Circuit Court for Wicomico County
Case No. 22-K-16-000124

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 556

September Term, 2018

RICHARD NATHANIEL JONES

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Thieme, J.

Filed: September 6, 2019

A jury in the Circuit Court for Wicomico County convicted Richard Nathaniel Jones, appellant, of one count of child sexual abuse, one count of fourth degree sexual offense, and two counts of second degree assault. Appellant was sentenced to twenty-five years, with all but twelve suspended, on the child sexual abuse conviction, plus a consecutive five years on the second degree assault conviction, along with five years' supervised probation. He presents the following questions for our review:

1. Was the evidence legally insufficient to sustain the child sexual abuse conviction?

2. Did the trial court err in precluding [a]ppellant from cross-examining Detective Fissel?

Because the evidence of appellant's responsibility for the supervision of K.S. supports the child sexual abuse conviction, and the trial court did not err in sustaining appellant's objection during Detective Fissel's cross-examination, we shall affirm appellant's convictions.

BACKGROUND

Based on events that occurred on February 4 and February 8, 2016, appellant was charged with sexually abusing involving fifteen-year-old K.S. At that time, appellant and K.S.'s mother, L.S., had been "in a relationship, boyfriend girlfriend[,]" for almost "two years." K.S. testified that she had known appellant for "about three years."

The three of them previously lived at 1108 West Road in Salisbury, along with L.S.'s grandfather and her "son periodically." At the West Road household, appellant "paid the cable bill."

Appellant, K.S., and L.S. "moved in August of 2015" to 8 East Pine Street in Delmar. The financial agreement at the new residence was that appellant and L.S. each paid half of the household bills and expenses. This also included the "big purchase" of a used car for K.S., for which appellant paid $750 in December. Although appellant was not responsible for making decisions about medical, educational, or disciplinary matters concerning K.S., he frequently drove her to and from school, sporting events, and social engagements. Occasionally, he also purchased toiletries and sundries for K.S.

From August of 2015, until the second incident on February 8, 2016, K.S. viewed her relationship with appellant as familial. She and appellant had been planning a horse-and-buggy ride as a Valentine's Day surprise for L.S. In text messages, appellant called K.S. "sweetheart" and said "love you." K.S. thought of him as a "second dad," "called him pop," and often texted him for rides, "[signing] off with the salutation I love you." She testified that she loved and trusted him as "[a] parent."

Approximately "a week and a half" before February 4, 2016, "things started to get weird" between appellant and K.S. While giving K.S. a ride home from a basketball game, appellant suggested that they play a game "for money[.]" The game started with appellant asking K.S. to "sing a song" while "walking into the house" for a small amount of money. For K.S.'s turn, she "told [appellant] to do the same." He then asked K.S., for $8, to "take [her] shirt off," which K.S. refused to do.

On February 4, appellant arrived home to find K.S. alone in the house. While she was in her bed, on her phone and laptop, he "sat down next to [her]" and remarked about

how hard her mattress was. As he pressed on the mattress, he "touched…the side of [her] thigh or upper thigh," in the "hip/buttocks area[.]" K.S. "scooted over[,]" and shortly after that her mother arrived home.

Four days later, on February 8, K.S. "texted [appellant] and asked can he pick [her] up" after a basketball game. At home, K.S., expecting her mother to "be home relatively soon[,]" showered, then dressed in a sports bra and shorts. While her mother was "in the shower[,]" appellant entered her room and returned her car keys. He gave "a weird look" and "grabbed" her "chest area" with "his hand." K.S. "backed away," and appellant then "put his hand" on "[her] vaginal area[.]" He then "grabbed [her] butt," and said "you're getting fat back there[.]" K.S. "was looking away" and "pushing him away . . . at the same time[.]"

Appellant left the room and showered, then returned "in his towel, and [said] look[.]" He wanted her to "see his penis[,]" which was "erect[.]" Appellant offered "$1,000 and more thousand dollars" [sic] for K.S. "to touch it and stuff."

The next morning, February 9, K.S. "told her mom" that appellant "keeps touching her." That evening K.S. spoke to a social worker and Salisbury Police Detective Edward Fissel at Child Protective Services, telling them that appellant had "inappropriately touched her, made advances toward her, solicited her for sex."

Appellant, testifying in his defense, denied making any inappropriate comments; offering money for sexual acts; or touching K.S. on her breasts, vaginal area, or buttocks. Although he admitted the conversation about replacing her mattress and that he picked her

up from a party and went out to fill her car with gas on February 8, he insisted that he never played any games with sexual overtones and that he did not expose his penis or ask her to touch it.

