RECORD NO. _____

IN THE
Supreme Court of the United States

JOHN VIGNA,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

APPENDIX

Justin Eisele
Seddiq Law Firm
PO BOX 1127
Rockville, MD 20850
301.513.7832
justin.eisele@seddiqlaw.com

Counsel of Record for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

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Circuit Court for Montgomery County
Case Nos. 130781C & 129932C
Argued: March 9, 2020

IN THE COURT OF APPEALS

OF MARYLAND

No. 55

September Term, 2019

JOHN VIGNA

v.

STATE OF MARYLAND

Barbera, C.J.
McDonald
Watts
Hotten
Getty
Booth
Biran,

JJ.

Opinion by Biran, J.
Watts and Hotten, JJ., concur.

Filed: August 18, 2020

For many years, John Vigna was a popular elementary school teacher in Silver Spring, Maryland. But, as our nation has learned all too well, it is possible for a person to be a popular teacher (or coach or trainer or member of the clergy, etc.) and, at the same time, to sexually abuse children entrusted to his care. According to the evidence the jury heard in this case, Vigna sexually abused several female students while he was their teacher. The evidence showed that Vigna would have these young girls sit in his lap, and then would rub their buttocks and touch their genital areas over their clothes, or otherwise touch the girls for his sexual gratification.

At his trial, Vigna sought to elicit evidence from parents of students and from professional colleagues that, in their opinion, Vigna is the type of person who behaves appropriately with children in his custody or care. The trial judge ruled this evidence inadmissible, reasoning that appropriateness with children in one's custody or care is not a "trait of character" within the meaning of the applicable rule of evidence. However, the trial judge allowed Vigna's character witnesses to testify that Vigna is law-abiding and truthful.

The jury convicted Vigna on nine counts, and the trial judge sentenced Vigna to 80 years of imprisonment, suspending all but 48 years. The Court of Special Appeals affirmed the trial court's evidentiary rulings and upheld Vigna's convictions.

We have not previously considered whether the type of character evidence Vigna sought to introduce at his trial is proper under the Maryland Rules. For the reasons discussed below, we conclude that character evidence of appropriateness with children in one's custody or care (or of similar character traits, such as trustworthiness with children

or sexual morality with respect to children) may be admissible in a criminal case where a defendant is accused of sexually abusing a child. However, we hold that any error by the trial court in excluding such character evidence in Vigna's case was harmless beyond a reasonable doubt. We also reject Vigna's constitutional arguments based on the trial court's evidentiary rulings. Accordingly, we affirm Vigna's convictions.

I

Background

A. Vigna's Career as a Teacher

Vigna was a teacher in the Montgomery County Public Schools ("MCPS") system from 1992 until his dismissal in 2016 following the emergence of the allegations that led to this criminal case. During his tenure with MCPS, Vigna taught grades three through five at Cloverly Elementary School ("Cloverly") in Silver Spring. He also coached baseball and unified bocce at nearby Paint Branch High School, handling the three roles simultaneously before the end of his employment with MCPS.

Vigna was very popular with students and other teachers. Vigna's students adored his affectionate teaching style, and many of them maintained close relationships with Vigna after they left his classroom. Vigna's fellow teachers respected his abilities as a teacher, and several entrusted him with their students when they had to attend to other matters.

According to Vigna, he treated his students like family, which for Vigna included physical displays of affection. He often hugged, kissed, and consoled students during the school day. These interactions with students did not go unnoticed by colleagues and others. Occasionally, other teachers and staff saw Vigna with students on his lap as he sat behind

his desk. On several occasions, these physical contacts prompted concerned observers either to speak with Vigna directly or to alert school officials about his conduct.

Jennifer Grey, a fifth-grade teacher at Cloverly, took the former approach. More than once, Ms. Grey cautioned Vigna that, "especially as a male teacher," he should not "be alone with female students one-on-one," and that he should "keep [his] distance." Another teacher at Cloverly and a close friend of Vigna, David Cline, also cautioned Vigna about engaging students too closely. Ms. Grey and Mr. Cline were not concerned about the possibility of any sexual contact with students; rather, Vigna's colleagues were "looking out for his well-being" by reminding him of professional guidelines and what they "felt was appropriate." In response to Ms. Grey, Vigna on at least one occasion asserted that he was "not doing anything wrong."

On two occasions in 2008, while Vigna was a fifth-grade teacher, Cloverly principal Melissa Brunson[1] became aware of students sitting in Vigna's lap. First, on February 28, 2008, a fire marshal reported to Dr. Brunson that, during a routine inspection, he saw a student sitting on Vigna's lap. Dr. Brunson gave Vigna a verbal warning and counseled him not to have students sit in his lap. Vigna indicated to Dr. Brunson that he understood the problem.

[1] MCPS documents dating from 2013 and earlier, which were introduced as exhibits at Vigna's trial, refer to Cloverly's principal as "Ms." Brunson. At trial, the parties referred to her as "Dr." Brunson. The record does not reflect when Dr. Brunson obtained her doctoral degree. We will use Dr. Brunson's current title in this opinion.

Second, on or about May 29, 2008, a building service worker became upset after he saw a student sitting in Vigna's lap. Vigna pursued the staff member down the hall. According to Vigna, he tried to "explain that the child was upset and that [he] was trying to meet the child's needs at that moment." The loud exchange between Vigna and the building service worker received the attention of nearby staff, including Mr. Cline, who helped to deescalate the situation and took Vigna to Dr. Brunson's office. On June 2, 2008, having received two reports of lap-sitting over a three-month span, Dr. Brunson issued a letter of reprimand to Vigna (the "2008 reprimand"), stating that his "handling of this situation was improper, unprofessional, and must not be repeated." The letter informed Vigna that further incidents could lead to his termination. Vigna signed the 2008 reprimand on June 2, 2008.

To monitor Vigna more easily, Dr. Brunson moved him from a classroom located outside the building to one next to her office. Thereafter, Vigna taught the third grade instead of the fifth grade, although fourth- and fifth-grade students often visited his classroom after dismissal, while they were waiting for their buses to be called. According to Vigna, he remained committed to his "family" style of teaching despite Dr. Brunson's warnings.

During the 2012-13 school year, prompted by a parent complaint, Dr. Brunson requested that MCPS's Office of Human Resources and Development investigate allegations that Vigna "had invited female students to sit on [his] lap, lift[ed] them in the air, and danc[ed] with them during class." During the investigation, Vigna was placed on administrative leave for approximately three weeks. In a statement that Vigna provided in

relation to that investigation, Vigna wrote: "I am going to restrict my activities in the classroom to strictly teaching, counseling and advising students and will make every effort to not have any physical contact at all with my students." The result of the 2012-13 investigation was that Vigna received another letter of reprimand, this time from Larry A. Bowers, the Chief Operating Officer of MCPS (the "2013 reprimand"). Referencing Vigna's two lap-sitting incidents in 2008 and Dr. Brunson's admonition to Vigna at that time, Mr. Bowers wrote, "It is difficult to believe that any teacher, especially a veteran teacher, would not understand what is respectful and professional behavior, even after receiving a reprimand." Mr. Bowers warned Vigna that he needed to "alter [his] interactions with students immediately," and that "[a]ny further instances of such unprofessional behavior may be grounds for more severe disciplinary action up to and including dismissal."

B. The Criminal Investigation and Charges

The criminal charges against Vigna involved four girls and a young woman who all accused him of touching them in a sexual manner while they attended Cloverly.[2] The first of Vigna's former students to identify incidents of sexual abuse was A.C., who had been Vigna's student in third grade during the 2013-14 school year. Teachers knew A.C. as an engaging and attentive student. In February 2016, A.C. was in Ms. Grey's fifth-grade classroom when, during a pilot class on body safety taught by school counselor Heather

[2] We will refer to the victims by their initials to protect their privacy. The five former Cloverly students who testified that Vigna abused them were: friends A.C. and G.G.; L.D., who was an adult at the time of trial; and sisters A.S. and J.S.

Sobieralski, her demeanor changed. For the fifth-grade version of the body safety class, Ms. Sobieralski taught lessons on different types of abuse, starting with physical abuse. Later, she discussed sexual abuse. The PowerPoint slide she showed the class defined sexual abuse as follows: "When someone touches you or asks you to touch them on the private parts of the body (those parts covered by a bathing suit), other than to keep you clean and/or healthy." The following slide identified different types of touches, including "Unsafe/unwanted touch," which "feels uncomfortable, embarrassing or scary."

At about this point in the presentation, Ms. Sobieralski noticed that A.C. was "slumped down in her chair and staring out the window. And eventually she put her head down." Observing the near-30 student class from her desk at the front of the room, Ms. Grey saw the same thing. They both considered this behavior unusual for A.C. During a break in instruction, Ms. Grey pulled Ms. Sobieralski aside to express her concern, and Ms. Sobieralski advised Ms. Grey to check on A.C. after class. When Ms. Grey first approached her, A.C. told Ms. Grey that she was okay, but at the end of the school day about an hour later, A.C. spoke to Ms. Grey again. This time, A.C. brought up Vigna: "You know how we all love Mr. Vigna? Well, he touches us in ways that make[] us feel uncomfortable." Ms. Grey then took A.C. to Ms. Sobieralski's office. After Ms. Sobieralski asked A.C. to explain how Mr. Vigna makes her feel comfortable, A.C. responded, "when he hugs me he touches my butt. And he makes me sit on his lap, and when I try to get up he doesn't let me." A.C. said this activity occurred when she was in Vigna's third-grade class and continued when she regularly went to say goodbye to him in the fourth and fifth grades.

A.C. then met with a forensic social worker, Sara Kulow-Malave, at the Tree House Child Advocacy Center of Montgomery County. There, A.C. described how Vigna made girls feel uncomfortable. She told Ms. Kulow-Malave that Vigna touched her buttocks and made her sit on his lap. A.C. said that Vigna would rub her thighs with his hands and breathed steadily more and more heavily as she sat on his lap. She also stated that when she was on Vigna's lap, she could feel a "hard" part of his body "under her butt." When Ms. Kulow-Malave asked A.C. to show on an anatomical drawing where the hard part of Vigna's body was, she circled the waistline. A.C. told Ms. Kulow-Malave that the first time Vigna made A.C. feel uncomfortable was during her second-grade year, and that the most recent time was just a few days before the body safety class with Ms. Sobieralski.

During her discussion with Ms. Sobieralski and again with Ms. Kulow-Malave, A.C. also claimed that she saw Vigna touch her friend, G.G., inappropriately. G.G. never had Vigna as her primary teacher but would accompany A.C. when she visited his classroom after the final bell of the day. A.C. said that Vigna moved his hand over G.G.'s buttocks while giving her a hug.

On February 12, 2016, the day after her interview with A.C., Ms. Kulow-Malave interviewed G.G. In addition to describing her own encounter with Vigna, G.G. corroborated A.C.'s account of repeated uncomfortable touches. G.G. explained how Mr. Vigna touched them differently during their hugs, and described how Vigna "squeezed" A.C.'s buttocks.

Vigna was removed as a teacher at Cloverly immediately after these allegations of sexual abuse surfaced. A criminal investigation ensued. On June 23, 2016, Vigna was

charged in the District Court of Maryland sitting in Montgomery County with various sex offenses relating to his alleged abuse of A.C. and G.G. In July 2016, the charges were forwarded to the Circuit Court for Montgomery County.

The investigation continued, and three more victims came forward. L.D., a young adult, learned about the charges against Vigna through a Facebook group of Cloverly alumni. She then contacted police and reported incidents of sexual abuse by Vigna between August 2001 and June 2002, when Vigna was her fourth-grade teacher. According to L.D., she and Vigna interacted frequently during her time at Cloverly. L.D. alleged that Vigna would sit her and her friend on his lap, and touch her on her crotch. L.D. described one particular instance of abuse while she was sitting on Vigna's lap:

> [H]e was talking to some boys across the desk, and every time he talked, I felt his finger on my crotch. And I remember this so well, even though it was so many years ago, because I felt sexually aroused when that happened. I felt like that tingly sensation, and that's when I knew something wasn't right.

According to L.D., Vigna would engage in this touching activity when there was a lot of commotion in the room, as children waited for their buses. L.D. said that other children could not see Vigna touch her because their view was blocked by his desk. Vigna had L.D. kiss him on his cheek during her visits prior to leaving for the school bus. She also described one instance when she had to change her clothes, and Vigna said she could use the closet in his classroom. They were the only two people in the room at the time, and L.D. remembered feeling uncomfortable as the closet door was left ajar.

Two more of Vigna's former students came forward with similar accounts. A.S., a sixth-grader at the time of the trial, reported that when Vigna was her third-grade teacher,

he touched her weekly, or perhaps even more often, in ways that made her uncomfortable. In particular, A.S. said that Vigna had her sit on his lap at his desk while the rest of the class faced away to watch a video. On multiple occasions, he then touched her genitals, buttocks, and chest area over her clothes. Sometimes he kissed the top of her head and asked her for a kiss on the cheek. According to A.S., Vigna told her that he loved her and that she was beautiful while he held her on his lap.

J.S., who is A.S.'s sister and one year younger, claimed that, when Vigna was her third-grade reading teacher, he would "call me over to the back table, just me and him, and then he would make sure I sat right next to him, and then he would start hugging me. He would start touching my butt."

In a superseding indictment filed on December 1, 2016, the State added charges related to the alleged sex abuse of L.D., A.S., and J.S. Ultimately, the State proceeded on two counts from the first indictment, which were consolidated with 12 counts contained in the second indictment. The charges included multiple counts of sexual abuse of a minor[3] and third-degree sex offense.[4]

[3] "A … person who has … temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor." Md. Code Ann., Crim. Law ("CR") § 3-602(b)(1) (2012). With respect to L.D., the indictment charged a violation of Article 27, § 35(C)(b)(1), of the Maryland Code, the predecessor statute to CR § 3-602(b), which was in effect at the time that Vigna allegedly abused L.D.

