UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1436

SEPTEMBER TERM, 2014

NATHANIEL MORALES

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James, A., III,
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: April 8, 2016

In the Circuit Court for Montgomery County, in two jury trials, Nathaniel Morales, the appellant, was convicted of child sexual abuse and sexual offenses. In Case No. 121884 ("Case One"), a jury convicted him of child sexual abuse of B.W., child sexual abuse of S.B., child sexual abuse of J.C, and two counts of second-degree sexual offenses against S.B. Five days later, in Case No. 123156 ("Case Two"), a jury convicted him of child sexual abuse of D.T. and third-degree sexual offense against D.T.[1]

Sentencing in both cases took place on August 14, 2014. The appellant was sentenced to consecutive ten-year terms of imprisonment for each child sexual abuse conviction, and concurrent ten-year terms for both second-degree sexual offense convictions regarding S.B. and for the third-degree sexual offense conviction regarding D.T., for an aggregate term of 40 years' imprisonment.

The appellant presents seven questions on appeal, which we have consolidated, reordered, and rephrased as follows:

I. In Case One, was the appellant illegally convicted and sentenced for the crime of child sexual abuse of B.W.?

II. In Case One, did the trial court err by denying the appellant's motion to sever?

III. In Case One, was the evidence legally sufficient to sustain the appellant's convictions for child sexual abuse?

IV. In Case Two, did the circuit court err by allowing the State to make improper and prejudicial statements during closing argument?

[1] Given the nature of the cases, we have chosen not to use the victims' names.

V. In both cases, did the circuit court err in failing to merge the appellant's sexual offense convictions for sentencing?

For the following reasons, we shall vacate the judgment of conviction for child sexual abuse of B.W.; vacate the sentence for one second-degree sexual offense against S.B.; and vacate the sentence for third-degree sexual offense against D.T. We shall otherwise affirm the judgments. We shall remand for further proceedings not inconsistent with this opinion.

FACTS AND PROCEEDINGS

The following facts were adduced at the trials in Cases One and Two. Because it makes sense for context, we shall discuss Case Two first.

Case Two

In 1979, at age 21, the appellant was living in a faith-based group home in the Washington, D.C., area, operated by the New Testament Church ("NTC"). He was working as a minister and "youth mentor" for NTC. D.T. was approximately 12 years old at that time, and also was living in the group home. One evening that year, after D.T. got out of the shower in the bathroom of the group home, the appellant approached him and fondled his genitals.

In 1980, D.T. and other people from the group home, including the appellant, attended a summer retreat at the Peach Orchard Retreat Center in Montgomery County. D.T. became ill during the retreat and remained in the dormitory. The appellant stayed with him. At some point, D.T. "passed out," but awoke upon being sexually stimulated. Although D.T. could not recall whether the appellant had touched him, he did recall that

the appellant's face was near his genitals when he woke up. Thereafter, D.T. left the group home to live with his mother and siblings.

According to Brother Wayne Pratt ("Brother Wayne") of the NTC, the appellant was an "ordained worker" who was "very involved in youth activities" and was responsible for running the NTC retreats. At some point in the early 1980s, Pastor Don Spires, NTC's senior pastor, approached Brother Wayne and asked him to speak with D.T. about allegations of abuse by the appellant. Brother Wayne spoke to D.T., and reported back to Pastor Spires. Thereafter, the appellant was excommunicated from NTC.

In 1990, the appellant contacted Brother Wayne and told him that he was teaching at the Montgomery County Covenant Academy ("MCCA"). He invited Brother Wayne to interview for a science teacher position. After the interview, Brother Wayne spoke to the appellant privately and asked him whether he had told the administrators at MCCA about his history of sexually abusing D.T. The appellant replied, "I have told the principal about everything."

Grant Layman worked at Covenant Life Church ("CLC") for 31 years. He met the appellant "sometime in the mid '80s," when he came to serve on the worship team at CLC. Sometime in 2007, the appellant told him "that Don Spires was [the appellant's] mentor and that [the appellant had] acknowledged to [Pastor Spires] everything from his past" and that Pastor Spires had held him accountable for the sexual abuse.

In March of 2013, D.T. contacted Detective Sally Magee of the Montgomery County Police Department, and reported that he had been sexually abused by the appellant in 1979 and 1980.

Case One

After leaving NTC in the early 1980s, the appellant was hired by CLC as a gospel singer and aide in the youth ministry. He began teaching at MCCA in the fall of 1989, and was vice-principal of MCCA from 1990 to 1991.

S.B. first met the appellant in the early 1980s, when S.B. was "10, 11, 12, in that range[.]" They met "through [CLC] in one of the youth activities." The appellant befriended S.B.'s family and was "like an older brother" and a "mentor" to S.B. The appellant drove S.B. and other CLC youth members to activities such as movies and bowling. When the youth members had sleepovers, the appellant would stay with them. Many of the sleepovers took place at S.B.'s and B.W.'s homes.

