APPENDIX

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[ENTERED: April 2, 2019]

Circuit Court for Worcester County
Case No.: 23-K-15-000516
Argued: October 4, 2018

IN THE COURT OF APPEALS OF MARYLAND

No. 20

September Term, 2018

STATE OF MARYLAND

v.

KEVIN SEWELL

Barbera, C.J.
Greene
*Adkins
McDonald
Watts
Hotten
Getty,
JJ.

Opinion by Adkins, J.
Hotten, J., dissents.

Filed: April 2, 2019

*Adkins, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Md. Constitution, Article IV, Section 3A, she also participated in the decision and adoption of this opinion.

> It is a fundamental rule of law that the public has a right to every persons' evidence. There are a small number of constitutional, common-law and statutory exceptions to that general rule, but they have been neither "lightly created nor expansively construed, for they are in derogation of the search for truth."

Ashford v. State, 147 Md. App. 1, 63 (2002) (Moylan, J.) (emphasis removed) (quoting *In re Cueto*, 554 F.2d 14, 15 (2d Cir. 1977)). These exceptions are commonly known as privileges. This case asks us to balance the search for truth against one of the strongest privileges—confidential marital communications.

We weigh the introduction of evidence that tends to implicate child abuse against the protection of the confidential marital communications privilege. In so doing, we resolve the two questions presented: (1) whether this Court should adopt a principle of narrow construction with respect to the marital communications privilege, and (2) whether the trial court properly exercised its discretion by allowing the State to introduce text messages that Kevin Sewell sent to his wife's cell phone. As to the first

question, we agree with the State that courts should narrowly construe privileges, including the marital communications privilege. As to the second, we affirm the trial court's decision to admit the text messages, although we diverge from its rationale.

BACKGROUND

Factual Overview and Procedural Posture

Three-year-old Luke Hill lived with his mother, Victoria Harmon, and her fiancé, Nick Miller, in Keller, Virginia. Luke was a happy, healthy little boy who enjoyed running around, playing outside, and driving his toy Jeep. In late April, Luke went to his pediatrician for a wellness check, and the doctor told his mother that he was "perfectly fine." Approximately one week later, Luke's mother and Nick left Luke in the care of Amanda and Kevin Sewell ("Amanda" and "Kevin," respectively), his aunt and uncle, so that they could enjoy a night out. They arrived at Amanda and Kevin's house in Pocomoke City, Maryland around 3:00 p.m. and visited for a short time, during which Luke and his cousin were running, playing, and wrestling. When Victoria and Nick departed for Salisbury, Kevin was holding Luke.

Kevin played with the boys until around 5:00 p.m. They all ate eggs and bacon for dinner, and afterward, Amanda gave Luke a bath. She testified that during Luke's bath, she noticed, for the first time, that he had "[a] lot" of bruises, including bruising behind his ears, down his neck, on his chest, arms, and legs. He also had black eyes and a knot on

his head. Amanda testified that she called Victoria and told her about the bruises behind his ears and that Luke was not feeling well.

Amanda woke up around 5:00 a.m. on Sunday morning, May 3, to get ready for her shift at a nearby restaurant. Luke and his cousin woke shortly thereafter, and Amanda made them breakfast. She departed for work around 6:45 a.m., leaving the children in Kevin's care.

Beginning around 9:00 a.m., Amanda and Kevin sent a series of text messages to each other.[1]

> [AMANDA 9:07:22 a.m.]: Everything ok?
>
> [KEVIN 9:14:15]: Ye boo
>
> [KEVIN 9:14:28]: He doesn't listen worth shit but were fine
>
> [KEVIN 9:14:49]: I think tori told me he [breaks] out from grass
>
> [KEVIN 9:15:02]: I wonder if thats why his neck n chest are broke out
>
> [AMANDA 9:15:48]: His ear is bruised
>
> [KEVIN 9:16:34]: Yeah, it sure [is]

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[1] Some messages have been edited for ease of reading or confidentiality. Substitutions are indicated by brackets. All other text messages appear as they were upon being entered into evidence.

[KEVIN 9:16:47]: [Maybe] him and [Son] were rough housing

[AMANDA 9:33:14]: He's very [skittish]

[KEVIN 9:40:58]: Yeah, he is I've noticed

[KEVIN 9:41:00]: Why, tho

[KEVIN 9:47:55]: He threw up on our sheets

[KEVIN 9:48:24]: [Daughter] was sleeping n he started [screaming] so I [made] him lay down

[KEVIN 9:48:32]: Then he threw up on our bed

[AMANDA 9:53:43]: Nice.

[AMANDA 9:54:23]: Strip the bed and put [what] u can in the washer please

[KEVIN 10:02:27]: Ok

[AMANDA 10:12:49]: Thank u how are u

[KEVIN 10:13:07]: Good boo boo

[AMANDA 10:32:39]: U going with me to take him[home]

[AMANDA 10:41:48]: ?

[AMANDA 11:20:32]: ?

[KEVIN 11:44:12]: I thought u were taking him tomorrow

[KEVIN 12:05:59 p.m.]: [What] time u getting off?

[AMANDA 12:32:19]: Today

[AMANDA 12:32:27]: 1:30

[KEVIN 12:35:39]: Ok

[KEVIN 12:35:53]: Thats fine because he's acting like a fucking asshole

[KEVIN 12:36:20]: He ignores u like hes retarded hes thrown up twice n all he does is whine

[KEVIN 12:36:28]: This is the [last] time

[KEVIN 12:37:21]: The other thing I have been entertained by is him running around saying butt fuck. He starts clapping n looking for high fives

[AMANDA 12:51:54]: Wtf

[AMANDA 12:53:25]: U going to do the yard while I'm gone?

[AMANDA 12:59:49]: ?

[KEVIN 1:13:57]: Idk [maybe]

[KEVIN 1:14:10]: This has been a day from hell Hes [finally] asleep on our room

[KEVIN 1:14:28]: Please get me a bottle this has been a day from hell

[KEVIN 1:25:00]: Please

[AMANDA 1:31:43]: Ok

[AMANDA 1:32:58]: I'll be off round 2

[KEVIN (unspecified time)]: Ok

[KEVIN 2:18:14]: Is it too late for u to get me a shot too

[KEVIN 2:18:23]: If so its fine I can run out

[AMANDA 2:19:12]: I'll give u the money I'm [still] at work

[KEVIN 2:19:12]: Ok

[KEVIN 2:19:16]: I [have] [money]

Amanda testified that when she got home from work on the afternoon of May 3, she went into her bedroom to change and saw Luke covered with a

blanket, seemingly asleep. She further stated that without waking Luke, she put a diaper on him, changed his shorts, and Kevin put him in her car. While Amanda was driving Luke home, she and Kevin exchanged the following text messages:

[KEVIN 3:16:16]: Hey I love you be careful

[KEVIN 3:16:45]: Dont tell them o bit him back lol Blame [Son]

[KEVIN 3:17:01]: I didn't even bite him hard but apparently he bruises easy

[AMANDA 3:18:33]: I told her he had bruises so I'll just say they were all ready there.

[AMANDA 3:18:42]: I love u too

[KEVIN (unspecified time)]: Im glad we have a day off together

[KEVIN 3:19:42]: Well he bit the shit out of me

[KEVIN 3:19:51]: How else will he learn not to bitw

[KEVIN 3:19:53]: Bite

[AMANDA 3:20:22]: Right

[AMANDA 3:20:33]: I only get on u cause I know u can do better

[KEVIN 3:20:46]: [I'd] be more con[c]erned about all the bruises

When Amanda arrived at her sister's home, Victoria found Luke in a booster seat in the backseat hunched over. He was unresponsive, had a large bump on his head, had a bite mark on his arm, and was making a phlegmy sound while barely breathing. It was later discovered that Luke also had several other bruises. Nick took Luke out of the car, and Victoria called 911. Nick then went to get a neighbor who was an EMT.

Initially, Luke was transported by ambulance to Shore Memorial Hospital in Nassawadox, Virginia but, given the grave nature of his condition, he was promptly transported by helicopter to King's Daughters Hospital in Norfolk, Virginia. Luke was taken into surgery immediately upon arrival. He never regained consciousness. Luke died on Tuesday, May 5, 2015.

Kevin Sewell was charged with (1) first-degree murder, (2) first-degree child abuse, second-degree murder, and (4) neglect of a minor. Amanda Sewell was also charged in the death of Luke, but was granted immunity by the State and compelled to testify.

Before trial, a hearing was held on defense counsel's motion *in limine* to exclude the text messages between Kevin and his wife while Luke was in his care. The basis for the motion was the marital communications privilege. The trial court denied the motion. During the trial, the State moved into evidence screenshots of the text messages containing timestamps. Over defense counsel's continuing objection, the screenshots of the text

messages were received in evidence as a State's exhibit. The text messages were also read into the record in a colloquy between Amanda and the State.

At trial, Dr. Suzanne Starling, the medical director of the child abuse program at the Children's Hospital of the King's Daughters, testified that she examined Luke when he arrived at the hospital. She observed that "he was covered in bruises from head to toe." She noted that Luke had multiple injuries, which included a large bruise on his stomach; bruises on both hips; bruises on his legs, arms, and underneath his armpit; several injuries across his chest; and "a very large bruise from his forehead up into his hair." On the left side of his face, he had a small cut underneath his eye, bruising on the front of his cheek, bruising across his jawbone, bruising inside his ear, bruising underneath his chin, and several bruises around his neck. Starling testified that Luke had similar injuries to the right side of his face. These injuries included "bruises all around his hairline, bruises all in front of his ear, and his right ear [was] really significantly bruised inside, and even swollen around the outside, and the bruises extend[ed] all the way down from his jawbone onto his neck." In addition, Luke "had a very large bite mark on his right shoulder," a bite mark on his left shoulder, and a bite mark on his left forearm. The doctor also testified that "the skin from the base of [Luke's] penis to the tip of his penis [had] been removed." Starling opined, with a reasonable degree of medical certainty, that "the bruises were inflicted," meaning "they didn't occur by accident." She determined that "a blow to the abdomen caused

[Luke] to have abdomen trauma," and that he sustained abusive head trauma.

Starling concluded that the fatal injury did not occur until after breakfast on Sunday, May 3. She explained that Luke "would not be expected to eat normally" due to the severity of his head injury and abdominal trauma, and the "fact that he was able to sit up and eat breakfast demonstrates that he had not received his fatal injury at that time." Starling testified that Luke was "clearly significantly injured at the time that he lost consciousness later in the morning."

