Circuit Court for Baltimore County
Case No. 03-K-17-003606

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 408

September Term, 2018

KAREN CAMPBELL MCGAGH

v.

STATE OF MARYLAND

Meredith,
Shaw Geter,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.
Dissenting Opinion by Meredith, J.

Filed: February 4, 2020

Appellant Karen Campbell McGagh was touched at least 10 times by a cellphone salesman during a two-hour sales encounter.[1] After she accused him under oath (in an application for statement of charges) of sexual assault by touching intimate areas (breast and upper thigh), McGagh was charged with perjury by affidavit and making a false statement to a police officer. After a bench trial in the Circuit Court for Baltimore County, she was convicted, largely on the basis of silent video evidence that did not show the intimate contact, and was sentenced to eight and a half years imprisonment.[2]

In this Court, McGagh[3] challenges the sufficiency of the evidence, particularly the finding that she did not reasonably believe she was a victim of sexual assault. For reasons set forth below, we reverse the convictions for lack of sufficient evidence.

STANDARD OF REVIEW

Under Maryland Rule 8-131(c), when an action has been tried without a jury, we review the case on both the law and the evidence. This Court will not set aside the judgment of the trial court on the evidence unless it is clearly erroneous, and we will give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *See Middleton v. State*, 238 Md. App. 295, 304 (2018).

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1 On a video, she was seen being touched on the shoulders, arms, wrists, and hand.

2 Sentencing guidelines for a perjury conviction recommend a sentence of six months to three and a half years.

3 In appellant's brief, she is referred to as Campbell-McGagh. In the State's brief she is referred to as McGagh. Circuit court records do not show a hyphen. So, we will refer to appellant as McGagh.

When reviewing a challenge to the sufficiency of the evidence, this Court must ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Breakfield v. State*, 195 Md. App. 377, 392 (2010) (Citation omitted).[4]

Special evidentiary requirements are present in a perjury case. At one time, a charge of perjury had to be proven by the direct and positive testimony of two witnesses. *Mason v. State*, 225 Md. App. 467, 477 (2015). In *Brown v. State*, 225 Md. 610, 616-17 (1961), the Court of Appeals stated:

> [T]he rule has been relaxed so as to allow a conviction of perjury to stand if there are two witnesses, or one witness corroborated by circumstances proved by independent testimony. The testimony of one witness and other independent corroborative evidence must be of such a nature so as to be of equal weight to that of at least a second witness, thus foreclosing any reasonable hypothesis other than the defendant's guilt. It has been held that circumstantial evidence, including documentary evidence, springing from the defendant himself, may take the place of a living witness. (Citations and quotation marks omitted).

In *Mason*, *supra*, we concluded that a video could be sufficiently independent and corroborative of the testimony of one witness to satisfy the relaxed two-witness rule. 225 Md. App. at 481-91.

Aside from these considerations, there are other factors at play here that affect the standard of our review of McGagh's convictions. Long before the advent of the #MeToo

[4] Although this is a rigorous standard, in 1999, this Court reversed a perjury conviction on sufficiency grounds. *Palmisano v. State*, 124 Md. App. 420 (1999).

movement,[5] the Court of Appeals noted that "clear public policy [] encourages" a woman's "legal recourse against one who degradingly assault[s] her" and that public policy provides sanctions "against attempted and consummated harmful and offensive touching of the person, whether or not sexually motivated." *Watson v. Peoples Sec. Life Ins. Co.*, 322 Md. 467, 485-86 (1991).[6] Although not relevant to the Court of Appeals's decision, Watson premised her lawsuit in part on the First Amendment right to petition the government for the redress of grievances. 322 Md. at 472.[7]

Turning to this case, we note that some courts have held that the filing of a criminal complaint against a person is protected by the First Amendment's guarantee of the right to petition government for the redress of grievances. *Entler v. Gregoire*, 872 F.3d 1031 (9th Cir. 2017). So too, is an attempt to report to law enforcement officers an

[5] The #MeToo movement is "a worldwide phenomenon" dedicated to "encouraging millions to speak out about sexual violence and harassment." The movement took off in October 2017, when "women flooded social media with their stories of being harassed and abused – using the #MeToo hashtag." Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements – And How They're Alike*, TIME (Mar. 22, 2018), https://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/ (last visited Feb. 4, 2020).

[6] *Watson* was a wrongful discharge case, where a female employee was fired after suing her sales manager, who approached her from behind, placed his hands on her shoulders and made a biting motion toward her chest. 322 Md. at 469-70.

[7] She also relied on Article 19 of the Maryland Declaration of Rights, which confers a right of access to the courts. 322 Md. at 473. Watson might also have sought support in the State Equal Rights Amendment, Article 46 of the Maryland Declaration of Rights, which would protect the rights of both men and women to seek legal recourse for sex-based harassment or assault.

assault allegedly perpetrated against the victim. *Meyer v. Bd. of County Comm'rs of Harper County, Okla.*, 482 F.3d 1232 (10th Cir. 2007).[8]

We do not mean to suggest that these authorities immunize the appellant from a criminal prosecution for perjury or for knowingly making false accusations. However, under the circumstances presented here, we do believe the First Amendment arguably triggers our obligation to "make an independent examination of the whole record" to assure ourselves that the convictions below are not the result of a forbidden abridgement of the right to petition. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)[9]. Moreover, and without question, independent appellate review furthers Maryland's clear public policy encouraging a woman's legal recourse against a claimed assailant and insures that attempts to seek such a remedy are not deterred by the imposition of substantial prison time for a perjury conviction.

McGagh did not advance any First Amendment claims or rely on the *Watson* case below or in this Court. However, she did assert a sufficiency of the evidence issue. And we cannot adequately address that question without applying what we believe to be the

[8] On the other hand, perjured testimony in a proceeding is not covered by the free speech protections of the First Amendment. *See United States v. Alvarez*, 567 U.S. 709, 720-21 (2012) (plurality opinion).

