence of Green’s prior conviction could be considered to rebut an express or implied allegation that the minor victim fabricated the sexual offense, or on the question of intent, but for no other purposes. The jury convicted Green of two counts of sexual abuse of a minor, and one count of indecent exposure.

On appeal, Green alleged that the circuit court erred by admitting evidence of his prior conviction for sexual abuse of a minor under § 10-923 of the Courts and Judicial Proceedings Article (“CJP”) of the Maryland Code, as well as under Maryland Rule 5-404(b); Green also challenged the sufficiency of the evidence to support his convictions.

Held: Affirmed.

Under CJP § 10-923(e)(1)(ii), a trial court may admit evidence of prior sexually assaultive behavior if the evidence is offered to “[r]ebut an express or implied allegation that a minor victim fabricated the sexual offense.” The Appellate Court held that, for the purposes of CJP § 10-923, a defendant alleges that a minor victim has fabricated an offense when the defendant disputes a portion of the victim’s testimony that, if accepted by a factfinder, would supply a

necessary element of the offense, even if the defendant admits to the central act itself. Here, Green disputed the portion of the victim's testimony that asserted that he made eye contact with her while masturbating, which provided the context required to find that Green's otherwise permissible act was a crime. Thus, Green implicitly alleged the minor victim fabricated the sexual offense, although he admitted to the act of masturbating itself, and did not explicitly allege the victim fabricated the offense.

The circuit court did not abuse its discretion by admitting the prior conviction under CJP §10-923 when the court stated on the record that the probative value of appellant's prior conviction was not substantially outweighed by the danger of unfair prejudice and found evidence that the two acts were sufficiently factually similar.

Md. Rule 5-404(b) allows a trial court to admit evidence of a prior bad act to show "proof of motive, opportunity, intent, . . . or absence of mistake or accident," provided the court finds the evidence fits into one of the Rule's exceptions, the underlying act was established by clear and convincing evidence, and the probative value outweighs any likely undue prejudice to result from its admission.

The trial court was permitted to allow the jury to consider prior act evidence under Md. Rule 5-404(b), even having made the requisite findings after the parties had rested their cases, as the evidence did not pose unfair surprise to the defense where the evidence had already been admitted, was referenced in opening statements, and been the subject of a pretrial motion. Nor did the trial court abuse its discretion when it found on the record that the prior act evidence was admissible under Rule 5-404(b) because the evidence was (1) relevant to intent, (2) established by clear and convincing evidence, and (3) more probative than unfairly prejudicial.

The evidence was sufficient to support a finding of sexual abuse of a minor when the record evidence, viewed in the light most favorable to the State, allowed a reasonable factfinder to infer that Green looked at the victim while masturbating for his own sexual gratification.

Baltimore Cotton Duck, LLC v. Insurance Commissioner of the State of Maryland, et al., No. 951, September Term 2022, filed October 25, 2023. Opinion by Nazarian, J.

<https://mdcourts.gov/data/opinions/cosa/2023/0951s22.pdf>

INSURANCE – FINANCIAL IMPAIRMENT – SUPERVISORS, LIQUIDATORS, CONSERVATORS, REHABILITATORS OR RECEIVERS – POWERS AND DUTIES

Facts:

This appeal arises out of delinquency proceedings in the Circuit Court for Baltimore City brought by the Maryland Insurance Administration (“MIA”) against Evergreen Health, Inc. (“Evergreen”), a licensed health maintenance organization (“HMO”). The dispute involves a commercial lease for office space between Evergreen, as tenant, and Baltimore Cotton Duck, LLC (“BCD”), as landlord and creditor. The State of Maryland, acting as a Receiver through an agent, Risk & Regulatory Consulting, LLC (“RRC”), and standing in the shoes of Evergreen, agreed with BCD to amend the lease as part of the plan to liquidate Evergreen, which was insolvent.

RRC sought to recover the security deposit Evergreen had paid and collect other money BCD owed Evergreen under that lease amendment. BCD disputed the amounts owed, arguing that it entered into the lease amendment under economic duress, that the notice of the delinquency proceeding and claims process violated its right to due process, and that RRC was granted authority by the circuit court to disavow the original lease improperly. The circuit court disagreed and enforced the lease amendment. BCD appealed and, among other things, claimed that the entire enforcement scheme, including the Department’s authority to disavow the lease, is unconstitutional.

Held: Affirmed.

The Appellate Court held that once an Insurance Commissioner is appointed receiver, the Commissioner may, either directly or through an agent, disavow or amend existing contracts for impaired insurers in order to protect insureds, creditors, and the general public. There is an important state interest in protecting health insurance policyholders, creditors, and the general public, and the procedures and powers the Insurance Code affords the Commissioner do not violate the U.S. or Maryland Constitutions. The Appellate Court further held that RRC complied with statutory and constitutional notice requirements in the claims process and that the lease amendment between BCD and RRC was valid and enforceable.

ATTORNEY DISCIPLINE

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This is to certify that the name of

TIFFANY T. ALSTON

has been replaced on the register of attorneys permitted to practice law in the State as of October 19, 2023.

*

By an Opinion and Order of the Supreme Court of Maryland dated October 23, 2023, the following attorney has been indefinitely suspended:

DONALD DORIN DAVIS

*

By an Order of the Supreme Court of Maryland dated September 1, 2023, the following attorney has been indefinitely suspended by consent, effective October 31, 2023:

MARLENE A. JOHNSON

*

JUDICIAL APPOINTMENTS

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On September 8, 2023, the Governor announced the appointment of **Jennifer Sue Hollander Fairfax** to the Circuit Court for Montgomery County. Judge Hollander was sworn in on October 26, 2023, and fills the vacancy created by the retirement of the Hon. David A. Boynton.

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UNREPORTED OPINIONS

The full text of Appellate Court unreported opinions can be found online:

<https://mdcourts.gov/appellate/unreportedopinions>

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