Circuit Court for Baltimore City
Case No. 114175034-35

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2175

September Term, 2016

JEROME FLOYD

v.

STATE OF MARYLAND

Eyler, Deborah, S.,
Leahy,
Thieme, Raymond T., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: September 6, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a grand-jury indictment, Appellant Jerome Floyd, stood trial in the Circuit Court for Baltimore City, facing four counts, including sexual abuse of a developmentally challenged child. At trial, evidence was presented that one morning Floyd gained the trust of a boy who did not know him with magic videos while the boy waited for his bus to school. Floyd then met the boy after school, bought him food, and showed him more magic videos. Floyd instructed the boy to meet him the next day, at which point he brought the boy to his apartment where Floyd fed the boy again and watched movies with him before he eventually sexually assaulted the boy. The next day, Floyd gave the boy money and brought him to Dave & Busters before the boy eventually went home to his family. A jury convicted Floyd of sexual abuse of a minor and second-degree sexual offense, and the court sentenced him to 25 years for the first count and 20 years for the second, with the two sentences to run consecutively.

In this direct appeal, Floyd asserts that the State did not adduce sufficient evidence at trial to bring him within the class of individuals covered by the criminal statute under which he was charged prohibiting the sexual abuse of a minor because the boy was not in his care with a parent's consent. He acknowledges, however, that his trial counsel failed to preserve this issue for our review by not arguing it with particularity in his motion for judgment of acquittal. Floyd asks us to reach the merits of his argument anyway and find that his trial counsel was constitutionally deficient for failing to raise the issue below. He presents the following question for our review:

> "Is the evidence insufficient to sustain the conviction for sexual abuse of a minor, and was appellant denied his constitutional right to the effective

> assistance of counsel because his trial attorney failed to preserve the sufficiency issue for appellate review?"

We hold that the ineffectiveness of Floyd's trial attorney is not properly before us on direct appeal. Based on the record before us, we cannot say, *as a matter of law*, that Floyd's counsel was constitutionally deficient for failing to raise this argument with specificity as a ground for acquittal. Accordingly, Floyd must pursue his claim of ineffective assistance of counsel in a post-conviction claim.

BACKGROUND

The facts that formed the basis for Floyd's convictions for sex abuse of a minor and second-degree sex offense are undisputed on appeal. We have elicited the following account from trial testimony.

A. The Sexual Assault

In April 2014, a 74-year-old man who referred to himself as "Mr. Hollywood" approached an 11-year-old boy who was waiting at an MTA bus stop for a bus to go to school. Floyd approached and asked the boy if he wanted to watch a magic video. The boy did, and the two sat together until the bus came. When the boy got on the bus to go to school, Floyd followed and sat next to him. The boy got off the bus alone and went to school, but at the end of the school day, Floyd was waiting outside on a bicycle. Floyd brought the boy to the store to buy him food, then took him to Lexington Market, where they sat together, watched the magic video, and ate. Next, Floyd took the boy to the Inner Harbor, and again, the two sat together—this time for two hours watching birds. The boy tried to call his mom, but Floyd told him his phone wasn't working. The boy took the bus

home that evening, but Floyd told him to meet him the following day at Mondawmin Mall at 3:00.

The next day, the boy went to Bible study at the church next door to his house. When he returned, his mother observed that he was "really, really upset," so she left him in his room to calm down, but eventually discovered he wasn't in his room and was missing from the house. Without any money for bus fare, and without telling his mother where he was going, the boy left home wearing a red jacket and walked to Mondawmin, where he met Floyd. Floyd took the boy on the bus to his apartment. Inside the apartment, the boy saw that Floyd had bicycles, video games, movies, and cell phones. He sat on a couch in the living room and Floyd gave him a book bag, a cell phone, and some video games, which the boy put into the bag. Floyd then left the boy in his apartment as he went to go get Chinese food for the two of them. The two ate and watched movies on the couch.