[4] "A person may not: … engage in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim." CR § 3-307(a)(3). At the time of Vigna's alleged abuse of L.D., this offense was codified at Article 27, § 464(A) of the Maryland Code.

C. Pretrial Hearing on Character Evidence

Prior to trial, Vigna filed a motion *in limine* seeking a ruling allowing him to introduce pertinent character evidence under Maryland Rule 5-404(a)(2)(A), which provides: "An accused may offer evidence of the accused's pertinent trait of character. If the evidence is admitted, the prosecution may offer evidence to rebut it." At a pretrial hearing on this motion on June 5, 2017, Vigna's counsel argued that Vigna should be allowed to introduce character evidence of three pertinent traits: truthfulness, law-abidingness, and appropriate interaction with children in his custody or care. The State did not challenge Vigna's ability to introduce evidence as to his character for truthfulness and law-abidingness. However, the State objected to the admission of character evidence of Vigna's appropriateness with children in his custody or care. While Vigna acknowledged that it would be improper to have former students specifically testify that Vigna did not abuse them, he argued that he should be allowed to introduce "classic reputation" and/or "classic opinion" evidence concerning his "character for interacting appropriately" with children in his custody or care.

The trial court ruled that evidence concerning Vigna's character for the traits of truthfulness and being law-abiding would be admissible. As for Vigna's character for appropriateness with children in his custody or care, the court commented that, unlike the traits of honesty, peacefulness, and law-abidingness, which "span across all walks of life and all categories of interaction with people," the trait proffered by Vigna seemed too "unique and specific and limited … to be considered a character trait." The court reserved ruling with respect to the admissibility of this third category of character evidence.

D. The Trial and Appeal

Vigna's jury trial began on June 6, 2017, in the Circuit Court for Montgomery County, and concluded on June 9, 2017. The five victims discussed above all testified in the State's case-in-chief. Each victim described how Vigna touched her buttocks and/or genital area. The State called the social workers who interviewed A.C., G.G., A.S., and J.S., and played for the jury the videos of those interviews. Ms. Grey testified about having seen Vigna with students in his lap a "handful of times." In addition, over Vigna's objection, Dr. Brunson testified about the circumstances that led to Vigna's prior discipline, and the court admitted both the 2008 reprimand and the 2013 reprimand as exhibits. The court admitted this testimony and the letters of reprimand under Maryland Rule 5-404(b).[5] The court found that this evidence was admissible to demonstrate Vigna's intent, knowledge, and absence of mistake.

Vigna testified in his own defense, and denied that he ever touched any of his students for sexual gratification. He claimed that touching a student inappropriately was "simply against the fiber of [him]." He acknowledged that he had often hugged students, had them sit on his lap, and told them that he loved them. He claimed that his teaching style, which included these types of displays of affection, was the result of having grown up in a large Italian family that emphasized physical affection. He explained that his

[5] "Evidence of other crimes, wrongs, or acts … is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." Md. Rule 5-404(b).

teaching philosophy included treating a class like a family and the students as if they were his own children. Vigna testified that he made an effort to change his teaching style after he was reprimanded in 2013, but that the students continued to "hop on [his] knee" and initiate hugs with him, and that he was not going to push them away. Vigna attributed any contact that a student could have interpreted as sexual to be the result of an accidental touching.

In addition to testifying himself, Vigna called nine witnesses in his defense case. Seven of these were character witnesses. They included Dr. Brunson's predecessor as the Cloverly principal; fellow Cloverly teachers; parents of former female students in Vigna's classes; a fellow coach and the athletic director at Paint Branch High School; and Vigna's 12-year-old niece.[6] Prior to these character witnesses testifying, the trial judge took up the question on which he had reserved ruling, i.e., whether appropriate interaction with children is a proper character trait. The court concluded that it is not:

> I think that the proper character category would be character for … lawfulness or law[-]abiding citizen, something like that. Because the other one seemed so specific and so – it doesn't seem like a character trait to me. It seems more like – it seems like it's too narrow and too specific to be a character trait. So, but I think the more general notion of that request is that Mr. Vigna is generally a law-abiding person or I think that's more consistent with a character trait, which is what the rule permits. So to that extent, I'll grant the defendant's motion to permit character evidence on that character trait.

[6] The other two defense witnesses, who were teachers at Cloverly, testified as fact witnesses to circumstances that called into question the accuracy of some of the victims' testimony.

The court also confirmed that the character witnesses would be permitted to testify as to Vigna's character for truthfulness.

Six of the seven character witnesses testified to their opinion that Vigna possessed a character for being law-abiding. Those character witnesses provided extensive testimony concerning Vigna's interactions with children in his custody or care in the course of opining as to his law-abidingness. For example, Janet Lopez, the principal of Cloverly from 2004 to 2007, testified that she made unannounced classroom visits and "saw [Vigna] with children every day." Based on her observations, Ms. Lopez opined that Vigna was law-abiding.

Kristen Delikat, a former colleague of Vigna's at Cloverly for eight years, testified that she worked closely with Vigna when she was a reading specialist. Ms. Delikat often observed Vigna in his classroom. Ms. Delikat testified that she never saw Vigna touch or put a student in his lap. She, too, opined that Vigna was a law-abiding person.

The Paint Branch athletic director, Heather Podesek, testified that she knew Vigna from his work as a bocce coach and his volunteering as a baseball coach, as well as Vigna's service as the Vice President of the Paint Branch Athletic Association. Ms. Podesek testified that she would often watch Vigna's interaction with his players and the student coaches, and saw Vigna's "positive interactions . . . with his student athletes." Based on her years of knowledge of, and experience with, Vigna, Ms. Podesek also opined that he was a law-abiding person.

Jill Doll, the parent of two girls who had been in Vigna's fifth-grade classes in the 2006-07 and 2009-10 school years, testified about her interactions with Vigna as a parent

volunteer and a substitute teacher. She told the jury that she had seen Vigna interacting with students and trusted him with them, noting that this included trusting him "with the lives of [her] children."

Irena Nalls, whose daughter was in Vigna's third-grade class in 2014-15, testified that, as a room parent, she often visited Vigna's classroom. She assisted with and observed various parties in Vigna's classroom, including parties for Halloween, Valentine's Day, and the end of the school year. Ms. Nalls explained that she would stay in the room after these parties to help clean up while the children were still in the classroom before dismissal. Based on her experiences and observations, Ms. Nalls also opined that Vigna was law-abiding.

Terry Conrad, a parent whose daughter had been in Vigna's class and who coached youth sports and high school baseball with Vigna, testified that Vigna was law-abiding and that he trusted Vigna "with [his] life."

Vigna's 12-year-old niece testified that, after her father died when she was in the third grade, Vigna was like a father to her. She spent time with Vigna and trusted him. She further testified that she saw Vigna with other children when he was a parent chaperone on her field trips. She provided her opinion that Vigna obeyed the law.

The character witnesses also testified to their opinion that Vigna was truthful.[7]

[7] In its rebuttal case, the State called Mr. Cline and recalled Ms. Grey and elicited evidence concerning specific instances of alleged untruthfulness by Vigna, as permitted under Maryland Rule 5-404(a)(2)(A). In addition, in an effort to rebut the character evidence concerning Vigna being law-abiding, the State elicited testimony that Vigna had smoked marijuana several times.

The jury found Vigna guilty on nine of the 14 counts with which he was charged. The circuit court subsequently sentenced Vigna to 80 years in prison, with all but 48 years suspended.

The Court of Special Appeals affirmed Vigna's convictions. *Vigna v. State*, 241 Md. App. 704 (2019). As pertinent here, the intermediate appellate court held that: (1) in resolving a question of first impression in Maryland, "appropriate interaction with children" is not a pertinent character trait under Rule 5-404(a)(2)(A); and (2) the circuit court's evidentiary rulings did not deprive Vigna of his right to a fair trial under the Sixth Amendment to the United States Constitution.

On September 24, 2019, Vigna filed a petition for *certiorari*. On November 6, 2019, we granted Vigna's petition. 466 Md. 311 (2019). We agreed to review the following questions (which we paraphrase here slightly):

I. Did the Court of Special Appeals err by contradicting the majority of other jurisdictions in holding that appropriate interaction with children is not a pertinent character trait under Maryland Rule 5-404(a)(2)(A)?

II. Did the Court of Special Appeals err when it failed to recognize that denying Vigna the ability to introduce relevant character evidence, while at the same time allowing the State to introduce non-criminal "bad acts" character evidence, denied Vigna the right to a fair trial under the Sixth Amendment of the United States Constitution?

II

Standard of Review

Although an evidentiary ruling, including the decision to admit or exclude character evidence, is typically reviewed for abuse of discretion, *see, e.g., Devincentz v. State*, 460 Md. 518, 539 (2018), in this case the circuit court excluded Vigna's proffered character evidence based on its determination that appropriate interaction with children in one's custody or care is "too narrow and too specific to be a character trait" under Rule 5-404(a)(2)(A). The Court of Special Appeals affirmed the circuit court, framing the question as whether the proffered character evidence was relevant to the specific crimes with which Vigna was charged. *See Vigna*, 241 Md. App. at 718. The Court of Special Appeals considered that to be a question of statutory interpretation requiring *de novo* review. *Id.* at 717. We agree with the Court of Special Appeals that *de novo* review is appropriate for this question. *See Williams v. State*, 457 Md. 551, 563 (2018) (contrasting the decision whether a piece of evidence is relevant, which is a legal conclusion reviewed *de novo*, with the decision to admit relevant evidence, which is reviewed for abuse of discretion). We also review constitutional claims *de novo*. *See, e.g., State v. Cates*, 417 Md. 678, 691 (2011); *Schisler v. State*, 394 Md. 519, 535 (2006).

III

Discussion

Vigna contends before us that the circuit court improperly excluded the proffered evidence concerning his character for appropriate interaction with children in his custody or care, and that this error was not harmless beyond a reasonable doubt. In addition, Vigna

asserts that the circuit court's evidentiary rulings violated his constitutional rights to due process and a fair trial.[8]

We hold that appropriateness with children in one's custody or care may be a "pertinent trait of character" within the meaning of Rule 5-404(a)(2)(A). However, we conclude that any error in the circuit court's exclusion of such evidence in Vigna's case was harmless beyond a reasonable doubt. As for Vigna's constitutional arguments, Vigna abandoned his Sixth Amendment claim and failed to preserve a due process claim for appellate review. In any event, both constitutional claims lack merit.

A. Appropriateness with Children in One's Custody or Care May Be a Pertinent Character Trait for Purposes of Maryland Rule 5-404(a)(2)(A).

1. Character Evidence under Maryland Rule 5-404(a)

Maryland Rule 5-404(a)(1) provides that "evidence of a person's character or character trait is not admissible to prove that the person acted in accordance with the character or trait on a particular occasion." However, there are exceptions to this rule. As pertinent here, a defendant in a criminal case "may offer evidence of [his or her] pertinent trait of character. If the evidence is admitted, the prosecution may offer evidence to rebut it." *Id.* § 5-404(a)(2)(A).[9]

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[8] In the Court of Special Appeals, Vigna also asserted claims of evidentiary error relating to the admission of the 2008 and 2013 reprimands under Maryland Rule 5-404(b), as well as the admission of A.C.'s statements to Ms. Sobieralski under Maryland Rule 5-802.1(d), which is a hearsay exception for a "prompt complaint of sexually assaultive behavior to which the declarant was subjected." The intermediate appellate court rejected these contentions, and Vigna did not seek further review of those questions in this Court.

[9] The Rule also contains exceptions that allow: (1) a criminal defendant, in certain circumstances, to offer evidence of an alleged crime victim's pertinent trait of character,

Maryland Rule 5-404 derives from its similarly numbered federal counterpart, Federal Rule of Evidence 404. The original Advisory Committee Note to Federal Rule of Evidence 404(a) explained that

> [c]haracter questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations [include] … the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405,[10] immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

We are concerned here with a defendant's effort to elicit "circumstantial" character evidence. Specifically, Vigna argues that a defendant, who has been accused of sexually abusing a child in his custody or care, should be permitted to introduce evidence of his

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subject to rebuttal evidence being introduced by the prosecutor, *id.* § 5-404(a)(2)(B); (2) a prosecutor to offer evidence in a homicide case of an alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor, *id.* § 5-404(a)(2)(C); and (3) a party in any type of case to offer evidence, under certain circumstances, "of the character of a witness with regard to credibility," *id.* § 5-404(a)(3).

[10] The Maryland Rules also include a counterpart to Federal Rule of Evidence 405, which governs the methods of proof a proponent of character evidence may use. As pertinent here, Maryland Rule 5-405 provides: "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct."

character for being appropriate in interactions with children in his custody or care, so that he may then ask the jury to infer from such evidence that it is less likely he committed the charged offense.

This Court has not previously considered whether evidence concerning the character of a defendant for appropriateness with children (or similar traits) may be admissible in a criminal case where the defendant is charged with a sex crime against a child. To help inform our resolution of this question, we examine similar cases from other jurisdictions.