According to appellant, L.S. had called him around 8 a.m. on February 9, asking for $2,500. When he did not give it to her, she called again and told him "that if [he] didn't give her the money that she . . . was going to call the cops and say that I did something to her daughter."

With regard to the February 4 interaction, the jury acquitted appellant of the sexual abuse charge but convicted him of second degree assault. With regard to the February 8 incident, the jury convicted appellant of child sexual abuse, second degree assault, and fourth degree assault. The latter two convictions were merged for sentencing purposes.

We shall add facts in our discussion of the issues raised by appellant.

DISCUSSION

I. Sufficiency Challenge

Appellant was convicted of violating Md. Code, § 3-602(b)(1) of the Criminal Law Article, which provides in pertinent part that "[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."[1] Appellant disputes that the evidence was sufficient to establish

[1] Although the alternative subsection, Crim. § 3-602(b)(2), provides that "[a] household member or family member may not cause sexual abuse to a minor[,]" and appellant was undisputedly a "household member," because he "live[d] with" K.S. at the

guilt under this "caretaker" provision, because he had neither "temporary care or custody" of K.S., nor "responsibility for [her] supervision." He contends that the State failed to prove the predicate level of caretaking because K.S.'s mother was present in the home during their February 8 interaction. Distinguishing his role from the teacher in *Anderson v. State*, 372 Md. 285 (2002), who had responsibility for a student he was driving home, appellant argues that "the testimony and evidence of [his] relationship to K.S., demonstrates that his 'temporary care or custody or responsibility for the supervision of a minor' was tantamount to that of 'babysitter,' which at least implicitly terminated whenever Ms. S. returned to the home and 'resumed responsibility' for K.S."

The State counters that appellant's "overly cramped view" of the child sexual abuse statute ignores that, "[a]lthough [his] status as a 'household member' was not in and of itself sufficient in this case to convict him (if only because the State failed to charge that theory of the case), his activities in the household were a robust evidentiary predicate for a rational jury's conclusion that he, at the very least, acted like, and held himself out as, a caretaker." Alternatively, the State maintains that "the evidence was legally sufficient to show that he was a *de facto* parent" with "temporary care" of K.S.

In *Wicomico County Dep't of Soc. Svcs. v. B.A.*, 449 Md. 122 (2016), the Court of Appeals interpreted the pertinent provision as it appears in the analogous statute governing civil child abuse investigations, Md. Code, § 5-701(x)(1) of the Family Law Article.

time of the incidents, for reasons that are not clear from the record before us, he was not charged under that subsection.

"[B]ecause the definitions in the civil and criminal provisions originated as one[,]" "the "legislative DNA" governing "caretaker status" "is identical" in both the civil and criminal statutes. *See id*. at 136 n.8.

In *B.A.*, an administrative finding of "indicated" child sexual abuse was premised on "sexually exploitative" messages digitally exchanged between a martial arts instructor and a fifteen-year-old member of his class. *Id*. at 133. The Court of Appeals summarized precedent in defining and distinguishing between "temporary care or custody" of a minor and "responsibility for supervision" of a minor, as follows:

> The resolution of this case depends . . . on the construction of the pertinent statutory language—*i.e.*, what it means to have "temporary care or custody or responsibility for the supervision of" a child. As always, we look to the "normal, plain meaning of the language of the statute." The statute refers to an "act . . . by a . . . person who has ... temporary care or custody or responsibility for the supervision of a child." FL § 5-701(x)(1) (emphasis added). The present tense indicates that the act must take place while the person has temporary care or custody or responsibility for supervision.
>
> This Court has previously said that "temporary care or custody" is equivalent to "*in loco parentis*," a relatively restrictive classification that "arises only when one is willing to assume all the obligations and to receive all the benefits associated with one standing as a natural parent to a child." *Pope v. State*, 284 Md. 309, 323 (1979) . . . . However, "responsibility for . . . supervision" is broader. As the Court in *Pope* observed:
>
> > "Responsibility" in its common and generally accepted meaning denotes "accountability," and "supervision" emphasizes broad authority to oversee with the powers of direction and decision . . . . Absent a court order or award by some appropriate proceeding pursuant to statutory authority, we think it to be self-evident that responsibility for supervision of a minor child may be obtained only upon the mutual consent, expressed or implied, by the one legally charged with the care of the child and by the one assuming the responsibility.