After a while, Floyd told the boy to lay down on the couch and took off the boy's pants. Floyd got on the floor, took out his penis, and for the next 20 minutes or so, Floyd masturbated while kissing the boy's butt and licking his anus. When Floyd was done, he instructed the boy to go clean off, which the boy did with toilet paper. Floyd then gave the boy $50 and the boy went to sleep on the couch. Floyd slept on the floor next to him.

The next morning, Floyd took the boy on a bus and train from Baltimore to Dave & Buster's in the Arundel Mills Mall. Floyd took back $30 of the money he'd given the boy the night before, and went to the casino, leaving the boy at Dave & Buster's with $20 and a cell phone. The boy spent the $20 in about 30 minutes but had to wait for four to five hours at Dave & Buster's for Floyd to return from the casino. The boy explained that he

asked other customers to use their phone to call his mother, but they all said no, likely because his "clothes w[ere] raggedy." Floyd and the boy then took a train and a bus from Dave & Buster's. Floyd asked the boy to come back to his apartment again, but the boy said, "no," and went home instead.

While the boy was gone, his mother searched frantically. After realizing the boy was no longer in his room that Saturday, April 26, she searched the surrounding area herself for most of the day. Believing she had to wait 24 hours to report a child missing, she did not call the police until around 6:00 a.m. on Sunday morning. By that night, she formed a search party with friends and family. Then, while the search party convened at the mother's house, the boy got off a bus and walked inside.

B. The Investigation

For two days after he returned, the boy did not tell his mom what happened with Floyd. He testified that he was "scared and ashamed." But once he did, his mother alerted the police. Several weeks of investigating and re-tracing the boy's steps eventually led to Floyd's apartment, and detectives soon identified Floyd, who went by "Mr. Hollywood," as the suspect. The boy then identified Floyd's photo from an array, writing "Mr. Hollywood licked my butt" on his photo. The police executed a search and seizure warrant at Floyd's apartment and discovered the boy's red jacket in Floyd's bedroom closet, as well as a bag of cell phones.

A grand jury in the Circuit Court for Baltimore City indicted Floyd on four counts: sexual abuse of a minor, second-degree sex offense, third-degree sex offense, and second-degree assault.

C. The Trial

On August 29, 2016, a two-day trial began. The boy's mother, Ms. N, was the first to testify. In addition to testifying about hearing her son's account of the assault and describing her efforts during the ensuing investigation, she testified more generally to her son's attributes at the time of the assault. She explained that her son was diagnosed with ADHD and bipolar disorder but was off his medication back in April 2014. Additionally, back then, he was still unable to tie his shoes and needed help buttoning his shirts. She testified that her son "has the mind of a toddler in the sense of he is still very fascinated with toys and games and candies and snacks," and "is very trusting to anyone that's really nice to him[.]" She explained, "If someone offers him ice cream or lollipops or anything, he would take it. He would – if someone says, '[] can you come over here and have a lollipop?' he would take it and he would go sit with that person.'" She then offered the following example:

> One time in New York, he saw – there w[as] a couple and they were like, "Wow, you're such a handsome boy. Look at you. You're so handsome," and he was like, "Mom, they really like me. Let's go with them to the other trail," and I'm like, "[son], you can't go. We don't know these people," but he was ready to go because he felt, wow, they complimented him and he believed that they were genuine with their compliment. So, he was ready to go with them.

Following the mother's testimony, the boy and lead detective both testified. The boy described the events surrounding the assault, and the detective offered his account of the investigation that led to Floyd's arrest. The State then rested its case and defense counsel moved for judgment of acquittal, arguing that the count of second-degree sex offense was not sustained because "[t]here was no testimony as to a penetration." The

State responded that the victim testified "very clearly" that Floyd performed analingus when he stated Floyd "'licked his butthole." The court denied the motion.

After a brief recess, the court reconvened, and the defense rested its case without calling a witness. The defense then renewed its motion for judgment of acquittal, arguing: "I would ask [the court] to consider what I said earlier and all the factors. Now we're at a higher standard here. So, I would ask that all charges be dismissed." The State responded that it "met its burden . . . for the case to go back to the jury. It's a question of fact. Whether they believe the witnesses, or don't believe the witnesses, the State has met its burden." The court denied the motion and submitted the case to the jury following the parties' closing arguments.

