Circuit Court for Washington County
Case No. C-21-CR-18-000472

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 974

September Term, 2020

JOHN BARNARD

v.

STATE OF MARYLAND

Leahy,
Reed,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: August 10, 2021

In 2018, John Barnard ("Appellant") was indicted by a grand jury in Washington County on two counts: sexual abuse of a minor in violation of Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CR"), § 3-602; and engaging in a continuing course of sexual conduct against a minor in violation of CR § 3-315.[1] Appellant waived his right to a jury trial and elected to proceed with a bench trial. At trial, the State presented evidence of numerous rapes and sexual acts that Appellant committed over the course of multiple years against V.,[2] a relative meeting the requirements of CR § 3-602. The court found Appellant guilty of both counts and sentenced him to 35 years in total, as follows: 25 years suspend all but 17 years and 6 months for count 1, sexual abuse of a minor; and 30 years suspend all but 17 years and 6 months for count 2, engaging in a continuing course of conduct. Appellant was further ordered to complete five years of supervised probation upon release, subject to conditions, and register as a sex offender.

Appellant filed a timely appeal and presents a single issue for our review: "Was the evidence sufficient to support appellant's convictions?"

We hold that the evidence was legally sufficient to sustain Appellant's convictions and, accordingly, affirm the judgments of the circuit court.

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[1] Throughout this opinion, we cite to the version of the Criminal Law Article referenced in the indictment. Between April 13, 2008 and February 27, 2018, the time of the offense, CR § 3-602 did not undergo amendment. However, CR § 3-315 was amended once during the same period, in 2017, to reflect a reclassification of certain criminal sexual offenses. 2017 Md. Laws ch. 161 (S.B. 944). The amendment did not substantively impact Appellant's potential liability under CR § 3-315.

[2] To protect the victim's identity, we refer to her by an initial that has no connection to her name.

BACKGROUND

An officer of the Hagerstown Police Department responded to a reported sexual assault on February 27, 2018. Earlier that day, V. had disclosed to a friend that Appellant had sexually assaulted her. The friend and V. then went to the friend's house, where they told the friend's mother, who contacted the police. V. was then transported to the police department. There, V. advised a detective that the most recent sexual assault occurred that morning. Appellant had forced V. to perform fellatio on him until he ejaculated on her chest. V. then used a "green or blue towel" to clean the semen and sperm.

The police contacted the Department of Social Services ("DSS") to perform a forensic interview with V. V. was transported to the Safe Place Child Advocacy Center ("Safe Place") where she was interviewed by Tammy Puffenberger, the Child Welfare Supervisor from DSS.

During her interview with Ms. Puffenberger, V. related that, earlier that day, Appellant was still mad at her about an incident that occurred the day before. Apparently, V. had violated one of his rules. Appellant cautioned V. that "the next time [she didn't] do something right . . . he was going to get seven guys to . . . rape [V.]" Then, Appellant made V. perform oral sex on him, which he referred to as "deep throat." V. told Ms. Puffenberger that:

> sometimes [Appellant] forces my head down and it chokes me. And I tell him I can't breath[e], he says, "Don't say that you can't." He says, "Just go with it."

V. revealed that Appellant ejaculated on her chest. V. then went to the bathroom and wiped the ejaculate off her chest with a blue or green towel and returned the towel to a stand in the bathroom.

Ms. Puffenberger then asked V. if similar incidents occurred before, and she responded affirmatively. V. advised that she had not previously told anyone of these sexual incidents because she did not want Appellant to go to jail. V. finally told her friend because of the threatening comments Appellant had made to her earlier in the day.

That same day, V. underwent a sexual assault forensic examination ("SAFE"), and her chest was swabbed for evidence. The police obtained a search warrant and recovered a green towel from the bathroom in Appellant's house. In addition, the police collected a cheek swab from Appellant. The evidence from the SAFE examination and the cheek swab from Appellant was then forwarded to the Forensic Sciences Division of the Maryland State Police for analysis. A report from the Forensic Sciences Division stated that the chest swabs from V. tested positive for semen and sperm, and the sperm fraction matched the DNA profile of Appellant. Appellant was indicted on June 28, 2018.