284 Md. at 323. Thus, the Court said, a babysitter temporarily has responsibility for the supervision of a child, and so does a school teacher when the child is at school. *Id*. at 324. Having begun, such responsibility ends as follows:

> [O]nce responsibility for the supervision of a minor child has been placed in a third person, it may be terminated unilaterally by a parent by resuming responsibility, expressly or by conduct. The consent of the third party in such circumstances is not required; he may not prevent return of responsibility to the parent. But, of course, the third person in whom responsibility has been placed is not free to relinquish that responsibility without the knowledge of the parent. For example, a sitter may not simply walk away in the absence of the parents and leave the children to their own devices.

Id.

The Court examined the significance of a temporal break in responsibility for supervision of a child in *Anderson v. State*, 372 Md. 285 (2002). In that case, a male teacher, who was driving a 14-year-old girl home from school, took a detour to his house where he and the girl had sex. 372 Md. at 289. In holding that the teacher had temporary responsibility for the supervision of his student at the time of the abusive conduct, the Court reasoned that the teacher's responsibility for her supervision began at school and had not yet terminated when they had sex, because he had not yet delivered the girl back to her parents. *Id*. at 295-96. *Anderson* relied heavily on the implied consent of the parents to "any reasonable assistance that a teacher may provide to assure the child's return home from school" and the lack of any "temporal break in the teacher and student relationship" that might, "depending on its length and nature, . . . interrupt the implied consent of the parent and dispel the teacher's duty to supervise." *Id*. at 294.

This understanding of the statute nearly resolves this appeal. Mr. A. had responsibility for the supervision of Ms. K. when she was in his class, but that responsibility ended when she departed the martial arts studio and her parents resumed their responsibility—thereby terminating the implied consent of the parents and the instructor's duty to supervise.

Id. at 134-36 (some citations omitted).

As in *B.A.*, *Pope*, and *Anderson*, the resolution of this case depends on the construction of what it means to have either "temporary care or custody" or "responsibility for the supervision" of the victim. Appellant acknowledges that he was responsible for supervising K.S. whenever they were alone together in the house, equating his caretaking role to a sitter. Although the evidence was sufficient to convict him as a supervisory caretaker during the February 4 incident, when K.S.'s mother was not home, appellant was acquitted of those sexual abuse charges. With respect to the February 8 incident, however, appellant contends that the presence of K.S.'s mother, who was in the shower during their interaction, disqualified him as a caretaker, in the same manner that a parent's return to the home relieves a babysitter of supervisory responsibility.

We disagree. In reviewing the sufficiency of the evidence supporting a child sexual abuse conviction, "we apply well-settled principles of law[.]" *Scriber v. State*, 236 Md. App. 332, 344 (2018). This Court's task is to determine "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." *Id*. (internal quotation marks and citation omitted). Whether a "conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone[,]" when "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." *Id*. (internal quotation marks and citation omitted). This reflects that

"weighing the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact." *Id*. (internal quotation marks and citation omitted). "Thus, the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Id*. (internal quotation marks and citation omitted).

The sole issue raised by appellant is whether the evidence is sufficient to establish beyond a reasonable doubt that he "had care, custody, or responsibility for the victim's supervision." *See id.* at 343. Appellant seeks to distance himself from an ongoing caretaker role that continues even in the presence of a natural parent. In doing so, appellant ignores the undisputed evidence that he voluntarily undertook to share not only significant financial responsibility for K.S., but also to share in the responsibility for her supervision.

Beyond appellant's mere presence in the household, the evidence supports an inference that his caretaking role encompassed "powers of direction and decision" with respect to K.S.'s daily affairs, whether she was in or out of the household and without regard to whether her mother was present. Appellant regularly transported K.S. to and from school, sports, and social engagements. He provided for her financially and logistically, by contributing equally to the roof over her head and her vehicle. He expressed his affection for her via text messages and conversation and received her affection in return.

Although appellant did not have legal authority over K.S.'s medical and educational needs, neither was his caretaking role extinguished whenever L.S. was on the premises.

Instead, appellant assumed a joint responsibility for the supervision of K.S. in that he exercised supervisory authority in her daily activities and affairs. We agree with the State that appellant's responsibility for supervising K.S. was a joint and ongoing role that "could not be turned on and off like a motion sensored light switch every time K.S.'s mother entered and exited the room." From this evidence, the jury reasonably inferred that appellant had responsibility for supervising K.S., within the meaning of Crim. § 3-602(b)(1).

As the State points out, a contrary interpretation of the statutory scheme could be used to absolve a "piano teacher invited into a child's home to practice for a recital, all the while covertly groping the child under the keys as mom and dad gardened outside" or "a day-time nanny who inappropriately touches an infant while unsuspecting parents toil in the home office[.]" Such an "exclusive-reversion rule" would undermine the statute by making a parent's presence on the premises into "a poison pill to the child-sexual-abuse statute's applicability."