After Luke's death, Dr. Wendy Gunther performed an autopsy. At trial, Gunther testified that Luke sustained a minimum of 40 to 50 injuries, and that his brain was still in the process of swelling when she performed the autopsy. Based on her observations, Gunther concluded, to a reasonable degree of medical certainty, that Luke died from "shaken/slam syndrome with many other injuries contributing." She explained that when "a child is shaken, or shaken and slammed, their brain is injured," and when the brain sustains an injury, it swells. Gunther concluded that someone punched or hit Luke on the top of his head causing "direct blunt trauma to his head." She also observed that many of the injuries were "control injuries," which occur "anyplace where a person's hands would naturally fall when grabbing a child to control it," such as the arms, legs, stomach, and hip. Like Starling, Gunther testified that Luke's injuries were recently inflicted, as they did not "look like they[were] starting to heal."

Kevin Sewell was convicted of first-degree murder, first-degree child abuse, and neglect of a minor child. Sewell timely appealed to the Court of Special Appeals. In a reported decision, *Sewell v. State*, 236 Md. App. 96, 114 (2018), the intermediate appellate court ruled that the text messages between Sewell and his wife were marital communications and, as such, it was incumbent upon the State to rebut that presumption of confidentiality. Concluding that the State failed to do so, it held that the trial court abused its discretion in admitting the text messages, and it remanded the case for a new trial. *Id.* at 115–16. We granted the State's petition for a writ of certiorari.

DISCUSSION

Confidential Marital Communications Privilege

Subject to limited exceptions, "[l]itigants and their spouses are competent and compellable to give evidence." *See* Md. Code (1973, 2013 Repl. Vol.), § 9-101(2) of the Courts and Judicial Proceedings Article ("CJP"). There are two distinct marital privileges: the first, protecting confidential marital communications, and the second, privileging adverse spousal testimony. Here, the confidential marital communications privilege is at issue. In Maryland, this privilege is codified at CJP § 9-105, "Confidential communications occurring during marriage." This section provides that "[o]ne spouse is not competent to disclose any confidential communication between the spouses occurring during their marriage." *Id.* The privilege is available in both civil and criminal trials and may be invoked

by either spouse. *See* Joseph F. Murphy, Jr., *Maryland Evidence Handbook*, § 903(B) at 445–46 (4th ed. 2010).

The State contends that a "conflict" exists among the Court of Special Appeals' decisions and that we should resolve it by holding that the marital communication privilege must be narrowly construed. Regarding the confidential marital communications privilege, the State asserts that, to the extent that it has been construed in the past, this Court has been too "liberal" and untethered the privilege from its original purpose—to preserve and promote marital and family harmony. All testimonial privileges, the State contends, should be disfavored and narrowly construed. Sewell, on the other hand, sees no conflict to resolve. Instead, Sewell characterizes all past case law as broadly interpreting the marital communications privilege and recognizing few, if any, exceptions.

Typically, "privilege statutes are interpreted narrowly." *Bryant v. State*, 393 Md. 196, 202 (2006) (citations omitted). *See also* Murphy, *Maryland Evidence Handbook*, § 900 at 422 ("It is obvious that evidence excluded on grounds of privilege increases the danger of an incorrect verdict. The privilege laws are therefore given a narrow, strict construction."); 6 Lynn McLain, *Maryland Evidence: State and Federal*, § 501:1 at 6 (3d ed. 2013) ("[P]rivileges are strictly construed, because they exclude relevant, reliable evidence."); 1 Kenneth S. Brown, *McCormick on Evidence*, § 74 at 474 (7th ed. 2013) ("Since privileges operate to deny litigants access to every person's evidence, the courts have generally

construed them no more broadly than necessary to accomplish their basic purposes."). We have stated as much in cases involving the psychotherapist-patient privilege, *Bryant*, 393 Md. at 202; the attorney-client privilege, *E.I. du Pont de Nemours & Co. v. Forma–Pack, Inc.*, 351 Md. 396, 406 (1998); and the accountant-client privilege, *Sears, Roebuck & Co. v. Gussin*, 350 Md. 552, 562 (1998).

We have not explicitly announced a narrow interpretation of CJP § 9-105, but we have interpreted the statute and discerned that the General Assembly intended certain limitations on what communications qualified for the marital privilege:

> The policy reasons underlying the privilege for confidential communications between husband and wife are (1) that the communications originate in confidence, (2) the confidence is essential to the relation, (3) the relation is a proper object of encouragement by the law, and (4) the injury that would inure to it by the disclosure is probably greater than the benefit that would result in the judicial investigation of truth.

Coleman v. State, 281 Md. 538, 541 (1977) (citing 8 Wigmore, *Evidence*, § 2332 (McNaughton rev. 1961)). *See also* 1 Brown, *McCormick on Evidence*, § 80 at 507 (most courts "read into [marital communications privilege statutes] the requirement of confidentiality").

We reinforced the importance of confidentiality in assessing whether a given communication to a spouse was within the privilege: "The essence of the privilege is to protect confidences only, . . . and thereby encourage such communications free from fear of compulsory disclosure, thus promoting marital harmony." *Id*. (citing 8 Wigmore, *Evidence*, § 2332; and McCormick, *Handbook of the Law of Evidence*, § 86 (2d ed. 1972)).

To narrowly construe a privilege, however, simply means that courts must not endeavor to overread its applicability and resolve ambiguities in favor of admitting evidence. *See Ashford*, 147 Md. App. at 70. In Maryland, any party resisting discovery by asserting a privilege "bears the burden of establishing its existence and applicability" and must "substantiate its non-discovery" by a preponderance of the evidence. *Forma–Pack*, 351 Md. at 406, 409 (applying attorney-client privilege). The confidential marital communications privilege requires: (1) a communication; (2) that the couple was married at the time of the communication; and (3) that the communication was intended to be confidential. *See* CJP § 9-105.

The parties agree that the first two showings have been made, but they disagree about whether the communication was confidential, on two grounds. First, the parties dispute which party bears the burden of establishing that a communication was confidential—i.e., whether marital communications are presumed confidential. Second, they disagree about whether the specific text message

communications at issue were, in fact, demonstrated to be confidential.

We have recognized that communications between spouses are considered confidential when: (1) "expressly made so"; or (2) "the subject is such that the communicating spouse would probably desire that the matter be kept secret, either because its disclosure would be embarrassing or for some other reason." *Coleman*, 281 Md. at 542 (citation omitted). The *Coleman* Court cited, with approval, language from the Court of Appeals of New York indicating that the privilege is "designed to protect and strengthen the marital bond" and, thus, "encompasses only those statements . . . induced by the marital relation . . . ." *Id.*

Sewell contends that this Court presumes marital communications to be confidential, unless presented with evidence to the contrary, citing *State v. Enriquez*, 327 Md. 365, 372 (1992). The State, on the other hand, emphasizes that any presumption of confidentiality is a judicial creation and, thus, encourages the Court to constrain this presumption, to the extent that one exists. The State argues that Maryland is "not so much at the tip of the spear, as at the back of the line" when it comes to a progressive interpretation of the confidential marital communications privilege.

"Generally, the courts have presumed that communications between husband and wife are confidential and privileged, although the circumstances of a given case can negate this presumption." *Coleman*, 281 Md. at 543 (citations

omitted). We reasserted this presumption in *Enriquez*, 327 Md. at 372, stating clearly that "there is a rebuttable presumption that marital communications are confidential and privileged. The presumption is rebutted . . . where it is shown that the communication was not intended to be confidential." The State recognizes this history, but asks us to modify our approach to this privilege.

It is our practice to avoid unnecessarily "making shipwreck" of well-settled precedent. *See Boyd v. Parker*, 43 Md. 182, 201 (1875). And we think wreckage is not necessary here. Rather we rely on settled law that the presumption of confidentiality can be rebutted by showing that the communication was made with the reasonable expectation that a third party would learn of it. *See Gutridge v. State*, 236 Md. 514, 516 (1964) ("The message sought to be sent to the appellant's wife through another cannot be regarded as confidential."). We also consider precedent from the Court of Special Appeals allowing rebuttal of the presumption when the party supporting admission could show that the statement was not induced by the marital relation. *See Harris v. State*, 37 Md. App. 180, 184 (1977). We have never attempted to identify all possible avenues to rebut this presumption, and today we consider a new one.

Confidentiality of Text Message Communications

The State makes various general and policy-based arguments to support the view that testimonial privileges, including marital communications, should be narrowly construed

because "the fundamental objective of a trial is the ascertainment of the truth . . . through the introduction of relevant evidence[.]" This theme permeates the State's more specific arguments. We consider two theories advanced by the State to demonstrate rebuttal of the presumption of confidentiality for marital communications, which we discuss below.[2] Sewell, in response, focuses on the presumption of confidentiality, and asserts that a waiver of the confidential marital communications privilege "will only be found in the clearest of circumstances."

(i) Wong-Wing v. State

First, the State asks us to extend the Court of Special Appeals' reasoning in *Wong- Wing v. State*, 156 Md. App. 597, 610 (2004), and conclude that Sewell and his wife had "no reasonable expectation of confidentiality" when they communicated via text message. Sewell, responding, sees *Wong-Wing* as presenting entirely different circumstances—the relevant communication being a message left on a telephone answering device located in a shared living space—and disagrees that the presumption has been rebutted.

Wong-Wing involved a defendant-husband ("Wong-Wing") accused of sexually abusing his then-wife's ("Sherry") daughter. *See id.* at 602. After he was confronted about this sexual abuse, Wong-Wing left multiple messages on an answering machine located in Sherry's home. *See id.* at 603. He

[2] The State offers these theories without conceding the existence of a presumption of confidentiality.

addressed the messages to his wife, beginning each with the word "Sherry." *Id.* The messages stated that Wong-Wing did not "want to hear anything that happened before," knew he caused "a lot of pain and grief," was "sorry" for all he caused, and did not "feel like living anymore." *Id.* The trial court overruled Wong- Wing's objection and admitted the recording transcripts. *See id.* at 605.

The Court of Special Appeals agreed with the trial court's decision and held that admission of the messages did not violate CJP § 9-105. *Id.* at 610. The intermediate appellate court observed that Wong-Wing left his messages "on an answering machine in a home that he knew [Sherry] shared with her adolescent daughter and her mother" and that all family members "moved freely between the two living spaces." *Id.* at 609. Accordingly, Wong-Wing "ran the risk" that others could have overheard or retrieved the message and had no reasonable expectation of confidentiality. *Id.* at 610. Thus, the State demonstrated that the circumstances surrounding Wong-Wing's communication destroyed his expectation of confidentiality—knowing that multiple individuals had access to the answering machine, he chose to leave his message there anyway. We agree with the Court of Special Appeals that evidence about Sherry's living arrangements rebutted the presumption of confidentiality. For Wong-Wing to trust that these messages would be confidential simply was not reasonable.