2. Case Law Concerning Character Evidence in Child Sex Abuse Prosecutions

The majority of the out-of-state courts that have considered this issue have held that appropriate interaction with children, sexual morality, and other similar formulations of traits relating to sexual disposition, may be pertinent character traits in child sex abuse cases. *See State v. Rothwell*, 294 P.3d 1137, 1143 (Idaho Ct. App. 2013) (holding that "character traits relating to a defendant's sexual morality with children are pertinent"); *State v. Enakiev*, 29 P.3d 1160, 1163 (Or. Ct. App. 2011) ("Evidence of a person's character with respect to sexual propriety evinces that person's propensity to act in a sexually proper manner," and therefore may be admissible as a pertinent trait in a prosecution for a sex crime); *State v. Rhodes*, 200 P.3d 973, 976 (Ariz. Ct. App. 2008) (holding that defendant's "sexual normalcy, or appropriateness in interacting with children, is a character trait, and one that pertains to charges of sexual conduct with a child"); *State v. Hughes*, 841 So. 2d 718, 723 (La. 2003) (*per curiam*) (in case where defendant was charged with aggravated rape and other offenses involving child molestation, holding that "a defendant may present evidence of his or her reputation in the community as a moral person and for safe and

proper treatment of young children"); *People v. McAlpin*, 812 P.2d 563, 575-76 (Cal. 1991) (holding that character witnesses should have been permitted to testify to opinion that defendant was not "a person given to lewd conduct with children" and that he had a reputation for "normalcy in his sexual tastes," which included not having "a reputation for being sexually attracted to young girls"); *State v. Benoit*, 697 A.2d 329, 331 (R.I. 1997) (where defendant was convicted of child molestation sexual assault charges, remanding case to trial court to consider whether proffered character witness had sufficient basis to provide an opinion concerning defendant's "trustworthiness with children or other pertinent character traits"); *State v. Hallman*, 379 S.E.2d 115, 117 (S.C. 1989) (trial court erred by excluding character evidence of defendant's "morality" in prosecution for sexual offenses against a minor); *see also Wheeler v. State*, 67 S.W.3d 879, 882 (Tex. Crim. App. 2002) (noting that defendant "was entitled to proffer evidence of his good character (or propensity) for moral and safe relations with small children or young girls"); *State v. Griswold*, 991 P.2d 657, 663 (Wash. Ct. App. 2000) (in case where defendant was charged with third degree child molestation, stating that "sexual morality is a pertinent character trait"); *State v. Miller*, 709 P.2d 350, 353-54 (Utah 1985) (where defendant was accused of sexually abusing a child, noting that defendant was permitted to introduce "reputation or opinion testimony to prove good moral character"); *McMullin v. State*, 486 S.W.3d 818, 820-21 & n.1 (Ark. Ct. App. 2018) (citing *Rothwell* for the proposition that "a relevant trait of good character could be proved by reputation or opinion evidence," which the trial court had allowed the defendant to do; but affirming the trial court's exclusion of evidence of

specific instances of conduct to prove the trait of "sexual morality with respect to minors") (cleaned up).

A minority of courts, on the other hand, have reasoned that character traits similar to the trait at issue here are not "pertinent" in child sex abuse prosecutions, because sex crimes generally occur in private. Thus, according to these courts, evidence of a defendant's reputation in the community for appropriate interaction with children, based on public observation, does not make it more likely that the defendant is innocent of a sex crime he is alleged to have committed in private. *See State v. Jackson*, 730 P.2d 1361, 1364 (Wash. App. Ct. 1986) ("The crimes of indecent liberties and incest concern sexual activity, which is normally an intimate, private affair not known to the community. One's reputation for sexual activity, or lack thereof, may have no correlation to one's actual sexual conduct.")[11]; *Hendricks v. State*, 34 So. 3d 819, 822, 825-26 (Fla. Dist. Ct. App. 2010) (in child molestation case, affirming exclusion of evidence that defendant had an "excellent" reputation for sexual morality; because "a person's tendency, or lack thereof, to commit acts of child molestation is not something that a community tends to have knowledge of, testimony concerning a person's reputation for having such a trait is inherently unreliable and distinguishable from traditionally admissible reputation evidence"); *State v. Graf*, 726

[11] In *State v. Griswold*, cited above, a different Washington intermediate appellate division court disagreed with *Jackson*. *See Griswold*, 991 P.2d at 663. The *Griswold* Court suggested that the Washington Supreme Court's holding concerning a character evidence jury instruction in the post-*Jackson* case of *State v. Thomas*, 757 P.2d 512 (1988), indicated that the state's highest court approved of the type of character evidence *Jackson* had not allowed. To date, the Washington Supreme Court has not resolved this split in Washington's intermediate appellate courts.

A.2d 1270, 1274-75 (N.H. 1999) (in sexual assault case involving a minor victim, relying on *Jackson* to hold that proffered evidence that defendant was "not the type of person to sexually assault or to take advantage of children" was irrelevant and, therefore, properly excluded at trial).

In *Rothwell*, the case upon which Vigna most relies, the Court of Appeals of Idaho considered the majority and minority lines of cases on this question and adopted the majority position, rejecting the argument that the secretive nature of child sexual abuse renders character evidence of sexual morality inadmissible:

> We conclude the majority rule is correct. Because character traits relating to a defendant's sexual morality with children are pertinent, or relevant, in this type of case, such evidence is admissible under I.R.E. 404(a)(1). We recognize that sexual abuse is usually secret behavior that would not be observed by others, and therefore the opinion or reputation evidence about a defendant's trustworthiness with children may be of marginal persuasiveness. The same can be said, however, of many types of criminal activity. It appears that Rule 404(a)(1) was nevertheless intended to allow an accused the opportunity to present evidence of good character that is pertinent to the nature of the charged offense. The unlikelihood that the character witnesses would have been in a position to witness criminal conduct of the defendant goes to the weight of character evidence, not its admissibility.

294 P.3d at 1143. The *Rothwell* Court confirmed that a defendant who seeks to introduce such evidence through a witness first must establish that the witness has a sufficient foundation of knowledge to opine or provide reputation evidence about the defendant's sexual morality with children. *Id.* at 1143-44. In addition, the Court noted that a trial court retains the authority to exclude such character evidence under Idaho's equivalent to

Maryland Rule 5-403,[12] if the trial court finds that the probative value of the character evidence is substantially outweighed by the danger of, among other things, unfair prejudice, confusing the issues, or misleading the jury. *Id.* at 1144.

3. A Blanket Rule of Exclusion of Character Evidence of Appropriateness with Children in One's Custody or Care Is Erroneous.

Like the *Rothwell* Court, we adopt the majority position among the courts around the country that have considered this question, and hold that evidence of a defendant's character for appropriateness with children in his or her custody or care (or a similarly worded trait) may be admissible in a case where the defendant is charged with sexual abuse of a minor or a similar crime against a child.

The Court of Special Appeals opted for the minority position, based on its view that such character evidence can never be relevant in a child sex abuse case. *See Vigna*, 241 Md. App. at 719-24. The intermediate appellate court reached this conclusion for two reasons. First, the court accepted the reasoning of *Jackson* and *Hendricks* that, due to the "secretive nature of sexual crimes, and sexual activity in general, a defendant's reputation for sexual activity, or the lack thereof, [bears] no correlation to the likelihood that they committed the crimes charged." *Id.* at 720. In this regard, the court observed that, "[u]nlike one's reputation for honesty or peacefulness, traits that might be noticed by the community,

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

whether one secretly molests children or does not would not be openly exhibited." *Id.* at 721.

Second, the Court of Special Appeals observed that sexual predators often gain special access to children for the very reason that they are able to appear "appropriate" (and trustworthy, moral, etc.) in their interactions with children:

> Sexual predators are "not instantly recognizable as the 'dirty old man in the raincoat.'" Anne-Marie McAlinden, *Setting 'Em Up: Personal, Familial, and Institutional Grooming in the Sexual Abuse of Children*, 15 SOC. AND LEGAL STUD. 339, 348 (2006). They blend into the community and often stand in trust relationships—coaches, clergy, teachers, physicians, or family members—with their victims. *Id.* Offenders "groom" victims through these relationships and "skillfully manipulate a child into a situation where he or she can be more readily sexually abused and is simultaneously less likely to disclose." *Id.* at 346. Recent news accounts demonstrate how offenders exploit trust relationships, not only with children but also their parents and the community at large, to gain access to victims. Before these allegations became public, there undoubtedly were colleagues, parents, and other children who could have testified honestly that they believed those abusers were appropriate with children and much beloved by the community for the strong relationships they formed with them.
>
> To admit a community member's opinion about a defendant's reputation for propriety with children would fail to "consider that sex offenders may [ ] groom not just the child but also their family or the wider community as a necessary prerequisite to gaining access" to child victims. *Id.* at 341. In this way, they "ingratiate themselves with children and infiltrate themselves into unsuspecting ... communities.... To do this successfully, they must pass themselves off as being very nice, usually, men who simply like children." *Id.* at 348. This is not to suggest that teachers, clergy, or other adults with close relationships with children should inherently be regarded with suspicion, or that their close relationships with children suggest impropriety with children. But an adult's public interaction with children under his care doesn't make it any more or less likely that the alleged victims were abused by him privately. And because it's not relevant, it's not admissible under Rule 5-404(a)(2)(A).

Vigna, 241 Md. App. at 722-23 (footnotes omitted).

We disagree with the Court of Special Appeals' reliance on *Jackson* and *Hendricks.* Rather, we agree with the *Rothwell* Court that "[t]he unlikelihood that the character witnesses would have been in a position to witness criminal conduct of the defendant goes to the weight of character evidence, not its admissibility." 294 P.3d at 1143. To be sure, child sexual abusers do not usually commit their crimes in the view of others in the community from whom character witnesses are drawn.[13] But, as the Court observed in *Rothwell*, the same can be said of other cases in which character evidence is routinely admitted. *Id.* For example, it is common for a defendant accused of a fraud offense to offer opinion and reputation testimony about the defendant's character for honesty. *See, e.g.*, *Grant v. State*, 55 Md. App. 1, 39 (1983) (noting that a defendant's "reputation for truth and veracity would be relevant upon the trial of a charge such as perjury, false pretenses, or embezzlement"); *In re Sealed Case*, 352 F.3d 409, 413 (D.C. Cir. 2003) (evidence of a defendant's character for truthfulness and honesty is admissible in cases involving fraud or false statements). In such cases, prosecutors frequently elicit on cross-examination that the character witness did not work in the defendant's allegedly fraudulent company or otherwise have any knowledge about the transactions at issue in the indictment. Such cross-examination often is powerful, resulting in the proffered character evidence having

[13] However, as Vigna points out, there have been well publicized incidents in which colleagues of sexual predators allegedly became aware of the conduct at the time it was happening. *See, e.g.*, Tom Winter, Hannah Rappleye & Tracy Conner, *Sandusky Case Bombshell: Did 6 Penn State Coaches Witness Abuse?*, NBC News (May 6, 2016), available at https://www.nbcnews.com/news/us-news/sandusky-case-bombshell-did-6-penn-state-coaches-witness-abuse-n569526 (accessed on Aug. 3, 2020), archived at https://perma.cc/7GGZ-9JSY.

"marginal persuasiveness" to the jury. *Rothwell*, 294 P.3d at 1143. However, we certainly cannot say that such challenged character evidence – or the character evidence that Vigna wanted to elicit in this case – will never have any relevance to a properly instructed jury.

In addition, although we understand that child sex abusers frequently engage in "grooming" activity – with respect to child victims, as well as to their parents and other adults in the community – it does not follow that evidence that an alleged abuser has the character of appropriately interacting with children is categorically irrelevant. As the Court of Special Appeals correctly observed, not all close relationships between children and "teachers, clergy, or other adults … suggest *impropriety*." *Vigna*, 241 Md. App. at 723 (emphasis in original). Indeed, most adults in positions of trust with children undoubtedly choose to occupy those positions because they want to help children, not abuse them. For this reason, we believe that the Court of Special Appeals' reliance on the grooming activity of *convicted* child sexual abusers to prevent an *accused* child sexual abuser from introducing character evidence of his appropriateness with children encroaches on the latter's presumption of innocence. This we cannot allow. *See, e.g., Montgomery v. State*, 292 Md. 84, 91 (1981) (listing the presumption of innocence among the "bedrock characteristics" that "are indispensable to the integrity of every criminal trial"), *overruled on other grounds by Unger v. State*, 427 Md. 383 (2012); *see also* Rinat Kitai, *Presuming Innocence*, 55 Okla. L. Rev. 257, 265 (2002) ("This presumption [of innocence prior to conviction] is a general one, granted equally to every person even before the onset of the investigation and trial, and independent of prior conditions such as her status, the amount of incriminating evidence, or her criminal history.").

However, the State is not powerless when it comes to challenging the probative value of character evidence of appropriateness with children (as well as other positive traits such as law-abidingness and truthfulness) where there is evidence that the defendant engaged in grooming conduct not just toward children, but also toward the community as a whole. To the extent the State possesses such evidence, the State may seek to introduce expert testimony on such grooming to assist the jury in understanding its significance. *See Coates v. State*, 175 Md. App. 588, 607 (2007) (expert witness "described the process of 'grooming,' in which an abuser gains a child's trust through special attentiveness"); *see also United States v. Romero*, 189 F.3d 576, 585 (7th Cir. 1999) (affirming admission of expert testimony on the "modus operandi of modern child molesters").[14] This, in turn, may provide the jury with insight as to how someone accused of a horrible crime against a child may nevertheless have a stellar reputation in the community for appropriate interaction with children and other positive traits of character. In addition, the prosecutor may cross-examine the character witness concerning specific uncharged acts of inappropriateness. *See* Md. Rule 5-405(a). And, as discussed above, the prosecutor often will score points on cross-examination of such a character witness, even without going into specific acts of inappropriateness.

[14] This observation should not be taken to suggest that expert testimony is always necessary before the State (or the defense) may refer in closing arguments to evidence of a defendant's conduct as "grooming" or the lack thereof. *See Dandass v. State*, 233 So. 3d 856, 868-69 (Miss. Ct. App. 2017) (holding that prosecutor's reference in closing argument to defendant's "grooming" of victim, without supporting expert testimony, was not improper in light of the victim's testimony). We express no opinion on the factors that would permit (or require) expert testimony on "grooming" in any particular case.