Our conclusion that appellant had supervisory responsibility is also consistent with *Bowers v. State*, 283 Md. 115 (1978). In that case, Bowers was convicted of physically abusing his fifteen-year-old step-daughter, while her mother watched, under a statute prohibiting a "'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.'" *Id.* at 118. Just as the mother's actual presence as an onlooker during the abuse did not negate Bowers's caretaking role over the victim, here L.S.'s

presence elsewhere in the household while the sexual abuse occurred did not negate appellant's caretaking role over K.S. Although Bowers had "temporary care or custody" of the child, whereas appellant had "responsibility for the supervision" of K.S., we discern no reason that the presence of the victim's mother should automatically negate such a caretaking role. Instead, it is the jury's task to evaluate the extent to which a parent's presence during the abuse affected whether the defendant had "temporary care or custody or responsibility for the supervision" of the child.

We also find *Pope* instructive, as a contrast to this case and *Bowers*. In that case, Pope gave a troubled mother and her three-month-old son shelter in her household. *See Pope*, 284 Md. at 314. While Pope was present, the mother, in a disturbed mental state, physically abused the infant, causing his death. *Id*. at 314-16. The Court of Appeals held that the evidence was insufficient to convict Pope of child abuse based on her failure to intervene while the abuse was occurring. *Id.* at 330-33. Even though Pope had provided care for the child while the mother was alternating between lucid intervals and episodes when she believed she was God, *id.* at 314-15, Pope did not have "responsibility for the supervision" of the child while his mother was abusing him. *Id.* at 328-33.

As the Court of Appeals explained in *B.A.*, the *Pope* Court examined the meaning of "supervisory responsibility," explaining that "[a] person may have the responsibility for the supervision of a minor child in the contemplation of [the child abuse statute] although not standing *in loco parentis* to that child." *Id.* at 323. Even though "a parent may not impose responsibility for the supervision of his or her minor child on a third person unless

that person accepts the responsibility," and may terminate that authority unilaterally, either "expressly or by conduct[,"]" nevertheless, once accepted, the "person in whom responsibility has been placed is not free to relinquish that responsibility without the knowledge of the parent." *Id.* at 323-24

Because Pope had taken the mother and child into her household, as an "act[] of hospitality and kindness, made out of common decency and prompted by sincere concern for the well-being of a mother and her child[,]" *id.* at 329-30, the Court compared Pope to a "Good Samaritan" who merely performed "functions of a maternal nature from concern for the welfare, comfort or health of a child" and attempted to protect him "from danger because of a sense o[f] moral obligation." *Id.* at 325. Finding no "intent to grant or assume the responsibility contemplated by the child abuse statute[,]" *id.,* the Court held that Pope did not have supervisory responsibility over the child, so that she could not be convicted of child abuse, as a principal in either the first or second degree. *Id.* at 329-32.

Here, as in *Pope* and *Bowers*, the fact that the victim's mother was in the home during the abuse, by itself, is not dispositive. In contrast to both *Pope* and *Bowers*, this mother, although present in the household, neither witnessed the abuse, nor was aware of it. Moreover, the relationship between appellant and K.S. falls somewhere between *Bowers* and *Pope* on the caretaking spectrum. As in *Bowers*, appellant's role was ongoing and familial. Even though appellant did not expressly assume the *in loco parentis* role undertaken by Bowers, his caretaking responsibility was far greater than the temporary Good Samaritan role played by Pope.

In our view, the evidence was sufficient for the jury to find that, in contrast to *Pope*, appellant assumed responsibility for the supervision of K.S. and that, as in *Bowers*, his role was not conditioned on her mother's absence. The record shows that appellant's relationship with K.S. extended far beyond the acts of kindness performed by Pope. He supplied the type of support commonly performed by parents, and he received many benefits associated with parenting, by voluntarily providing for K.S. financially, participating in her daily direction, giving and accepting her affection, and generally treating K.S. as her "second dad." Indeed, appellant's sexual abuse of K.S. on February 8, 2016, occurred in the home they shared, after he picked her up from a basketball game, when he entered her bedroom to deliver keys to her car, which he had partially paid for and just filled with gasoline. We need not decide whether such logistical, financial, and emotional supports to K.S. rose to the level of responsibilities commonly performed by "a parent or other person with temporary care or custody of a" teenager, as in *Bowers*, because the evidence is sufficient to establish beyond a reasonable doubt that during his live-in relationship with L.S., appellant accepted joint responsibility for the supervision of K.S., regardless of whether L.S. was present in the home. Consequently, the evidence is sufficient to support appellant's conviction under § 3-602(b)(1).