Sometime in 1983, when he was "around 12 years old," S.B. had a sleepover at his home that the appellant came to. He and the appellant were sleeping in the basement; no one else was present. S.B. awoke in the early morning, while it "was dark outside," to find the appellant rubbing his penis. According to S.B., sexual encounters of this type continued, all under similar circumstances, and at some point, the appellant began performing fellatio on him. All told, the appellant touched S.B. sexually "20 to 30 times" of which "15 to 20" involved the appellant performing fellatio on him. The last sexual encounter occurred in the "[l]atter part of '87."

B.W. and his family moved to Montgomery County in 1983 to join CLC. B.W. first met the appellant in 1988. B.W. attended MCCA.

In September of 1989, the appellant moved into B.W.'s family's house. At that time, B.W.'s bedroom was in a sectioned-off portion of the basement. The appellant slept on a couch in the other part of the basement. One night after the appellant had moved in, B.W. awoke to find the appellant kneeling by his bed and touching his genitals. On other occasions, he awoke to find the appellant performing oral sex on him. These incidents all happened in the middle of the night.

In June 1990, the appellant moved out of B.W.'s house to an apartment in Germantown. B.W. visited the appellant at his house in Germantown because he would give him alcohol. In March of 1991, the appellant moved back to B.W.'s house. He remained there until June of that year. According to B.W., he was sexually abused by the appellant intermittently from 1989 through "the first half of '91[,]" both when the appellant was living with and apart from B.W. and his family.

J.C. was friends with B.W. and S.B. He attended MCCA, where he met the appellant. The appellant led weekly bible study. J.C. often went to sleepovers at S.B. and B.W.'s homes, where the appellant was present.

The appellant first sexually abused J.C. in the winter of 1988, at a sleepover at B.W.'s house. Several boys were present. J.C., who has asthma, was sleeping on a cot by a window, away from the others. He awoke in the early morning to find the appellant touching his chest. The appellant made "shushing" sounds to keep him quiet and

masturbated him. The appellant repeated this abuse on other occasions, and sometimes forced J.C. to "touch and masturbate him." These acts occurred at B.W.'s house and at the appellant's apartment in Germantown.

S.B., B.W., and J.C. all were between 12 and 17 years old at the times the appellant sexually abused them. They did not disclose the abuse when it happened because they were embarrassed. In late 1991, B.W. and S.B. told their mutual friend, Robert Rosencrantz, about the abuse. Thereafter, S.B. approached J.C., who acknowledged that the appellant had abused him as well.

According to B.W.'s father, the appellant was a "secondary level" authority at CLC, and had come to live with the W. family because he was "adrift" and a "man in need." The appellant was "another adult in our family, where we could feel free to entrust the care of our children to him." The appellant moved out of the W. home in "June or July . . . of 1991." B.W.'s father learned about the abuse in the spring of 1992, from Rosencrantz. He approached leaders at CLC about the abuse, but did not report it to the police. In the summer of 1992, he learned that the appellant was in the "Teen Challenge" rehabilitation center in Michigan. He visited the appellant there, and the appellant told him that he had abused B.W.

Pamela Playsted met the appellant in 1982 at CLC. They were engaged from 1988 to 1989, when Playsted ended the relationship. She did not speak to the appellant again until 1993. He told her then that he had gone to Teen Challenge and that he had provided alcohol to B.W. on prior occasions.

S.B.'s mother knew the appellant as a "helper" and "youth leader" at CLC, who led bible study for the 12 to 13 year-old age group, and attended sleepovers with the CLC youth. In 1992, S.B. told her that the appellant had sexually abused him. S.B.'s mother did not contact the police, but spoke to Layman about the abuse. Layman recalled this conversation taking place in the early 1990s. A year later, he learned that B.W. also had been abused by the appellant. The appellant left CLC sometime "in the early '90s." In 2007, Layman attended a pastoral team meeting at CLC, where the team members agreed to reach out to the appellant. Layman contacted the appellant, who told him that he had "admitted himself to Teen Challenge after leaving [CLC] for alcohol abuse and homosexuality" and that he "acknowledged abuse but could not remember the details." Layman never reported the abuse to the police.

In 2009, S.B. contacted Detective Magee about having been sexually abused by the appellant, and she conducted an investigation.

We shall include additional facts as pertinent to the issues on appeal.

DISCUSSION

I.

In Case One, Count VIII of the indictment charged the appellant with child sexual abuse of B.W. "on or between January 1, 1988 through December 31, 1988," in violation of Md. Code (1957, 1987 Repl. Vol.) Art. 27 section 35A(a)(4)(i). During that offense period, child sexual abuse only could be committed "by a parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child." *Id.*

The indictment alleged that the appellant had had temporary care or custody or responsibility of B.W.