Trial

A. The State's Case

The case proceeded to a three-day trial, beginning March 3, 2020. The State first called V. V. established, by her birthdate, that she was a minor at the time of the most recent incident on February 27, 2018, *see* CR § 3-602(b) and CR § 1-101(g) (defining minor), and had been "under the age of 14 years at any time during the course of conduct,"

s*ee* CR § 3-315(a). V. testified that Appellant began to sexually molest her when she was eight years old. On the first occasion, Appellant touched her vagina. Appellant directed V. to come over to where he was seated. He proceeded to rub her vagina over and under her clothes with his hands. While he was rubbing V., Appellant told V. "that it would feel good." On that particular occasion, V. recounted, Appellant did not touch V. anywhere else. "About a week or two went by" before Appellant touched V. "in the same way" again. V. testified that Appellant continued to touch V.'s vagina with his hands, albeit with less frequency, approximately "a month or two apart."

When V. was 11 or 12, around the time V. began her first menstrual period, Appellant began to penetrate V.'s vagina with his penis and to require V. to perform fellatio. V. testified that Appellant began to penetrate her vagina every "month or two and then progress[] to like almost every day."

V. testified to a period of time that these incidents would occur in a middle room upstairs in the house of another relative. Appellant would instruct V. to '"Stay quiet."' When she would resist, he would respond that '"Women just take it."'

In addition to vaginal penetration, V. testified that Appellant would put his penis in her mouth and had required her to perform fellatio "about 30 times." V. testified that Appellant would instruct her to '"Touch me there,' and like grab[] [her] hand to put [it] there."

She testified that the incidents would tend to start the same way "[w]ith [Appellant and V.] sitting there watching something in his tablet or him playing and then he would

just like tell me to make him feel good or something to that effect." When V. would resist, Appellant would say '"Women just do it,' and then [she] couldn't really fight back at that point."

In total, V. testified that Appellant penetrated her vagina with his penis twenty times. Occasionally, Appellant would stick his finger in V.'s anus. V. knew that Appellant's penis was inside her vagina while he was penetrating her because she "felt it." Likewise, V. felt his finger inside her anus "like he was pushing everything up. It just felt really odd." V. did not cry out during these incidents because Appellant told her to "be quiet" and "coerce[d] [her] into saying that he would go to jail and stuff like that."

V. then testified regarding the incident on February 27, 2018. She recalled that day because it "was the day that [Appellant] threatened" her. The night before, V. had violated one of Appellant's rules. At the time, another male relative was at the same house. Mr. Barnard had required V. to cover her skin around other people, and V.'s clothing violated this rule. The next morning, V. asked Appellant how she "could make it better," to which Appellant responded that she should "just start listening" and threatened her that if she "didn't start listening to him he would have seven of his guy friends come in and rape [V.] while he watched." This threat made V. "scared." V. then testified at the trial that nothing sexual happened that morning.

B. Motion to Dismiss

Counsel for Appellant moved to dismiss count 1 of the indictment as, according to Appellant, it avers that a sexual abuse occurred on February 27, 2018,[3] and V. testified that "nothing sexual happened to her on that date" and to dismiss evidence regarding a February 27th interview and the DNA expert's testimony, "who is here reporting on evidence that was gathered on the 27th." In response, the court stated:

> One thing at a time, first as to . . . dismissal, the [c]ourt is not going to dismiss either of the counts of the indictment at this point. Certainly there will be renewal of motions at the appropriate time, assuming we get there, and the [c]ourt will consider it. The State has not completed its presentation of evidence. I don't know what else they are going to put on, but obviously until I hear it, I don't think it's appropriate for the [c]ourt to actually rule out a count.

Counsel for the State then noted that it would play a portion of the February 27th interview, a "Safe Place recording," in which V. stated that fellatio occurred on the morning of February 27. The State contended that this portion of the interview was an "inconsistent statement directly admissible pursuant to [Maryland Rule] 5-802.1"

Counsel for Appellant responded that, while the statement "could almost be the telltale definition of" an inconsistent statement, he questioned "[a]t what point, though, does the [c]ourt . . . permit evidence that's highly prejudicial to the defendant to come in when in fact the witness, complaining witness . . . remembers nothing happened[?]" The Court overruled Appellant's objection based on the State's proffer and permitted the State

[3] A review of both counts in the Indictment, however, indicates that the relevant time period was between "on or about April 13, 2008 through February 27, 2018" and not solely February 27, 2018 as counsel indicated.

to play in court "the portion that the State alleges is inconsistent with the complaining witness's testimony today."