[9] In this First Amendment free-press case, the U.S. Supreme Court made its own determination that the evidence failed to show knowing or reckless falsity of an allegedly defamatory advertisement published by the New York Times. We see no reason why this rule of appellate review should not apply to First Amendment rights other than free press, such as the right to petition.

appropriate standard of appellate review. Therefore, without substantial deference to the fact-finding in the circuit court, we independently examine the evidence in the record.

BACKGROUND & PROCEDURAL HISTORY

At 6 p.m. on April 24, 2017, McGagh entered a Verizon store on York Road in Towson to replace a cellphone that had died. Glenn Trebay was the sales representative who waited on her. After approximately two hours and extended discussion about an outstanding obligation on McGagh's account, she paid for a new phone and left the store. This much is uncontested. Although the encounter was caught on a silent video, what else happened was subject to much dispute.

That evening, according to her trial testimony, McGagh called the manager of the Verizon store to complain of sexual harassment by Trebay and spoke again the next day to a Verizon official. Then, she called the Baltimore County Police, claiming she was touched by Trebay while at the Verizon store.

In the morning, Officer Allen Heims came to her home. He was wearing a body camera that recorded both sight and sound. That video and the officer's testimony were presented at trial.

On the video, McGagh stated Trebay "had alcohol on his breath," "moved his chair right next to me," "sat too close," "touched [or "brushed"] the inside of my leg," asked "are you single?," said "I know where you live now," and "I can pull up your address," and "I'll call you tomorrow." She said that another salesman said to her "that it was bad for you but it's so much worse for the college girls that come in." Later in the

discussion, McGagh said "I don't want anyone else to be touched like that," "he should never work around women," "What I want to do with him is put him on notice to knock it off," and "I felt really dirty, I didn't sleep last night and it's a horrible feeling."

The camera recorded the following exchange:

Ms. McGagh: And he like, physically, too close.

Officer: Okay.

Ms. McGagh: Still, that's not assault, that's creepy.

Officer: Um hm. But was he talking and then he kind of like overreached --

Ms. McGagh: Yes, yes.

Officer: -- I hate to use that term, cop a feel, but --

Ms. McGagh: But that's exactly what it was.

Officer: Okay.

Ms. McGagh: That's exactly what it was.

McGagh said that she just wanted to get out of the store, but Trebay had taken the SIM card to her cellphone.[10] Digesting McGagh's allegations, Officer Heims said he

[10] According to WhatIs.com,

> A SIM card, also known as a subscriber identity module, is a smart card that stores identification information that pinpoints a smartphone to a specific mobile network. Data that SIM cards contain include user identity, location and phone number, network authorization data, personal security keys, contact lists and stored text messages. SIM cards allow a mobile user to use this data and the features that come with them . . . An individual's SIM card can be a target for hackers since the SIM card has indirect access to a person's email, banking information or social media accounts."

(Continued…)

would report to his supervisor that Trebay "was kind of holding your SIM card hostage for an extended period." McGagh also told the officer that while Trebay controlled access to the SIM card, he displayed and tried to privately sell certain products, such as a Fitbit, a sweater, and a watch, which he got from his car and which were not Verizon items.

At various times in the video, McGagh expressed some doubts as to whether some of the alleged touchings were illegal:

> Ms. McGagh: Like his leg was rubbing mine.
>
> Officer: Okay.
>
> Ms. McGagh: Like that's creepy, but that's not assault.
>
> Officer: Yeah.
>
> * * *
>
> Ms. McGagh: And it's like, it, it was wrong, like should he go to prison? I don't know . . .
>
> * * *
>
> Ms. McGagh: I felt dirty last night.
>
> Officer: I gotcha.
>
> Ms. McGagh: But is that illegal?

Available at https://searchmobilecomputing.techtarget.com/definition/SIM-card (last visited Feb. 4, 2020).

At trial, McGagh testified that at one point Trebay held her SIM card and said, "I've got your life in my hands now."

At one point, McGagh said that "maybe a good scary warning from a police officer" would be a sufficient remedy. The officer responded: "I think there is going to be a little more than a scary warning. I can promise you that." Officer Heims indicated that "groping" could constitute "a second degree assault" and that brushing the leg "kind of sounds like it's in that pseudo fourth degree [sex offense] range." But he also repeatedly noted that the allegations were "in a gray area." He explained the procedure for applying for a statement of charges to present to a District Court Commissioner and for obtaining a peace order. After he left McGagh's home and spoke to his supervisor, he took no further action.

Later that evening, McGagh appeared at the District Court in Towson and completed under oath a 10-page handwritten application for a statement of charges. The application stated the apparent reason for McGagh's filing:

> Today I was called by Mr. Trebay. Because he has my home address I am terrified he will come by for retribution. In the store, he was very clear to let me know he knew where I lived as a warning. I am afraid he will come back and assault me more.

The opening bars of McGagh's application stated that Trebay "sexually assaulted me." She repeated her allegations about Trebay's private sales, and his possession of her SIM card. She then stated that "[h]e leaned in and in a flash cupped my breast with his hand," and then later "he leaned in and rubbed my upper thigh."[11] McGagh related her

[11] She also said that Trebay touched her arm, but did not touch her vagina or bare skin.

attempt to seek help from a co-employee of Trebay [Ben] and his remark about the salesman's treatment of "college girls."

The application went on to state:

> Ben sat next to me in an appropriate way to help me get my SIM card back and stop terrible things from happening. That's when Trebay became irritated. He said he needed Tanqueray. He said I needed to calm down. He said he needed to stop by Wells Liquor Store and was going to celebrate with me . . .