Effective July 1, 1991, the statute was amended to include sexual abuse by "any household or family member." Md. Code (1957, 1987 Repl. Vol., 1991 Cum. Supp.) Art. 27 § 35A(a)(6)(i). A household member is "a person who lives with or is a regular presence in a home of a child at the time of the alleged abuse." *Id.* at § 35A(a)(5).

At the outset of trial, the State moved to amend the dates in Count VIII to September 1, 1989, through September 30, 1991. The appellant did not object, and the court amended Count VIII by writing in the new dates.

In a discussion among the court and counsel about proposed jury instructions, the following colloquy took place:

> THE COURT: The defendant is charged with the crime of sexual, child sexual abuse. Child sex abuse is sexual molestation or exploitation of a child under 18 years of age caused by, and then it has in brackets, of a parent. We're not doing that. It's not a family member. A member of household, a person with permanent or temporary care, custody, or responsibility for supervision.
>
> [THE STATE]: Your Honor?
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> THE COURT: Yes?
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> [THE STATE]: In regards to that, because [B.W.] was the only one who was a household member --
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> THE COURT: Yes.
>
> [THE STATE]: -- and because his abuse extended into 1991, when that portion of the statute was at play, he's the only one that that applies to, so I think we're going to have to have a separate child sexual abuse instruction for [B.W.]

THE COURT: Okay.

[THE STATE]: And then a separate one for [J.C.] and [S.B.] And I'm sorry that the State didn't propose that when we initially provided you with the instructions.

* * *

THE COURT: So what bracketed part do you want in?

[THE STATE]: For [B.W.], it should read a member of the household or a person with temporary care, custody, or responsibility for the supervision of a child.

* * *

THE COURT: Yes. At the time of the abuse the defendant was, let's put either a member of the household or a person with temporary care, custody, or responsibility of [B.W.] --

[THE STATE]: For the supervision of [B.W.]

THE COURT: For the supervision of [B.W.], or both. All right?

[DEFENSE COUNSEL]: I don't agree, Your honor, please, with either/or. I mean he either was a person who was a member of the household, or he was a person with temporary care and custody, with supervision over [B.W.] I don't think you can have either/or in terms of an instruction to the jury, because they're not going to know what to follow.

THE COURT: Well, as long, it has to be one, the State has to prove one or the other. If it were a parent, you wouldn't have that problem. Then you wouldn't get into a family member, a member of the household, you see what I'm saying?

[DEFENSE COUNSEL]: I see.

THE COURT: But theoretically you could add all that in there, but the parent would cover it. But in this unique setting, there's testimony that he had visited times when he wasn't staying there, and other times he was

staying there paying rent. So I think it fits, and I think it, they have to be given that.

The court subsequently instructed the jury, without objection:

> Defendant is charged with the crime of child, child sexual abuse. Child sexual abuse is sexual molestation of a child under 18 years of age, caused by a member of the household or a person with temporary care, custody, or responsibility of the supervision of [B.W.]
>
> In order to convict the defendant of the child sexual abuse, the State must prove, one, that the defendant sexually abused by [sic] [B.W.] by acts of fondling and or fellatio. Two, at the time of the abuse, [B.W.] was under 18 years of age. And three, at the time of the abuse, the defendant was either a member of the household or a person with temporary care, custody, or responsibility for the supervision of [B.W.], or both.

The State argued in closing:

> If you find that at the time that [the appellant] abused [B.W.] that he was a member of the household, that's enough. Okay, you don't have to go the step further to determine that he had temporary care and custody. If he is a member of the household at the time abuse occurs, that is enough to satisfy that element.

As noted, the appellant was convicted of child sexual abuse of B.W. and was sentenced to 10 years' imprisonment.

On appeal, the appellant emphasizes that Count VIII of the indictment only charged him with child sexual abuse of B.W. based on his having had temporary care, custody, or responsibility for supervision of B.W. It did not charge him with child sexual abuse based on his status as a household member of B.W. Moreover, he could not have been charged based on "household member" status because there were no alleged incidents of sexual abuse by him of B.W. after July 1, 1991. He maintains that the jury instructions, the State's theory of the case, and the jury verdict sheet "made it impossible

to determine whether [he] was convicted of the charged crime or the uncharged crime" and therefore his conviction and sentence for Count VIII are illegal.

The State counters that the appellant did not object to the "household member" language in the jury instruction, and therefore the issue is not preserved for review. Even if preserved, the jury reasonably could have inferred from the evidence that B.W. was sexually abused by the appellant "in July or even August of 1991[,]" at which time the "household member" prong of the child sexual abuse statute was in effect. The State argues that it is irrelevant which prong the jury relied upon because the appellant was convicted of the general offense of child sexual abuse and the conviction is lawful.