Although the juries in many child sex abuse cases probably will not find reasonable doubt of guilt after hearing character evidence of the defendant's appropriateness with children, it does not follow that there is no relevance to such character evidence. While not all people who have reputations for appropriate interaction with children in their custody or care refrain from sexually abusing some of those children, we expect that almost all people in positions of trust toward children who *do* refrain from sexually abusing those children, over time, will have built reputations in their community for appropriateness with children. Although research suggests that false allegations of child sexual abuse are very rare,[15] they have occurred.[16] For an innocent teacher, coach, or other person occupying a position of trust who has been falsely accused of child sexual abuse, the ability to introduce opinion or reputation evidence from respected members of the community about the defendant's appropriateness with children in his custody or care may not only be relevant, but also crucial to avoid a miscarriage of justice. We have confidence that juries will be able to appropriately weigh such character evidence in conjunction with all the other relevant evidence they receive in child sexual abuse cases.

[15] *See, e.g.*, The Leadership Council on Child Abuse & Interpersonal Violence, *How Often Do Children's Reports of Abuse Turn Out to Be False*, available at http://www.leadershipcouncil.org/1/res/csa-acc.html (summarizing several studies that all concluded such false allegations occurred in single-digit percentage ranges) (accessed on Aug. 4, 2020), archived at https://perma.cc/T3KP-GJJT.

[16] *See* Caroline Hendrie, *Living Through a Teacher's Nightmare: False Accusation*, Education Week, https://www.edweek.org/ew/articles/1998/12/09/15false.h18.html, Dec. 9, 1998 (accessed on Aug. 4, 2020), archived at https://perma.cc/6A7K-6SQH.

In sum, we decline to adopt a *per se* rule that character evidence of appropriateness with children in one's custody or care (or similar traits) is never relevant in a criminal case where the defendant is charged with a sex crime against a child. Rather, as we discuss in the next section, the trial court must conduct an individualized, three-part analysis to determine whether such evidence is admissible.

4. The Test for Admissibility of Character Evidence Under Rule 5-404(a)(2)(A)

When the State objects to a defendant's proffer of opinion or reputation evidence under Rule 5-404(a)(2)(A) to establish his or her character for a particular trait, the trial court must determine whether: (1) the particular quality identified by the defendant is a "trait of character" within the meaning of Rule 5-404(a)(2)(A); and (2) evidence of such a trait of character is "pertinent," i.e., relevant to the trier of fact's consideration of the charged offenses. If the court answers both of these questions in the affirmative, then the court (if requested by the State) should (3) analyze the proffered evidence under Rule 5-403 to determine whether its probative value is substantially outweighed by the danger of unfair prejudice or another circumstance listed in that Rule.[17]

a. Whether a Quality Is a "Trait of Character"

Rules 5-404 and 5-405 do not define what constitutes "character" or a "trait of character"; neither do their counterparts in the Federal Rules of Evidence, in what one

[17] A pretrial motion *in limine* is typically the best way to address the admissibility of character evidence. That is the approach the parties took in this case. However, if neither party requests a pretrial ruling on the admissibility of character evidence, if the State objects to (or requests an offer of proof regarding) character evidence the defendant seeks to admit under Rule 5-404(a)(2)(A), the trial court should conduct this analysis outside the presence of the jury.

commentator has said "is perhaps a nod to the impracticality of defining [character]." Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 Yale L.J. 1912, 1923 (2012). The Advisory Committee Notes to Federal Rule of Evidence 405 at the time of its adoption "are just as imprecise, listing several examples of character traits, such as honesty, peacefulness, and violence, and then stating generally that 'character is defined as the kind of person one is.'" *Id.* There is scant additional guidance as to what constitutes a "trait of character" for purposes of admitting character evidence in a criminal trial. However, a proffered character trait cannot be "so diffuse as to be merely synonymous with good character generally, which is not admissible." *United States v. Angelini*, 678 F.2d 380, 381 (1st Cir. 1982). As the Court in *Angelini* explained, Federal Rule of Evidence 404(a)(2)(A), from which Maryland Rule 5-404(a)(2)(A) is derived,

> permits evidence of traits only; an earlier draft was modified, deleting language that would have allowed the introduction of evidence of a defendant's character generally. *See* Advisory Committee's Note to Rule 404; Proposed Federal Rules of Evidence 4-04(a)(1), 46 F.R.D. 161, 227 (1969). Under the common law, there was a similar distinction made between general good character and particular traits of character. *See* McCormick, Evidence § 191, at 455 (2d ed. 1972); 1 Wigmore, Evidence § 59, at 458; 22 Wright & Graham, Federal Practice and Procedure: Evidence § 5236, at 382.

Angelini, 678 F.2d at 382. Rule 404 "was intended to restate the common law rule." *Id.* (citing 2 Weinstein & Berger, Evidence ¶ 404(05) (1981)).

We determine that, at the outset of a hearing regarding the admissibility of character evidence under Rule 5-404(a)(2)(A), the defendant must identify with particularity the quality that the defendant contends is a "trait of character," and must articulate how the proffered trait sheds light on the "kind of person" he or she is. Generally, this should not

be a difficult burden to meet. As long as the defendant's proffered character trait is sufficiently specific to distinguish it from "good character generally," the defendant will pass this first part of the test.

We have no difficulty concluding that the quality of being appropriate with children (or similar formulations, such as trustworthiness with children, or sexual morality with respect to children) can shed light on the type of person one is. *See Enakiev*, 29 P.3d at 1163 ("Evidence of a person's character with respect to sexual propriety evinces that person's propensity to act in a sexually proper manner in all the varying situations of life. In that sense, sexual propriety is materially indistinguishable from … other examples of character traits," such as truthfulness, honesty, temperance, carefulness, or peacefulness, "and is properly deemed a character trait.") (citation omitted); *Hughes*, 841 So. 2d at 722 (evidence of a defendant's lack of sexual deviancy, or lack of interest in children as the occasion of sexual desire, "constitutes evidence of character because it reveals the '*actual* moral or psychical *disposition*' of the person") (quoting 1 Wigmore, Evidence, § 52, at 448 (3d ed. 1940) (emphasis in original)). Thus, when a defendant seeks to offer evidence of his character for appropriateness with children in his custody or care, or a similar trait involving a disposition toward children, the trial court should proceed to the pertinence, i.e., relevance, inquiry.

b. Whether a Defendant's Character for Appropriateness with Children Is a "Pertinent" Trait in a Particular Criminal Case

As discussed above, a court may not exclude *per se* proffered character evidence of appropriateness with children as irrelevant to the determination of charges in a criminal

case. However, such evidence is not automatically relevant in every criminal case in which a defendant is charged with a crime against a child. A court should consider in each instance whether the proffered testimony is evidence of a "pertinent" trait of character, given the specific charges in the case. That is, the court should consider whether such evidence, if believed by the jury, makes it less likely that the defendant committed the charged offense. *See Sahin v. State*, 337 Md. 304, 311 (1995) ("To be relevant, it is necessary that the character be confined to an attribute or trait the existence or nonexistence of which would be involved in the noncommission or commission of the particular crime charged.") (cleaned up). Thus, while a particular character trait may be relevant in one kind of criminal case, that same trait will not be relevant in others. In *Braxton v. State*, 11 Md. App. 435 (1971), the Court of Special Appeals listed several examples of irrelevant character traits for specific crimes:

> It is irrelevant to show the defendant's reputation for honesty and integrity in a prosecution for adultery; for truth and veracity, or peace and quietude, in a prosecution for statutory rape; for good military conduct in a rape prosecution; for truth and veracity in a robbery prosecution; or for honesty and integrity, in a murder prosecution; for morality and sobriety in a prosecution for a false bank report entry; or for reliability in business in a prosecution for the malicious destruction of property.

Id. at 440 n.3 (internal quotation marks and citation omitted).

Where the State alleges that a defendant sexually abused a child who was in his custody or care at the time of the alleged offense, the relevance of character evidence concerning the defendant's appropriateness with children in his custody or care is clear to us. To be sure, a jury may ultimately give such evidence little weight. However, for the reasons discussed above, we believe such character evidence has probative value,

especially in a case where (as here) temporary custody or care of the allegedly abused child is an element of at least one of the charged offenses.

An arguably more difficult case in which to establish relevance may be where the defendant is charged with, for example, kidnapping and sexually assaulting a child with whom he has no prior relationship. In such a case, the probative value of character evidence of appropriateness with children (in one's custody or otherwise) may depend on additional factors, including the theory of the defense and the particulars of the character evidence the defendant seeks to introduce. We leave such determinations of relevance for trial judges to assess on a case-by-case basis.

c. Application of the Rule 5-403 Balancing Test

If a trial judge determines that the proffered evidence goes to a "trait of character" and that such evidence has probative value to the jury's consideration of the charges against the defendant, then the trial court should conduct a Rule 5-403 analysis (if the State requests that the court do so). If the court concludes that the probative value of the character evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, etc., then the trial court may exclude the proffered evidence.[18]

[18] If the result of the trial court's analysis under the three-part test we have articulated is that the category of proposed character evidence is ruled admissible, the defendant still must establish that the proffered witness has a sufficient basis of knowledge upon which to provide opinion or reputation testimony regarding the character of the defendant. *See Devincentz*, 460 Md. at 543-44. And, if the defense seeks to admit character evidence through improper methods, e.g., proof of specific instances of conduct, as opposed to opinion and/or reputation evidence, then the court may sustain an objection by the State on that basis as well. Md. Rule 5-405(a).

B. Any Error in Excluding Vigna's Proffered Character Evidence Was Harmless Beyond a Reasonable Doubt.

A trial court's error does not necessarily require reversal of a conviction and a new trial. If an appellate court finds, beyond a reasonable doubt, that the error had no influence on the verdict, then the error is deemed harmless, and the conviction stands. *See, e.g., Morris v. State*, 418 Md. 194, 221-22 (2011). The exclusion of evidence is harmless if it is "unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Dionas v. State*, 436 Md. 97, 117 (2013).

In this case, the circuit court ended its admissibility analysis after concluding that appropriateness in interactions with children is not a character trait. The circuit court was troubled by the "specific" and "unique" nature of the quality that Vigna articulated as a character trait. However, as discussed above, at the first step in the analysis we outlined above, we are concerned with traits that suffer from the opposite problem, i.e., traits that are so broad they are synonymous with good character generally. Appropriateness with children in one's custody or care does not suffer from this infirmity. The circuit court should have considered that trait's relevance to the jury's consideration of the charges Vigna faced.

The Court of Special Appeals considered the relevance question, but as discussed above, erred in adopting a *per se* rule that such character evidence has no relevance in a case where a defendant is charged with a sex offense against a child. We conclude that evidence of Vigna's character for appropriateness with children in his custody or care had

at least some probative value in determining whether he abused the five children in his temporary custody or care, as alleged in the indictments.

If we assume for the sake of argument that the State had no valid basis upon which to argue for exclusion of the proffered character evidence under Rule 5-403, we nevertheless conclude that the circuit court's error in excluding the evidence was harmless beyond a reasonable doubt. As the Court of Special Appeals aptly observed:

> Ultimately, very little of the testimony that Mr. Vigna offered did not find its way to the jury. He called nine defense witnesses who testified that he was law-abiding and truthful. Four were former colleagues, and two worked in Mr. Vigna's classroom alongside him. One character witness, who was both a former colleague and the parent of a former student, testified that she trusted Mr. Vigna "obviously, with the lives of [her] children" and that "as a coworker, I trust him helping me out of some very difficult situations with other children. So [ ] he's very trustworthy and ... very calming to the children that I needed help with." Another stated that he would trust Mr. Vigna with his life. Mr. Vigna's twelve-year-old niece testified that she trusted her uncle. And despite excluding testimony about Mr. Vigna's reputation for interacting appropriately with children, the court allowed multiple parents to testify about the positive experience of having Mr. Vigna teach their children. He was not permitted to elicit testimony that he had the reputation for conducting himself appropriately with children, but the extensive testimony he did elicit supports the "trait" that Mr. Vigna sought to establish.

241 Md. App. at 679-80.

We agree with the Court of Special Appeals' assessment of the record. The testimony from parents who stated that, based on their experiences in seeing Vigna interact with children, they would entrust the lives of their children and other children to him, was functionally the equivalent of an opinion that Vigna was the type of person who was appropriate with children. *See McDowell v. State*, 318 P.3d 352, 359-60 (Wyo. 2014) (witness who testified that her brother (the defendant) was an attentive, "fun uncle" and

that she never "ha[d] any problems" with him while her children were growing up, colloquially provided an opinion as to the defendant's trustworthiness with children).

Moreover, the opinion testimony of multiple defense witnesses that Vigna was law-abiding, although broader than the excluded opinion evidence Vigna sought to elicit, ultimately served the same purpose. That is, if the jurors credited the character evidence that Vigna was law-abiding, they logically would have inferred that Vigna was not the type of person who would commit the specific violations of law with which he was charged.

Finally, Vigna testified in his own defense and denied that he ever improperly touched any of his students. Indeed, he claimed that touching a student inappropriately was "simply against the fiber of [him]." The defense witnesses who followed Vigna on the witness stand testified to his character for truthfulness. The character evidence that Vigna was a truthful person, if believed, supported Vigna's argument that the jurors should believe his denial of the charges.

For these reasons, we conclude that any error in precluding the defense witnesses from opining that Vigna was not just law-abiding and truthful, but also was the type of person who is appropriate with children, was harmless beyond a reasonable doubt. *See Rothwell*, 294 P.3d at 1150 (improper exclusion of character evidence that defendant was trustworthy with children was harmless, given its marginal probative value); *McAlpin*, 812 P.2d at 577-78 (erroneous exclusion of opinion evidence that defendant was not a person given to lewd conduct was harmless under a reasonable probability standard); *Hallman*, 379 S.E.2d at 117 (erroneous exclusion of evidence of defendant's reputation for "morality" was harmless beyond a reasonable doubt, where the character witnesses

testified that defendant had a good reputation for truth and veracity, which supported defendant's own testimony that he did not commit the alleged abuse).[19]

C. Vigna's Constitutional Arguments Are Not Preserved for Appellate Review or Abandoned, and Lack Merit in Any Event.

In the Court of Special Appeals, Vigna argued that the circuit court's decisions to exclude his proffered character evidence and admit the 2008 and 2013 reprimands violated his right to a fair trial under the Sixth Amendment to the United States Constitution. Vigna's theory was that the circuit court's admission of his prior reprimands, combined with the exclusion of the defense witnesses' proffered opinion and/or reputation testimony concerning Vigna's character for appropriateness with children, was so prejudicial that it

[19] Vigna's reliance on *Pierce v. State*, 62 Md. App. 453 (1985), is unavailing. In *Pierce*, the evidence showed that the victim began arguing with the defendant at a party when the defendant applied first aid to the victim's teenage son. The victim, who was intoxicated at the time, started grappling with the defendant, who was carrying a handgun for protection. During the struggle, the firearm discharged, killing the victim. *Id.* at 455-56. The trial judge precluded the defendant from eliciting character evidence of her peaceable nature, but two defense witnesses were allowed to testify to the defendant's general good character and law-abiding nature. The jury acquitted the defendant of murder, but convicted her of voluntary manslaughter. On appeal, the Court of Special Appeals held that the erroneous exclusion of character evidence of peacefulness was not harmless beyond a reasonable doubt. *Id.* at 461-62.