McGagh stated that she paid for a new phone and when she got out of the store, she called a friend and "started to cry" and "I went home [and] threw up."[12]

Pursuant to Md. Rule 4-212(d)(1)(B), a District Court Commissioner apparently issued a warrant for Trebay's arrest. Some time later, he was arrested.[13] The charges were soon dropped.

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[12] The application stated that McGagh "went to a therapist at 1:30 and filed the report."

[13] At McGagh's trial, the following colloquy occurred:

> [State]: Did the police ever come to your house?
>
> Mr. Trebay: Oh, yes, months later. Months later they came and shackled me and dragged me away.
>
> [State]: At what time of day was that?
>
> Mr. Trebay: Unfortunately, it was at [] like 7:00 a.m. and my eighty-eight year old father had to escort them slowly up my third floor staircase of my thirty-eight, thirty, thirty-eight year residence and I had no idea, I heard heavy footsteps and there were there SWAT like guys in full tack gear and Dad said you have visitors and I was, I thought I was on a different planet. It was, it was the most bizarre thing of my life.

(Continued…)

After an investigation, the State's Attorney, on July 26, 2017, filed a criminal information charging McGagh with perjury by affidavit and false statement. *See* Md. Code (2002, 2012 Repl. Vol.) Criminal Law Article ("CL"), §§ 9-101(a)(2), 9-501(a).[14]

In December of 2017, her bench trial began. Trebay testified for the State. Describing his April 24th sales encounter with McGagh, he said, "[s]he was abnormally distraught because her phone was completely dead." He said his many attempts to obtain a warranty replacement for the cellphone were unsuccessful because McGagh's account was purportedly in arrears. The account problem took up "an interminable amount of time" and McGagh's "agitation level was rising as time went by." Trebay said McGagh

> [State]: What happened to you after that?
>
> Mr. Trebay: They escorted me out to the sidewalk, much to the embarrassment of myself, for my neighbors walking their early morning dogs, on early morning dog walks and they put me in an unmarked car, they took me to the, I want to say to the Parkville, might be the Parkville station where they took my fingerprints, my palm prints, my photos and then they put me in a cell with another gentleman.
>
> [State]: How long were you in jail?
>
> Mr. Trebay: They transferred me from one facility to another, so I would say between four and five hours until my release right here in Towson.

[14] The first count stated that in her application for a statement of charges, McGagh "willfully and falsely [did] make an affirmation that Glenn Trebay did sexually assault her . . . ." The second count alleged that McGagh "did make a false statement to Officer Allen Himes (sic), Jr. . . . knowing the same to be false, with the intent to deceive and with intent to cause an investigation or other action to be taken."

paid the balance, purchased a new phone and after he transmitted data from the old phone to the new one, she left the store. At trial the following exchange occurred:

> [State]: So, in this case, did you ever spend any time talking to Ms. McGagh about her personal life or your personal life?
>
> Mr. Trebay: No.
>
> [State]: Did you –
>
> Mr. Trebay: I mean, I listened to her business life, but no.
>
> [State]: Did you ever speak to her about coming over to her house?
>
> Mr. Trebay: No, absolutely not.
>
> [State]: Did you ever offer any items for sale that weren't Verizon products?
>
> Mr. Trebay: No.
>
> [State]: *Was there ever a time that you spoke to her and were close enough to touch her?*
>
> Mr. Trebay: *There was a distance between us, from what I recall, the entire time.*
>
> [State]: Do you recall –
>
> Mr. Trebay: *So, no.*
>
> [State]: Do you recall ever putting your hand on her inner thigh?
>
> Mr. Trebay: No.
>
> [State]: Do you recall ever touching her breast?
>
> Mr. Trebay: No.[15]
>
> [State]: And do you recall her ever complaining to you or anybody else about anything inappropriate that you did?

[15] Trebay also denied "rubbing her shoulders or upper neck."

> Mr. Trebay: No and as I, as I mentioned earlier, my next closest co-worker might have been six feet from me.
>
> (Emphasis added).

Under questioning by the circuit judge, Trebay said "it was physically within the realm of possibility" that he could have touched McGagh, but he "would have to reach backward or swivel around."

The State introduced the store video of the sales encounter, and most of the remainder of Trebay's testimony was commentary on the images.

Trebay admitted that he moved over next to McGagh. And according to the State's brief, "he did ultimately acknowledge touching McGagh on multiple occasions."[16] Upon examination, Trebay offered explanations for some of the touchings:

> [State]: [W]hat was the reason for doing that?
>
> Mr. Trebay: To relate to her I'd be right back.
>
> * * *
>
> [State]: Can you describe what that was and why you did that?
>
> Mr. Trebay: Incidental to getting on the phone to continuing the journey of trying to get her into the phone.
>
> * * *

[16] The State says that according to the video, McGagh was touched 11 times: right shoulder, right arm, right elbow, back of right arm, left wrist, left wrist, right shoulder, left shoulder, left shoulder, right shoulder, and right hand.

[State]: Okay. I see there in the video at 7:11 that you touched the Defendant's shoulder. Do you know why you would have done that at that time?

Mr. Trebay: The upgrade wasn't working and I was calling into customer care on a separate phone and in an attempt to make the customer feel as though we could get this done –

[State]: What was Ms. McGagh's demeanor at this time, if you remember?

Mr. Trebay: She had gone from settled to what I perceive as agitated again because things weren't working smoothly at that point.[17]

* * *

[State]: Mr. Trebay, I see at 7:49, you touch the shoulder of the Defendant. Do you know why you did that?

Mr. Trebay: To let her know I'd be right back with likely more paperwork.

* * *

[State]: Mr. Trebay, I see that you touched again the Defendant's shoulder at 8:01. Do you know why and where you were going?

Mr. Trebay: To alert her to the fact that I was grabbing her bill of sale from the printer.

* * *

[State]: Okay and I see right there that you touch Ms. McGagh's hand. Do you know why?