In *Tapscott v. State*, 106 Md. App. 109, 133 (1995), the defendant was charged with committing child sexual abuse while "having responsibility for supervision of" a child. The case was tried and the verdict sheet and jury instructions allowed the defendant to be convicted if the jury found that he "had temporary custody or control" of the child, ***or*** was "a person who had responsibility for the supervision of" the child, ***or*** "was related by blood" to the child. *Id.* at 134–35. The defendant was convicted of child sexual abuse.

On appeal, we explained that Article 27 section 35A "is a statute that proscribes several different types of conduct, by several categories of people, from which can be constructed separate statutory offenses[.]" *Id.* at 135. Although the State could have "generally charged the appellant under the statute[,]" instead it "delineated the particular section of the statute" on which he was charged, *i.e.*, that he had "responsibility for

supervision of" the victim. *Id.* We reversed the child sexual abuse conviction, holding that the "individual questions posed by the verdict sheet, coupled with the jury instruction, allowed the jury to convict the appellant of a crime for which he was not charged." *Id.*

In the case at bar, the appellant was not charged generally with child sexual abuse of B.W., and was not charged with child sexual abuse perpetrated by a household member. "[O]ne of the primary purposes of an indictment in Maryland is to fulfill the constitutional requirement contained in Art. 21 of the Maryland Declaration of Rights that each person charged with a crime must be informed of the accusation against him." *State v. Morton*, 295 Md. 487, 490 (1983) (footnote omitted). The charging document places "the accused on notice of what he is called upon to defend by characterizing and describing the crime and conduct[.]" *Williams v. State*, 302 Md. 787, 791 (1985). Here, Count VIII of the indictment was amended to change the time period in which the appellant's child sexual abuse of B.W. took place. It was not amended to allege household member status on the part of the appellant. Had the State (or the court) moved to so amend that count, the amendment only would have been permitted with the appellant's consent because, as *Tapscott* makes clear, the amendment would have changed the character of the charge against the appellant. *See* Md. Rule 4-204 (court may permit a charging document to be amended at any time before verdict is returned, but if amendment changes character of charge, parties must consent).

Even if the State had sought to amend Count VIII to include household member status as a basis for child sexual abuse, such an amendment would have been improper because there was no evidence that the appellant committed any act of sexual abuse against B.W. on or after July 1, 1991, the effective date of the "household member" amendment to the statute. B.W. testified that the appellant moved into the W. family's home in the fall of 1989; that he lived there until the spring of 1990, at which time he moved to Germantown; and that he moved back to the W. family's home in 1991 and lived there from March through June of that year. According to B.W., the abuse began in 1989 and occurred "dozens" of times until "the first half of '91," when the appellant moved out in the "June timeframe, spring '91." Given B.W.'s own testimony, his father's estimate that the appellant moved out "roughly in June or July of 1991" was not itself sufficient to prove that any act of sexual abuse was committed by the appellant against B.W. on or after July 1, 1991.

A sentence is illegal when "there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful." *Chaney v. State*, 397 Md. 460, 466 (2007); *see also Hoile v. State*, 404 Md. 591, 621 (2008) ("An illegal sentence properly is corrected only 'where there is some illegality in the sentence itself or where no sentence should have been imposed.'" (quoting *Evans v. State*, 382 Md. 248, 278–79 (2004))). This Court "may correct an illegal sentence at any time[.]" Md. Rule 4-345(a); accordingly, the issue need

not be raised or decided below to be addressed on appeal. *Waker v. State*, 431 Md. 1, 5 (2013).

The verdict sheet in this case does not reflect whether the appellant was convicted of child sexual abuse of B.W. based on his status as a "household member"—a crime with which he *was not* charged and could not have been charged, and for which there was no legally sufficient supporting evidence—or based on his status as having temporary responsibility for the supervision of B.W.—a crime with which he *was* charged and, as we shall explain, there was sufficient evidence in support. The "household member" status variation of child sexual abuse did not exist as a crime during the time frame in which the appellant committed the acts of sexual abuse against B.W. In these circumstances, it is just as likely that the jury convicted the appellant of a crime that did not exist and with which he was not charged as that it convicted him of an existing crime with which he was charged. The former clearly would be illegal and the latter cannot be presumed.

An illegal sentence, which includes a sentence imposed on an illegal conviction, can be raised at any time and is not subject to waiver. Accordingly, we shall vacate the appellant's conviction for child sexual abuse of B.W.

II.

