Circuit Court for Montgomery County
Case No. 132462

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 833

September Term, 2018

MARCELO DENIEL

v.

STATE OF MARYLAND

Fader, C.J.,
Gould,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: July 30, 2019

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

Marcelo Deniel, appellant, was convicted by a jury sitting in the Circuit Court for Montgomery County of the following offenses related to his sexual abuse of his step daughter from when she was about four years old until she was about eight years old: sexual abuse of a minor, three counts of second-degree sexual offense, and six counts of third-degree sexual offense.[1] Appellant raises one question on appeal: Did the trial court err in denying his motion of judgment of acquittal on all his convictions? For the reasons that follow, we shall affirm the judgments.

FACTS

Sandra S. and Eduardo S., who are from Argentina, married in 1992 and divorced in 2003. During their marriage, they had three children: two older boys and J.S., who was born in December 2002. In 2004, Sandra S. met and began living with appellant, and in 2008, they married and had two children together. In 2006, Eduardo S. married Kim Edmonds, and a year later they had one child together.

J.S., who was 15 years old at the time of trial, testified that she lived with her mother following her parents' divorce. J.S. testified that when she was around five years old and in kindergarten, she lived in a townhouse in Kensington, Maryland with her mother, appellant, her two older brothers, her mother's and appellant's two children, and appellant's two older children from a previous marriage sometimes visited on the weekends. The townhouse had two floors – the upstairs had two bedrooms and the

[1] The court sentenced appellant to a total of 35 years of imprisonment, all but 18 years suspended, and five years of probation and sex offender registration, following his release from prison.

downstairs had a kitchen, living room, and dining room. She testified to an incident when she was lying on the edge of her mother's and appellant's bed in their bedroom when appellant entered the room. Appellant stood in front of her, leaned his groin into her, and held her legs up while repeatedly spreading her legs open and closed.

When she entered the first grade until mid-way through third grade, the family lived in a house in Rockville that had a main floor and a basement. A hallway separated the main floor, with the living room to the left and the kitchen to the right. In the left rear of the house was her brothers' bedroom behind which was her bedroom, and in the right rear of the house was the master bedroom.

J.S. testified to an incident shortly after moving into the Rockville house in which she and appellant were the only ones in the living room watching television. They played "horsey," and she bounced on his lap facing him. She testified that it lasted longer than usual and she felt "uncomfortable and strange." She testified that appellant helped her with her homework in his and her mother's bedroom, and there came a time when he told her that if he helped her, she would have to help him. During their homework sessions he touched her - touching and kissing her breasts, anus, and vaginal area with his hands, mouth, and penis. The actions escalated, and he had her perform fellatio at least once and he performed cunnilingus on her. The sexual encounters would last five to 20 minutes, and the bedroom door would be closed and often locked. Appellant told her that if she told anyone no one would believe her because she was "disgusting" and a "slut," she would be placed in foster care, and her parents would not love her.

J.S. also described an incident while on family vacation the summer after first grade. Appellant touched her vagina under her bathing suit while in a lake, and she told her mother about it. Her mother later told J.S. that she had spoken to appellant, and he said "nothing happened and he didn't mean it. And I was confused. I was – it was a mistake." J.S. testified that appellant stopped the abuse for about a week after she reported it to her mother, but then it continued.

In November 2011, while J.S. was in the third grade, her mother took J.S. to Argentina, along with J.S.'s older brother and J.S.'s half siblings from her mother's marriage with appellant. In February 2013, J.S.'s father went to Argentina and brought J.S. and her older brother back to the United States. J.S. has lived with her father ever since.

After returning to the United States and while in the fifth grade, J.S. told her best friend Corin Roth about appellant's sexual abuse of her, and that she had told her mother, who had not believed her. She swore her friend to secrecy. Roth confirmed J.S.'s testimony. Roth testified that she first met J.S. in third grade, and they instantly became best friends and had frequent sleepovers. While having a sleepover in fifth grade, J.S. told her that when she was younger her stepfather touched her all over her body. He had once wanted to put his penis in her mouth, but she had stopped him. J.S. said she once told her mother, but nothing changed "so she lost faith in her mom." J.S. made her promise not to tell anyone, and Roth did not. Roth testified that she is still best friends with J.S., and they are in daily contact.