Mr. Trebay: We typically shake the customer's hand and thank them for their visit and their business and bid them farewell.

* * *

[State]: Okay, I see there again you touched Ms. McGagh, it looks like her wrist. Do you know what, if anything, you were doing there?

[17] Later, the prosecutor pointed out that the video showed McGagh with "her head in her hands" and asked Trebay what was going on. He said, "I believe she's frustrated because the process hadn't been working smoothly."

> Mr. Trebay: It looks as though I was retrieving a watch that she wanted to look at.[18]

On cross-examination, McGagh's attorney also focused on some of the touchings. Questioned about touching McGagh's arm, Trebay said "the main focus was to calm Ms. McGagh down and the issue then was a speed bump in getting her upgrade." When asked whether he did this with all customers, Trebay said: "Yes. I'm generally garrulous with all my customers and friends." The cross-examination continued:

> [Defense counsel]: Now, you can go to 6:42. At this point, you're sitting pretty close to Ms. McGagh and you're going on about these Fitbits, is that correct?
>
> Mr. Trebay: I would say I'm sitting relatively close to Ms. McGagh. I don't know what I was saying.
>
> [Defense counsel]: Do you know if your knees were touching?
>
> Mr. Trebay: I do not know, but I doubt seriously that they were. In over six years, I don't think I ever made knee contact with a customer.
>
> [Defense counsel]: But you don't know?
>
> Mr. Trebay: I, I do not know but I doubt it.

Upon cross-examination, Trebay indicated that the video showed his sales colleague Ben talking to McGagh, but did not know what they were saying. At first, Trebay testified that he did not recall calling McGagh, but under questioning he said, "I did not." He did not recall talking about whether McGagh was married or divorced or discussing Wells Liquor.

[18] Twice in his testimony, Trebay could not recall the reason he was touching McGagh.

Much of the questioning focused on whether Trebay was trying to sell McGagh his private wares, which the video caught being displayed to her. Trebay denied the allegations. Under sharp questioning from the trial judge and McGagh's lawyer, he testified:

> So, my main goal was to try to suppress her agitation by basically making her feel more at home with another, you know, something other than her, she may not be able to get that phone this day. Not selling something of mine, but making her feel more at ease that she's not being held hostage because her phone can't be repaired or can't be replaced because of financial difficulties on her account. Mine was basically, my, my sole purpose for having that material in that office for the first time in six plus years was to sell that item, you know, not while we're on the sales floor but to, if the gal wanted to grab the box and bring it back and look at it herself, she could, my fellow co-worker. So, it was never my intent to peddle materials from my desk but Ms. McGagh was in an unusual state of sort of, I don't know, upset and so I thought, maybe, maybe she'll feel better if we, if we make her feel more comfortable with another thing, another topic, another whatever.

At the conclusion of the State's case, McGagh's counsel moved for judgment of acquittal. The motion was denied.

McGagh was the only witness for the defense.[19] She described Trebay as a "sort of gregarious, kind of affable guy." She testified that "he asked me what does hubby do?" When she said she was divorced, "that sort of started it." McGagh related her phone problems and said Trebay said he could sell her a loaner phone with a $50 deposit "and then I'll come by your house and get the rest of it." She said he took her SIM card and then tried to sell her merchandise that he got out of his car.

[19] Under questioning by her attorney, McGagh admitted that she had been convicted of theft and was on probation.

Continuing her testimony, McGagh said:

It seemed like forever. I couldn't, I couldn't, I couldn't get out of there. I kept just wanting it to end. I, I'm polite and jovial but I wanted it, I wanted to get out of there. I had this creepy vibe. There is a smell that old alcoholics have and it comes out of their pores and he had that smell and particularly when he came back from his car, he had alcohol on his breath. . . . And then I said, I really have to go and he said, woman, you have nowhere to be and then I said, I've got, you know, I kept making, you know, I've got my dog in the car, I got to go, I have a conference call. He's like, you know, I've got your life in my hands, you're not going anywhere. And then he was touching me a lot. And, with the alcohol on his breath and the touching me, it was awful.

The examination of McGagh focused on the video evidence:

[Defense counsel]: Now, when you, you've since watched the video?

Ms. McGagh: Yes.

[Defense counsel]: Of course, and you see that he doesn't particularly, as your statement of charges says, cup your breast on the video.

Ms. McGagh: Yes.

[Defense counsel]: Can you explain to her Honor why you wrote that in your statement of charges?

Ms. McGagh: I was trying to, I was, I used the wrong word. I was confused, I used the wrong word, you know, is, you could, is it a cup, is it a feel, is it a brush, is it a touch, it's that sort of, you know, you know it's different than an elderly man, you know it's different, you know you feel violated, you know you feel, you know that it's not okay. You know there is a power, he's got my phone, he's got pictures of my nieces, he's got pictures of my –

The Court: Well, show me where there is a brush or a cupping or a touching or anything of your breast.

Ms. McGagh: That's how it felt.

The Court: . . . You show me where he either touches the, upper inside of your thigh or he comes even near your thigh.

Ms. McGagh: It does.

The Court: Because you indicated several times to that police officer that it is the upper inside of your left thigh. Mr. Trebay, I don't remember, being on your left side. He was on the right side. So, if I missed it, I truly, genuinely, authentically, want you to show me what I missed. But you're saying that's what I thought happened and you're saying that's what happened, are two completely different things.

Ms. McGagh: That's what I thought happened.

The Court: Okay. So, there's no point in looking anymore because it's not there. You concede that point.

Ms. McGagh: I can.

The Court: Okay. . . .

[Defense counsel]: And why did you call the police?

Ms. McGagh: I spoke to first, I called the manager that night and then I called Verizon in the morning and I explained it to them the same way I explained it to the police officer and they said you should call the police and then I explained it to the, I called the police, I explained what I remembered happened and they sent a police officer.