In Case One, the appellant was charged by way of indictment with crimes against victims S.B., B.W. and J.C.[2] He moved to sever the trial as to each victim. At a hearing on that motion, the State argued that the charges against each victim were similar in nature and were part of a common plan or scheme. The victims met the appellant through church or school; he stayed with them at sleepovers; and the pattern of abuse was the same. Other crimes evidence would be admissible under Rule 5-404(b), and testimony by non-victim witnesses that the appellant confessed to abusing the victims would eliminate any concern that other crimes evidence would be unduly prejudicial. The State maintained that trying one case instead of three would serve the purpose of judicial economy.

Defense counsel argued that it was the State's burden to show by a clear and convincing standard that the evidence regarding each individual victim would be admissible as to the other victims, and that the State had not done so. He also argued that the common plan exception did not apply under the facts and, even if it did, the evidence would be unduly prejudicial to him.

The court denied the appellant's motion to sever. In an order entered on March 11, 2013, it explained:

[2] The appellant also was charged with crimes against a fourth victim, but the State *nol prossed* those charges at the outset of trial.

> [A]ll of the evidence against the Defendant with respect to the [three] victims would be mutually admissible at separate trials. This Court's basis for admissibility of all [three] incidents during one trial is to show common scheme or plan, criminal signature, identity, intent, absence of mistake, motive, a passion or propensity for illicit sexual relations with teenage boys of similar age, consciousness of guilt, preparation, plan and knowledge. *Solomon v. State*, 101 Md. App. 331 (1994).
>
> This Court finds that the probative value outweighs any prejudice to the Defendant.
>
> Additionally, the Court finds that in the interest of judicial economy, the counts involving all [three] victims should be tried together.

On April 11, 2013, the appellant filed a motion to reconsider, which the court denied.

The appellant contends the trial court abused its discretion by denying his motion to sever because the evidence for each victim was not admissible in the trials of other victims, and even if it was, it nevertheless was unduly prejudicial. The State counters that the "evidence of each of the three victims would be mutually admissible in separate trials as other-crimes evidence relevant to show" that a common scheme or plan existed and that the evidence was "mutually admissible to show [the appellant's] criminal signature." It maintains that the joint trial "avoided the wasted resources occasioned by multiple trials" and that any prejudice was outweighed by the benefit of judicial economy.

Rule 4-203(a) states:

> Two or more offenses, whether felonies or misdemeanors or any combination thereof, may be charged in separate counts of the same charging document if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 4-253(c) provides that if "any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the court may, on its own initiative or on motion of any party, order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires."

> [The trial court] undertakes a two-step process when severance is framed as a question of mutual admissibility, and [this Court reviews that] process for abuse of discretion. *See Conyers v. State,* 345 Md. 525, 554–56 (1997). First, the court must determine whether the evidence from the "other crimes" would be admissible if the trials occurred separately, taking into account the danger of unfair prejudice and other concerns under the usual evidentiary inquiry of Rule 5–403.[3] *See id.* at 553–54. Second, if the evidence is deemed mutually admissible, then "any judicial economy that may be had will usually suffice to permit joinder unless other non-evidentiary factors weigh against joinder." *Id.* at 554–56.

Garcia-Perlera v. State, 197 Md. App. 534, 548 (2011) (parallel citations omitted).

Evidence is "mutually admissible" when it is within an exception to the prohibition against "other crimes" evidence, under Rule 5-404(b). These exceptions include "proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident."

As noted, the State argues that the "common scheme or plan" exception applies. Relying on *McKinney v. State*, 82 Md. App. 111 (1990), the appellant asserts that it does not.

[3] Rule 5-403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

McKinney is a joinder case. The defendant, a camp counselor, was charged in three indictments with separate third-degree sex offenses committed against three campers during a four-day summer camp. The State moved to consolidate the cases. It argued only "that joinder would be convenient and non-prejudicial." *Id.* at 117. The court granted the State's motion. At trial, the three campers testified that the defendant touched them sexually on numerous occasions during the camp, sometimes under similar circumstances. For example, each camper testified that the defendant sat next to her during a meal and "patted" or "rubbed" her legs and "genitalia area." *Id.* at 116. The defendant denied touching any of the girls in a sexual way, although he conceded that he may "have touched the girls accidentally or incidentally during" the four-day camp. *Id.* at 125. He was convicted on all counts.

On appeal, we held that the trial court abused its discretion by joining the cases in one trial because the evidence about the defendant's sexual contact with the other girls "would not have been mutually admissible in separate trials on the three indictments." *Id.* at 126. The defendant's only connection to the victims was that he was the counselor at the four-day camp and, although the campers testified that the instances of abuse were similar, "taken separately, the evidence to support each indictment was far from overwhelming." *Id.* at 127. Moreover, none of the Rule 5-404(b) exceptions applied. With respect to the common plan exception, we stated:

> The common scheme or plan "exception" might mean either of two things: (1) a *modus operandi,* which is but one means of establishing identity and thus would not be material in the case *sub judice,* or (2) a plan to commit one offense as part of a grand scheme to commit others, such as a theft of

> nitroglycerine for use in blowing open a safe. In the latter sense, the other crimes evidence in a separate prosecution of [the defendant] for sexual contact with one child–evidence of similar conduct with a different child–would not be relevant because it would not tend to prove that kind of common scheme.