Assuming we would reach the same conclusion in *Pierce* as the Court of Special Appeals did, *Pierce* is distinguishable from this case. Evidence that a defendant is generally law-abiding may be much less significant than evidence that the defendant is peaceful, where the defendant is charged with murder as a result of a homicide that is not alleged to have been premeditated, but rather occurred during a struggle in a matter of seconds. In contrast, when a defendant is charged with committing sex crimes against multiple children spanning more than a decade, a jury may be able more readily to infer from character evidence about the defendant's law-abidingness that the defendant is not the type of person who would commit the crimes with which he is charged.

denied him a fair trial. The Court of Special Appeals rejected this argument. *Vigna*, 241 Md. App. at 732-33.

In his petition for *certiorari*, the second question Vigna asked us to review was: "Did the Court of Special Appeals err when it failed to recognize that denying Mr. Vigna the ability to introduce relevant character evidence, while at the same time allowing the state to introduce non-criminal 404(b) 'bad acts' character evidence, denied him the right to a fair trial under the Sixth Amendment of the United States Constitution?"

We agreed to consider this question when we granted Vigna's petition for *certiorari*. However, in his briefs to this Court, Vigna did not include any substantive argument about how the purported imbalance of the two evidentiary rulings rendered his trial unfair under the Sixth Amendment. Thus, Vigna abandoned the constitutional argument underlying the second question for which we granted review. *See* Md. Rules 8-504(a)(6) & (c).

In place of his abandoned Sixth Amendment argument, Vigna made a different constitutional argument, claiming for the first time that the exclusion of his proffered character evidence violated his right to due process.[20] Vigna seemingly accepts that exclusion of the type of character evidence he sought to admit would not have posed a due process problem when "our court system [was] male-centered." However, according to

[20] Vigna did not specify in his briefs whether his due process claim arises under the Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, or under Article 24 of the Maryland Declaration of Rights, or both.

Vigna, in the advent of statutory protections that now exist for victims,[21] "this Court should be mindful of the pendulum swinging too far," and should hold that, as a matter of due process, a court must allow a defendant to introduce relevant character evidence of the sort Vigna proffered in his trial.

Vigna failed to preserve this due process argument for appellate review. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court."). Regardless, both Vigna's original Sixth Amendment argument and his new due process argument lack merit. As discussed above, any error in the exclusion of character evidence was harmless beyond a reasonable doubt. By definition, then, Vigna received a fair trial. It may not have been a perfect trial, given the limitation on Vigna's ability to elicit the more specific character evidence he proffered, but fairness, not perfection, is the constitutional standard. *See Dorsey v. State*, 276 Md. 638, 647 (1976) ("[I]t is firmly established that an accused has a constitutional right to a fair trial but not necessarily to that seldom experienced rarity, a perfect trial.") (cleaned up).

Moreover, we disagree with Vigna that due process requires the admission of character evidence of the sort he sought to elicit in this case, either as applied to him or as to all defendants. The logical conclusion of Vigna's argument is that a trial judge lacks all

[21] Vigna observes that "[i]n Maryland we have seen the advent of rape-shield laws, expansion of 404(b)-character evidence applied to sexual assault cases; child hearsay evidentiary rules (See Md. Rule 5-802.1), amendments to criminal procedure rules specifically to protect child sexual assault victims (See Md. Crim. Pro. 11-304), and also the establishment of Maryland's victim's rights laws that are so robust and progressive that they are now explicitly listed in the Maryland Declaration of Rights."

discretion when it comes to relevant character evidence. To accept that contention would be to render such evidence immune to exclusion or limitation under Rule 5-403. We reject that assertion. We trust trial judges to exercise their discretion wisely in such circumstances, giving due consideration to a defendant's right to put on a meaningful defense. *See, e.g., California v. Trombetta*, 467 U.S. 479, 485 (1984). As for the contention that the circuit court's ruling, as applied to Vigna, violated due process, we again disagree. The ruling did not prevent Vigna from putting on any kind of character evidence, let alone a meaningful defense. The record reflects that Vigna was ably represented by experienced trial counsel who, indeed, did present a meaningful defense on behalf of his client. The jury seems to have deliberated with care, acquitting Vigna of five of the 14 charges. We are confident that Vigna received due process, regardless of any harmless error that resulted from the exclusion of the character evidence Vigna sought to introduce.

IV

Conclusion

As discussed above, character evidence of a defendant's appropriateness with children in his custody or care (or a similar character trait) may be admissible in a case where a defendant is charged with a sex crime against a child. However, any error in the exclusion of such character evidence in Vigna's case was harmless beyond a reasonable doubt, given the extensive character evidence that the jury heard about Vigna's character

for being law-abiding and truthful. Therefore, we affirm the judgment of the Court of Special Appeals.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED; COSTS TO BE PAID BY PETITIONER.

Circuit Court for Montgomery County
Case Nos. 130781C & 129932C
Argued: March 9, 2020

IN THE COURT OF APPEALS

OF MARYLAND

No. 55

September Term, 2019

JOHN VIGNA

v.

STATE OF MARYLAND

Barbera, C.J.,
McDonald,
Watts,
Hotten,
Getty,
Booth,
Biran,

JJ.

Concurring Opinion by Hotten, J., which Watts, J. joins.

Filed: August 18, 2020

Respectfully, I join the Majority in affirming the judgment of the Court of Special Appeals. However, I write separately to express my views regarding the Majority's conclusion that appropriateness with children in the care of Mr. Vigna *is* a pertinent character trait.

Before trial, Mr. Vigna attempted to introduce, as character evidence, testimony that he had a reputation in the community for "appropriate interaction with students," which he later broadened to include "any situation in which he has supervisory responsibility for children in his custody[.]" Under Maryland Rule 5-404(a)(2)(A): "An accused [in a criminal case] may offer evidence of the accused's pertinent trait of character. If the evidence is admitted, the prosecution may offer evidence to rebut it." But fundamentally, what constitutes a "character trait"?

The plain-language of the Rule outlines two elements that must be satisfied before the accused may offer character evidence: (1) the evidence must pertain to a trait of character and (2) that trait must be pertinent, or relevant, to the crime charged. Appropriateness with children in his care or custody is not a trait of character. I am unconvinced that "reputation" for appropriate interaction with children in his care is a character trait, nor am I convinced that this testimony would be relevant in a child sex abuse trial. I explain my reasoning more fully herein.

A. Appropriate Interactions with Children in His Care is Not a Trait of Character.

As a general rule, "evidence of a person's character or character trait is not admissible to prove that the person acted in accordance with the character or trait on a particular occasion." Md. Rule 5-404(a)(1). Stated differently, such evidence is

inadmissible to prove propensity. Maryland Rule 5-404(a)(2)(A) is an exception to the general prohibition against propensity evidence.

Character under the evidentiary rules, "is a generalized description of a person's disposition, or of the[ir] disposition [with] respect to a general trait, such as honesty, temperance or peacefulness, that usually is regarded as meriting approval or disapproval." 1 McCormick on Evid. § 195 (8th ed. 2020). While the text of the relevant rules does not explicitly define what constitutes a "character trait," Black's Law Dictionary similarly defines "character" as "[t]he qualities that combine to make an individual human being distinctive from others, esp[ecially] as regards morality and behavior; the disposition, reputation, or collective traits of a person as they might be gathered from close observation of that person's pattern of behavior." BLACK'S LAW DICTIONARY (11th ed. 2019). A "trait" is generally understood to be an "[e]lement of a person's [makeup] serving as an explanation of personal characteristics." *Trait*, THE LAW DICTIONARY, https://thelawdictionary.org/trait/ (last visited on August 11, 2020), archived at https://perma.cc/DE6Y-PMTF; Trait, *Merriam-Webster's Dictionary*, https://www.merriam-webster.com/dictionary/trait (last visited August 11, 2020), archived at https://perma.cc/XA8F-P3HY (defining "trait" as "a distinguishing quality (as of personal character)").

These definitions prove useful here. As the trial judge articulated at the motions hearing, "usually character traits . . . span across all walks of life and all categories of interaction with people." However, Mr. Vigna attempted to elicit testimony that he was appropriate with children when they were under his supervision. Unlike a general character

for being a peaceful person in an assault prosecution, for example, evidence that Mr. Vigna acted appropriately with children in his care or custody is evidence of conduct under specific circumstances. It is not the kind of evidence contemplated by the exceptions to Rule 5-404(a)(1), because the evidence is situational and does not transcend *all* circumstances and interactions with *all* people. Although a defendant is permitted to introduce evidence of a character trait on direct examination, such evidence is limited to testimony regarding the reputation of the accused for a particular character trait, and the witness's personal opinion concerning that trait. Md. Rule 5-405. A defendant is not permitted to introduce evidence of specific instances of conduct on direct examination, unless evidence of the character trait is an "essential element of a charge, claim, or defense[.]" Md. Rule 5-405(b). Mr. Vigna framed this witness testimony as concerning his reputation in the community, but in actuality, this testimony constitutes past instances of behavior or conduct, which is prohibited under the relevant evidentiary rules. Mr. Vigna's attempt to reframe testimony of past conduct as "reputation" evidence falls just short of describing his conduct with children on a particular date and time. As such, the proffered evidence was not evidence of a character attribute or trait.

B. Appropriate Interactions with Children in His Care is Not "Pertinent" to Allegations of Child Sex Abuse.

Assuming that the proffered evidence does qualify as a character trait, it was not pertinent. As so well expressed by the Court of Special Appeals, "[t]he scope of what constitutes a 'pertinent character trait' under Rule 5-404(a)(2)(A) is defined by the nature of the crimes alleged." *Vigna v. State*, 241 Md. App. 704, 717–18, 213 A.3d 668, 676

(2019). It is one that is relevant to the alleged crimes of the accused. *Braxton v. State*, 11 Md. App. 435, 440, 274 A.2d 647, 650 (1971). To surpass the relevance bar, the character trait must be "confined to an attribute or trait the existence or nonexistence of which would be involved in the noncommission or commission of the particular crime[.]" *Id.* In other words, to be admissible as a pertinent trait of character, the particular evidence offered must bear some nexus to the charged crimes. *See State v. Bogle*, 324 N.C. 190, 201, 376 S.E.2d 745, 751 (1989) (stating that a "pertinent" character trait is that which "*bear[s] a special relationship to* . . . the crime charged") (emphasis in original). In the case at bar, we are concerned with whether "Mr. Vigna's reputation in the community for appropriately interacting with children bears on whether he sexually abused them." *Vigna*, 241 Md. App. at 718, 213 A.3d at 676. I agree with the Court of Special Appeals and the trial court, that such evidence has no bearing in this type of case.

Evidence of appropriate behavior or conduct with children, unlike character for truthfulness or peacefulness in a fraud or assault investigation, adds nothing to a child sex abuse prosecution, because of the nature of the allegations. As I believe the Court of Special Appeals correctly pointed out, child sexual predators are particularly insidious. These types of sexual predators often hide in plain sight. They "blend into the community and often stand in trust relationships—coaches, clergy, teachers, physicians, or family members—with their victims." *Vigna*, 241 Md. App. at 722, 213 A.3d at 678 (citing Anne-Marie McAliden, *Setting 'Em Up: Personal, Familial, and Institutional Grooming in the Sexual Abuse of Children*, 15 SOC. AND LEGAL STUD. 339, 348 (2006)). They "groom victims through these relationships and skillfully manipulate a child into a situation where

he or she can be more readily sexually abused and is simultaneously less likely to disclose." *Id.* (internal quotations omitted). Mr. Vigna was an elementary school teacher with more than twenty years in the same school system. Considering the covert nature of child sexual abuse under the circumstances presented, testimony regarding Mr. Vigna's appropriate behavior with children in his care would prove irrelevant and tend to confuse or mislead the triers of fact.

A minority of jurisdictions have reached similar conclusions in that regard. For example, in *State v. Jackson*, "the Court of Appeals of Washington held that[,] because of the secretive nature of sexual crimes, and sexual activity in general, [] reputation for sexual activity, or lack thereof, bore no correlation to the likelihood that [the defendant] committed the crimes charged[.]" *Vigna*, 241 Md. App. at 720, 213 A.3d at 677 (citing *Jackson*, 46 Wash. App. 360, 365, 730 P.2d 1361, 1364 (1986)). In that case, the defendant was convicted of statutory rape, after the trial court excluded witness testimony that the defendant had a good reputation in the community for "not spend[ing] an inordinate amount of time with children in the community who are less than the age of ten" and generally for "not molesting children[.]" *Jackson*, 46 Wash. App. at 365, 730 P.2d at 1364. The appellate court rejected the argument that this evidence was relevant because crimes of a sexual nature are "normally [] intimate, private affair[s] not known to the community." *Vigna*, 241 Md. App at 720, 213 A.3d at 677 (footnote omitted). As the Court of Special Appeals aptly acknowledged:

> Unlike honesty or peacefulness, traits [that] a person might exhibit visibly day-to-day, sexual interests, predilections, or deviancy are not readily discernable to a casual observer, or even a close colleague. For that reason,

> courts in other states have disagreed with the majority view and have found reputation evidence relating to sexual behavior irrelevant to a defendant's guilt for sexual crimes involving children. Put another way, the fact that a defendant might have behaved appropriately with children in some instances does not make it more or less likely that the defendant sexually abused a child.