The jury found Floyd guilty of sexual abuse of a minor and second-degree sexual offense. At a sentencing hearing on November 15, 2016, the court sentenced Floyd to 25 years in prison for sex abuse of a minor, and for 20 years for second-degree sex offense, with the two sentences to run consecutively. The court also ordered Floyd to register as a sex offender. Floyd noted his timely appeal to this Court on December 13, 2016.

DISCUSSION

Floyd's main contention on appeal is that the evidence was insufficient to support his conviction for sexual abuse of the minor because the State did not establish that he had "temporary care, custody, or responsibility for the supervision" of the minor as required by Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 3-602(b). His trial counsel, however, failed to raise this issue with particularity in his motion for judgment of acquittal. We may afford Floyd relief, then, only if his case fits into one of

the narrow exceptions to the general rule that permits us to find ineffective assistance of counsel on direct appeal.

I.

Review on Direct Appeal

A. Parties' Arguments

Floyd acknowledges "the general rule that ineffective assistance of counsel claims should be raised in post-conviction proceedings, instead of on direct appeal[.]" He argues, however, that it is "appropriate and desirable" to review his claim on direct appeal because "the record is sufficiently developed to permit a fair evaluation of the claim, and there is no need for a collateral fact-finding proceeding[.]" According to Floyd, the record would permit us to decide both elements of his claim on appeal: "whether trial counsel failed to state 'with particularity,' why the motion for judgment of acquittal should have been granted as required by Rule 4-324(a), and (2) whether the evidence is sufficient to sustain the conviction for sexual abuse of a minor under § 3-602(b)." Floyd contends that the undisputed evidence at trial demonstrated that he did not fall within the class of persons subject to CL § 3-602(b) and that his trial counsel failed to articulate that point with particularity. Counsel's failure to do so, Floyd suggests, could not have been based on a trial strategy because "[t]here is no conceivable reason why, as a tactical matter, counsel would not seek his client's acquittal on the most serious count." Given this, Floyd argues that his counsel's performance meets the ineffective assistance of counsel standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984), and he asks us to reach the merits of his appeal and to reverse his conviction on that ground.

The State urges us to defer the merits of Floyd's claim to a post-conviction hearing because the merits of the legal issue are unclear. It argues that, although the facts are not in dispute, the application of the law to those facts is neither unassailable nor conclusively established, as our case law requires for direct review. The State contends that the evidence, viewed in the light most favorable to it, permitted a rational trier of fact to conclude that Floyd's conduct demonstrated an intent to establish an *in loco parentis* relationship with the victim, bringing him within the ambit of CL § 3-602(b). Further, the State continues, the record establishes that defense counsel knew the distinction under CL § 3-602(b) between a person given responsibility and a person taking care or custody of a child, suggesting that a post-conviction fact-finding hearing—not direct appellate review—is the proper setting to review counsel's decision.

B. Applicable Law

The Maryland Uniform Post Conviction Procedure Act provides a defendant who attacks a criminal judgment based on ineffective assistance of counsel "the possibility of an evidentiary hearing, reflecting a recognition that 'adequate procedures exist at the trial level, as distinguished from the appellate level, for taking testimony, receiving evidence, and making factual findings thereon concerning the allegations of error." *Mosley v. State*, 378 Md. 548, 560 (2003) (citations omitted). We prefer post-conviction hearings "with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Id.* (citations omitted). If the trial record does not *clearly* "illuminate

why counsel's actions were ineffective[,]" it places appellate courts "in 'the perilous process of second-guessing' without the benefit of potentially essential information." *Id.* at 561 (citations omitted). There may, however, be "exceptional cases where the trial record reveals counsel's ineffectiveness to be 'so blatant and egregious' that review on appeal is appropriate." *Id.* at 562-63. The Court of Appeals has instructed that Maryland appellate courts may consider ineffective assistance of counsel claims "on direct review only when the facts found in the trial record are sufficiently developed to clearly reveal ineffective assistance of counsel and that counsel's performance adversely prejudiced the defendant." *Id.* at 567.