The State would have us extend this rationale to encompass text messages generally, including the ones at issue here. It focuses on the *Wong-Wing*

court's reasoning that "[e]ven if there were any ambiguity, 'the disfavor with which the law looks on testimonial privileges dictates that we resolve an ambiguity against the privilege, rather than in its favor.'" Praising the *Wong-Wing* rationale, the State asserts: "The merit of the approach taken in *Wong-Wing* is that it imposes a reasonable and pragmatic limitation on an otherwise boundless presumption of entitlement to a policy-based privilege that itself was never intended to be boundless." It further advances that "[i]f a spouse chooses to communicate in a manner that assumes a practical risk that someone other than the intended recipient could retrieve the message, there is no logical basis for 'presuming' that the person intended for the communication to be confidential[.]"

We are not in lock-step with the State's view of text messages. We agree, rather, with Sewell that the circumstances in *Wong-Wing* differ from those in this case. We see a substantial difference between traditional answering machines (prevalent before cell phones) and the text messaging capabilities of modern cell phones. Because cell phones are so small, they are highly portable, and can be easily carried in a pocket or purse. Conceivable scenarios exist wherein a party could reasonably believe a text message to be confidential, just as scenarios exist wherein this assumption would not be reasonable. Thus, it would be unwise to presume that text messages themselves can never be confidential. Again, it was the State's responsibility to make a demonstration one way or the other.

(ii) Confidentiality of Matters the Spouse is Mandated to Report

In the alternative, the State focuses on the nature of the crime—arguing that "every federal circuit court to have ever considered the issue has interpreted an exception to the corresponding federal privilege in cases of, *inter alia*, child abuse," and citing cases from multiple federal jurisdictions. It emphasizes that "child abuse occurs most often in the home at the hands of a parent or parent-substitute. Testimony regarding confidential marital communications may constitute critical evidence in such cases." *United States v. Breton*, 740 F.3d 1, 11 (1st Cir. 2014). It continues, "Several states, and the District of Columbia, recognize a similar exception by court rule or statute."

Maryland, the State asserts, has also legislatively recognized an exception concerning child abuse, citing Maryland Code (1987, 2012 Repl. Vol.), § 5-705(a)(1) of the Family Law Article ("FL"). This requires that "notwithstanding any other provision of law, including a law on privileged communications" any person in Maryland "who has reason to believe that a child has been subjected to abuse or neglect **shall** notify the local [Department of Social Services] or the appropriate law enforcement agency."[3] *Id.* (emphasis added). The

[3] Reports made under this section are encouraged, "to the extent possible," Maryland Code (1987, 2012 Repl. Vol.), § 5-705(d)(1) of the Family Law Article ("FL"), to include all information specified in FL § 5-704(c)—the name, age, and address of the child and responsible parent; the whereabouts of the child; the nature, extent, and possible previous incidents of child abuse or neglect; and any information "that would help to

State sees the Family Law Article as "reflect[ing] a legislative determination that preserving marital harmony, though a legitimate value in its own right, is not predominant over society's interest in identifying and prosecuting the abuse of children in Maryland." It submits that Sewell had no reasonable expectation of confidentiality when he communicated something his wife had a statutory duty to disclose.

Sewell, although not specifically addressing FL § 5-705 in his brief, generally responds that the marital communications privilege applies, even when made in furtherance of a crime, citing *State v. Mazzone*, 336 Md. 379 (1994). During oral arguments, Sewell seemed to suggest that, were the General Assembly intending that marital communications regarding child abuse or neglect be exempted from the marital privilege, it would have done so in the Courts and Judicial Proceedings Article, not the Family Law Article.

There are few matters our State takes more seriously than child abuse. Thus, we examine carefully the impact of FL § 5-705 on the marital communications privilege, especially in light of the General Assembly's explicitly broad statement of application— "notwithstanding any other provision of law." Mandatory reporting for suspected child abuse has existed for some time, but it was previously only a requirement for health practitioners, police officers, educators, and human service workers. *See id.* § 5-704(a). In 1987, the

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determine" the cause of and the individual responsible for the abuse or neglect.

General Assembly expanded this child protective statute by adding § 5-705— imposing a child abuse reporting obligation on the general public. *See* 1987 Md. Laws ch. 635 at 2948.

The original statute applied, notwithstanding "any law on privileged communications . . . ." *Id.* But in its first amendment thereto, the General Assembly specifically exempted knowledge gained through the attorney-client and priest-penitent privileges. *See* 1988 Md. Laws ch. 769 at 5021. Knowledge gained through the confidential marital communications privilege, however, has not been exempted, and thus a spouse, notwithstanding the privilege, is obligated to report suspected child abuse.

In evaluating a privilege claim, we consider whether the information could "reasonably be expected to remain confidential." *Forma–Pack*, 351 Md. at 416–17 (citations omitted). One method of destroying a reasonable expectation of confidentiality is through disclosure to a third party. "Disclosure to one's spouse with the intent that the spouse reveal one's communication to a third party, outside any other privileged relationship such as attorney-client, also will negate the privilege." 6 McLain, *Maryland Evidence State and Federal*, § 505:2 at 203. The question, here, is what to do when one spouse is mandated to disclose certain information to a third party upon hearing it, notwithstanding the confidential marital communications privilege.

We have not so far been presented with a case involving a privilege claim competing with a mandatory disclosure obligation. But we consider relevant our cases dealing with third party disclosure. Among our first of these was *Master v. Master*, 223 Md. 618 (1960), involving a husband who sought to bar his wife's testimony as to statements he made claiming to have paid his taxes. *See id.* at 623. The husband alleged that these statements were protected by the confidential marital communications privilege. *See id.* Nonetheless, we determined that, because the statements were "made in the presence of children old enough to understand fully what was being said," they were not confidential. *Id.* We concluded that confidential communications do not include those made "in the hearing of third persons," and that these statements "may be testified to by husband or wife." *Id.* at 624.

Maryland courts have continually reaffirmed that third party disclosure, and reasonable expectation of third party disclosure, are quintessential situations negating any reasonable expectation of confidentiality. *See, e.g.*, *Coleman*, 281 Md. at 543 ("[T]he fact that a husband knew that his wife was unable to read without the assistance of a third party would rebut the presumption that a letter which he sent to her was intended to be confidential.") (citation omitted); *Gutridge v. State*, 236 Md. 514, 516 (1964) ("The message sought to be sent to the appellant's wife through another cannot be regarded as confidential."); *Matthews v. State*, 89 Md. App. 488, 502 (1991) ("If the communication is made with the contemplation or expectation that a third party will learn of it, the confidential

communication privilege does not apply.") (citation omitted); *Mulligan v. State*, 6 Md. App. 600, 615 (1969) ("The admission made by the appellant to his wife in the presence of the police when he saw her in the room in the police station was not a confidential communication . . . .").

In *Coleman* we reviewed whether a wife could disclose statements her husband made to her regarding the location of a ring that he had stolen from a woman he was alleged to have raped. 281 Md. at 540. The husband asked his wife to retrieve the ring from another woman who had access to his apartment and, at his request, had hidden the ring. *Id.* Disagreeing with the Court of Special Appeals' holding that the husband knew his communication would be disclosed to a third person, we concluded that the husband "did not suggest that his wife disclose his communication to a third party, **nor did the circumstances require a disclosure**." *Id.* at 544 (emphasis added). We held that the statements remained confidential and privileged. *See id.*

Coleman may represent the outer reaches of the confidential marital communications privilege. It is also readily distinguished from the present case. Retrieving a ring from a third party is not a circumstance requiring disclosure because the task could have been carried out without revealing the husband's communication. Further, unlike the child abuse reporting statute, no law requires disclosure of all known or suspected illegal activity to law enforcement. Because it is reasonable to expect that a spouse will not betray the other spouse's

marital trust, the communication remains encased in its confidential patina.

But the tipping point is reached when the privilege is asserted with respect to information the other spouse is under a legal duty to disclose to law enforcement.[4] Amanda Sewell, like all Marylanders, owed a legal duty to make a report if she had any "reason to believe" that a child was the victim of abuse or neglect, "**notwithstanding any other provision of law**." FL § 5-705(a)(1) (emphasis added). We hold that the phrase "notwithstanding any other provision of law" in this section includes the confidential marital communications privilege. Kevin Sewell, like all Marylanders, is "presumed to know the law," irrespective of his subjective understanding. *Benik v. Hatcher*, 358 Md. 507, 532 (2000). When Kevin discussed matters that he knew (or should have known) Amanda had an affirmative duty to report to a third party, he no longer retained a colorable claim that the communications were "reasonably expected" to remain confidential.

It is not material that Amanda did not, in fact, make a report. Rather, the focus is on what Kevin could reasonably expect. Thus, we agree with the

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[4] Sewell's potential ignorance of the law is no excuse. "[E]veryone is 'presumed to know the law regardless of conscious knowledge or lack thereof, and are presumed to intend the necessary and legitimate consequences of their actions in its light.'" *Benik v. Hatcher*, 358 Md. 507, 532 (2000) (citation omitted). There are some instances where the General Assembly has determined that such a presumption is inappropriate, like when the Legislature requires notice. *See Hughes v. Moyer*, 452 Md. 77, 98 (2017). But this is not such a circumstance.

State that, in such a circumstance, such communication is not confidential, and therefore not excluded by CJP § 9-105, the confidential marital communications privilege.

Our decision is reinforced when we consider the relative dates of enactment of FL § 5-705 and CJP § 9-105. We have stated that "if two statutes contain an irreconcilable conflict, the statute whose relevant substantive provisions were enacted most recently may impliedly repeal any conflicting provision of the earlier statute." *Atkinson v. Anne Arundel Cty.*, 428 Md. 723, 743 (2012) (citation omitted). To the degree that the present statutes are in conflict—and we need not decide whether there is an "irreconcilable conflict" here— FL § 5-705 would control the Court's reading in this instance. The confidential marital communications privilege has existed, in some fashion, since 1864. *See* 1864 Md. Laws ch. 109 at 137. The mandated reporting requirement, as discussed earlier, was not enacted until 1987. Thus, were these statutes in conflict, we would presume that the General Assembly knew the language of CJP § 9-105 and passed the reporting statute with the intention that it control.