The Court: Okay. So, then you, what you told the manager and what you told Verizon is the same as what you told the police officer?

Ms. McGagh: To the best of my recollection.

The Court: Which turns out to not be true. Is that where we are?

Ms. McGagh: It's what I remembered.

The Court: Okay.

Ms. McGagh: It's what I felt. It's, that's –

The Court: But it's not true.

[State]: Judge, just for the record, (inaudible) that the Defendant is nodding yes.

Continuing her examination, McGagh's attorney initiated the following colloquy:

[Defense counsel]: Ms. McGagh, you were touched by the, by Mr. Trebay on several occasions that evening, were you not?

Ms. McGagh: Yes.

[Defense counsel]: And you were touched on your arm and your shoulder?

Ms. McGagh: Yes.

[Defense counsel]: Now, there came a point where you changed seats when he came over near you, is that correct?

Ms. McGagh: Yes.

[Defense counsel]: Why did you change your seat?

Ms. McGagh: To get away from him.

[Defense counsel]: Pardon me?

Ms. McGagh: To get away from him.

[Defense counsel]: And there was a point where he, his arm moves towards your arm, in other words, two arms are touching and you moved away, is that right?

Ms. McGagh: Yes.

[Defense counsel]: And why did you do that?

Ms. McGagh: I felt violated.

[Defense counsel]: And describe to her Honor how you felt violated by this man?

Ms. McGagh: It starts with the alcohol on his breath, scares me and then the touching and he knows where I live and he goes out to his car. I don't know if he took a drink, I'm from an alcoholic home, I am right back where I was and I felt dirty and helpless.

The testimony continued:

[Defense counsel]: Now, when you completed this report, can you describe to her Honor what your state of mind was?

Ms. McGagh: Confused, upset, embarrassed, I felt violated, I felt sick.

The Court: Okay. But you knew you were signing this stuff under oath, right?[20]

* * *

[20] The following colloquy occurred with respect to McGagh's claim that she tried to get help from the other salesman, Ben:

[Defense counsel]: Well, there's one point . . . where you were making this motion to the other young man.

Ms. McGagh: Yeah.

[Defense counsel]: Behind his back.

Ms. McGagh: Yeah.

[Defense counsel]: Describe to her Honor why you're doing that motion? Tell her Honor.

Ms. McGagh: I want him to help me, that's how I'm starting to signal him, to help me get out of there.

The Court: By blowing a kiss?

Ms. McGagh: No, I put my hand on my mouth.

The Court: That's what happened.

Ms. McGagh: But that, that's how, that's that's, I don't blow kisses. I mean, I'm just being straight. I, that's not, that's not what I do.

The Court: but you, you agree, that's exactly what it looks like.

Ms. McGagh: Well, if you're, that's how I talk.

> [Defense counsel]: And it was, it, your understanding, in your conversation with the officer, is that the best way to keep him from being able to get another job would be to take out criminal charges?
>
> Ms. McGagh: Yes.
>
> [Defense counsel]: And did you indicate to the officer that you thought maybe just have the officer go scare him, a warning?
>
> Ms. McGagh: Yes. I'm sorry, can you repeat the question?
>
> [Defense counsel]: Did, did the officer, did you ask the officer if there was an option that he would just go and give Mr. Trebay a warning?
>
> Ms. McGagh: Yes.
>
> [Defense counsel]: And that wasn't an option, was it?
>
> Ms. McGagh: No.

After McGagh renewed her motion for judgment of acquittal, the trial judge issued her decision:

> I have no reasonable doubt. I find beyond a reasonable doubt that Ms. McGagh perjured herself and that she gave a false statement to Officer Heims. I find that she intentionally lied. And not about everything, that is a many page statement of charges. Many of the things in the statement are true, but the essential, critical facts are untrue. It is completely and totally untrue that Mr. Trebay cupped Ms. McGagh's breast. It, it's not even a close call. He didn't cup her breast, he didn't brush her breast, he did not touch her breast or her chest in any way. He never got close to her upper inner thigh. I can't say, having looked at two plus hours of video, that I know where his hands were all the time, but my, I feel like they were, he's a, as he said, a garrulous guy, he talks with his hands and I saw his hands in the air a lot but, I'll tell you this, he wasn't in a position to reach across from where he was and rub her or touch her upper inner thigh on the left hand side, which is what Ms. McGagh told Officer Heims happened. I saw it as she showed him on the video, the body camera, I guess is what I mean to say. And I don't believe that she was confused about what happened. It's far more likely that she wanted Mr. Trebay fired and the story started and was sort of like that proverbial snowball going down the hill, it just got

> more ingrained and more elaborate, but it was false. And so, that's my decision.[21]

This appeal followed.

DISCUSSION

Falsity alone does not equate with perjury.[22] Under § CL 9-101(a)(2), "[a] person may not *willfully and falsely* make an oath or affirmation as to a material fact . . . in an affidavit required by any state, federal, or local law[.]" (Emphasis added). And CL § 9-501(a) provides:

> A person may not make, or cause to be made, a statement, report, or complaint that the person *knows to be false* as a whole or in material part, to a law enforcement officer of the State, of a county, municipal corporation, or other political subdivision of the State, or of the Maryland-National Capital Park and Planning Police *with intent to deceive* and to cause an investigation or other action to be taken as a result of the statement, report, or complaint.
>
> (Emphasis added).

In a perjury by affidavit case, among the elements the State must prove are that "the false information was material, that is, it was capable of affecting the decision in the matter," that "the defendant knew or believed the information was false at the time [he] [she] made the statement," and that "the defendant provided the information willfully,

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[21] The court did not specifically indicate which portions of McGagh's statements it found truthful.