C. Continuation of the State's Case

The State then played a portion of the "Safe Place recording" from Ms. Puffenberger's interview of V. on February 27, 2018. In the interview, V. was crying because she did not want Appellant's wife to leave or hurt him. She then relayed that Appellant threatened her and then required her to perform oral sex on him. After watching a portion of the recording, counsel for the State asked again whether "something sexual" happened on the morning of February 27. V. responded: "according to the video it did, but I don't necessarily remember." V. did recall receiving a SAFE examination and telling the nurse that "there would have been evidence on [her] chest" because Appellant "ejaculated on [her] chest."

On cross-examination, among other lines of questioning, counsel for Appellant asked if V. remembered any "identifying marks" on Appellant's groin area or penis. V. responded that she could not remember and "didn't study [Appellant's penis]."

Ms. Puffenberger testified next. She testified that she first met V. at the police department on February 27, 2018, interviewed V. at the Safe Place later that evening, and then went to the hospital afterwards with V. for her SAFE examination.

Victoria Wright Connor, a certified forensic nurse examiner and the former coordinator for the forensic nurse examiner program for Meritus Medical Center, testified regarding her administration of the SAFE examination. Ms. Connor testified as an expert

in the field of forensic examination as a forensic nurse practitioner. Ms. Connor testified that, on February 27th, she performed a sexual assault forensic examination on V.[4] During the examination, Ms. Connor, pursuant to standard protocol, asked whether V. had showered after the incident or changed clothes. V. responded that she had not showered since the assault but had changed her clothes. Ms. Connor then swabbed V.'s chest. At the conclusion of the SAFE examination, Ms. Connor placed the evidence in a large envelope, sealed it, and signed over the tape at the top. Then, an officer arrived to pick up the envelope at Ms. Connor's request.

Detective Kevin Brashears then testified concerning his limited interactions with V. He described V.'s demeanor at the police station as "very sad, very upset, very depressed." After briefly speaking with V., Detective Brashears testified that V. was transported to the Safe Place for a forensic interview and that he began to author a search and seizure warrant to collect the blue and/or green towel. Alongside other officers, Detective Brashears also executed the warrant and recovered the towel that was in the bathroom.

[4] Ms. Connor testified that a SAFE examination,

> consists of the medical part of the exam which is a head-to-toe physical exam . . . where . . . the forensic nurse is looking for any injuries, any complaints of pain, that sort of thing, . . . looking for obvious injuries such as bruises, lacerations, and . . . there's an interview period where the nurse asks the patient . . . the circumstances that brought them there. . . . [T]o get a little bit of what the circumstances are that's bringing them there and to get an understanding of maybe what kind of injuries or where to direct evidence collection to. . . . [A]nd then the evidence collection portion of the exam i[s] started. And there are sometimes pictures involved, obviously, . . . collection of evidence from various parts of the body with swabs that . . . you know directed by the patient. Patient's . . . account of what happened by the patient.

Detective Anthony Fleegal, the lead investigator, testified next, and in addition to corroborating prior testimony concerning the investigation, Detective Fleegal explained that he received a cheek swab of Appellant's DNA. The swab, alongside the SAFE kit, was sent to the Maryland State Crime Laboratory. After the Laboratory returned a report of DNA results, Detective Fleegal sought charges for Appellant. During cross-examination, Detective Fleegal affirmed that his decision to file charges was based "primarily" upon the results from the DNA swabs.

Finally, the State called Dr. Leslie Mounkes, a Forensic Scientist III at the Maryland State Police Forensic Sciences Division. Dr. Mounkes holds a bachelor's degree in microbiology from the University of California at Berkeley, a PhD in molecular and cellular biology from the University of Colorado at Boulder, and a master's degree in forensic molecular biology from The George Washington University. She received specific training in the field of forensic DNA analysis and serology and estimated that she had testified as an "expert in the field of forensic serology and DNA analysis" in Maryland courts "a little over 30 times." While counsel for Appellant objected to her being entered as an expert, the circuit court denied this objection, finding her "imminently qualified through her significant education, work experience."