Excluding statements regarding child abuse from the realm of "confidential" marital communications is also sensible policy aligned with the privilege's purpose. The confidential marital communications privilege cannot be a safe harbor for abuse and predation—excluding the invaluable testimony of one of the only likely witnesses to such intimate crime against such vulnerable victims. [5]

[5] We have employed such a rationale before. In *Brown v. State*,

"The argument traditionally advanced in support of the marital communications privilege is that the privilege is needed to encourage marital confidences, which confidences in turn promote harmony between husband and wife." 1 Brown, *McCormick on Evidence*, § 86 at 523. Therefore, offenses against a "spouse, child, or cohabitant . . . most strongly implicate the policy that justifies the creation" of an exception to the marital communication privilege. 6C–13 Edward J. Imwinkelried, *The New Wigmore: A Treatise on Evidence, Evidentiary Privileges*, § 6.13.5 at 1467–68. Such offenses "imperil the family unit," and thus undermine the overarching rationale for the privilege.[6] *Id.*

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359 Md. 180, 192 (2000), we observed the existence of a significant exception to the common law marital privileges—"from the earliest time, a wife was permitted to testify against her husband when she was the victim of his criminal conduct." The rationale behind this exception is to prevent the "perversion" of allowing a husband who commits a crime against his wife to then quash her testimony by asserting privilege, as she is often the only one able to testify against him. *Id.* This statement affirms the position we took in *State v. Enriquez*, 327 Md. 365, 369 n.1 (1992), providing that, "[c]learly, crimes against the other spouse are not privileged." How far this rationale extends beyond crimes against the spouse, we stated, was "not clear." *Brown*, 359 Md. at 192 n.4.

[6] Modern explanations for the confidential marital communications privilege revolve around more "humanistic considerations." 1 Kenneth S. Brown, *McCormick on Evidence*, § 86 at 524 (7th ed. 2013). "It is a matter of emotion and sentiment. All of us have feelings of indelicacy and want of decorum in prying into the secrets of husband and wife." *Id.* at 525. Protection against disclosure of communications revealing child abuse within the home is also at odds with this more "humanistic" rationale.

In sum, we hold that when one spouse communicates information to the other spouse that the other spouse is under a statutory duty to disclose, any reasonable expectation of confidentiality is destroyed. Consequently, this communication is not confidential, and not protected by the confidential marital communications privilege. To reach any other conclusion would be to sanction ignorance of the law and mock the principal basis for the confidential marital communications privilege, in the first instance.

Yet, our interpretation of these competing statutes does not fully answer the question as to whether the trial court abused its discretion by allowing the text messages into evidence in this case.

Sewell's Text Messages to His Wife

We do not agree with the trial court that the text message communications should have been admitted on the grounds that the marital privilege did not apply because the text message medium itself could not reasonably be considered confidential. As we said before, text messaging is a platform capable of confidential use.

But the texts were nonetheless admissible under the circumstances here. The texts are not shielded by marital privilege because they consisted of information that Amanda had an affirmative legal duty to report to authorities—Kevin could not reasonably expect they would be confidential.[7] It is

[7] It is of no moment that the trial court used a different rationale. We have, on numerous occasions, stated that "where

worth repeating the specifics of this statutory duty, beginning with the obligation of all Marylanders with "reason to believe" that a child is the victim of abuse to "notify the local department or the appropriate law enforcement agency." FL § 5-705(a)(1). A report of abuse made pursuant to FL § 5-705(a) "may be oral or in writing," *id.* § 5-705(c), and "shall include," to the extent possible, "the information required by [FL] § 5-704(c)," *id.* § 5-705(d)(1). This includes the name, age, and address of the child and responsible parent; the whereabouts of the child; the nature, extent, and possible previous incidents of child abuse or neglect; and any other information "that would help to determine" the cause of and the individual responsible for the abuse or neglect. *Id.* § 5-704(c).

Amanda observed many bruises on Luke's body after dinner on Saturday, as well as a knot on his head—enough to cause her to call his mother. On Sunday at 9:07 a.m., after Amanda had been at work for a couple of hours, she texted Kevin to see if "everything [was] ok." A series of messages followed, during which Kevin complained that Luke "doesn't listen worth shit," was "acting like a f---ing asshole," had vomited, and that it had been a "day from hell." After work, Amanda changed Luke's diaper after the skin from the base of Luke's penis to the tip of his penis had been removed, and discovered that Luke had large bitemarks on his body. It is palpable that, by the time Amanda placed Luke in her car to take

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the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm." *Robeson v. State*, 285 Md. 498, 502 (1979) (emphasis omitted).

him back to his parents—and very likely before that—she possessed the requisite "reason to believe" that Luke had been the victim of child abuse at the hands of her husband, and knew that her husband had bitten the child causing the marks. Amanda's awareness of the severity of the abuse is evident in the couple's effort to conceal the source of Luke's injuries from Luke's parents. Indeed, the text messages indicate that Amanda had to "get on" Kevin before about similar behavior.

The injuries were so severe that, upon seeing her child, Luke's mother immediately realized he was in grave danger—he was unresponsive, covered in bruises, and "making a phlegmy sound" while barely breathing. Under these circumstances, no reasonable person could miss the abuse. Thus, Amanda was mandated to report this information, and by law, none of her husband's text messages relating to the time during which Luke was in his care were confidential.

Information or circumstances giving rise to a reportable incident of child abuse need not be found in each individual communication to be admissible. *See, e.g.*, *Utah v. Widdison*, 4 P.3d 100, 111 n.9 (Utah Ct. App. 2000) (recounting the testimony from a wife concerning statements by her former husband that gave rise to suspected child abuse and were admitted over an objection invoking the confidential marital communications privilege). Reporting can be cumulative. For example, some suspicions of abuse are built up over time—e.g., from ongoing conversations and experience with a child or their suspected abuser—while others are gained

instantaneously—e.g., seeing a child with injuries clearly suggesting abuse. Regardless, once a mandated reporter possesses the necessary "reason to believe" that a child has been the victim of abuse, **any** information "that would help to determine" the individual suspected of the abuse and the circumstances surrounding that suspicion **shall** be revealed, "notwithstanding any other provision of law, including a law on privileged communications," FL §§ 5-704(c), 5-705(a)(1).

Accordingly, Amanda was obligated by law to report the suspected abuse, including each text message quoted in this opinion. They were not protected by the confidential marital communications privilege because it was not reasonable for Kevin to believe that his text message communications were confidential when they pertained to child abuse and must be disclosed. It matters not whether Kevin thought they were confidential at the time he sent them. A court performs an objective analysis, and based on such, clearly the privilege does not attach to communications relating to child abuse. The entire collection of text messages relate to Kevin's actions that day as caretaker for the children, and therefore, they were admissible against him for all charges relating to and stemming from child abuse.[8]

[8] Kevin Sewell was charged with and convicted of first-degree murder, first-degree child abuse, and neglect of a minor child. Each of these charges possesses the necessary relation to child abuse to warrant admissibility of the text messages.

CONCLUSION

We hold that courts should continue to narrowly construe all privileges. Even so, the confidential marital communications privilege contains a rebuttable presumption of confidentiality once other elements are established. Further, text messages, like other marital communications, are presumed to be confidential, unless the party advocating for their admission can establish that they were not. Finally, we hold that it is unreasonable for a spouse to assume that communication made to the other spouse, which the latter has a legal duty to report to law enforcement, is confidential.

The text messages in this case were properly admitted against Respondent. For the reasons stated herein, we reverse the judgment of the Court of Special Appeals and remand the case to that Court with instructions to affirm the judgment of the Circuit Court for Worcester County.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY IN ACCORDANCE WITH THIS OPINION. COSTS TO BE PAID BY RESPONDENT.

Circuit Court for Worcester County
Case No.: 23-K-15-000516
Argued: October 4, 2018

IN THE COURT OF APPEALS OF MARYLAND

No. 20

September Term, 2018

STATE OF MARYLAND

v.

KEVIN SEWELL

Barbera, C.J.
Greene
*Adkins
McDonald
Watts
Hotten
Getty,

JJ.

Dissenting Opinion by Hotten, J.

Filed: April 2, 2019

*Adkins, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the MD. Constitution, Article IV, Section 3A, she also participated in the decision and adoption of this opinion.

Respectfully, I dissent and would affirm the judgment of the Court of Special Appeals.

On appeal, the State presented two issues for our review:

1. Should this Court apply a principle of narrow construction to the marital communications privilege?

2. Did the trial court properly exercise its discretion by allowing the State to introduce text messages that Respondent sent to his wife's cell phone?

As to the first issue, the Majority contends that Maryland Code, Family Law Article ("Fam. Law") § 5-705(a)(1) rebuts the presumption of confidentiality that arose between Respondent Kevin Sewell ("Sewell") and his wife, Amanda Sewell ("Amanda"). According to the Majority, "[w]hen [Sewell] discussed matters that he knew (or should have known) Amanda had an affirmative duty to report to a third party, he no longer retained a colorable claim that the communications were 'reasonably expected' to remain confidential." *Slip op.* at 21.

In this regard, the Majority departs from settled case law. Though we have narrowly construed other privileges, we have not adopted a principle of narrow construction to marital communications. *See e.g.*, *State v. Mazzone*, 336 Md. 379, 648 A.2d 978 (1994); *State v. Enriquez*, 327 Md. 365, 609 A.2d 343 (1992); *Coleman v. State*, 281 Md. 538, 380 A.2d 49 (1977), discussed *infra*.

STATUTORY AUTHORITY

As the Majority provides, "[t]here are two distinct marital privileges: the first, protecting marital communication [("marital communications privilege")], and the second, privileging adverse spousal testimony [("adverse spousal testimony privilege")]. Here, themarital communications privilege is at issue." *Slip op.* at 9. The marital communications privilege is codified in Maryland Code, Courts and Judicial Proceedings Article ("Cts. & Jud. Proc.") § 9-105 and states that "[o]ne spouse is not competent to disclose any confidential communication between the spouses occurring during their marriage." The adverse spousal testimony privilege is codified in Cts. & Jud. Proc. § 9-106 and **explicitly contemplates** that the privilege will not apply in cases of child abuse. The statute reads, in relevant part:

> (a) The spouse of a person on trial for a crime may not be compelled to testify as an adverse witness **unless the charge involves:**
>
> **(1) The abuse of a child under 18[.]**

(emphasis added). Cts. & Jud. Proc. § 9-106 clearly provides an exception to the privilege, and is evidence that the General Assembly could have written an exception into Cts. & Jud. Proc. § 9-105, had it wanted to do so. Instead, the Majority contends that a **separate** Article of the Maryland Code, the Family Law Article, should guide our interpretation of Cts. & Jud. Proc. § 9-105.