[22] "[T]he pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more." *Alvarez*, 567 U.S. at 734 (2012) (concurring opinion of Justices Breyer and Kagan).

that is, intentionally, rather than as a result of confusion or reasonable mistake . . . ." MPJI-Cr 4:26.1

Wharton's elaborates on the latter requirement:

> The false testimony must be given willfully, i.e., it must be given intentionally or with knowledge that it is false. *Thus, a person who testifies falsely but in good faith with the honest belief that he is telling the truth is not guilty of perjury. The fact that the witness made a hasty statement or a statement which he did not actually know to be true, but which seemed reasonable to him, does not of itself establish that the witness did not testify in good faith with an honest belief in its truthfulness.* Of course, if, under the circumstances, a reasonable man could not have believed that the testimony was true, a claim to the contrary by the witness may simply be rejected. C. Torcia 4 Wharton's Crim. Law (15ed. 1996) at § 574. (Emphasis added).

McGagh makes a two-pronged attack on the sufficiency of the evidence before the circuit court. She contends that the false statements were not material and that there was insufficient evidence of willful falsity.[23]

To rebut the materiality element of the perjury and false report charges, McGagh argues that her assertions that Trebay touched her breast and inside of her leg would not affect the course or outcome "of any second degree assault case against Trebay because he touched her in other places." However, McGagh accused Trebay of sexual assault, which was an essential basis for the Commissioner's decision to issue a warrant and the ordering of Trebay's arrest. In our view, the materiality component of the perjury and false report charges has been satisfied.

[23] She does not challenge the sufficiency of the evidence with regard to the other elements of the offenses.

It is not as easy a matter to dispose of McGagh's second contention, *viz.*, that the evidence does not show willful falsity. It is undeniable that she was touched on multiple occasions. Whether or not one or more of those touchings were of a sexual nature or whether Trebay's remarks were in any way sexual or intimidating cannot be determined from a silent video of the sales encounter. *See Tarus v. Borough of Pine Hill*, 916 A.2d 1036, 1045 (N.J. 2007) ("The combination of audio and visual information also affords the most complete record of public proceedings.").

Among the issues a video with sound would have resolved include:

1) Whether McGagh was "abnormally distraught" over her dead phone as Trebay testified?

2) Whether Trebay said they would celebrate the new phone with alcohol purchased from Wells Liquor?

3) Whether the salesman said he would call her the next day or come by her home to receive full payment for a loaner phone?

4) Whether Trebay asked McGagh questions about her personal life, such as whether she was married?

5) Whether the salesman made any comments that might be interpreted as intimidating, such as "I've got your life [the SIM card] in my hands," "I know where you live," or "[W]oman you have nowhere to go"?

6) Whether McGagh sought help from Trebay's colleague Ben, and whether Ben said that "it was bad for you but it's so much worse for the college girls that come in"? and

7) What, if any, words were exchanged during any of the touchings?[24]

[24] It is noteworthy that the popular understanding of what is a "sexual assault" is evolving more quickly than its legal definition. For instance, the Victorian Centres Against Sexual Assault (CASA) Forum "defines sexual assault as any behavior that

(Continued…)

In short, the silent video does not equate to a "second witness," *Brown*, 225 Md. at 616-17, on the critical issue of whether McGagh's false statements under oath and to the officer were made in good faith with an honest belief in their truthfulness.[25]

In addition, there is a reason, grounded in research, for inconsistencies in McGagh's statements. According to clinical psychologist Dr. David Lisak, "inconsistencies in the accounts provided by victims of sexual assaults are quite common and can be easily explained by the way trauma affects memory[.]"[26] Jon Krakauer, *Missoula* 94 (2015) (hereinafter "Krakauer"). "[T]raumatic experiences impact the brain so profoundly that memories associated with trauma 'are categorically different from what we think of as normal memory . . . [w]e have even identified the brain structures that are primarily responsible for this difference.'" Krakauer (quoting Lisak) at 254. According to Lisak, "If somebody is experiencing something very traumatic, it's scary but it's enormously confusing. It's overwhelming." *Id.*

makes someone feel uncomfortable, frightened, intimidated or threatened . . . It can include anything from sexual harassment through to life threatening rape." CASA Forum, *What is Sexual Assault?*, https://www.casa.org.au//assets/Documents/What-is-sexual-assault2.pdf (last visited Feb. 4, 2020). The Forum's fact sheet lists as examples of sexual assault: "[u]nwanted touching," "[p]ressuring for dates," and "[u]nwanted, offensive and invasive interpersonal communication." *Id.* It also asserts that a woman cannot consent to a sexual assault if she is "[d]etained against [her] will." *Id.*

[25] A video with sound would also answer the largely extraneous question of whether Trebay's denial that he was selling private wares to McGagh was accurate.

[26] Lisak is the author of the highly regarded 2010 paper, "False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases." Krakauer at 109.

If the store video had sound, it might have been possible to determine whether the April 24, 2017 sales encounter was a traumatic event for McGagh that could have resulted in inconsistencies about which, if any, leg was touched or whether knees merely made contact or whether a touch of the shoulder[27] could have been misinterpreted as "overreaching" or "cupping of the breast."[28]

Motive became an issue in the case. The prosecutor in his opening argument suggested that even though motive was not an element of the charged offenses, McGagh may have had a "financial" motive for the falsehoods. No proof was offered on the point by the State.

The Maryland Criminal Pattern Jury Instructions provide the following guidance:

> Motive is not an element of the crime charged and need not be proven. However, you may consider the motive or lack of motive as a circumstance in this case. Presence of motive may be evidence of guilt. Absence of motive may suggest innocence. You should give the presence or absence of motive the weight you believe it deserves. MPJI-Cr 3:32.