Dr. Mounkes testified concerning her analysis of the chest swabs and other samples provided from the SAFE kit. Specifically, she determined that Appellant's DNA "matches the single male profile from [] two X2 sperm fractions of the chest swabs." Dr. Mounkes opined that the:

> probabilities of selecting an unrelated individual at random having this DNA profile are approximately 1 in 1.2 sextillion U.S. Caucasians, 1 in 5.3 septillion African Americans, and 1 in 6.5 sextillion U.S. Hispanics.[5] And because of the rarity of that profile exceeds 1 in 333 billion, it is unreasonable to conclude that an unrelated individual would be the source of that profile.

On cross-examination, counsel for Appellant questioned whether having swabs in the open would permit the transfer of DNA. Dr. Mounkes responded that she "would not expect that" and, while she could not "rule it out," she "would dry swabs in the same manner." On redirect, Dr. Mounkes testified that the deposit of DNA on V.'s body was

> certainly consistent with direct transfer. . . . [I]n terms of a secondary or tertiary event, it depends if somebody is sticking their finger in a semen glob and then taking it directly to her chest, then to me that would be giving you a similar type of - - similar type of result. If we're talking about transfer from a laundry item, then no I would not expect that.

At the conclusion of Dr. Mounkes testimony, the court admitted the first nineteen minutes of V.'s interview with Ms. Puffenberger at the Safe Place. Then, the State rested.

D. Motion for Acquittal

At the conclusion of the State's case, Appellant moved for acquittal "based on a number of different factors." Counsel for Appellant referenced "a number of inconsistencies," including "changing description of changing timeframes offered by" V. Counsel referenced his continuing objection to evidence regarding what occurred on February 27th and other difficulties V. had with remembering details. Counsel pressed that

[5] A sextillion is a number equal to one followed by 21 zeroes, one thousand million million million, and a septillion is a number equal to one followed by 24 zeroes.

there were "no witnesses to the allegation." Finally, counsel critiqued the DNA evidence, including Dr. Mounkes' testimony.

The court denied Appellant's motion, finding "sufficient evidence if believed to support the two counts" and "recognizing the . . . inference goes in favor of [the] State at this point in the trial."

E. The Defense's Case

Appellant called four witnesses, in addition to testifying in his own defense. The defense theory was that V. transmitted Appellant's sperm onto her chest from a used towel in the bathroom of Appellant's home.

Appellant's adult daughter testified first. She testified that she lived with Appellant when she was younger, but admitted on cross-examination that she last lived with Appellant "a long time ago" and did not live with him anytime V. was there because she lived with her mother after her parents split.

Joanne Barnard—Appellant's current wife, who married Appellant in 2004—testified next. Through her testimony, notes taken between 2007 and 2012 regarding V. and pictures of V. smiling and appearing happy were discussed. Appellant's wife also testified to distinguishing marks on Appellant's private areas, including a scar from his pelvic area to his scrotum and a scar on the head of his penis.

Appellant's niece testified, among other things, that V. was in a "very teenage rebellion." Appellant's twenty-seven-year-old nephew, who was at his house on the evening before the 27th, testified next. He related that he took a shower at Appellant's

house and thought he used both of the towels in the bathroom to dry off. He testified that he was "pretty much [at the house] all day."

Finally, Appellant testified in his own defense. Appellant described distinguishing scars on his penis and groin area. He then testified that, on February 26th, he had sexual relations with his wife and cleaned himself off on a towel. On cross-examination, after the State played his interview with Detective Fleegal, Appellant clarified that he cleaned himself off with two towels. Appellant then admitted that "at the time [he] came in to meet with Detective Fleegal, [he] knew that there had been a warrant executed at [his] residence . . . and that a towel had been seized[.]" At the conclusion of Appellant's testimony, the defense rested.[6]

F. Judgment

After closing argument, the court found Appellant guilty of both counts. In support of this determination, the court first identified items that were not in dispute. These included the ages of Appellant and V., and the periods when V. and Appellant were together in Maryland. The court then summarized that "[t]his case largely comes down, of course, as sex offense cases usually do, to the testimony of the victim."