When contrasted against one another, the statutory text of Cts. & Jud. Proc. §§ 9-105 and 9-106 provides evidence that the marital communications privilege is construed more broadly than its counterpart. An analysis of our case law also reveals that the marital communications privilege has been interpreted more broadly relative to our interpretation of other evidentiary privileges.

CASE PRECEDENT

In *Ashford v. State*, 147 Md.App. 1, 65, 807 A.2d 732, 769 (2002), the Court of Special Appeals emphasized that testimonial privileges are disfavored because they operate in opposition to the truth-seeking function of a trial. However, this Court has consistently applied a more liberal construction to the privilege of confidential marital communications, as demonstrated with its precedent in *State v. Mazzone*, 336 Md. 379, 648 A.2d 978 (1994); *State v. Enriquez*, 327 Md. 365, 609 A.2d 343 (1992); and *Coleman v. State*, 281 Md. 538, 380 A.2d 49 (1977).

In *Coleman*, this Court held that a husband's call to his wife, in which he directed her to conceal evidence of his crime, constituted a confidential

conversation protected by privilege. 281 Md. at 544-45, 380 A.2d at 53-54. This Court's holding clarified the scope of Cts. & Jud. Proc. § 9-105, holding that confidential communications between spouses are privileged, even if the communication is in furtherance of a crime. *Id.* at 545, 380 A.2d at 54. In *Coleman*, the Court established that "[c]ommunications between husband and wife occurring during the marriage are deemed confidential if expressly made so, or if the subject is such that the communicating spouse would probably desire that the matter be kept secret, either because its disclosure would be embarrassing or for some other reason." *Id.* at 542, 380 A.2d at 52. The assertion that communications are confidential if so desired by spouses provides for a liberal construction of the spousal privilege.

The Majority writes that *Coleman* "may represent the outer reaches of the confidential marital communications privilege." *Slip op.* at 20. I fail to discern how *Coleman* does not represent this Court's liberal interpretation of the privilege. There is nothing directly in the relevant statutory text (*see supra*) that enables us to construe the privilege as applying to crimes, but lacking in application to child abuse.

In *Enriquez*, this Court held that the trial court had improperly admitted Petitioner's telephone conversation with his wife. 327 Md. at 373, 609 A.2d at 346. During the conversation, Petitioner apologized for his alleged sexual assault on his wife and claimed that he was in a treatment center. *Id.* at 369, 609 A.2d at 344. We applied a liberal

construction to the privilege of marital communications, maintaining our assertion that no exceptions apply to the privilege—whether for communications pertaining to the furtherance of a crime (*Coleman*) or for prosecutions of one spouse against the other. *Enriquez*, akin to *Coleman*, reasserted this Court's rejection of a narrow construction to the privilege of marital communications and the presumption of confidentiality.

The State asserts that the liberal construction of the marital communications privilege has exceeded the scope of the policy rationale for the privilege. In *Coleman*, this Court explained the policy reasons for the statutory marital communications privilege, namely:

> (1) that the communications originate in confidence, (2) the confidence is essential to the relation, (3) the relation is a proper object of encouragement by the law, and (4) the injury that would inure to it by the disclosure is probably greater than the benefit that would result in the judicial investigation of the truth.

281 Md. at 541, 380 A.2d at 51-52. The State claims that both *Coleman* and *Enriquez* have resulted in precedent that "is now wholly untethered" to the Court's policy rationale. However, in *Enriquez*, this Court explained that the General Assembly had not amended Cts. & Jud. Proc. § 9-105, nor had it taken action to add express exceptions to § 9-105 since

Coleman was decided.[1] Md. 365 at 373, A.2d at 346. As such, this Court concluded that the legislature "intended that [this Court's] interpretation of the statute in *Coleman* should obtain." *Id.* This Court's precedent and interpretation of legislative intent have consistently emphasized a liberal interpretation of the marital communications privilege that is codified in Cts. & Jud. Proc. § 9-105.

In *State v. Mazzone*, 336 Md. 379, 648 A.2d 978, this Court held that the Maryland Wiretapping and Electronic Surveillance Act preserved the marital communications privilege if interception of these communications was not minimized and reasonable. Mazzone was convicted of conspiracy to violate controlled dangerous substance laws but appealed his conviction based on the introduction of alleged confidential communications with his wife that had been intercepted through a wiretap. *Id.* at 381, 648 A.2d at 979. This Court analyzed the Court of Special Appeals reversal, noting that the Court of Special Appeals "explor[ed] the policy behind the privilege statute, rather than the words of the statute." *Id.* at 389, 648 A.2d at 982. This Court emphasized the necessity in considering the statutory construction and plain language of Cts. &

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[1] In proclaiming that there are no exceptions to Cts. & Jud. Proc. § 9-105, this Court "held that the legislature recognized the need for . . . express exception[s] for a statutory privilege protecting certain communications [including those] between accountant and their clients, and between psychiatrists or psychologists and their patients. *See* § 9-110 and § 9-109 of the Courts Article, respectively." *Enriquez*, 327 Md. at 372-73, 609 A.2d at 346. Note that these express exceptions are codified in the Cts. & Jud. Proc. Article, where the marital communications privilege also exists.

Jud. Proc. § 9-105 in order to properly "surmise legislative intention[.]" *Id.* In exploring legislative intent, this Court analyzed § 9-105 in conjunction with § 10-407 of the wiretapping statute, concluding "that privileged communications remain privileged even after they are overheard by monitoring agents." *Id.* at 389, 648 A.2d at 983. This Court's holding in *Mazzone* reveals that a plain language analysis of Cts. & Jud. Proc. § 9-105 uncovers the legislative intent to err on the side of preserving confidential marital communications as a privilege, further evidencing the liberal construction of the privilege.

Our longstanding precedent in *Coleman*, *Enriquez*, and *Mazzone* all speak to a liberal interpretation of the marital communications privilege. The case precedent, in conjunction with the statutory authority, reveal that we have consistently provided a broad interpretation of the marital communications privilege. I fear that the Majority's decision will erode the privilege. Accordingly, I dissent and would affirm the judgment of the Court of Special Appeals.

[ENTERED: March 5, 2018]

CASE NO. 2188, SEPT. TERM, 2016

Circuit Court for Worcester County
Case No. 23-K-15-0516

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2188

September Term, 2016

KEVIN SEWELL

v.

STATE OF MARYLAND

Wright, Graeff,
Raker, Irma S.
(Senior Judge, specially assigned), JJ.

Opinion by Raker, J.

Filed: March 5, 2018

Appellant Kevin Sewell appeals from the judgments of convictions in the Circuit Court for Worcester County for the offenses of first degree murder, child abuse in the first degree, and neglect of a minor. He presents the following questions for our review:

> "1. Did the trial court err in admitting privileged marital communications?
>
> 2. Should this Honorable Court exercise plain error review and reverse Appellant's convictions based on the State's improper opening argument?"

We shall hold that the trial court erred in admitting into evidence communications between appellant and his wife which were privileged marital communications. Because we reverse on this issue, we do not address appellant's second issue.[1]

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[1] The alleged improper State's argument is often referred to as a "first-person" argument. We note that courts around the country have split on the propriety of such first-person arguments, although in the context of the prosecution's closing arguments rather than opening statements. Compare *Malicoat v. State*, 992 P.2d 383, 401 (Okla. Crim. Appl. 2000) (holding that first-person argument that "does not manipulate or misstate the evidence" was not error), and *McCray v. State*, 88 So.3d 1, 50 (Ala. Crim. App. 2010) (holding that first-person argument that only included reasonable inferences from the evidence was not error), with *Drayden v. White*, 232 F.3d 704, 712–13 (9th Cir. 2000) (holding that first-person argument was error but did not render the trial "fundamentally unfair" which would have entitled defendant to a new trial), and *Hawthorne v. United States*, 476 A.2d 164, 172–73 (D.C. 1984) (holding that first-person argument substantially prejudiced the defendant as to require a new trial).

I.

The Grand Jury for Worcester County returned an indictment charging appellant with the offenses of first degree murder, child abuse in the first degree, second degree murder, and neglect of a minor child. He proceeded to trial before a jury and on September 23, 2015, the jury found appellant guilty of first degree murder, child abuse in the first degree, and neglect of a minor child. The court imposed a term of life imprisonment without the possibility of parole for murder; thirty years' imprisonment, to be served concurrently with the life term, for child abuse; and a term of five years' imprisonment to be served consecutive to the life term for neglect.

The following facts emerged at trial. The victim in this case was Luke Hill, a child born on March 28, 2012. Luke died on May 5, 2015, and according to Dr. Wendy Gunther, the cause of his death was shaken/slam syndrome, with additional blunt trauma to Luke's chest, abdomen, back, and extremities, and bite marks on his body.

Appellant was Luke's uncle. He is married to Amanda Sewell, the sister of the victim's mother, Victoria Harmon. Ms. Harmon testified that Amanda and appellant would babysit Luke occasionally, and that she drove Luke to their house on May 2, 2015, leaving him there overnight. When Amanda returned Luke to Ms. Harmon on May 3, his eyes were closed, he was making a "phlegmy kind of sound," and he was covered in bruises. Ms. Harmon called 911 immediately. Luke was transported to the

hospital where he died on May 5. Several witnesses testified that Luke had no injuries before he arrived at appellant's home. Robert Nottingham, a firefighter, testified that on May 3, he had just returned from work when Nick Miller (Ms. Harmon's fiancé) asked him to look at Luke. From his training, he realized that Luke needed an ambulance immediately.

The State charged appellant and Amanda with crimes related to Luke's death. The State compelled Amanda to testify against appellant, granting her use immunity for her testimony.

On December 14, 2015, appellant filed a pre-trial motion to exclude from evidence text messages sent by him to his wife, arguing that the messages should be excluded as violative of the marital privilege. On January 13, 2016, the court held a hearing on appellant's motion. The court denied the motion in an order on January 20, without specifying its reasoning.

At trial on September 20, 2016, the State delivered the first two-thirds of its opening statement[2] speaking as the victim. Appellant did not object at any time during the State's opening statement.