The trial court found that McGagh "wanted Trebay fired," as if that were an improper motive. McGagh told Officer Heims that "I don't want anyone else to be touched like that . . . he should never work around women . . . what I want to do is put

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[27] Some out of state courts in sex harassment cases have characterized the incidental touching of a woman's shoulder as "[h]armless body contact of an inadvertent non-sexual nature[.]" *Baliva v. State Farm Mut. Auto. Ins. Co.*, 730 N.Y.S.2d 655, 657 (2001). *See also E.E.O.C. v. Finish Line, Inc.*, 940 F.Supp.2d 777, 786 (M.D. Tenn. 2013) (describing shoulder touching as "relatively benign conduct"). However, in *Watson*, the Maryland Court of Appeals said that unconsented touching of a woman's shoulders is a battery. 322 Md. at 481.

[28] The "cop a feel" language was first suggested by Officer Heims.

him on notice to knock it off." These are reasonable responses to *the perception* of improper touching by a salesman. According to the record, McGagh had no sinister or secret reason for making her allegations.[29]

Finally, Trebay's claim (adopted by the trial court) that he was a "garrulous" person would not excuse unconsented touching. The term has everything to do with talking not touching.[30] This finding by the circuit court does not undermine the conclusion that McGagh may have made her false statements in good faith with an honest belief in their truthfulness. Although McGagh's false statements caused serious harm to Trebay, in our view, the evidence of McGagh's *willful* falsehood is lacking and her convictions must be reversed.

JUDGMENTS OF CONVICTION REVERSED. COSTS TO BE PAID BY BALTIMORE COUNTY.

[29] McGagh was willing to conclude the matter if Trebay received "a good scary warning from a police officer," but Officer Heims rejected the request.

[30] The word "garrulous" has been defined as "a. given to conversation, b. characterized by long-winded or diffuse statements, c. full of rambling detail." *Webster's Third New International Dictionary* 937 (2002).

Circuit Court for Baltimore County
Case No. 03-K-17-003606

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 408

September Term, 2018

KAREN CAMPBELL MCGAGH

v.

STATE OF MARYLAND

Meredith,
Shaw Geter,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Dissenting by Meredith, J.

Filed: February 4, 2020

I cannot agree with the majority's conclusion that the trial judge's findings should be overturned based upon an independent review of the evidence "without substantial deference to the fact-finding in the circuit court."

The function of appellate courts was summarized by Judge Charles E. Moylan, Jr., in *State v. Albrecht*, 336 Md. App. 475, 478-79 (1994), as follows:

> At the outset, we emphasize that when an appellate court is called upon to determine whether sufficient evidence exists to sustain a criminal conviction, it is not the function or duty of the appellate court to undertake a review of the record that would amount to, in essence, a retrial of the case. Rather, we review the evidence in the light most favorable to the State, *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979); *Branch v. State*, 305 Md. 177, 182–83, 502 A.2d 496, 498 (1986), giving due regard to the trial court's finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses. *See, e.g., State v. Raines*, 326 Md. 582, 589, 606 A.2d 265, 268 (1992); Maryland Rule 8–131(c).1 Fundamentally, our concern is not with whether the trial court's verdict is in accord with what appears to us to be the weight of the evidence, see Jackson, 443 U.S. at 319, 99 S.Ct. at 2789, 61 L.Ed.2d at 573; *Allison v. State*, 203 Md. 1, 5, 98 A.2d 273, 275 (1953), but rather is only with whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.
>
> In other words, when a sufficiency challenge is made, the reviewing court is not to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt"; rather, the duty of the appellate court is only to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 318–19, 99 S.Ct. at 2789, 61 L.Ed.2d at 573 (emphasis in original); *see also Oken v. State*, 327 Md. 628, 661, 612 A.2d 258, 274 (1992); *Raines*, 326 Md. at 588–89, 606 A.2d at 268.

In prior perjury cases decided by either this Court or the Court of Appeals, I discern no departure from the "clearly erroneous" standard, applicable to a bench trial as occurred in this case, pursuant to Maryland Rule 8-131(c). In *Mason v. State*, 225 Md. App. 467, 475 (2015), Judge Patrick Woodward stated that the applicable standard of review in that perjury case was as follows:

> The standard of review for non-jury trials is governed by Maryland Rule 8–131(c), which requires this Court to accept the factual findings of the trial court unless clearly erroneous. Determinations of legal questions or conclusions of law based on the trial court's findings of facts are reviewed *de novo*. *Saxon Mortg. Servs., Inc. v. Harrison*, 186 Md. App. 228, 262–63, 973 A.2d 841 (2009).
>
> > "In reviewing a challenge to the sufficiency of the evidence to support a conviction, we view the evidence in the light most favorable to the prosecution in order to determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. We defer to the fact-finder's decisions on which evidence to accept and which inferences to draw when the evidence supports differing inferences. In other words, we give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether . . . [we] would have chosen a different reasonable inference. In our independent review of the evidence, we do not distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence."
>
> *Montgomery v. State*, 206 Md. App. 357, 385, 47 A.3d 1140 (alterations in original) (quoting *Morris v. State*, 192 Md. App. 1, 30–31, 993 A.2d 716 (2010)), *cert. denied*, 429 Md. 83, 54 A.3d 761 (2012).