II. Cross-Examination Challenge

Appellant's alternative assignment of error arises from the cross-examination of Detective Fissel regarding K.S.'s report of what happened on February 8, 2016. In appellant's view, the trial court's refusal to allow defense counsel to cross-examine the

detective regarding what K.S. told him violated his constitutional rights to confront witnesses and to present his defense, by preventing him from impeaching her with a prior inconsistent statement concerning the sequence of appellant's abusive acts on February 8, 2016. After reviewing the relevant record and law, we are not persuaded that the trial court erred or abused its discretion in sustaining the State's objection to that line of questioning.

Relevant Record

K.S. testified on direct that when appellant entered her room on February 8, he returned her car key, then gave her a "weird look," "grabbed her breast," touched "down" at her vaginal area, and "grabbed [her] butt, too." On cross-examination, defense counsel sought to elicit her testimony about the sequence of these events, as follows:

> [DEFENSE COUNSEL]: And it's while your mother is in the shower it's your testimony that is when [appellant] came into your room and touched your breasts, correct?
>
> [K.S.]: Yes.
>
> [DEFENSE COUNSEL]: And you remember that occurring, correct?
>
> [K.S.]: Yes.
>
> [DEFENSE COUNSEL]: And it's your testimony that he walked into the room and the first thing he did was he gave you the keys but the first place he touched you was on the breast, correct?
>
> [K.S.]: After we have our conversation about my car, yes.
>
> [DEFENSE COUNSEL]: Do you remember talking to Detective Fissel?
>
> [K.S.]: Yes.
>
> [DEFENSE COUNSEL]: And I believe you talked to him on the 9th?

[K.S.]: Yes.

[DEFENSE COUNSEL]: You didn't tell Detective Fissel that he touched you on the breast, correct?

[K.S.]: Yes, I did.

[DEFENSE COUNSEL]: Did you?

I'm going to mark for identification Defendant's Exhibit 2.

Just so my question is clear, you're testifying today that you told Detective Fissel that once [appellant] gave you the keys to the car the first place he touched you was the breast?

[K.S.]: What are you asking?

[DEFENSE COUNSEL]: I'm asking if you told Detective Fissel after he gave you the keys to the car the first place that [appellant] touched you was your breast. Is that what you told him?

[K.S.]: Do I have to answer that questions?

[DEFENSE COUNSEL]: Yes.

THE COURT: Yes.

[K.S.]: Yes.

[DEFENSE COUNSEL]: Okay.

[K.S.]: Can I change my answer?

[DEFENSE COUNSEL]: How about I ask another question?

[K.S.]: Can you rephrase it?

[DEFENSE COUNSEL]: What's the truth of what happened that night?

[K.S.]: I was touched.

[DEFENSE COUNSEL]: Where?

Let me know when you're ready to proceed.

[PROSECUTOR]: Your Honor, perhaps a brief recess to allow her to compose herself.

THE COURT: All right, let's take five minutes. . . .

(Whereupon there was a recess in the proceedings) . . . .

THE COURT: [Defense Counsel], if you'd ask another question please.

[DEFENSE COUNSEL]: I just want to clarify, when you spoke to Detective Fissel on the 9th did you tell Detective Fissel the first place [appellant] touched you was your breast?

[K.S.]: Yes.

Defense counsel proffered to the trial court that this testimony was inconsistent with what K.S. told Detective Fissel on February 9, 2016, when she reported the abuse. This contention was premised on the following excerpt from the transcript of that recorded interview:

[K.S.]: We got home – well, my mom got home first. But we got home, and he said he was going to go fill my car up with gas, and he left.

And my mom got in the shower – well, I got in the shower before he left, and when I got out, he was gone. So my mom got in, and I put my clothes on, and I only had like – so I had a sports bra on and shorts. And he came into my room and brought me my keys. He said, here, you go. And I was like, thank you.

Then he touched me. Then we were just stand – he's like, you're getting fat back there, and I was just like – like I didn't say anything. Then he left. Then he came back and touched me again. He just kept touching me. And I just kept pushing him away.

[DET. FISSEL]: What do you mean by kept touching you?

[K.S.]: Like, kept grabbing my butt.

> [DET. FISSEL]: Like was it just smacking your butt, rubbing it, or was he actually grabbing it?
>
> [K.S.]: Like grabbing it.
>
> [DET. FISSEL]: Okay.
>
> [K.S.]: And at one point, he grabbed my chest, too. And then he left.