During trial, the State introduced photographs of Amanda's phone screen, displaying

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[2] This ratio is based on the transcript of the opening statement, which was a little over ten pages. The portion in which the prosecutor spoke as Luke Hill covered about seven of those ten pages.

the text messages she and appellant exchanged on May 3, with timestamps added to almost every text message. Appellant renewed his objection to the text message evidence, which the court overruled. Next, the prosecutor and Amanda read the texts, with the prosecutor reading appellant's texts and Amanda reading her own. They read the texts to the jury as follows:[3]

> [AMANDA 9:07:22 a.m.]: Everything okay?
>
> [APPELLANT 9:14:15]: Ye boo.
> [APPELLANT 9:14:28]: He doesn't listen worth shit, but we're fine.
> [APPELLANT 9:14:49]: I think Tori told me he breaks out from grass.
> [APPELLANT 9:15:02]: I wonder if that's why his neck and chest are broke out.
>
> [AMANDA 9:15:48]: His ear is bruised.
>
> [APPELLANT 9:16:34]: Yeah, it sure it [sic].
> [APPELLANT 9:16:47]: Maybe him and Landon were roughhousing.
>
> [AMANDA 9:33:14]: He's very skittish.

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[3] The text of these messages is taken from the trial transcript, to avoid confusion over abbreviations and misspellings. Timestamps are taken from the transcript where available, or the photographs when the transcript does not include them.

[APPELLANT 9:40:58]: Yeah, he is. I've noticed.
[APPELLANT 9:41:00]: Why, though?

[APPELLANT 9:47:55]: He threw up on our sheets.
[APPELLANT 9:48:24]: Phoebe was sleeping, and he started screaming, so I made him lay down.
[APPELLANT 9:48:32]: Then he threw up on our bed.

[AMANDA 9:53:43]: Nice.
[AMANDA 9:54:23]: Strip the bed and put what you can in the washer, please.

[APPELLANT 10:02:27]: Okay.

[AMANDA 10:12:49]: Thank you. How are you?

[APPELLANT 10:13:07]: Good boo boo.

[AMANDA 10:32:39]: You going with me to take him home?
[AMANDA 10:41:48]: ?
[AMANDA 11:20:32]: ?

[APPELLANT 11:44:12]: I thought you were taking him tomorrow.
[APPELLANT 12:05:59 p.m.]: What time you getting off?

[AMANDA 12:32:19]: Today.

[AMANDA 12:32:27]: 1:30.

[APPELLANT 12:35:39]: Okay.
[APPELLANT 12:35:53]: That's fine because he's acting like a fucking asshole.
[APPELLANT 12:36:20]: He ignores you like he's retarded. He's thrown up twice and all he does is whine.
[APPELLANT 12:36:28]: This is the last time.
[APPELLANT 12:37:21]: The other thing I have been entertained by is him running around saying butt fuck. He starts clapping and looking for high fives.

[AMANDA 12:51:54]: WTF.
[AMANDA 12:53:25]: You going to do the yardwork while I'm gone?
[AMANDA 12:59:49]: ?

[APPELLANT 1:13:57]: I don't know, maybe.
[APPELLANT 1:14:10]: This has been a day from hell. He's finally asleep on our room.
[APPELLANT 1:14:28]: Please get me a bottle. This has been a day from hell.
[APPELLANT 1:25:00]: Please.

[AMANDA 1:31:43]: Okay.
[AMANDA 1:32:58]: I'll be off around 2.

[APPELLANT (unspecified time)]: Okay.
[APPELLANT 2:18:14]: Is it too late for you to get me a shot, too?
[APPELLANT 2:18:23]: If so, it's fine. I can run out.

[AMANDA 2:19:12]: I'll give you the money. I'm still at work.

[APPELLANT 2:19:12]: Okay.
[APPELLANT 2:19:16]: I have money.

[Counsel establishes that Amanda was driving Luke home by 3:16 p.m., at which time appellant sent the following texts.]

[APPELLANT 3:16:16]: Hey, I love you. Be careful.
[APPELLANT 3:16:45]: Don't tell them o [sic] bit him back. LOL. Blame Landon.
[APPELLANT 3:17:01]: I didn't even bite him hard, but, apparently, he bruises easy.

[AMANDA 3:18:33]: I told her he had bruises. I'll just say they were all ready [sic] there.
[AMANDA 3:18:42]: I love you, too.

[APPELLANT (unspecified time)]: I'm glad we have a day off together.

> [APPELLANT 3:19:42]: Well, he bit the shit out of me.
> [APPELLANT 3:19:51]: How else will he learn not to bitw?
> [APPELLANT 3:19:53]: Bite.
>
> [AMANDA 3:20:22]: Right.
> [AMANDA 3:20:33]: I only get on you because I know you can do better.
>
> [APPELLANT 3:20:46]: I'd be more concerned about all the bruises.

On cross-examination, Amanda testified that she had called her sister the night prior because Luke was not well, and told her that Luke had a knot on his head, bruises like black eyes, and additional bruises behind his ears and on his arms, legs, and chest. Her sister did not check on Luke, nor did she come and get him. After several other neighbors and the firefighter Mr. Nottingham testified, the Warden of the Worcester County jail and Jason Hill, an inmate there, testified that appellant told Hill that he struck Luke and Hill reported it to the Warden.

Appellant called no witnesses.

Fifteen percent of the prosecutor's closing argument[4] consisted of reviewing the text messages between appellant and Amanda as follows:

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[4] This ratio is based on the transcript of the closing argument, which was about twenty-six pages. The portion in which the prosecutor discussed the text messages covered about four of those twenty-six pages.

"[THE STATE]: Cell phones can be a blessing and a curse. Sometimes probably when you're driving in the car and you're thinking, you know, I would really just like some quiet time, and the phone is ringing, you think of them as a curse. Sometimes they are a blessing, though, like when you need to call 911.

For [appellant] they were a curse on May 3rd of 2015 because you were able to, we were all able to, see in great detail what occurred during the morning into the afternoon hours of Sunday, May 3rd. These cell phone text messages give you all a window into 607 Oxford Street just as surely as that window lets you look outside. The timestamps will tell you when things were said and correlate to what was going on at that time.

So at that 9:07 Amanda says, everything okay?

The Defendant says, ye boo. He doesn't listen worth shit, but we're fine, at 9:14 in the morning.

He then says, I think Tori told me he breaks out from grass. I wonder if that's why his neck and chest are broke out. He's now planning?

Amanda mentions that he's very skittish, and [appellant] says, yes, I've noticed.

He then confirmed what we already know through the observations and testimony of Amanda, that he threw up on our sheets. Significant because of the injuries. This is at 9:47:55. We know now why. Phoebe was sleeping, and he started screaming, so I made him lay down. I made him lay down.

Do you remember Doctor Starling's testimony regarding triggers? What makes people do this type of thing? Children that don't listen. Children who are being potty trained. Children who might wake up another sibling in the house.

He then says at 9:48, he then threw up on our bed. Amanda's response, nice. And then she says, strip the bed and put what you can in the washer, please. And he responds, okay, at 10:02.

At 10:32:39 Amanda says, you going with me to take him home?

What's also occurring between 10:30 and 10:45? Christopher Payne is outside in his yard hearing a blood-curdling scream.

Question mark number one and question mark number two, these take place, I submit, because [appellant] hasn't responded to her question, which is, are you going to take—are you coming with me to take him home?

He responds one hour and twelve minutes later. And when you look at the text messages, you look at the timestamps and how quickly he responds during the course of the day, except for right now. One hour and twelve minutes to respond, you going home—you going with me to take him home?

I thought you were taking him tomorrow.

He inquires what time she's getting off.

She responds, we're taking him today, and I get off about 1:30.

And he says, at 12:35, that's fine because he's acting like a fucking asshole.

[Appellant] says, he ignores you like he's retarded. He's thrown up twice, and all he does is whine. Triggers?

The Defendant, [appellant], says, at 12:36:28, this is the last time.

At 1:14 in the afternoon [appellant] sends a text message to Amanda that says, this has been a day from hell. He's finally asleep on our room.

And a few seconds later he says, please get me a bottle. This has been a day from hell.

And follows up 11 minutes later with a please.

At 3:16:16 in the afternoon, Sunday, May 3rd, 2015, [appellant] sends a message to Amanda that says, hey, I love you. Be careful.

We know from Amanda's testimony that she was in the Chrysler Pacifica at this time taking Luke back to his home. Luke is unconscious. His eyes are kind of open, and he's snoring. And [appellant], the Defendant, at 3:16:45 says, don't tell them I bit him back. LOL. Blame Landon.

And then says, I didn't even bite him hard, but, apparently, he bruises easy.

> And Amanda, going along with it, says, I told her he had bruises, so I'll just say they were already there.
>
> Amanda tells [appellant] at 3:20:33, I only get on you because I know you can do better."

Appellant's closing argument, among other arguments, said appellant had no motive to kill Luke: "There was certainly no motive here to kill. There's no reason. Even if you're dealing with a troublesome and whiny child, he's going home in two hours."

The State's rebuttal closing argument addressed the motive question as follows:

> "[THE STATE]: [Defense counsel] mentions the lack of motive. The motive is and are the triggers were talked about. Those triggers are in the text messages.
>
> And you can always tell the strength or weakness of a case by what the attorney doesn't talk about. What did [defense counsel] not talk about? He didn't talk about, essentially, the confession of [appellant] in the text messages. He called Luke Hill an asshole. He tried to conspire with his wife to cover up his assaultive behavior. You can't get around that. That's why [defense counsel] didn't discuss it."

The prosecutor used one of the text messages to frame the conclusion of his rebuttal closing argument as follows:

> "[THE STATE]: [Appellant] told his wife at 12:36 on [May 3], this is the last time. I am confident that when you take the constellation of symptoms, when you take the constellation of injuries, and combine that with what you know is impossible, then you will return a verdict, and that verdict will tell [appellant] that this is the last time."

As indicated *supra,* the jury returned guilty verdicts on all counts, the court imposed the life sentence, to be served without benefit of parole, and this timely appeal followed.

II.

Before this Court, appellant argues that the trial court erred in admitting privileged marital communications, *i.e.*, the text messages between appellant and his wife. He argues that communications between spouses are presumed to be confidential, and that a waiver of the privilege will be found only in the clearest of circumstances. This presumption of confidentiality, he argues, may be rebutted only "by a showing that the communication was not intended to be confidential, or was made to, or in the presence of a third party." *State v. Mazzone*, 336 Md. 379, 384, 648 A.2d 978, 980 (1994) (internal citations omitted). He maintains that in this case, the State presented no facts to

rebut the presumption that the text messages were privileged.

Appellant asks us to recognize as plain error the opening statement of the State where the prosecutor spoke to the jury in the voice of three year old Luke Hill. He considers it a "golden rule" argument in which "a prosecutor improperly appeals to the passions of the jury, and asks jurors to place themselves in the shoes of the victim."