One such instance can be found in *In re: Parris W.*, 363 Md. 717, 727 (2001). In that case, a juvenile argued "that he was denied effective assistance of counsel by his attorney's failure to subpoena properly the necessary alibi witnesses for trial." *Id.* at 723. The juvenile urged the Court to reverse his conviction on direct review because his attorney's deficient performance "was plain and confessed." *Id.* at 724. The Court obliged, determining that his case fell within an exception to the general rule that "a claim of ineffective assistance of counsel is raised most appropriately in a post-conviction proceeding[.]" *Id.* at 726, 727. It explained:

> The trial record is developed sufficiently to permit review and evaluation of the merits of the claim, and *none of the critical facts surrounding counsel's conduct is in dispute*. Therefore, a collateral evidentiary hearing on the adequacy of counsel's performance is unnecessary to develop a complete record of the basis for the challenged acts or omissions, and our refusal to address Appellant's claim in this appeal would constitute a waste of judicial resources.

Id. at 727 (emphasis added). The Court then proceeded to review the juvenile's claim

under the ineffective assistance of counsel standard set forth in *Strickland* and concluded that his "counsel's performance in failing to subpoena [] five corroborating witnesses for the correct trial date was deficient and that, as a result of the deficient performance, Appellant was prejudiced." *Id.* at 730.

Two years later, the Court of Appeals decided *Mosley v. State*, 378 Md. 548—a case that stands in contrast to *Parris W.* Mosley had appealed convictions for assault and robbery based on an incident in which he used a plastic air gun to rob two women. *Id.* at 553. His single contention on appeal was that his trial counsel was constitutionally ineffective in failing to state with particularity as grounds for judgment of acquittal that the evidence (i.e., the air gun) was insufficient to support his convictions for robbery with a dangerous or deadly weapon and wearing or carrying a dangerous weapon. *Id.* at 554. When the trial court transmitted the record to this Court, however, it did not include the air gun, which had apparently been stolen from the trunk of the investigating officer's car. *Id.* Mosby was able to secure an affidavit from the Assistant State's Attorney describing his memory of the air gun, who described the plastic air gun as "heavy," "approximately ten pounds," and "between seven and nine inches long." *Id.* We held that the evidence was sufficient to sustain his convictions and that he must bring his ineffective assistance of counsel claim in a post-conviction hearing rather than direct appeal. *Id.* at 554-55.

The Court of Appeals vacated this Court's judgment, holding that it could not "evaluate on direct appeal whether or not [Mosley's] counsel provided ineffective assistance because critical facts [we]re in dispute." *Id.* at 569. Those facts, the Court explained, were that the weapon was missing from the record and that Mosley contested

the Assistant State's Attorney's description of the air gun's characteristics. *Id.* The Court of Appeals asked rhetorically: "What kind of air gun it was? Was it a lightweight or heavy plastic?" *Id.* at 571. Unable to evaluate whether the evidence was sufficient to support Mosley's conviction, and unwilling to say that an air gun cannot be a dangerous or deadly weapon *per se*, the Court of Appeals declined to take the next step to evaluate on direct appeal whether or not Mosley's counsel's was ineffective by not making a motion for judgment for acquittal with particularity. *Id.*

In so holding, the Court distinguished Mosley's appeal from that in *Parris W.*, where "the critical facts regarding counsel's performance were undisputed and specific, and the record was more than sufficient to allow the appellate court to evaluate the case." *Id.* at 572 (citations omitted). The Court noted that "there may be instances where failure to make a motion for judgment for acquittal with particularity might be determined to be ineffective counsel based on the trial record alone," but reiterated from *Parris W.* that "direct review is only appropriate if the record is sufficiently developed and the critical facts are not in dispute." *Id.*