In discussing V.'s testimony, the court noted that V.'s "testimony did differ from the previous statement at the Child Advocacy Center in one major way, that being specifically as to the events of the morning of February 27th." V., however, "was consistent

[6] Because the trial was a bench trial, the court indicated that Appellant did not have to renew his motion for judgment of acquittal.

in her description of the threat that was given . . . to her by Appellant," which was why, the court determined, V. "made the decision to disclose what had happened." The court, commenting on the "testimony of the defense witnesses," noted that "nothing [] was testified to that would have made it impossible or directly contradicted the possibility that it did exist and had occurred." Alternatively, the court found that V. "did remember in significant detail locations where the sex offenses would occur" and that V. testified to "very specific details" to "from when, to a lesser extent, why it occurred and progressed and evolved into more times and to different types of sexual acts." The court believed V.'s testimony.

The court noted that V.'s "testimony alone is enough to warrant conviction . . . and does meet all of the legal elements of the crime[s] charged," however, the court stated that "[i]n this case, there was more evidence [] to help substantiate or corroborate [V.]'s testimony." The court found the DNA evidence compelling, noting that it supported that the sperm on V.'s chest included the "DNA of the defendant."

The court found Appellant's theory that V. transferred his sperm with a towel problematic. First, the court noted that Dr. Mounkes testified that the portion of sperm recovered was "not consistent with a transfer or a touch DNA, but consistent with a direct contact placement of DNA." Second, the court noted, for Appellant's "theory to stand, this had to be some type of contrived and planned event . . . [and] [V.] would have had to know a few things."

> Would have had to be intending to do this. Would have had to have been waiting to a time when she knew that [Appellant]had had sex and had

> deposited . . . sperm and semen on a towel. She would have known of course what towel. She would have then, when she disclosed, specifically identified her chest as the area where it could be found. The Court finds that this is . . . , quite frankly, . . . incredible and not credible, and gives that theory no weight.

The court then found "great credibility in the reason for her disclosure." Accordingly, the court found "beyond a reasonable doubt" that Appellant was guilty on both counts.

DISCUSSION

Sufficiency of the Evidence

A. Parties' Contentions

Appellant avers that "the testimony of [V.] is so inconsistent, shocking and unbelievable, in her own story and when applied to other testimony elicited at trial[,] that a rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt." Specifically, Appellant referenced: V.'s failure to complain of sexual molestation prior to February 27, 2018; inability to identify distinguishing marks on Appellant's penis and groin; and inconsistencies in her testimony regarding the first and last instance of sexual abuse. Finally, Appellant asserts that V. could have potentially transferred Appellant's sperm to her chest using one of the towels in the shared bathroom.

In response, the State avers that Appellant did "not identify any single element that the State supposedly failed to establish." The State purports, "[f]or legal sufficiency purposes, evidence of the numerous rapes and sexual acts that [Appellant] perpetuated

against [the victim] from the time she was 11 . . . , sufficed to establish the offences of sexual abuse of a minor and continuing course of conduct against a child."

The State understands Appellant to be mounting a challenge under *Kucharczyk v. State*, 235 Md. 334 (1964), because, according to Appellant, V.'s testimony was so fraught with inconsistencies to render it devoid of any probative value. Relying on our decision in *Rothe v. State*, 242 Md. App. 272 (2019), the State urges that the "so-called *Kucharczyk* Doctrine, if it ever lived, is dead. . . . Damaged credibility is not necessarily inherent incredibility." (Quoting *Rothe*, 242 Md. App. at 285.) Because, the State argues, Appellant's argument "goes to the weight of the evidence, not legal sufficiency," none of the "perceived inconsistencies or gaps in [V.]'s testimony entitle [Appellant] to the reversal on legal sufficiency grounds."