Similarly, Judge Sally Adkins described the appropriate standard for appellate review of a perjury conviction in *Furda v. State*, 421 Md. 332, 353 (2011). Writing for a unanimous Court, Judge Adkins explained that appellate courts defer to credibility

determinations made by trial courts, even with respect to whether a defendant in a perjury case acted "knowingly and willfully." Judge Adkins stated:

> Furda contends that he did not have the subjective intent necessary to support a perjury conviction, explaining that he did not knowingly and willfully lie on the application because he truly believed that the Denial Order was wrong. Although the perjury and false information statutes employ two different terms—willfully and knowingly—to describe the requisite state of mind of the defendant, this Court has stated that the two words are of "similar import" and are "the same in substance and effect." *Greenwald v. State*, 221 Md. 235, 244, 155 A.2d 894, 899 (1959). "To be willful, the false oath must be deliberate and not the result of surprise, confusion or bona fide mistake[.]" *Myers v. State*, 303 Md. 639, 640 n. 1, 496 A.2d 312, 312 n. 1 (1985). In conducting our inquiry, we are mindful that the trial judge here did not find Furda to be a credible witness: "The Court also finds that Mr. Furda did not testify candidly when he testified during his trial. He told me then, he told me now, he was not aware of [the Denial Order]. To be blunt, I do not believe him[.]" We give "great deference to a hearing judge's . . . credibility determinations" because "**credibility determinations are to be made by trial courts, not appellate courts**." *Longshore v. State*, 399 Md. 486, 520, 924 A.2d 1129, 1149 (2007).

(Emphasis added.)

In my opinion, the majority erred by engaging in a *de novo* review of the facts. But, even if I had endeavored to review the cold record *de novo*, despite the fact that both the defendant in this case and the person she falsely accused of committing a fourth degree sexual offense testified at the non-jury trial in this matter, I would conclude the evidence is sufficient to sustain the judgments of conviction entered by the trial judge.

The confusion appears to be at least partly attributable to the anachronistic requirement of corroboration that applies in perjury prosecutions. *See Mason*, *supra*, 225 Md. App. at 477 ("The State urges this Court to abandon the two-witness rule as 'an

artifact of the jurisprudence of the Court of Star Chamber.'"). But there was ample evidence in this case corroborating the fact that Ms. McGagh made a false report and swore falsely that Mr. Trebay had "groped [her] twice," once when she swore that he "cupped my breast with his hand," and again when she swore that he "leaned in and rubbed my upper thigh."

The surveillance video from the Verizon store provided corroboration that the touching that allegedly would have met the definition of "sexual contact"—set forth in Maryland Code, Criminal Law Article, § 3-301(e)(1)—did not occur. Not only did Mr. Trebay deny that the alleged sexual contact occurred, but Ms. McGagh also admitted on the witness stand in this case that the sexual contact she had described in her sworn statement of charges is not shown in the surveillance video. As the majority opinion recounts, during Ms. McGagh's direct examination testimony, the trial judge asked her if she could show the judge where in the video "he either touches the, upper inside of your thigh or he comes even near your thigh." The response that Ms. McGagh merely "thought" that had happened led to this exchange:

> The Court: Well, show me where there is a brush or a cupping or a touching or anything of your breast.
>
> Ms. McGagh: That's how it felt.
>
> The Court: . . . You show me where he either touches the, upper inside of your thigh or he comes even near your thigh.
>
> Ms. McGagh: It does.
>
> The Court: Because you indicated several times to that police officer that it is the upper inside of your left thigh. Mr. Trebay, I don't remember, being

> on your left side. He was on the right side. So, **if I missed it, I truly, genuinely, authentically, want you to show me what I missed. But you[r] saying that's what I *thought* happened and you[r] saying that's what *happened,* are two completely different things**.
>
> Ms. McGagh: That's what I *thought* happened.
>
> The Court: Okay. **So, there's no point in looking anymore because it's not there. You concede that point**.
>
> Ms. McGagh: I can.

(Emphasis added.)

The majority opinion notes that Ms. McGagh has not challenged the trial court's finding of falsity, and further agrees that "the materiality component of the perjury and false report charges has been satisfied." Nevertheless, the majority concludes that the evidence was not sufficient to permit the trial court to find that, when Ms. McGagh falsely swore that Mr. Trebay had groped her breast and upper thigh, she made the false accusation willfully and knowingly. In my view, that was a credibility determination that the trial judge was justified in making based upon the evidence, a finding as to which we are obligated to defer. *See Furda, supra,* 421 Md. at 353.

The trial judge forcefully explained her reasons for concluding that Ms. McGagh "intentionally lied" about "the essential, critical facts" :

> I have no reasonable doubt. I find beyond a reasonable doubt that Ms. McGagh perjured herself and that she gave a false statement to Officer Heims. **I find that she intentionally lied.** And not about everything, that is a many page statement of charges. Many of the things in the statement are true, but **the essential, critical facts are untrue. It is completely and totally untrue that Mr. Trebay cupped Ms. McGagh's breast. It, it's not even a close call.** He didn't cup her breast, he didn't brush her breast, **he did not touch her breast or her chest in any way. He never got close**

> **to her upper inner thigh**. I can't say, having looked at two plus hours of video, that I know where his hands were all the time, but my, I feel like they were, he's a, as he said, a garrulous guy, he talks with his hands and I saw his hands in the air a lot but, **I'll tell you this, he wasn't in a position to reach across from where he was and rub her or touch her upper inner thigh on the left hand side, which is what Ms. McGagh told Officer Heims happened**. I saw it as she showed him on the video, the body camera, I guess is what I mean to say. **And I don't believe that she was confused about what happened.** It's far more likely that she wanted Mr. Trebay fired and the story started and was sort of like that proverbial snowball going down the hill, it just got more ingrained and more elaborate, but it was false. And so, that's my decision.

The majority opinion states that it was "reasonable" for Ms. McGagh to want to cause Mr. Trebay to be fired. I do not disagree that the boorish conduct that she experienced was, in her words, "creepy." But even if it was reasonable for her to want to see him discharged from his sales position, that would not provide legal justification for her to falsely accuse him of having committed a criminal sexual offense in the fourth degree. The trial judge did not commit a legal error in concluding that Ms. McGagh's false factual embellishments meet the legal definition of perjury and a false statement to the police.

In my view, it is an inappropriate exercise of appellate review to reverse the judgment of the trial judge in this case.

The correction notice for this opinion can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0408s18cn.pdf