The State argues that the trial court exercised its discretion properly in admitting into evidence text messages sent by appellant to his wife's telephone. The State appears to present three grounds to support the admission of the text messages. First, appellant did not meet his burden of establishing the element of "confidentiality" and, therefore, he failed to demonstrate his entitlement to the "narrowly construed" marital privilege. Because testimonial privileges are not designed or intended to facilitate the fact-finding process or to safeguard its integrity, they are a disfavored departure from the norm, and should be strictly construed. Moreover, according to the State, any ambiguity or close call with respect to whether a privilege applies should be resolved against the privilege. Factually, appellant sent texts to his wife's cellphone while she worked at a restaurant. By sending information over the phone, over which he had no control, he ran the risk that someone besides Amanda would retrieve the message. Concluding, the State asserts that

appellant failed to show he had a reasonable expectation of confidentiality in the text messages.[5]

Second, in the event appellant is arguing that the admission of the text through appellant's wife violated the testimonial spousal privilege, testimonial spousal privilege does not apply where charges involve the abuse of a child under the age of 18. *See* Md. Code, Courts and Judicial Proceedings Article, § 9-106(a)(1).

Third, the State maintains that by communicating via text messaging, appellant implicated a third party, *i.e.*, his service provider, Verizon. The State quotes from Verizon's privacy agreement, which contains a statement that information may be shared pursuant to "subpoenas, court orders or search warrants and as otherwise authorized by law."

The State asserts also that even if the admission of the text messages was erroneous, any error was harmless beyond a reasonable doubt. The content of the messages does not contain a confession to any of the charges. The State offered more than enough other evidence to eliminate any other suspect, including medical records and eyewitness accounts that Luke was fine until

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[5] The State makes clear that its argument here is case and fact-specific, and not that text messages can never convey confidential marital communications. The State suggests that the party asserting the privilege with respect to text messages (footnote continued . . .) could generate evidence that the recipient secured the phone by a passcode or set up the phone to ensure text messages would not appear on the screen if the phone was locked.

Amanda left for work on May 3, testimony from a neighbor who heard a blood-curdling scream come from the house, and Amanda and Ms. Harmon's testimony about Luke's behavior and appearance once Amanda returned home from work. DNA analysis and bruises on appellant's knuckles pointed towards appellant striking Luke. Appellant's cellmate testified appellant made statements that were both consistent with the other evidence and unlikely to be known to anyone but appellant. If admitting the text messages was error, it was harmless because the rest of the evidence was overwhelming.

The State argues that this Court should not review its opening statement for plain error. Maryland has never reviewed a prosecutor's opening statement for plain error. This opening statement was not improper, as the only limitation is not to refer to facts that the State does not expect to prove during the trial. The State responds to appellant's "golden rule" claim that this rhetorical device is not a "golden rule" violation. "Golden rule" arguments encourage jurors to consider their own interests in deliberation rather than the evidence presented, and the opening statement here confined itself to the evidence. Appellant bears the burden to prove material prejudice that requires plain error review, which appellant has failed to even attempt to do.

III.

It is "within the sound discretion of the trial court to determine the admissibility of evidence." *Blair v. State*, 130 Md. App. 571, 592, 747 A.2d 702,

713 (2000). An abuse of discretion occurs when "no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles." *Brass Metal Prods., Inc. v. E-J Enters., Inc.,* 189 Md. App. 310, 364, 984 A.2d 361, 393 (2009) (internal citations omitted).

Judge Charles E. Moylan, Jr., writing for the Court of Special Appeals in *Ashford v. State*, 147 Md. App. 1, 65, 807 A.2d 732, 769 (2002), emphasized that testimonial privileges such as the marital privilege are disfavored, and explained the significance of that status as follows:

> "Keeping in the forefront of the mind the appreciation that testimonial privileges are disfavored, rather than favored, and are to be strictly construed, rather than liberally construed, is important because that decided 'tilt' may well be dispositive in close or ambiguous cases. As this Court observed in *Ellison v. State,* 65 Md. App. at 326–27, 500 A.2d [at 652 (1985)]:
>
> '[A] brief word is in order as to why it is important for us to determine whether testimonial privileges are in favor or disfavor. *In an otherwise close case* for the application of a testimonial privilege, a case that could plausibly go either way, *the "tilt" to be taken by the court is critically important.* If

> testimonial privileges are determined to be in favor, our "tilt" toward finding the privilege applicable could well be decisive in that direction. *If*, on the other hand, *testimonial privileges are determined to be in disfavor, our "tilt" toward finding the privilege inapplicable could well be decisive* in the other direction.'"

(Emphasis in original). The disfavored testimonial privileges must be strictly construed and any ambiguous claims of these privileges will tend to be rejected.

The marital privilege is in fact two distinct privileges: the privilege protecting confidential marital communications and the privilege against adverse spousal testimony. *See Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906, 913 (1980). In this case, the adverse spousal privilege, one vested in the witness spouse, was not claimed. At issue here is the marital communication privilege, which enables either spouse the right to preclude the disclosure of any confidential communications between the spouses. *See United States v. Parker,* 834 F.2d 408, 410–11 (4th Cir. 1987).

Under the common law, and Maryland law, spouses enjoy a right, albeit limited, to protect the confidentiality of some, but not all, marital communications. *Coleman v. State*, 281 Md. 538, 541, 380 A.2d 49, 52 (1977); s*ee also* 8 Wigmore, *Evidence*, § 2336 (McNaughton rev. 1961). In Maryland the marital privilege is found at § 9-105 of the Courts &

Judicial Proceedings Article: Confidential communications between spouses. The statute provides as follows: "One spouse is not competent to disclose any confidential communication between the spouses occurring during their marriage."[6] Either spouse can prevent the other from testifying as to such confidential communications.

Private discussions and exchanged information between spouses are confidential and protected by the privilege. *Blau v. United States*, 340 U.S. 332, 333, 71 S. Ct. 301, 302 (1951).[7] Marital communications are presumed confidential, which qualifies them for the privilege. *State v. Enriquez,* 327 Md. 365, 372, 609 A.2d 343, 346 (1992). This presumption is rebuttable, however, when a party shows that "the communication was not intended to be confidential." *Id.* If this presumption has been thoroughly rebutted, the "burden of establishing the element of confidentiality" falls on the claimant.

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[6] The statute has been interpreted by the Court of Appeals in such a manner that the section "does not render a spouse 'incompetent' in any manner, but simply provides a privilege, exercisable and waivable by the person who made the confidential communication, to preclude the person's spouse from disclosing that communication through testimony." *Brown v. State*, 359 Md. 180, 202, 753 A.2d 84, 96 (2000).

[7] Many jurisdictions recognize as an exception to the marital privilege communications or exchanges of information (known as the joint crime exception) that have to do with the commission of a crime in which both spouses played a role. *See, e.g., United States v. Broome*, 732 F.2d 363 (4th Cir. 1984). Maryland has not adopted this exception. *See Coleman v. State*, 281 Md. 538, 545–47, 380 A.2d 49, 54–55 (1977) (noting that the Maryland statute contains no such exception and the privilege under this section applies where the confidential communication is made in furtherance of a crime).

Ashford, 147 Md. App. at 69, 807 A.2d at 771. Because of the disfavor with which the courts look upon the use of testimonial privileges at trial, "we resolve an ambiguity against the privilege, rather than in its favor." *Id.* at 70, 807 A.2d at 772. The presumption itself, however, is not ambiguous, but evidence introduced to rebut the presumption and/or subsequently establish confidentiality can lead to ambiguity.

"Communications between husband and wife occurring during the marriage are deemed confidential if expressly made so, or if the subject is such that the communicating spouse would probably desire that the matter be kept secret, either because its disclosure would be embarrassing or for some other reason." *Coleman,* 281 Md. at 542, 380 A.2d at 52; *see* 1 Kenneth S. Broun & Robert P. Mosteller, *McCormick on Evidence* § 80 (2016). As to the presumption of confidentiality, in *Coleman*, the Court of Appeals noted that the nature of the communication could indicate that it was intended to remain confidential, such as "where . . . the marital communication amounts to an admission or confession of a crime; in such circumstances, the courts have generally recognized the confidential nature of the communication." *Id.* at 544, 380 A.2d at 53. The spouse claiming the privilege does not have to initially establish the confidential nature of the communication because it is presumed confidential. *Id.* at 543, 380 A.2d at 52.

The circumstances of a given case can negate this presumption of confidentiality. *See, e.g.*, *Pereira v. United States*, 347 U.S. 1, 6, 74 S. Ct. 358, 361

(1954) (holding that the presence of a third party renders communications non-confidential); *Wolfle v. United States*, 291 U.S. 7, 14–17, 54 S. Ct. 279, 280–81 (1934) (holding that the dictation of a letter to a secretary renders the communication non-confidential); 8 Wigmore, *Evidence*, § 2336 (McNaughton rev. 1961). The presumption is rebutted where it is shown that the communication was not intended to be confidential, or was made to, or in the presence of a third party. *Pereira*, 347 U.S. at 6, 74 S. Ct. at 361; *Wolfle v. United States*, 291 U.S. at 14–17, 54 S. Ct. at 280–81; *Gutridge v. State*, 236 Md. 514, 516, 204 A.2d 557, 559 (1964); *Master v. Master*, 223 Md. 618, 623–24, 166 A.2d 251, 255 (1960); *Metz v. State*, 9 Md. App. 15, 19, 262 A.2d 331, 333 (1970). For example, the fact that a husband knew that his wife could not read without the assistance of a third party would rebut the presumption that he intended a letter which he sent to her to remain confidential. *See Grulkey v. United States*, 394 F.2d 244, 246 (8th Cir. 1968); *State v. Fiddler*, 57 Wash. 2d 815, 820, 360 P.2d 155, 157–58 (Wash. 1961). In another case, a husband left his wife a message on their answering machine, but because the evidence showed that other people lived in their home and had access to the machine, the message could not be intended as confidential between just the spouses. *Wong-Wing v. State*, 156 Md. App. 597, 609–10, 847 A.2d 1206, 1213 (2004).

The text messages exchanged between appellant and his wife were marital communications. Applying the presumption that marital communications are privileged, they are presumed to have been confidential. It is, therefore,

incumbent upon the State to rebut that presumption, and to show that the parties did not intend the communication to have been confidential. In the cases where the court admitted spousal communications, the State presented facts (*e.g.*, the wife's illiteracy, the location and use of the answering machine) that rebutted the presumption of confidentiality.