After the recess taken for K.S. to compose herself, defense counsel did not return to the "sequence of events" line of questioning. Instead, he continued cross-examination by inquiring about K.S.'s allegation that appellant offered her money "[t]o touch" him. Without objection or qualification, the two-page excerpt from the transcript of K.S.'s interview with Detective Fissel, as set forth above, was admitted into evidence as Defense Exhibit 2.

On re-direct, the prosecutor asked K.S. about whether she reported events chronologically to Detective Fissel, as follows:

> [PROSECUTOR]: [K.], when you spoke with the detective and the social worker, did you tell them everything that happened exactly in chronological order?
>
> [K.S.]: Yes.
>
> [PROSECUTOR]: And you volunteered that on your own or was that at the detective's questioning?
>
> [K.S.]: The detective's questioning.
>
> [PROSECUTOR]: So did there come times where you would say something and be like, oh, well, and then there was also this happened?
>
> [K.S.]: Yes.

[PROSECUTOR]: So as you're talking to the detective you start remembering things, is that fair to say?

[K.S.]: Yes. . . .

[PROSECUTOR]: All right, [K.]. Do you have Defense Exhibit 2? You have seen Defense Exhibit 2, right?

[K.S.]: Yes.

[PROSECUTOR]: That's a transcript of your testimony or of your statement to the detective and social worker, correct?

[K.S.]: Yes. . . .

[PROSECUTOR]: I'd like to direct your attention now to line 17. Are you still talking about the first time he came into your bedroom on the 8th at that point.

[K.S.]: Yes.

[PROSECUTOR]: And what did you tell the detective?

[K.S.]: Am I reading it?

[PROSECUTOR]: I'm asking you do you recall what you told the detective?

[K.S.]: Yes.

[PROSECUTOR]: Could you tell us what you told the detective?

[K.S.]: He grabbed my chest.

[PROSECUTOR]: Do you describe when he grabbed your chest?

[K.S.]: At one point.

[PROSECUTOR]: So you weren't clear about, to the detective, about when he touched your breast, is that fair to say?

[K.S.]: Yes.

Detective Fissel testified after L.S., explaining on direct that K.S. reported "that basically the Defendant had inappropriately touched her, made advances toward her, solicited her for sex." On cross-examination, defense counsel returned to the "sequence of events" line of inquiry, triggering the State's objection, as follows:

> [DEFENSE COUNSEL]: Did [K.S.] tell you a series of events that occurred, purportedly occurred between her and [appellant]?
>
> [DET. FISSEL]: Yes.
>
> [DEFENSE COUNSEL]: More specifically to February 8th, did she describe to you a series of events that occurred?
>
> [DET. FISSEL]: Yes, she described everything that had occurred.
>
> [DEFENSE COUNSEL]: You're looking at a document.
>
> [DET. FISSEL]: That is a copy of my report.
>
> [DEFENSE COUNSEL]: When you spoke with her, she indicated that [appellant] initially came in her room and gave her some keys to the car?
>
> **[PROSECUTOR]: Objection, Your Honor.**
>
> (Whereupon counsel and the Defendant approached the bench and the following occurred at the bench:)
>
> **[PROSECUTOR]: It's hearsay, Your Honor, an out-of-court statement.**
>
> **[DEFENSE COUNSEL]: It's a prior inconsistent statement. I showed and admitted into evidence part of a transcript of statements made to this officer. [K.S.] denied making certain statements. I think I'm permitted to ask this officer if those statements were made, and if he doesn't recall he can look at the transcript of their interview.**
>
> THE COURT: Do I need to see your Exhibit 2?
>
> [DEFENSE COUNSEL]: More specifically, **[K.S.] in direct examination indicated that [appellant] walked into her room and grabbed her breast**

first. And then at some point in time touched her other places. In cross-examination I inquired as to whether she actually said that to this officer, I think we went through – in fact she denied saying it to the officer. I can proffer that this officer will testify from the transcript of the statements that I have that [K.S.] said at the time my client came into the room and touched her on the legs or buttocks four or five times and then at some point in time after that touched her breast.

So I think it would fall under – used for a prior inconsistent statement that she said something different at some other time.

[PROSECUTOR]: And what I clarified on redirect, Your Honor, was that [K.S.] advised the officer that she had in fact told the detective that she was touched on the breast, she didn't specify the time what happened chronologically, and she did adopt that statement as being made.

THE COURT: I mean that's what I thought.

[DEFENSE COUNSEL]: I don't know that it was clarified how it occurred and I think this witness can testify that she said in a very distinctive different order than what she testified to before the Court.

THE COURT: So really **the point is not that – she said the same thing to him that she's saying here in court but you think that she's giving a different order to the court than she did.**

[DEFENSE COUNSEL]: **Absolutely**.