Id. In conclusion, for the reasons previously expressed, I respectfully concur.

Judge Watts has authorized me to state that she joins in this opinion.

John Vigna v. State of Maryland, No. 1327, September Term, 2017. Opinion by Nazarian, J.

CRIMINAL LAW – CHARACTER EVIDENCE – CHARACTER OF ACCUSED

In a child sex abuse case, the accused's reputation for appropriate interactions with children under their care is not a pertinent trait of character under Maryland Rule 5-404(a)(2)(A).

Circuit Court for Montgomery County
Case No. 130781

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1327

September Term, 2017

JOHN VIGNA

v.

STATE OF MARYLAND

Berger,
Nazarian,
Arthur,

JJ.

Opinion by Nazarian, J.

Filed: July 31, 2019

John Vigna was a long-time teacher at Cloverly Elementary, a public school in Montgomery County. In 2016, several students reported that Mr. Vigna had touched them inappropriately in his classroom, dating back as early as the 2001-2002 school year. Under the guise of a warm and affectionate teaching style, Mr. Vigna allegedly hugged female students and held them in his lap as he fondled their bodies through their clothing. He was tried in the Circuit Court for Montgomery County and, on June 9, 2017, convicted of one count of Child Abuse, three counts of Sex Abuse of a Minor, and five counts of Sex Offense in the Third Degree.

Mr. Vigna raises primarily evidentiary issues on appeal. *First*, he argues that the circuit court improperly excluded testimony (he describes it as character evidence) that Mr. Vigna had a reputation in the community for interacting appropriately with children under his care. *Second*, he argues that the circuit court improperly admitted reprimands he had received in previous school years for interacting inappropriately with students in the classroom. *Third*, he contends that the circuit court improperly admitted a school counselor's hearsay testimony relaying one victim's reports of her sexual abuse. And *finally*, he argues that the circuit court's evidentiary rulings violated his right to a fair trial under the Sixth Amendment to the U.S. Constitution. We disagree and affirm *in toto*.

I. BACKGROUND

Mr. Vigna's career with the Montgomery County Public Schools ("MCPS") began in 1992 and ended when the investigation giving rise to this case led to his dismissal in 2016. During his time at MCPS, Mr. Vigna taught grades 3–5 at Cloverly Elementary and coached bocce and baseball at Paint Branch High School. He was widely adored as a

teacher and a colleague. He maintained close relationships with his students long after they left his class, and his colleagues praised his teaching style and entrusted him to look after their own students when they were unable to do so.

Despite his positive reputation, some of Mr. Vigna's colleagues expressed concern about how he interacted with students. Jennifer Grey,[1] a fifth-grade teacher, testified that she had seen Mr. Vigna with students in his lap "[a] handful of times" and had spoken with him more than once about maintaining appropriate boundaries with students. Ms. Grey reported cautioning Mr. Vigna "especially as a male teacher . . . [not to] be alone with female students one-on-one, and keep [his] distance." Ms. Grey testified that she did not believe there was anything sexual about Mr. Vigna's interactions with his students, but that it violated professional guidelines and the policies laid out in MCPS's pre-employment training.

In 2008, a fire marshal observed Mr. Vigna holding a child on his lap in his classroom. The fire marshal reported the incident to then-principal Melissa Brunson, who called Mr. Vigna into her office and gave him a verbal warning. Three months later, a building service worker saw Mr. Vigna with another child in his lap and was upset by what he saw. A loud disagreement ensued, and Mr. Vigna followed the service worker down the hall and "[tried] to explain that the child was upset and that [he] was trying to meet that child's need at that moment." The incident nonetheless was reported to Dr. Brunson, who

[1] Ms. Grey's name appears as both Grey and Gray in the record. When asked to spell her name for the record, she spelled it Grey.

this time gave Mr. Vigna an official written reprimand and a formal warning that he could be terminated if his behavior persisted. Despite the warning, Mr. Vigna acknowledged that he "continued to hug, to kiss, to have kids in [his] lap and to have that kind of contact with children" because "[t]hat was what [he] deemed [to be] an effective teaching style."

In 2013, MCPS conducted an investigation into Mr. Vigna's conduct in response to a parent complaint. This time, Mr. Vigna allegedly invited three "female students to sit on [his] lap, lift[ed] them in the air, and dance[d] with them during class." Mr. Vigna was placed on administrative leave for three weeks and received another written reprimand, this time from the Chief Operating Officer of MCPS. Mr. Vigna wrote a brief response promising to alter his behavior:

> I am going to restrict my activities in the classroom to strictly teaching, counseling and advising students and will make every effort to not have any physical contact at all with my students.

In 2016, A.C.[2] became the first of several victims to report that Mr. Vigna sexually abused her. Mr. Vigna was A.C.'s third-grade teacher during the 2013-2014 school year. When she was in fifth grade, the school counselor, Heather Sobieralski, conducted a lesson in personal body safety for A.C.'s class. The lesson included information about various forms of abuse and how children should get help if they were mistreated. The lesson included a definition of sexual abuse: "When someone touches you or asks you to touch them on the private parts of the body (those parts covered by a bathing suit), other than to keep you clean and/or healthy." Both Ms. Sobieralski and A.C.'s fifth grade teacher,

[2] To protect their privacy, we refer to Mr. Vigna's victims only by initials.

Ms. Grey, noted with concern that A.C.'s demeanor changed during the lesson. Although ordinarily an engaged classroom participant, A.C. became despondent during the body safety class; she slumped down in her chair and eventually laid her head on the desk. Later that day, when Ms. Grey and Ms. Sobieralski asked A.C. if she was okay, A.C. said "You know how we all love Mr. Vigna? Well, he touches us in ways that makes us feel uncomfortable."

A.C. reported that Mr. Vigna touches both her and her friend G.G. "on our butt, and [] makes us sit on his lap, and won't let us get up." In a later interview with a social worker, A.C. stated that Mr. Vigna's behavior had gone on for years. The first incident she could recall occurred during her second-grade year, and the most recent just a few days before the interview. She reiterated that Mr. Vigna touched her buttocks and made her sit on his lap. A.C. said that Mr. Vigna would pull her onto his lap by her hips and pull her back if she attempted to get up. She said that he rubbed her thighs with his hands and breathed steadily more and more heavily the longer she was held on his lap. When she was not on his lap, she said, his breathing was normal. A.C. also stated that when she was on Mr. Vigna's lap she could feel a "hard" part of his body, for which she did not have the vocabulary, "under her butt." When asked to locate the body part on an anatomical drawing, she circled the waistline.

Mr. Vigna ultimately was charged with sexual crimes against five of his former students. Each victim reported a similar pattern of behavior. All five victims were prepubescent girls at the time of the alleged incidents, and most testified to having felt that they had a special relationship with Mr. Vigna. Each child reported that Mr. Vigna touched

their chests, buttocks, and genitals through their clothing. Most of the incidents took place with other students in the classroom and had been concealed by strategic timing and placement. For example, Mr. Vigna often sat a child on his lap at his desk while the rest of his students watched videos at the front of the classroom. He also touched students at chaotic times, such as the end of the day, as the children prepared for dismissal.

Another victim, G.G., reported that she and A.C. frequently went to say goodbye to Mr. Vigna at the end of the school day. G.G. described the same pattern that A.C. reported. G.G. approached Mr. Vigna to say goodbye and give him a hug while he was seated at his desk. Mr. Vigna then rubbed her buttocks in a circular motion with one hand during a "side hug." She also reported that Mr. Vigna rubbed and squeezed A.C.'s buttocks before they left his classroom.

Two other victims, A.S. and J.S., are sisters. A.S. was in Mr. Vigna's third-grade class and reported that Mr. Vigna touched her weekly, if not more often, in ways that made her uncomfortable. She reported that he called her to the back of the classroom during the school day and touched her chest, buttocks, and genitals over her clothing. He also placed his hands on her stomach under her clothing. A.S. said that Mr. Vigna kissed her forehead and told her that he loved her and that she was beautiful while he held her on his lap.

J.S. was in Mr. Vigna's reading class. She, too, reported that Mr. Vigna would call her to the back of the classroom and, while hugging her, rub her buttocks and genitals through her clothing. She stated that "[i]n class he would call me over to the back table, just me and him, and then he would make sure I sat right next to him, and then he would start hugging me. He would start touching my butt."

L.D. was an adult at the time of trial. She was Mr. Vigna's student in fourth grade and stated that she was "very close with him;" she remembered "having a bond with him that [she] didn't have with other teachers." L.D. contacted the police after she saw an article on Facebook describing others' allegations against Mr. Vigna. She reported that Mr. Vigna sexually abused her during the 2001-2002 school year, and she recounted events similar to those alleged by the younger victims:

> [A]t the end of the day, while we're waiting for the buses, he would have me and my former classmate [], I would sit on one leg and . . . she would sit on the other leg, but it wasn't like Santa Claus style. It was like horseback ride style. So, I remember like we would lean back, and his hands would be on our, . . . like on our legs. And I remember one specific instance where he was talking to some boys across the desk, and every time he talked, I felt his finger on my crotch. And I remember this so well, even though it was so many years ago, because I felt sexually aroused when that happened. I felt like that tingly sensation, and that's when I knew something wasn't right.

L.D. described "a routine" for Mr. Vigna's class, in which she "ha[d] to give him a kiss on the cheek every single day before we left to go ride our bus." She also said that on one occasion, Mr. Vigna instructed her to change her clothes in a closet in his classroom with the door ajar and that she felt very uncomfortable.

All five victims testified at trial, as did several of Mr. Vigna's former colleagues, including Ms. Sobieralski, Ms. Grey, and Dr. Brunson. Mr. Vigna also testified in his own defense, and he denied categorically that he ever touched a student for his sexual gratification. He testified that touching children inappropriately was "simply against the fiber of [him]." He did not deny that he often hugged children, had them sit on his lap, kissed them, and told them that he loved them:

> MR. VIGNA: I told all of my students that I loved them. I believe that you had to love them to lead them and if they knew that then they would follow you to new heights academically and socially.
>
> MR. VIGNA'S COUNSEL: There has been testimony that on occasion you kissed a student on the forehead or on the top of the head or a student kissed you on the cheek. Did that ever happen?
>
> MR. VIGNA: Yes, I would go back and blame that on my Italian family.
>
> MR. VIGNA'S COUNSEL: And did any of those incidents about which we have just been speaking did that involve any attempt to sexually exploit any of the students in your class?
>
> MR. VIGNA: Absolutely not.

Mr. Vigna attributed much of his behavior to growing up in a large Italian family that emphasized physical affection. He said he viewed his students as his family and would not want to carry on teaching if he could not show them love and physical affection. Mr. Vigna also acknowledged that he had failed to comply with his agreement not to have physical contact with his students, and stated repeatedly that the students initiated[3] the hugs and lap-sitting. "[T]hey are little kids," he explained, "[s]o you can try and tell them not to sit on your lap but . . . they are going to come up and hop on your knee whether you want them to or not." He attributed any contact that could have been interpreted as sexual to accidental touching in the daily classroom scuffle.

The jury convicted Mr. Vigna of nine of the fourteen counts charged. He later was sentenced to eighty years in prison, all but forty-eight suspended. Additional facts will be

[3] Several of his victims testified to the contrary that Mr. Vigna would ask for hugs and tell his students to "come here" before pulling them into his lap.

provided below as needed.

II. DISCUSSION

Mr. Vigna challenges three of the circuit court's evidentiary rulings on appeal. He contends *first* that the trial court erred when it excluded, under Maryland Rule 5-404(a)(2)(A), evidence of his character, specifically his character for interacting appropriately with children. *Second*, he argues that his 2008 and 2013 reprimands for inappropriate physical contact with his students were improperly admitted as prior bad acts evidence under Maryland Rule 5-404(b). *Third*, he argues that the trial court improperly admitted A.C.'s complaint to Ms. Sobieralski under Maryland Rule 5-802.1(d). And he argues *finally* that the circuit court's decisions to admit his prior reprimands while excluding his proffered character evidence violated his right to a fair trial under the Sixth Amendment to the United States Constitution.[4] We find that the circuit court properly exercised its discretion throughout the trial and affirm Mr. Vigna's convictions.

A. "Appropriate Interaction With Children" Is Not A Pertinent Character Trait Under Maryland Rule 5-404(a)(2)(A).

We begin with Mr. Vigna's argument that the circuit court erred when it excluded defense testimony about his reputation in the community for "appropriate interaction with students in his care and custody." Mr. Vigna sought to admit this testimony under Maryland Rule 5-404(a)(2)(A), which allows defendants in criminal cases to offer evidence of their "pertinent trait[s] of character." The trial judge permitted Mr. Vigna's character witnesses

[4] Mr. Vigna also asserts that the circuit court's decisions violated his right to a fair trial under the Maryland Declaration of Rights. Mr. Vigna does not develop an independent argument on this theory and we decline to address it.

to testify to his truthful and law-abiding nature, but found that interacting appropriately with the children under his care was not a pertinent character trait within the meaning of the Rule. We review this question of statutory interpretation *de novo.*

Generally, "evidence of a person's character or character trait is not admissible to prove that the person acted in accordance with the character or trait on a particular occasion." Md. Rule 5-404(a). Rule 5-404(a)(2)(A) is an exception to the general prohibition on propensity character evidence that applies in criminal cases:

> An accused may offer evidence of the accused's pertinent trait of character. If the evidence is admitted, the prosecution may offer evidence to rebut it.

Md. Rule 5-404(a)(2)(A).