This Court then considered on direct appeal a claim of ineffective assistance counsel in *Testerman v. State*, 170 Md. App. 324 (2006). That case also involved the failure of appellant's trial counsel to preserve for appeal the issue of whether the penal statute at issue applied to the appellant's conduct. *Id.* at 341-42. This Court began by observing that the critical facts were not in dispute: "Appellant changed seats with his front seat passenger after complying with a request by a police officer to stop his vehicle." *Id.* at 336. Testerman admitted to switching seats with a passenger in the car he drove after the police

pulled him over, but argued on appeal (as his trial counsel failed to do) that "switching seats does not satisfy the legal definition of 'eluding' a police officer[.]" *Id.* at 341. Because the issue was aired fully at trial, we concluded that the record was developed sufficiently to consider Testerman's claim on direct appeal without the need for a collateral fact-finding proceeding on a post-conviction motion. *Id.* at 336. Accordingly, we analyzed the relevant statute and determined that switching seats did not, in fact, constitute eluding a police officer, and then examined whether trial counsel's failure to raise that argument with particularity in his otherwise general motion for judgment of acquittal on that charge constituted ineffective assistance of counsel. *Id.* 342-43. We held that counsel's failure to argue the issue with particularity fell below an objective standard of reasonableness and, but for his error, the result of the proceeding would have been different because "we would have *directly* reviewed and reversed the sufficiency of the evidence" on appeal. *Id.* at 342-44 (emphasis in original). *See also Heffernan v. State*, 209 Md. App. 231, 239 (2012) (also addressing on direct appeal defense counsel's failure to argue the issue of legal sufficiency during a motion for judgment of acquittal, observing that there was no readily-perceivable trial strategy for failing to do so, but concluding that the penal statute in question *did* apply to the defendant so she could not satisfy the prejudice prong under *Strickland*).

Again, in *Steward v. State*, the appellant asked us to address on direct appeal whether defense counsel was ineffective. 218 Md. App. 550, 557-58 (2014). Because "there was no confusion on the part of the trial court regarding the basis for defense counsel's motion for judgment, we addressed the merits of Steward's sufficiency claim. *Id.* at 558. Steward was convicted of driving with a suspended license, but argued that the

evidence was insufficient to prove the requisite *mens rea* (knowledge or willful blindness) because she was homeless at the time the DMV sent notice of her license suspension to an apartment from which she'd been evicted. *Id.* at 561-62. Considering that she had her license suspended on previous occasions for accumulating too many points, we concluded that "[her] intervening homelessness d[id] not negate her knowledge that there would be consequence attendant to her accumulation of an additional point on her license[,]" and declined to overturn her conviction on that basis. *Id.* at 562-64.

Next, we considered whether Steward's counsel was ineffective by failing to object to a jury instruction, which stated erroneously that the jury could find Steward guilty "if she either knew or **should have known** that her license was suspended[.]" *Id.* at 565, 568 (emphasis in original). We observed that the record "d[id] not include any information regarding what sources the court consulted or what input counsel might have had in crafting the language of the erroneous jury instruction." *Id.* at 571. And we reasoned that counsel's failure to object might have been strategic, based on the belief that a sympathetic jury would not conclude that Steward, "who was homeless and ill during much of the relevant time period, 'should have known' that her drivers' license was suspended." *Id.* at 571-72. Thus, we concluded, the record did not make clear "[w]hether defense counsel's failure to object to the erroneous jury instruction arose from strategy, distraction, mistake, or ignorance[.]" *Id.* at 571. Distinguishing *Testerman*, because several key facts were in dispute and the question addressed "[wa]s *not a well-settled matter of law*[,]" we ultimately declined to address Steward's ineffective assistance of counsel claim on direct appeal. *Id.* at 572 (emphasis added). *See also Tetso v. State*, 205 Md. App. 334, 379-80 (2012)

(declining to consider on direct appeal Tetso's claim of ineffective assistance of counsel based on his attorney's failure to object to a juror's empanelment because the record "shed[] no light" on the reasons for his attorney's failure to do so, including whether his attorney believed that the juror was more desirable than other potential jurors); *Alford v. State*, 202 Md. App. 582, 606 (2011) (holding that appellant's ineffective assistance of counsel claim could not be reviewed on direct appeal because the record was not clear as to whether his counsel's failure to object to a specific juror was "part of a strategy to obtain Juror 753 in lieu of other members of the panel").