THE COURT: Than she did to him.

[DEFENSE COUNSEL]: Yes. That he memory should be – attacking her recollection and her memory should be challenged. To this officer she said a different series of events.

[PROSECUTOR]: And that's, Your Honor, when I pointed out to her on page eight if you flip the page there was a point where she states ["]and at one point he grabbed my breast," and that statement, she advised that she did make that statement, she adopted that statement as being true. It simply isn't clear as to the chronological order so I think the question is in itself misleading.

[DEFENSE COUNSEL]: If I could step back for one moment.

THE COURT: All right.

[DEFENSE COUNSEL]: And I'm reading from the transcript, I'm going to proffer to the Court Detective Fissel says ["]did you have anything else on besides shorts or just shorts?

["]I had on shorts. At that point I had a tee shirt on.

["]Okay. So at that point he had already touched your butt like three times.

["]Yes, probably four or five.

["]Four or five different times?

["]Yes, because he kept coming in and out.

["]At one point he grabbed your breast over the top of your sports bra?

["]Yes.

["]And did you say anything to him?

["]No.["]

THE COURT: Well.

[PROSECUTOR]: It's not inconsistent, but she doesn't identify timeframe.

THE COURT: Yeah, I don't see an inconsistency really, so I guess I'll sustain the objection.

(Emphasis added.)

Appellant's Challenge

Appellant contends that "[t]he trial court erred in foreclosing the cross-examination of Detective Fissel regarding K.S.'s prior inconsistent statement to him." In his view, the court "erroneously ruled that K.S.'s prior statement was not inconsistent[,]" because, as the State conceded, her statement to the detective was not "clear as to the chronological

order[,]" whereas she testified unequivocally at trial that appellant touched her breast first. Appellant posits that the error in restricting cross-examination of the detective about K.S.'s prior statement, which was admissible under the hearsay exception in Md. Rule 5-802.1 for prior inconsistent statements, significantly impaired his defense by excluding highly relevant impeachment evidence that undermined the credibility of K.S.'s trial testimony. *See* U.S. CONST. art. VI, XIV; Md. DECL. RTS., art. 21, 24.

The State responds that "it is inaccurate to say that K.S. denied her prior statement[,]" because defense counsel "never actually elicited K.S.'s denial of the prior statement." In support, the State points out that although "K.S. ultimately maintained that she told the detective that the first place [appellant] touched her was her breast," defense counsel introduced into evidence the transcript of K.S.'s interview with Detective Fissel, but "inexplicably never asked her about any supposed inconsistency with respect to the sequence of events," but "focused on the money matter instead."

"In any event," the State continues, the trial court did not err in sustaining the State's objection because, as the prosecutor elicited on re-direct, "K.S. agreed that she made the statements in the exhibit and explained away any seeming inconsistency with her testimony on the sequence of events." Morever, appellant's constitutional complaints, that he was denied a meaningful right to cross-examine the detective and to present his defense, "overlook[] that the trial court substantively admitted Defense Exhibit 2 without qualification on its use." Based on that evidence, the State points out, defense counsel was

able to argue in closing that K.S. had given inconsistent accounts of the sequence of events on February 8, 2016.

We agree with the State that because the relevant portion of the interview transcript was admitted into evidence, with no substantive qualification, the issue is whether the trial court prejudicially erred in excluding other extrinsic evidence proffered as a prior inconsistent statement. Specifically, did the court erroneously prohibit appellant from questioning Detective Fissel about the alleged inconsistency between what K.S. told him on February 9 and her trial testimony, regarding the sequence of appellant's abusive acts.

> Under Md. Rule 5-611, a trial court has broad discretion to control
>
> the parties' presentation of evidence. Subject to constitutional considerations, the same is true as to the scope . . . of cross-examination. The Rule provides, in pertinent part, as follows:
>
> > "(a) Control by court. The Court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
> >
> > "(b) Scope of cross-examination. (1) Except as provided in subsection (b)(2), cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. . . ."
>
> We review an exercise of this authority for abuse of discretion. An abuse of discretion can occur when the trial judge's action "impair[s] the ability of the defendant to answer and otherwise receive a fair trial."
>
> Cross-examination is a right guaranteed by the common law. The United States Supreme Court has recognized cross-examination as "the 'greatest legal engine ever invented for the discovery of truth.'"