Id. at 124.

In the case at bar, the court did not err in finding that the evidence about each of the three boys was relevant to show that the appellant's actions were not "'merely a repetitive pattern'" but were part of a common scheme to sexually abuse male children. *Emory v. State*, 101 Md. App. 585, 614 (1994) (quoting *Cross v. State*, 282 Md. 468, 475 (1978)). Each victim testified that he met the appellant at CLC or MCCA, that the appellant led bible study groups they were in, and that the appellant participated in various youth activities, including sleepovers. They described how the appellant fostered relationships with their families and friends and developed mentoring relationships with them before the first act of abuse. This evidence showed that the appellant took advantage of his position at CLC and MCCA to create, over an extended period of time, an environment in which he could perpetrate acts of sexual abuse against adolescent boys. Unlike the facts in *McKinney*, which showed only that the defendant used a brief opportunity in which he was supervising female campers to touch them sexually, the evidence in this case "support[ed] the inference that there exist[ed] a single inseparable plan" to commit child sexual abuse. The court did not abuse its discretion in determining that the evidence was mutually admissible.

Additionally, the victims in this case provided specific details about each act of abuse "'so nearly identical in method as to earmark them as the handiwork of the accused.'" *Solomon*, 101 Md. App. at 376 (quoting *State v. Faulkner*, 314 Md. 630, 638 (1989)). Unlike in *McKinney*, where each camper gave a general description of the defendant's acts, here the acts of abuse were specifically described and, with few exceptions, all were perpetrated during the late night or early morning hours, with the appellant waking the victim by touching his genitals, either with his mouth or hand. For each victim, the abuse continued anywhere from a "dozen" to 30 times from 1988 through 1991, more frequently and consistently than the isolated instances in *McKinney*, and most took place at sleepovers to which the appellant was invited and when he was the only adult present.

Moreover, the evidence here did not present the "danger of unfair prejudice and other concerns under the usual evidentiary inquiry of Rule 5–403." *Garcia-Perlera*, 197 Md. App. at 548 (citations omitted). In *McKnight v. State*, 280 Md. 604 (1977), a seminal case on joinder/severance, the Court of Appeals outlined the principal prejudicial concerns of misjoinder.

> First, [the defendant] may become embarrassed, or confounded in presenting separate defenses. Secondly, the jury may cumulate the evidence of the various crimes charged and find guilt when, if the offenses were considered separately, it would not do so. At the very least, the joinder of multiple charges may produce a latent hostility, which by itself may cause prejudice to the defendant's case. Thirdly, the jury may use the evidence of one of the crimes charged, or a connected group of them, to infer a criminal disposition on the part of the defendant from which he may also be found guilty of other crimes charged.

Id. at 609 (internal citations omitted). In *McKinney*, we focused on the second factor and concluded that the likelihood that the testimony of each victim—which was general in the description of the defendant's acts, sparse in detail, and inconsistent with prior statements—would be bolstered and "made more believable" in a trial with three victims instead of one. 82 Md. App. at 127.

In this case, by contrast, S.B, J.C., and B.W. each testified in detail about the numerous instances of abuse. And, the appellant admitted the abuse to several other witnesses, and, as we shall discuss, that evidence was sufficient to support the appellant's convictions for child sexual abuse with respect to each victim. Although the testimony was cumulative to show a common scheme of child sexual abuse, the probative value of that cumulative evidence was not substantially outweighed by any danger of prejudice to the appellant.

Finally, the economic value of holding one trial instead of three, when each trial would involve the same witnesses, many from out of state, was clear and the appellant points to no other non-evidentiary factors weighing against joinder. Indeed "[a] unitary trial requires a single courtroom, judge, and courtroom personnel[, o]nly one group of jurors need serve[,]" and "the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process." *Cortez v. State*, 220 Md. App. 688, 697 (2014). Thus, "the judicial economy considerations of joining the charges outweighed the minimal likelihood of prejudice." *Id.*

The trial court reasonably concluded from the proffered evidence that there was a common scheme to perpetrate child sexual abuse and that the probative value of that evidence was not outweighed by any danger of unfair prejudice. The court did not abuse its discretion in ruling that the evidence was mutually admissible and not unduly prejudicial, and that joinder served the interests of judicial economy.

III.

The appellant contends the evidence in Case One was legally insufficient to prove, beyond a reasonable doubt, that he had "temporary care, custody, or responsibility for the supervision of" S.B. or J.C., and therefore to support his convictions of child sexual abuse against them. He argues that there was no "articulated testimony connected to the episode of sexual activity that described how [he] consensually assumed 'responsibility for supervision.'"