C. Analysis

Applying the principles of these cases to the facts before us, we conclude that Floyd must challenge his counsel's ineffectiveness in a post-conviction proceeding because the issue is not properly before this Court on direct review. The record before us on appeal does not "reveal[] counsel's ineffectiveness to be 'so blatant and egregious' that review on appeal is appropriate." *Mosley*, 378 Md. at 562-63. To review Floyd's claim without the benefit of a post-conviction hearing to elucidate the issue would place this Court "in 'the perilous process of second-guessing' without the benefit of potentially essential information." *Mosley*, 378 Md. at 561 (citations omitted). Despite Floyd's protestations that the material facts of the case "are not in dispute[,]"the Court of Appeals has made clear that direct review is proper when "none of the critical facts *surrounding counsel's conduct* is in dispute." *Parris W.*, 363 Md. at 571 (emphasis added).

Additionally, the parties' arguments before this Court reveal that, unlike in *Testerman*, the application of the law to the facts of this case "[wa]s not a well-settled

matter of law." *Steward*, 218 Md. App. at 572. Floyd urges this Court to decide that he was not a "person who ha[d] permanent or temporary care or custody or responsibility for the supervision of a minor" within the meaning of CL § 3-602(b). The State concedes that "there was no evidence from which a trier of fact could find that Floyd was responsible for [the victim's] supervision, as there was no evidence from which it could infer that [the victim's] mother implicitly or explicitly consented to Floyd's supervision." But the parties disagree over whether the State adduced evidence at trial to permit a fact-finder to conclude that Floyd demonstrated intent to stand *in loco parentis* to the victim.

According to Floyd, his providing the victim with food, shelter, transportation, and money was not enough because *loco parentis* requires something more akin to *de facto* parent,[1] which cannot be achieved without the legal parent or guardian's consent. The

[1] We note that nothing in the decision by the Court of Appeals on the subject suggests that *in loco parentis* is nearly as restrictive as *de facto* parenthood, as Floyd suggests. *See Conover v. Conover*, 450 Md. 51, 68 n.12 (2012) (noting that the designations *de facto* parent, *in loco parentis*, and psychological parent are related but "'not always, or necessarily, identical in meaning" (citation omitted)). In *Conover*, the Court of Appeals adopted the following 4-part test for proving *de facto* parenthood:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;
> (2) that the petitioner and the child lived together in the same household;
> (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and
> (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Id. at 74 (citation omitted).

State responds that Floyd conflates the relevant case law and ignores the distinction between (1) a person with temporary care and/or custody of a minor and (2) a person to whom the minor's parent or guardian gives responsibility for the minor's supervision. Although the State concedes that a person may not assume responsibility without the parent or guardian's consent—which was absent here—it insists that a person may stand *in loco parentis* based on their own volition. And the State suggests that the victim's testimony that Floyd provided the victim with food, shelter, transportation, and money supports a finding that Floyd intended to put himself in a situation akin to the child's parent, thereby taking care of the victim.

Contrary to Floyd's position, the evidence at trial did not demonstrate undisputedly that his actions failed to bring him within the class of persons subject to CL § 3-602(b). Furthermore, the dimensions of what it means to be *in loco parentis* are not as settled as the law was in *Testerman*. *See* 170 Md. App. at 340-41 (concluding it was "unable to find a single reported case in any state" that supported appellant's conviction). We cannot say, *as a matter of law*, that Floyd's counsel was constitutionally deficient for failing to raise this argument with specificity as a ground for acquittal. *See Mosley*, 378 Md. at 571 (declining to say that an air gun cannot be a dangerous or deadly weapon *per se*, leaving the court unable to evaluate whether appellant's counsel provided ineffective assistance). Accordingly, Floyd must pursue his claim of ineffective assistance of counsel in a post-conviction proceeding.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY COSTS.