> Cross-examination has many purposes. The questioner may intend to impeach a witness with a prior inconsistent statement, to show bias or interest of a witness, or to even bring out helpful information not included in the direct testimony. . . .
>
> Cross-examination is permissible to elicit facts "tending to discredit the witness by showing his testimony in chief was untrue or biased." . . . A cross-examiner may also seek to draw out disparities in a witness' testimony. Such pursuit may yield an instance where "the witness who has told one story aforetime and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination was invented to explore."

Myer v. State, 403 Md. 463, 476-78 (2008) (citations omitted).

We are not persuaded that the trial court erred or abused its discretion in sustaining the State's objection to cross-examining the detective about certain statements made by K.S. during their February 9, 2016, interview. To be sure, the credibility of a witness may be challenged by showing that the witness previously made a statement that is inconsistent with her trial testimony. *See* Md. Rule 5-613(a) (impeachment based on witness's prior written or oral statement); Md. Rule 5-616(a)(1) (impeachment by inquiry of the witness); Md. Rule 5-802.1(a) (hearsay exception for prior inconsistent statement by a witness subject to cross-examination). Yet the witness must be "given an opportunity to explain or deny" her prior statement. *See* Md. Rule 5-613(a)(2); Md. Rule 5-616(a)(2). Moreover, extrinsic evidence of the witness's prior statement "is not admissible" unless those requirements have been satisfied. *See* Md. Rule 5-613(b).

Here, extrinsic evidence of a portion of K.S.'s statement to the detective on February 9 was substantively admitted, without objection, as Defense Exhibit 2, the two-page

excerpt from the transcript of that interview. Thereafter, defense counsel sought to have Detective Fissel testify from his memory about additional statements made by K.S., concerning the sequence of appellant's abusive acts during their interactions on February 8. In support, counsel proffered, based on a different excerpt from the same interview transcript, that the detective's account would be inconsistent with K.S.'s trial testimony that the first place appellant touched her was her breast.

Yet defense counsel never gave K.S. an opportunity to review her allegedly inconsistent prior statement, much less "to explain or deny it." *See* Md. Rule 5-616(a)-(b). Instead, it was the prosecutor who, on re-direct, asked K.S. to review her statements recorded in Defense Exhibit 2, then allowed K.S. to explain that when she told the detective that appellant "grabbed [her] chest[,]" she was not "clear about . . . when he touched [her] breast[.]"

The trial court compared the defense proffer of the detective's testimony, which was premised on a different excerpt from the interview transcript, against K.S.'s trial testimony. The court agreed with the State that the proffered testimony from Detective Fissel was not inconsistent with K.S.'s trial testimony because she "explained away" any inconsistency when she testified that she merely told the detective that appellant touched her breast "at one point," without stating when that specific act occurred within the sequence of abusive acts. For that reason, the trial court sustained the State's objection, foreclosing cross-examination that would have elicited the extrinsic evidence of K.S.'s prior statement, in the form of Detective Fissel's testimony.

We discern no error or abuse of discretion in that ruling. Appellant did not satisfy the procedural or substantive predicates for admitting extrinsic evidence of K.S.'s prior statement. Defense counsel did not question K.S. about either the proffered testimony of Detective Fissel or the transcript of her statements to him, much less afford K.S. an opportunity to deny or explain the alleged inconsistency, as required by Rules 5-613 and 5-616. Nevertheless, the State partially filled that gap on redirect, presenting her with the two-page excerpt from the transcript of K.S.'s statement and eliciting her testimony that she had not provided the detective with a strictly chronological account of the abuse. When defense counsel subsequently proffered that the detective would testify he asked K.S. whether "[a]t one point [appellant] grabbed [her] breast over the top of [her] sports bra[,]" the court did not "see an inconsistency" with K.S.'s trial testimony, agreeing with the prosecutor that "she doesn't identify timeframe" in her interview. Our reading of the record is the same as the trial court's. In these circumstances, the trial court did not err in determining there was no inconsistency between K.S.'s trial testimony and the statement she made to Detective Fissel, or in foreclosing cross-examination of the detective on that point.

Moreover, the restriction on cross-examination did not prejudice appellant's defense. As noted, Defense Exhibit 2, the excerpt from K.S.'s February 9 interview, includes her statement that appellant touched her breast "at one point." That prior statement was admitted without objection or limitation on its use. Based on that evidence, defense counsel argued in closing that K.S. was not a credible witness because her

statement on February 9 was inconsistent with her trial testimony concerning the sequence of abusive acts. In these circumstances, appellant was not prevented from arguing the alleged inconsistency to the jury.

Because appellant did not satisfy the procedural or substantive requirements for admitting extrinsic evidence of a prior inconsistent statement, and his defense was not impaired by the challenged ruling, the trial court did not err or abuse its discretion in sustaining the State's objection.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.