The scope of what constitutes a "pertinent character trait" under Rule 5-404(a)(2)(A) is defined by the nature of the crimes alleged. To be admissible, the evidence must be "confined to an attribute or trait the existence or non-existence of which would be involved in the noncommission or commission of the particular crime charged." *Braxton v. State*, 11 Md. App. 435, 440 (1971). In other words, pertinent character traits must be relevant to the specific crimes charged—they must have some bearing on the likelihood that a person exhibiting that trait would (or would not) commit the crimes of which he stands accused. The issue before us, therefore, is whether Mr. Vigna's reputation in the community for appropriately interacting with children bears on whether he sexually abused them. We agree with the circuit court that it does not.

This narrow issue is one of first impression in Maryland. Mr. Vigna relies primarily on *State v. Rothwell*, a decision from the Court of Appeals of Idaho that held that "character

traits relating to a defendant's sexual morality with children are pertinent" in a case involving sexual misconduct with a minor under Idaho Rule 404(a)(2)(A).[5] 154 Idaho 125, 131 (Ct. App. 2013). The court found the evidence relevant, albeit limited in probative value, and Mr. Vigna urges us to adopt its reasoning:

> Because character traits relating to a defendant's sexual morality with children are pertinent, or relevant, in this type of case, such evidence is admissible under I.R.E 404(a)(1). We recognize that sexual abuse is usually secret behavior that would not be observed by others, and therefore the opinion or reputation evidence about a defendant's trustworthiness with children may be of marginal persuasiveness. . . . It appears that Rule 404(a)(1) was nevertheless intended to allow an accused the opportunity to present evidence of good character that is pertinent to the nature of the charged offense. The unlikelihood that the character witnesses would have been in a position to witness criminal conduct of the defendant goes to the weight of character evidence, not its admissibility.

Id. at 131.

The majority of jurisdictions that have considered this general question have concluded, as Idaho did, that a defendant's interactions with children, sexual predispositions, and general "morality" are pertinent character traits in child sex abuse cases. *See e.g.*, *People v. McAlpin*, 53 Cal.3d 1289, 1309 (1991) (witnesses should have been permitted to testify that the defendant was "not a person given to lewd conduct with children"); *State v. Rhodes*, 219 Ariz. 476, 479 (App. 2008) (the defendant's "sexual normalcy, or appropriateness in interacting with children" was a pertinent trait); *State v. Hughes*, 841 So.2d 718, 723 (La. 2003) ("a defendant may present evidence of his or her

[5] Idaho Rule of Evidence 404(a) is virtually identical Maryland Rule 5-404(a).

reputation in the community as a moral person and for safe and proper treatment of young children . . ."); *State v. Enakiev*, 175 Or.App. 589, 596 (2001) (evidence of a defendant's "sexual propriety" is admissible as a pertinent trait in a prosecution for a sex crime). Those jurisdictions make no distinction between the traits for sexual propriety or appropriateness with children and more traditional traits offered as character evidence such as honesty or peacefulness. And like Idaho, they reason that the limited probative value of the evidence goes only to its weight, not to its admissibility. *See Rhodes*, 219 Ariz. at 479.

Mr. Vigna asks us to take this principle a step further, and essentially tries to cast the ultimate issue in this case—whether he acted in a sexually inappropriate manner around children—as a character trait. We don't dispute that reputation testimony about a pertinent character trait is admissible even when its probative value is limited. But evidence can be admitted for a jury's assessment of weight and credibility only after a threshold finding that the proffered trait is relevant. And we are not convinced that a defendant's reputation in the community for interacting appropriately with children is relevant in a child sex abuse case.

Unlike honesty or peacefulness, traits a person might exhibit visibly day-to-day, sexual interests, predilections, or deviancy are not readily discernable to a casual observer, or even a close colleague. For that reason, courts in other states have disagreed with the majority view and have found reputation evidence relating to sexual behavior irrelevant to a defendant's guilt for sexual crimes involving children. Put another way, the fact that a defendant might have behaved appropriately with children in some instances does not make

it more or less likely that the defendant sexually abused a child.[6]

In *State v. Jackson*, the Court of Appeals of Washington held that because of the secretive nature of sexual crimes, and sexual activity in general, a defendant's reputation for sexual activity, or the lack thereof, bore no correlation to the likelihood that they committed the crimes charged:

> The crimes of indecent liberties and incest concern sexual activity, which is normally an intimate, private affair not known to the community. One's reputation for sexual activity, or lack thereof, may have no correlation to one's actual sexual conduct. Simply put, one's reputation for moral decency is not pertinent to whether one has committed indecent liberties or incest.

46 Wash.App. 360, 365 (1986). Florida courts have likewise found that a defendant's reputation for sexual morality did not bear on the likelihood that he committed a sexual crime against a child. If anything, the District Court of Appeal of Florida observed, that sort of testimony is inherently unreliable:

> [T]he court was concerned with the reliability of such reputations given that sexual conduct of the nature alleged here normally does not occur in public. Implicit in the court's analysis is the conclusion that reputations for truthfulness, peacefulness, etc. are more reliable and less likely to differ from reality because those traits are commonly displayed in public. . . . In addition, it is highly unlikely that a person will discuss his or her immoral or indecent sexual conduct;

[6] North Carolina has also concluded that this kind of character evidence is not pertinent under the Rules of Evidence, but for slightly different reasons. *See State v. Clapp*, 235 N.C.App. 351, 363 (2014) ("[T]he evidence at issue in this case, which consisted of testimony . . . to the effect that [the witness] saw no indication that Defendant had an unnatural lust for or sexual interest in young girls, constituted nothing more than an attestation to Defendant's normalcy. As a result, given that the excluded evidence did not tend to show the existence or nonexistence of a pertinent trait of character, the trial court did not err by excluding [the] testimony[.]").

> therefore, a person's reputation for sexual conduct is not likely to reflect immoral or indecent conduct.

Hendricks v. State, 34 So.3d 819, 824 (Fla. 1st DCA 2010) (quoting *State v. Spencer*, 84 Wash.App. 1010 (1996) (unreported), No. 35276-8-I, 1996 WL 665931); *see also Alvelo v. State*, 769 So.2d 476 (Fla. 5th DCA 2000). And New Hampshire reached a similar conclusion, finding in *State v. Graf* that because sexual crimes are undertaken furtively, character witnesses necessarily lack the required foundation to "form an opinion as to whether the defendant is the type of person to sexually assault or to take advantage of children." 143 N.H. 294, 299 (1999). The court couched its conclusion in relevance terms: "Accordingly, the proffered evidence, lacking any foundation, would be irrelevant because it does not have the tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *Id.*

We join those courts that have declined to extend the general rule allowing character and reputation evidence to include more granular testimony about a defendant's reputation for sexual propriety or appropriateness with children. We agree with our Floridian counterparts that testimony from colleagues that Mr. Vigna hadn't acted inappropriately with children in their presence "is not the kind of evidence contemplated by character testimony. Unlike one's reputation for honesty or peacefulness, traits that might be noticed by the community, whether one secretly molests children or does not would not be openly exhibited[.]" *Alvelo*, 769 So.2d at 477. And we find those cases particularly compelling in

light of the growing understanding about adults who sexually abuse children and the tactics they employ to gain access to their victims.

Sexual predators are "not instantly recognizable as the 'dirty old man in the raincoat.'" Anne-Marie McAlinden, *Setting 'Em Up: Personal, Familial, and Institutional Grooming in the Sexual Abuse of Children*, 15 SOC. AND LEGAL STUD. 339, 348 (2006). They blend into the community and often stand in trust relationships—coaches, clergy, teachers, physicians, or family members—with their victims. *Id.* Offenders "groom" victims through these relationships and "skillfully manipulate a child into a situation where he or she can be more readily sexually abused and is simultaneously less likely to disclose." *Id.* at 346.[7] Recent news accounts demonstrate how offenders exploit trust relationships, not only with children but also their parents and the community at large, to gain access to victims.[8] Before these allegations became public, there undoubtedly were colleagues,

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[7] The U.S. Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehension, Registering, and Tracking uses the following definition of grooming:

> Grooming is a method of building trust with a child and the adults around a child in an effort to gain access to and time alone with her/him. . . . The offender may assume a caring role, befriend the child or even exploit their position of trust and authority to groom the child and/or the child's family.

U.S. Dep't of Justice, National Sex Offender Public Website, SMART Program. "Get Answers About Sexual Abuse and Associated Risks: Common Questions." Available at https://perma.cc/56RY-7J38.

[8] Consider a few recent and infamous examples: (1) Larry Nassar, the former U.S. Gymnastics national team doctor sentenced to nearly two centuries in prison for sexually abusing his patients—one of his victims had known him her entire life and was sexually abused starting at age ten by the doctor who was "almost like family," *see, e.g.*, Dan Barry, Serge F. Kovaleski and Juliet Macur, *As F.B.I. Took a Year to Pursue the Nassar Case, Dozens Say They Were Molested*, N.Y. TIMES, Feb. 4, 2018 at A1; (2) Jerry Sandusky, the former assistant football coach at Penn State who met his victims through a charity he

parents, and other children who could have testified honestly that they believed those abusers were appropriate with children and much beloved by the community for the strong relationships they formed with them.

To admit a community member's opinion about a defendant's reputation for propriety with children would fail to "consider that sex offenders may [] groom not just the child but also their family or the wider community as a necessary prerequisite to gaining access" to child victims. *Id.* at 341. In this way, they "ingratiate themselves with children and infiltrate themselves into unsuspecting . . . communities. . . . To do this successfully, they must pass themselves off as being very nice, usually, men who simply like children." *Id.* at 348. This is not to suggest that teachers, clergy, or other adults with close relationships with children should inherently be regarded with suspicion, or that their close relationships with children suggest *impropriety* with children. But an adult's public interaction with children under his care doesn't make it any more or less likely that the

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founded ostensibly to help at-risk youth, *see, e.g.*, Mark Viera, *Former Coach at Penn State Is Charged With Abuse*, N.Y. TIMES, Nov. 6, 2011 at A1; and (3) the thousands of children victimized by clergy. *See, e.g.*, Isaac Stanley-Becker, *'He's a priest. I trusted him': One of the 1,000 victims of the alleged Pennsylvania clergy abuse tells his story*, WASH. POST, Aug. 15, 2018 ("the priest physically and emotionally abused [the victim], 'grooming' him by exploiting the intensity of their bond."); Michael Rezendes *et al*., *Church allowed abuse by priest for years: Aware of Geoghan record, archdiocese still shuttled him from parish to parish*, BOS. GLOBE, Jan. 6, 2002 ("The affable Geoghan usually befriended Catholic mothers struggling to raise large families, often alone. His offers to help . . . were accepted without suspicion."); Elizabeth Dias, *Her Evangelical Megachurch Was Her World. Then Her Daughter Said She Was Molested by a Minister*, N.Y. TIMES, June 10, 2019; Hannah Dreyfus, *Did Baltimore's Orthodox Community Turn A Blind Eye To Child Sexual Abuse? Despite allegations against him, popular rabbi was still working with children—until Jan. 2018*, THE NEW YORK JEWISH WEEK, Jan. 17, 2018.

alleged victims were abused by him privately. And because it's not relevant, it's not admissible under Rule 5-404(a)(2)(A).

Mr. Vigna counters that his victims allege they were abused in public and that the reputation evidence he seeks to admit is therefore appropriate. But although it is true that much of the reported abuse took place in his classroom, with other students in the room, the victims explained that Mr. Vigna took active steps to avoid detection. His victims were abused most frequently during the chaos of the classroom at dismissal time, or during showings of videos when the room was darkened and other students' attention was distracted.

Ultimately, very little of the testimony that Mr. Vigna offered did not find its way to the jury. He called nine defense witnesses who testified that he was law-abiding and truthful. Four were former colleagues, and two worked in Mr. Vigna's classroom alongside him. One character witness, who was both a former colleague and the parent of a former student, testified that she trusted Mr. Vigna "obviously, with the lives of [her] children" and that "as a coworker, I trust him helping me out of some very difficult situations with other children. So [] he's very trustworthy and . . . very calming to the children that I needed help with." Another stated that he would trust Mr. Vigna with his life. Mr. Vigna's twelve-year-old niece testified that she trusted her uncle. And despite excluding testimony about Mr. Vigna's reputation for interacting appropriately with children, the court allowed multiple parents to testify about the positive experience of having Mr. Vigna teach their children. He was not permitted to elicit testimony that he had the reputation for conducting himself appropriately with children, but the extensive testimony he did elicit supports the

"trait" that Mr. Vigna sought to establish. We see no error in the circuit court's decision to exclude Mr. Vigna's proffered character evidence.

B. The Circuit Court Properly Admitted Mr. Vigna's Prior Reprimands.

Second, Mr. Vigna argues that the trial court abused its discretion by admitting, via Maryland Rule 5-404(b), reprimands he received from school administration in the past for inappropriate interactions with his students. The circuit court admitted two disciplinary letters, one from 2008 and one from 2013. The 2008 reprimand from Dr. Brunson described two incidents involving students on Mr. Vigna's lap:

> This letter is an official reprimand for inappropriate behavior and failure to exercise the professional judgment expected of a [MCPS] employee. . . . On Thursday, February 28, 2008, a public service worker observed a male[9] student sitting on your lap. As follow-up, you and I met on Friday, February 29, 2008, where you admitted to your wrongdoing and you received immediate counseling by me and a verbal warning not to have any students sit on your lap at any time. Again on Thursday, May 30, 2008 another student, this time a female student, was sitting on your lap. . . . [T]his investigation reveals that you have demonstrated insubordination on your part. Your handling of this situation was improper, unprofessional, and must not be repeated.