We shall review this issue as to S.B. and J.C., and also as to B.W., because, if the evidence was sufficient to support a conviction of child sexual abuse of B.W. based on the appellant's having had "temporary care, custody, or responsibility for the supervision of" B.W., the appellant maybe retried for child sexual abuse of B.W. on that basis.

> The standard of review for appellate review of evidentiary sufficiency is whether any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. We view the evidence in the light most favorable to the prosecution. We give due regard to the [fact finder's] finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.

Perez v. State, 201 Md. App. 276, 286 (2011) (alteration in original) (citations omitted).

One may have "responsibility for the supervision of" a child "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." *Pope v. State*, 284 Md. 309, 323 (1979). *See e.g. Harrison*, 198 Md. App. at 244 (the defendant had supervisory authority over child when he agreed to watch the child while he performed yardwork on his property); *Ellis v. State*, 185 Md. App. 522, 547 (2009) (schoolteacher assumed responsibility for supervising child on school premises); *Anderson v. State*, 142 Md. App. 498, 509 (2002) (schoolteacher's responsibility to supervise child extended off premises when he offered to drive child home), *aff'd*, 372 Md. 285 (2002); *Tapscott*, 106 Md. App. at 142 (defendant had responsibility to supervise child when he and the child stayed at a hotel together and the defendant had been entrusted with the child's care in the past); *Zaal v. State*, 85 Md. App. 430, 436 (1991) (child's parent gave implied consent to the defendant to supervise the child by giving the child permission to accompany the defendant to the movies), *rev'd on other grounds*, 326 Md. 54 (1992).

In this case, there was ample evidence on which a rational trier of fact reasonably could find that the appellant exercised "temporary care, custody, or responsibility for the supervision" of S.B., J.C., and B.W. The appellant was a teacher at MCCA and a religious leader at CLC; he provided transportation and supervision at youth group activities; and he attended sleepovers. S.B. testified that the appellant was "like an older brother" to him and that the acts of abuse occurred when the appellant slept over without other adults present. J.C. testified that the appellant was the only supervisor during youth

group functions, including the sleepovers where the incidents of abuse occurred. On at least one occasion, J.C. was abused at the appellant's Germantown apartment where the appellant was the only adult present. B.W. testified that the abuse occurred in the basement of the W. home when the appellant was the only adult present and that he would stay over at the appellant's Germantown residence and was abused there. B.W.'s father testified that having the appellant around "was like having another adult in our family, where we could feel free to entrust the care of our children to him." S.B.'s mother testified that the appellant led bible study for S.B.'s age group, that he stayed at her home with S.B. "once a month," and that she left S.B. with the appellant, unsupervised by anyone else. The record evidence is sufficient to support a reasonable finding that the appellant had "temporary care, custody, or responsibility for the supervision" of S.B., J.C., and B.W., beyond a reasonable doubt.

IV.

In closing argument in Case Two, in which D.T. was the sole victim, the prosecutor stated:

> We know what the defendant did based upon what he says and based upon what everyone else says that he did. We also know what he did based upon what he told other people. Again, he told Brother Wayne, when they were both employed at the [MCCA], when Brother Wayne says "Hey, did you tell these people about what happened at the faith home in regards to ***those other kids?" he says, "Yes."***

(Emphasis added.) In fact, Brother Wayne's testimony in this regard only concerned the abuse of D.T. Defense counsel did not object.

The appellant contends the State argued facts not in evidence that were "highly prejudicial" and "deprived [him] of a fair trial." He concedes that this issue is not preserved for appeal because the defense made no objection; he asks us to "review the issue under the plain error doctrine." We decline to do so. *Mines v. State*, 208 Md. App. 280, 303 (2012).

V.

Sentencing in both cases took place on August 14, 2014. As explained above, the appellant received a ten-year term for each of his four child sexual abuse convictions, to run consecutively, and a ten-year term for each of his two second-degree sex offense convictions and for his third-degree sex offense conviction, all to run concurrently.

In Case One, the appellant contends the court erred by not merging, for sentencing, his two second-degree sex offense convictions as to S.B. into his child sexual abuse conviction as to S.B. In Case Two, he contends the court erred by not merging, for sentencing, his third-degree sex offense conviction into his child sexual abuse conviction.[4]

[4] The appellant also complains that in Case Two the court illegally sentenced him by imposing a sentence for second-degree sex offense, even though the jury acquitted him on that count. The record reflects that the court imposed a sentence on the second-degree sex offense, but immediately recognized its error and struck the sentence in open court. Indeed, the commitment record reflects sentences only for the child sexual abuse and third-degree sex offense convictions. Thus, there is no illegal sentence for this Court to correct.