The State has not rebutted the presumption of a confidential communication. Simply because the communications were over a cell phone in the nature of text messages does not rebut the presumption.[8] The State's argument that any person could have seen the messages is inadequate. Cell phones have

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[8] In a footnote, the State suggests that text messages implicate the internet service provider as a third party to the communication, which rebuts the presumption of confidentiality. Appellant consented to Verizon's privacy agreement, which authorizes disclosure of information pursuant to "subpoenas, court orders or search warrants and as otherwise authorized by law."

This Court has not ruled directly on this issue, and neither have most other jurisdictions. The few courts that touch on this concern have not held that service providers compromise otherwise confidential electronic communications. The United States Court of Appeals for the Sixth Circuit held that emailers have a reasonable expectation of privacy even in emails "that are stored with, or sent or received through a commercial [internet service provider]." *United States v. Warshak*, 631 F. 3d 266, 288 (6th Cir. 2010). Other courts have found emails presumptively confidential, thereby not addressing confidential status. *See Reeves v. State*, 664 S.E. 2d 207, 210 (Ga. 2008); *Fire Truck, Inc. v Emergency One, Inc.*, 134 P. 3d 570, 572–75 (Colo. App. 2006). In accord with these opinions, we conclude that Verizon's provision of service does not rebut the confidentiality of appellant's text messages to his wife.

mechanisms to lock access to texts. Especially given the inculpatory nature of the conversation between appellant and his wife, it was incumbent upon the State to offer some facts and circumstances to rebut the presumption of confidentiality, which the State failed to do. We hold that the trial court abused its discretion in admitting the text messages because they were confidential marital communications.

The admission of the text messages was not, as the State claims, harmless error. While a significant amount of other evidence tied appellant to Luke's injuries, the error cannot be harmless "unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Mazzone*, 336 Md. at 400, 648 A.2d at 988. In *Mazzone*, the erroneously-admitted communications potentially led the jury to inferences that supported the State's case. *Id.* at 400–01, 648 A.2d at 988. In *State v. Enriquez*, 327 Md. 365, 609 A.2d 343 (1992), a privileged marital communication was introduced "to show a consciousness of guilt." *Id.* at 374, 609 A.2d at 347. Each of these introductions was ruled not harmless.

In this case, the State placed great emphasis on the text messages in the trial. The prosecution devoted fifteen percent of its closing argument to repeating the text messages, and claimed in its rebuttal that "[t]he motive is . . . the triggers [, which] are in the text messages." While motive is not an element of the crimes for which appellant was convicted, a jury may consider motive in evaluating the facts and circumstances of the events. Clearly,

the prosecutor thought that motive would assist the jury in evaluating the evidence, as reflected in his closing argument. We cannot say, beyond a reasonable doubt, that the text messages did not contribute to the verdict.

We hold that the inadmissible marital communications were not harmless beyond a reasonable doubt, and constitute reversible error.

JUDGMENTS OF THE CIRCUIT COURT FOR WORCESTER COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION AND A NEW TRIAL. COSTS TO BE PAID BY WORCESTER COUNTY.

U.S. CONST. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or

under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 1257

State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

34 U.S.C. § 20341

Child abuse reporting

Effective: February 14, 2018

(a) In general

(1) Covered professionals

A person who, while engaged in a professional capacity or activity described in subsection (b) on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, shall as soon as possible make a report of the suspected abuse to the agency designated under subsection (d) and to the agency or agencies provided for in subsection (e), if applicable.

(2) Covered individuals

A covered individual who learns of facts that give reason to suspect that a child has suffered an incident of child abuse, including sexual abuse, shall as soon as possible make a report of the suspected abuse to the agency designated by the Attorney General under subsection (d).

(b) Covered professionals

Persons engaged in the following professions and activities are subject to the requirements of subsection (a)(1):

(1) Physicians, dentists, medical residents or interns, hospital personnel and administrators, nurses, health care practitioners, chiropractors, osteopaths, pharmacists, optometrists, podiatrists, emergency medical technicians, ambulance drivers, undertakers, coroners, medical examiners, alcohol or drug treatment personnel, and persons performing a healing role or practicing the healing arts.

(2) Psychologists, psychiatrists, and mental health professionals.

(3) Social workers, licensed or unlicensed marriage, family, and individual counselors.

(4) Teachers, teacher's aides or assistants, school counselors and guidance personnel, school officials, and school administrators.

(5) Child care workers and administrators.

(6) Law enforcement personnel, probation officers, criminal prosecutors, and juvenile rehabilitation or detention facility employees.

(7) Foster parents.

(8) Commercial film and photo processors.

(c) Definitions

For the purposes of this section--

(1) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

(2) the term "physical injury" includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;

(3) the term "mental injury" means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response or cognition;

(4) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;

(5) the term "sexually explicit conduct" means actual or simulated--

> **(A)** sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral- anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin,

breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;

(B) bestiality;

(C) masturbation;

(D) lascivious exhibition of the genitals or pubic area of a person or animal; or

(E) sadistic or masochistic abuse;

(6) the term "exploitation" means child pornography or child prostitution;

(7) the term "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child;

(8) the term "child abuse" shall not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty;

(9) the term "covered individual" means an adult who is authorized, by a national governing body, a member of a national governing body, or an amateur sports organization that participates in interstate or international amateur athletic competition, to interact with a minor or amateur

athlete at an amateur sports organization facility or at any event sanctioned by a national governing body, a member of a national governing body, or such an amateur sports organization;

(10) the term "event" includes travel, lodging, practice, competition, and health or medical treatment;

(11) the terms "amateur athlete", "amateur athletic competition", "amateur sports organization", "international amateur athletic competition", and "national governing body" have the meanings given the terms in section 220501(b) of Title 36; and

(12) the term "as soon as possible" means within a 24-hour period.

(d) Agency designated to receive report and action to be taken

For all Federal lands and all federally operated (or contracted) facilities in which children are cared for or reside and for all covered individuals, the Attorney General shall designate an agency to receive and investigate the reports described in subsection (a). By formal written agreement, the designated agency may be a non-Federal agency. When such reports are received by social services or health care agencies, and involve allegations of sexual abuse, serious physical injury, or life-threatening neglect of a child, there shall be an immediate referral of the report to a law

enforcement agency with authority to take emergency action to protect the child. All reports received shall be promptly investigated, and whenever appropriate, investigations shall be conducted jointly by social services and law enforcement personnel, with a view toward avoiding unnecessary multiple interviews with the child.

(e) Reporters and recipient of report involving children and homes of members of the Armed Forces

(1) Recipients of reports

In the case of an incident described in subsection (a) involving a child in the family or home of member of the Armed Forces (regardless of whether the incident occurred on or off a military installation), the report required by subsection (a) shall be made to the appropriate child welfare services agency or agencies of the State in which the child resides. The Attorney General, the Secretary of Defense, and the Secretary of Homeland Security (with respect to the Coast Guard when it is not operating as a service in the Navy) shall jointly, in consultation with the chief executive officers of the States, designate the child welfare service agencies of the States that are appropriate recipients of reports pursuant to this subsection. Any report on an incident pursuant to this subsection is in addition to any other report on the incident pursuant to this section.

(2) Makers of reports

For purposes of the making of reports under this section pursuant to this subsection, the persons engaged in professions and activities described in subsection (b) shall include members of the Armed Forces who are engaged in such professions and activities for members of the Armed Forces and their dependents.

(f) Reporting form

In every federally operated (or contracted) facility, on all Federal lands, and for all covered individuals, a standard written reporting form, with instructions, shall be disseminated to all mandated reporter groups. Use of the form shall be encouraged, but its use shall not take the place of the immediate making of oral reports, telephonically or otherwise, when circumstances dictate.

(g) Immunity for good faith reporting and associated actions

All persons who, acting in good faith, make a report by subsection (a), or otherwise provide information or assistance in connection with a report, investigation, or legal intervention pursuant to a report, shall be immune from civil and criminal liability arising out of such actions. There shall be a presumption that any such persons acted in good faith. If a person is sued because of the person's performance of one of the above functions, and the defendant prevails in the litigation, the court may order that the plaintiff pay the defendant's legal

expenses. Immunity shall not be accorded to persons acting in bad faith.

(h) Training of prospective reporters

All individuals in the occupations listed in subsection (b)(1) who work on Federal lands, or are employed in federally operated (or contracted) facilities, and all covered individuals, shall receive periodic training in the obligation to report, as well as in the identification of abused and neglected children.

(i) Rule of construction

Nothing in this section shall be construed to require a victim of child abuse to self-report the abuse.

MD Code, Family Law, § 5-705

Reports of suspected abuse or neglect; other persons

Effective: October 1, 2011

Persons required to notify authorities and report suspected instances of abuse or neglect; exceptions

(a)(1) Except as provided in paragraphs (2) and (3) of this subsection, notwithstanding any other provision of law, including a law on privileged communications, a person in this State other than a health practitioner, police officer, or educator or human service worker who has reason to believe that a child has been subjected to abuse or neglect shall notify the local department or the appropriate law enforcement agency.

(2) A person is not required to provide notice under paragraph (1) of this subsection:

(i) in violation of the privilege described under § 9-108 of the Courts Article;

(ii) if the notice would disclose matter communicated in confidence by a client to the client's attorney or other information relating to the representation of the client; or

(iii) in violation of any constitutional right to assistance of counsel.

(3) A minister of the gospel, clergyman, or priest of an established church of any denomination is not required to provide notice under paragraph (1) of this subsection if the notice would disclose matter in relation to any communication described in § 9-111 of the Courts Article and:

(i) the communication was made to the minister, clergyman, or priest in a professional character in the course of discipline enjoined by the church to which the minister, clergyman, or priest belongs; and

(ii) the minister, clergyman, or priest is bound to maintain the confidentiality of that communication under canon law, church doctrine, or practice.

Agency to notify the other agency

(b)(1) An agency to which a report of suspected abuse or neglect is made under subsection (a) of this section shall immediately notify the other agency.

(2) This subsection does not prohibit a local department and an appropriate law enforcement agency from agreeing to cooperative arrangements.

Oral or written report

(c) A report made under subsection (a) of this section may be oral or in writing.

Contents of report

(d)(1) To the extent possible, a report made under subsection (a) of this section shall include the information required by § 5-704(c) of this subtitle.

(2) A report made under subsection (a) of this section shall be regarded as a report within the provisions of this subtitle, whether or not the report contains all of the information required by § 5-704(c) of this subtitle.

2013 MARYLAND CODE COURTS AND JUDICIAL PROCEEDINGS

§ 9-105 - TESTIMONY BY SPOUSES -- CONFIDENTIAL COMMUNICATIONS OCCURRING DURING MARRIAGE

One spouse is not competent to disclose any confidential communication between the spouses occurring during their marriage.