The second reprimand came five years later from Larry A. Bowers, the COO of MCPS, and also arose after Mr. Vigna was seen with students on his lap and dancing with them:

> The purpose of this letter is to strongly reprimand you for insubordination and failure to exercise the professional judgment expected of a [MCPS] employee. . . . [The Office of Human Resources and Development] investigated the allegation that you had invited female students to sit on your

[9] There was some dispute at trial regarding the gender of this student. Although the letter indicates Mr. Vigna had a male student in his lap, Dr. Brunson testified that she believed that was a typo and the student was, in fact, female.

> lap, lift them in the air, and dance with them during class. These behaviors are indefensible, inappropriate, and intolerable. . . . It is difficult to believe that any teacher, especially a veteran teacher, would not understand what is respectful and professional behavior . . . . This is to serve as a warning that you need to alter your interactions with students immediately. Any further instances of such unprofessional behavior may be grounds for more severe disciplinary action up to and including dismissal.

The circuit court admitted Mr. Vigna's reprimands under Rule 5-404(b). The court found that they were admissible for the purposes of demonstrating Mr. Vigna's intent, knowledge of his wrongdoing, and absence of mistake:[10]

> So what this shows is within seven months after being reprimanded and writing a letter saying he'll have no contact with his students, we have victims . . . talking about conducting in the same type of activity, which is sitting on the lap and now inappropriate touching. So I think under 404(B) parameters, although the prior acts [] themselves may not have been crimes independently, they certainly were acts that were determined to be inappropriate by school officials and he was given warning that it was inappropriate for the teacher to have any physical contact with students which he acknowledged and indicated that he would not do that in the future. So I think that the areas of special relevance of these activities from 2008 and 2013 certainly go to knowledge. It goes to the defendant's knowledge that this conduct was inappropriate, even at a school disciplinary level, much less criminal activity. It also I think goes to intent, which indicates he intended to never have any physical contact, knowing that it was inappropriate. . . . It also goes to the issue of lack of mistake or accident[.]

Mr. Vigna contends that the reprimands should not have come in because they did not indicate that he had engaged in prior *criminal* behavior, "because the evidence was not

[10] The circuit court did not admit all the evidence the State sought to admit. The court admitted Mr. Vigna's prior reprimands, but excluded evidence that students had been seen in the area behind his desk after concluding it was not relevant to the crimes charged.

substantially related to some contested issue in the case," and because the reprimands' prejudicial effect outweighed their probative value. We disagree.

Maryland Rule 5-404(b) governs "other crimes" or "prior bad acts" evidence:

> Evidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

Trial courts analyze proposed prior bad acts evidence using a three-part test. *State v. Faulkner*, 314 Md. 630, 634 (1989). The court must determine first whether the proffered evidence fits into one of the Rule's exceptions. *Id.* We review that decision *de novo*. *Behrel v. State*, 151 Md. App. 64, 125 (2003). The court then must assess "whether the accused's involvement in the other crimes is established by clear and convincing evidence." *Faulkner*, 314 Md. at 634. Finally, the trial court must weigh "[t]he necessity for and probative value of the 'other crimes' evidence . . . against any undue prejudice likely to result from its admission." *Id.* at 635. We review the circuit court's balancing of probative value against undue prejudice for abuse of discretion. *Smith v. State*, 218 Md. App. 689, 710 (2014).

Mr. Vigna's reprimands were not offered to show that he acted in conformity with his prior bad behavior with his students. The State offered them instead to show that Mr. Vigna had been on notice that his actions were wrongful. His primary defense at trial was that he intentionally cultivated a family-like environment in his classroom where physical affection was common. The prior reprimands demonstrated that, whatever his

claimed intentions, he was on notice that his behavior was "indefensible, inappropriate, and intolerable," but that he persisted in that behavior at least until 2013 when, he claims, he made "the very conscious effort to change [his] teaching style" after a three-week suspension. For that reason, Mr. Vigna's prior reprimands are "substantially relevant to some contested issue in the case," and the trial judge properly found they fell under Rule 404(b) special relevance. *Merzbacher v. State*, 346 Md. 391, 407 (1997).

We similarly see no merit in Mr. Vigna's arguments that the reprimands were inadmissible because they didn't involve criminal behavior. It's true that evidence admitted under Rule 5-404(b) is often called "other crimes evidence." *See, e.g.*, *Behrel*, 151 Md. App. at 124. But the Rule is not limited to prior criminal behavior. The plain language of the Rule encompasses "crimes, wrongs, or acts." "A bad act is an activity or conduct, *not necessarily criminal*, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit." *Brice v. State*, 225 Md. App. 666, 692 (2015) (cleaned up) (emphasis added). And in determining what may properly be admitted, courts look at the nature of the activity as it relates to the crime charged, not whether the activity independently constitutes a crime. *See Klauenberg v. State*, 355 Md. 528, 549 (1999) (*quoting U.S. v. Cooper*, 577 F.2d 1079 (6th Cir.), *cert. denied*, 439 U.S. 868 (1978)) ("Conceivably within the broad language of the rule is any conduct of the defendant which may bear adversely on the jury's judgment of his character.").

Finally, we consider and reject Mr. Vigna's argument that the probative value of his prior reprimands was outweighed substantially by the risk of unfair prejudice. Mr. Vigna claims that admitting his prior reprimands "had the very real effect of casting [him] as a

dirty man who had children sit in his lap." But Mr. Vigna readily admits both in appellate briefing[11] and in his trial testimony[12] that he had children sit in his lap. And his prior reprimands do not characterize his behavior towards the children as sexual, but as unprofessional and inappropriate. Moreover, the concern with prior bad acts evidence is not avoiding any and all prejudice, but avoiding "untoward prejudice" or "unfair prejudice" that creates the risk that the jury will convict the defendant for reasons unrelated to his commission of the crimes charged. *Faulkner*, 314 Md. at 641 (*quoting Cross v. State*, 282 Md. 468, 474 (1978)). In light of Mr. Vigna's ready acknowledgment that he had his students sit in his lap, we fail to see how the prior reprimands created a risk of unfair prejudice that outweighed their probative value substantially, and thus we see no abuse of the circuit court's discretion in admitting them.

C. Ms. Sobieralski's Testimony Is Admissible Under The Prompt Complaint Exception To The General Prohibition On Hearsay.

Mr. Vigna argues *next* that the circuit court erred by admitting A.C.'s statements to Ms. Sobieralski under Maryland Rule 5-802.1(d), which excepts from the general prohibition on hearsay a "prompt complaint of sexually assaultive behavior to which the declarant was subjected." Mr. Vigna contends that A.C.'s complaint was not made promptly and that Ms. Sobieralski's testimony extended beyond the scope allowable under

[11] "There was no need to make an argument of lack of intent or mistake in 5-404(B) because Mr. Vigna never denied that the students sat on his lap."

[12] "Well, first of all elementary education they are little kids. So you can try and tell them not to sit on your lap but if they are affectionate to you and they have feelings towards you and they feel like they can count on you they are going to come up and hop up on your knee whether you want them to or not. So it happened with some frequency."

the Rule. We review *de novo* the circuit court's determination of whether evidence is admissible under a hearsay exception. *Gordon v. State*, 431 Md. 527, 538 (2013).

Maryland Rule 5-801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is presumptively inadmissible unless it falls under one of the recognized hearsay exceptions. Md. Rule 5-802; *Parker v. State*, 156 Md. App. 252, 259 (2004). The circuit court admitted Ms. Sobieralski's statement under Md. Rule 5-802.1(d), the "prompt complaint" exception:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> ***
>
> (d) A statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony[.]

There is no dispute that A.C. testified at trial and was subject to cross-examination about her statement to Ms. Sobieralski. Mr. Vigna complains, however, that her statement came too long after her alleged abuse to be considered "prompt." We disagree.

Promptness in this context is not subject to any "immutable time frame." *Gaerian v. State*, 159 Md. App. 527, 541 (2013). To the contrary, "promptness is a flexible concept, tied to the circumstances of the particular case." *Id.* at 540. A complaint of sexual assault may be considered prompt if the victim's statement is made "without a delay which is unexplained or is inconsistent with the occurrence of the offense." *Harmony v. State*, 88 Md. App. 306, 321 (1991) (cleaned up). And in making that determination, we take into

account "what a reasonable victim, considering age and family involvement and other circumstances, would probably do by way of complaining once it became safe and feasible to do so." *Nelson v. State*, 137 Md. App. 402, 418 (2001). When the complainant is a young child, as in this case, the time analysis can include factors related to "the natural fear, ignorance, and susceptibility to intimidation that is unique to a young child's make-up" including "the relationship between the complainant and the defendant" and "whether the defendant held a position of trust in the complainant's life." *Gaerian*, 159 Md. App. at 542 (*quoting Commonwealth v. Fleury*, 417 Mass. 810 (1994)).

Until Ms. Sobieralski's body safety class, A.C. didn't understand that Mr. Vigna's behavior toward her was sexually abusive. As soon as she understood that Mr. Vigna had touched her inappropriately, she became upset and told her teacher and school counselor about what had happened. The delay between the onset of the abuse and A.C.'s complaint is explained readily by A.C.'s young age and close and trusting relationship with Mr. Vigna. And although we know that Mr. Vigna's abuse of A.C. spanned a period of years, "[n]owhere in any case of which we are aware does the applicability of Rule 5-802.1(d) . . . hinge upon the victim reporting the *first* act of abuse." *Gaerian*, 159 Md. App. at 538. (cleaned up). We agree with the circuit court that A.C.'s complaint was prompt within the meaning of Rule 5-802.1.

Mr. Vigna claims as well that Ms. Sobieralski's testimony exceeded the scope of what Rule 5-802.1(d) allows. The "legally sanctioned function" of the prompt complaint exception is to bolster the credibility of the victim by corroborating her account of the alleged assault. *Choate v. State*, 214 Md. App. 118, 146 (2013) (*quoting Nelson*, 137 Md.

App. at 411). But we have found that testimony admitted under the prompt complaint exception is subject to certain limitations, including "the extent to which the reference may be restricted to the fact that the complaint was made, the circumstances under which it was made, and the identification of the culprit, rather than recounting the substance of the complaint in full detail." *Muhammad v. State*, 223 Md. App. 255, 269 (2015) (*quoting Nelson*, 137 Md. App. at 411). That said, "[a]lthough the earlier case law admitted only the bare fact that the complaint had been made, the restraints have been loosened at least to the point of admitting as well the essential nature of the crime complained of and the identity of the assailant." *Cole v. State*, 83 Md. App. 279, 293 (1990).

Ms. Sobieralski simply recounted what A.S. told her:

> Ms. Grey walked in and said, [A], please tell Ms. S. what you told me. And she said, you know how everybody loves--this is [A] talking. You know how everybody loves Mr. Vigna? I said, yes. And she said, well he makes me feel uncomfortable. And I said, how so? And she said, when he hugs me he touches my butt. And he makes me sit on his lap, and when I try to get up he doesn't let me.
>
> ***
>
> I asked where and when this was happening. And she said when she goes to say goodbye at the end of the day. I asked if anybody else was involved and she said another student[']s name.

That was the full extent of Ms. Sobieralski's testimony on the content of A.C.'s complaint, and it fell well within the limitations to the prompt complaint exception. Ms. Sobieralski's testimony provided the context of the complaint, identified Mr. Vigna as the culprit, and stated the nature of the allegations. It did not, as Mr. Vigna claims, include a

narrative account of A.C.'s abuses at Mr. Vigna's hands. The circuit court properly admitted Ms. Sobieralski's testimony about A.C.'s prompt complaint.

D. Mr. Vigna Received a Fair Trial Under the Sixth Amendment to the U.S. Constitution.

Finally, Mr. Vigna argues that the circuit court's decisions to exclude his proffered character testimony and admit his prior reprimands violated his right to a fair trial under the Sixth Amendment to the United States Constitution. Mr. Vigna's constitutional arguments do not differ meaningfully in their substance from his evidentiary arguments. He argues that the court's admission of his prior reprimands coupled with the exclusion of his character witnesses' testimony that he interacted appropriately with students was so prejudicial that it denied him a fair trial. He claims that the court's decisions "set an impossibly unfair playing field at trial" and that the State "made [his trial] into a personality contest and [Mr.] Vigna was not allowed to present meaningful relevant evidence in his defense."

We disagree. As a general rule, Maryland appellate courts "will not reach a constitutional issue when a case can properly be disposed of on a non-constitutional ground." *Myer v. State*, 403 Md. 463, 475 (2008). Mr. Vigna nonetheless reminds us that "[t]he Constitution, not the Rules of Evidence, [r]eign [s]upreme[,]" and that "[w]hen push comes to shove, the right to a fair trial wins over evidentiary constraints." But Mr. Vigna was not deprived of his right to a fair trial—he was not prevented from putting on witnesses in his defense, only from allowing them to present irrelevant testimony that, in their opinion, he behaves appropriately with the children under his care. Furthermore, as

discussed in Section A above, most of what Mr. Vigna sought to admit reached the jury despite the circuit court's ruling.[13] We find that Mr. Vigna was not deprived of his right to a fair trial under the Sixth Amendment and affirm his convictions accordingly.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY COSTS.

[13] Mr. Vigna does not articulate a separate constitutional argument against the admission of his prior reprimands under Rule 5-404(b). But whatever his theory may be, the circuit court could not possibly have admitted his proffered character testimony while excluding his prior reprimands. If the circuit court were to have admitted his desired character testimony, that necessarily would have opened the door for the State to rebut that character testimony with specific conduct indicating that he did not, in fact, behave appropriately with children, which would bring Mr. Vigna's prior reprimands under that umbrella.

MPJI-Cr 3:23 OTHER CRIMES OR ACTS TO PROVE MOTIVE, INTENT, ABSENCE OF MISTAKE, IDENTITY, COMMON SCHEME, ETC.

You have heard evidence that the defendant committed the bad act of permitting students to sit in his lap, which is not a charge in this case. You may consider this evidence only on the question of intent, knowledge, accident, and lack of mistake. However, you may not consider this evidence for any other purpose. Specifically, you may not consider it as evidence that the defendant is of bad character or has a tendency to commit crime.