In Case One, the State agrees that ***one*** of the second-degree sex offense convictions as to S.B. should have merged with the child sexual abuse conviction as to S.B., for sentencing. It disagrees that both second-degree sex offense convictions should have merged. In Case Two, the State concedes that the third-degree sex offense conviction should have merged into the child sexual abuse conviction.

Because all of the sexual acts the appellant committed against S.B. happened before July 1, 1990, the amendment to the child abuse statute, effective that date, allowing for separate punishments for child sexual abuse and any underlying sexual offense, does not apply. *See* Laws of Maryland, 1990, Ch. 604, as codified in Md. Code (1957, 1987 Repl. Vol., 1989 Cum. Supp.) Art. 27 § 35A(b)(2) (effective July 1, 1990).

The merger issue the appellant raises was decided very recently by the Court of Appeals in *Twigg v. State*, No. 3 Sept. Term, 2015, 2016 WL 1178102, at *1 (Md. filed Mar. 28, 2016). In *Twigg*, the defendant was convicted of child sexual abuse, second-degree rape, third-degree sexual offense, and incest against his daughter, all perpetrated over a continuing period of time between March 25, 1974, and January 1, 1979. In its verdict sheet, the jury was not directed to specify which of the charged sexual offense(s) satisfied the sexual abuse element of the child sexual abuse conviction. The defendant received separate sentences for the rape, sexual offense, and incest convictions, to be served consecutively, and a fifteen year sentence for child sexual abuse that was entirely suspended in favor of probation.

The defendant took the position that the rape, sexual offense, and incest convictions all merged for sentencing purposes into the child sexual abuse conviction, under *Nightingale v. State*, 312 Md. 699 (1988). The State took the position that only one of those convictions merged for sentencing, under *State v. Johnson*, 442 Md. 211 (2015).

The Court of Appeals agreed with the State. It decided that this type of merger issue was not decided in *Nightingale* and that the decision in *Johnson*, that in a felony murder case where there is more than one predicate felony, only one predicate felony, and in particular the one carrying the most severe penalty, merges for sentencing, controls. The Court explained:

> Once the State proves a predicate sexual offense and abuse of a child as a result of that predicate offense, the crime of child sexual abuse is complete, and, for purpose of the required evidence test, the [sexual abuse] element of child sexual abuse is satisfied, rendering redundant, for purposes of *Blockburger* [*v. United States*, 284 U.S. 299 (1932),] multiple punishment merger, additional predicate sexual offenses.
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> ***
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> So long as the jurors were unanimous that [the defendant] committed child sexual abuse, which obviously they were, it is of no consequence that they may not have agreed on which of the underlying sexual offenses supplied the "element" of sexual molestation or exploitation that supported the child abuse conviction.

Twigg, slip op. at 14–15, 2016 WL 1178102, at *6–7.

The *Twigg* Court concluded that because it could not discern which conviction—for rape, sexual offense, or incest—the jury relied upon to find the defendant guilty of child sexual abuse, that ambiguity would be resolved in the defendant's favor, by merging for sentencing, the conviction that carries the greatest maximum sentence into

the child sexual abuse conviction. In *Twigg*, that was the rape conviction. Accordingly, only the rape conviction, and not the sexual offense and incest convictions, merged for sentencing.

Twigg controls the outcome here. We cannot discern from the verdict sheet which of the two second-degree sexual offense convictions (both for fellatio, but committed at different times) the jury relied upon to find the appellant guilty of child sexual abuse of S.B. Both of the second-degree sexual offense charges carried the same maximum sentence and the court sentenced the appellant to ten-year terms for each conviction. Accordingly, one of the appellant's convictions for second-degree sexual offense of S.B. merges, for sentencing, into his sentence for child sexual abuse of S.B. The other second-degree sexual offense conviction does not merge.

Finally, for all the same reasons, we agree with the appellant and the State that the third-degree sexual offense conviction as to D.T. merges with the child sexual abuse conviction as to D.T., for sentencing purposes.

CONVICTION OF CHILD SEXUAL ABUSE OF B.W. (COUNT VIII OF INDICTMENT IN CASE NO. 121884 IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY) VACATED. SENTENCE FOR SECOND-DEGREE SEXUAL OFFENSE AGAINST S.B. (COUNT III OF INDICTMENT IN CASE NO. 121884 IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY) VACATED. SENTENCE FOR THIRD-DEGREE SEXUAL OFFENSE AGAINST D.T. (COUNT III OF INDICTMENT IN CASE NO. 123156 IN THE CIRCUIT

COURT FOR MONTGOMERY COUNTY) VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY OTHERWISE AFFIRMED. CASE NO. 121884 REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID ONE-HALF BY THE APPELLANT AND ONE-HALF BY MONTGOMERY COUNTY.