In May 2017, J.S. told Edmonds and her daughter from a previous marriage about the abuse, after which Edmonds called the police. Both Edmonds and her daughter confirmed that J.S. told them about the abuse.

J.S.'s father testified, among other things, that in 2005, his ex-wife obtained a court order of child support from him, and that he quickly became in arrears. He testified that in 2013 he went to Argentina to retrieve his children with his ex-wife's knowledge. She gave him the children's passports so he could return to the United States with them. He had arrearages of over $30,000, at one point, but in 2013, he successfully terminated his child support obligation and had the arrearages vacated because his children were in his custody.

J.S.'s mother testified for the defense from Argentina. She testified that J.S. never complained to her about appellant sexually touching her. She testified the lock on her and appellant's bedroom door at the Rockville house was broken. She testified that her ex-husband took J.S. from Argentina without her permission, but she admitted that she never complained to the United States Embassy in Argentina, explaining that the embassy was too far from her house. She testified that she and appellant are still married and talk on a daily basis.

Appellant testified in his defense and denied sexually abusing J.S. He testified that the lock on his and his wife's bedroom door at the Rockville house was broken; that he helped both J.S. and her brother with their homework at the same time; and that he was never alone with J.S. during the years she lived with him.

DISCUSSION

Appellant argues that the trial court erred in denying his motion for acquittal on the charges against him because: "[the victim's] testimony was inconsistent, no physical evidence demonstrated abuse, and the defense evidence established a motive to fabricate." The State disagrees with appellant that the trial court erred, as do we. We shall address each of appellant's arguments in turn.

The standard for appellate review of evidentiary sufficiency is "'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.'" *Tracy v. State*, 423 Md. 1, 11 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original). 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 (2012) (quotation marks and citation omitted). A court, on appellate review of evidentiary sufficiency, will not "retry the case" or "re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010). Thus, "the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Allen v. State*, 158 Md. App. 194, 249 (2004) (quotation marks and citation omitted), *aff'd*, 387 Md. 389 (2005).

Appellant does not argue that the State failed to prove the elements of the crimes for which he was convicted. Rather, he argues that the evidence was insufficient to sustain

his convictions because J.S. was not credible. In support of his argument that J.S.'s testimony was too inconsistent to be credible, appellant points out that J.S. testified on direct examination that the sexual abuse occurred "[a]lmost every single day" but on cross-examination testified that the abuse took place "almost every week[,]" adding that "[i]f it wasn't every single day during the week then it was every other day, every other two days during the week." There is no merit to this argument. It is well-settled in Maryland that a juror, in performing its fact-finding role, is "free to believe some, all, or none of the evidence presented[.]" *Sifrit v. State*, 383 Md. 116, 135 (2004).

In support of appellant's argument that her testimony was not credible because it was uncorroborated, appellant points out that the State failed to introduce physical evidence of the abuse and J.S.'s testimony "strains credulity," given that the abuse took place in a busy household in a small house and no one else testified to seeing evidence of any abuse. There is no merit to this argument either. Corroboration of the testimony of a victim-eyewitness testimony is irrelevant to the sufficiency of the evidence inquiry because corroboration, or lack of corroboration, goes to the weight of the testimony, not its sufficiency. *Cf. Branch v. State*, 305 Md. 177, 183 (1986) ("Identification by the victim is ample evidence to sustain a conviction. . . . The testimony of a victim, unlike that of an accomplice, needs no corroboration.") (quotation marks and citations omitted).

In support of appellant's argument that we must reverse his convictions because J.S.'s father "had a motive to have J.S. fabricate allegations against" him, he reasons that if J.S.'s mother returned to the United States from Argentina, J.S.'s father would have had reason to worry that the mother "could re-gain custody of J.S. and his significant child

support obligation could resume." This argument likewise has no merit. A motive to fabricate is relevant to a witness's credibility, not the sufficiency of the evidence. *See Whiting v. State*, 160 Md. App. 285, 310 (2004) (observing that witnesses' motives to fabricate goes to the weight of their testimony not the sufficiency of the evidence to sustain the conviction), *aff'd*, 389 Md. 334 (2005).

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.