B. Analysis

Maryland Rule 8-131(c) governs our review of a case tried to the court, and the Court of Appeals "has consistently recognized and applied this rule when reviewing the sufficiency of evidence." *State v. McGagh*, 472 Md. 168, 193 (2021). The rule provides:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Md. Rule 8-131(c). Recently, the Court of Appeals in *McGagh* reaffirmed the oft-cited standard when reviewing sufficiency of the evidence:

> We normally review sufficiency of evidence rulings by whether "*any* rational trier of fact could have found the essential elements of the crime beyond a

> reasonable doubt." This Court does not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." "Our concern is only whether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." The deferential standard recognizes the trier of fact's better position to assess the evidence and credibility of the witnesses.

McGagh, 472 Md. at 194 (cleaned up) (emphasis in original). Consequently,"'[i]n examining the record, we view the State's evidence, including all reasonable inferences to be drawn therefrom, in the light most favorable to the State.'" *Johnson v. State*, 245 Md. App. 46, 57 (2020) (quoting *Spell v. State*, 239 Md. App. 495, 510 (2018)), *cert. granted*, 469 Md. 270 (2020)), *and cert. dismissed as improvidently granted*, 471 Md. 429 (2020).

This standard "applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010). "Although circumstantial evidence alone is sufficient to sustain a conviction, the inferences made from circumstantial evidence must rest upon more than mere speculation or conjecture." *Id.*

Appellant does not discuss the elements of CR § 3-602 or CR § 3-315 or otherwise identify any element that the State failed to establish. As the State suggests, the thrust of Appellant's challenge appears to be a challenge under *Kucharczyk v. State*, 235 Md. 334 (1964). Accordingly, we briefly review the evidence, in a light most favorable to the State, to determine "whether *any* rational trier of fact could have found the essential elements of [CR § 3-602 and CR § 3-315] beyond a reasonable doubt," *McGagh*, 472 Md. at 194

(emphasis in original) (citation omitted), before turning to Appellant's challenge under *Kucharczyk*.

The crime of sexual abuse of a minor prohibits a family member from causing sexual abuse to a minor. CR § 3-602. Specifically, § 3-602(b)(1) provides: "A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor." Likewise, the statute prohibits "[a] household member or family member" from causing sexual abuse to a minor. CR § 3-602(b)(2). Family members include "a relative of a minor by blood, adoption, or marriage," and a household member "means a person who lives with or is a regular presence in a home of a minor at the time of the alleged abuse." CR § 3-601(a)(3), (4). '"Sexual abuse' means an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not" and includes "incest," "rape," "sexual offenses in any degree," and "unnatural or perverted sexual practices." CR § 3-602(a)(4).

With respect to the crime of continuing course of conduct, CR § 3-315(a) sets forth the offense as follows:

> A person may not engage in a continuing course of conduct which includes three or more acts that would constitute violations of § 3-303 [rape in the first degree], § 3-304 [rape in the second degree], or § 3-307 [sexual offense in the third degree] of this subtitle, or violations of § 3-305 [sexual offense in the first degree] or § 3-306 [sexual offense in the second degree] of this subtitle as the sections existed before October 1, 2017, over a period of 90 days or more, with a victim who is under the age of 14 years at any time during the course of conduct.

CR § 3-315(a).[7]

Here, we conclude that the evidence was legally sufficient to satisfy the elements of CR § 3-602 and CR § 3-315. Without repeating our summary of the trial testimony, it is undisputed that Appellant is: "A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor." CR § 3-602(b)(1). The court found V. highly credible, noting that her "testimony alone is enough to warrant conviction . . . and does meet all of the legal elements of the crime charged." Specifically, V. testified that Appellant began to molest her when she was 8 and vaginally rape her after V. was 11 or 12, around the time that V. had her first menstrual period. This abuse persisted until February 27, 2018. In total, V. testified Appellant penetrated her vagina with his penis approximately twenty times and require her to perform fellatio "about 30 times." As the court recounted that V. testified to "very specific details" to "from when, to a lesser extent, why it occurred and progressed and evolved into more times and to different types of sexual acts." Further, additional evidence, including the DNA evidence and Dr. Mounkes' testimony, corroborated V.'s testimony.

[7] We note that the Court of Appeals held in *State v. Bey* that the "plain language of [CR] § 3-315 prohibits separate convictions and sentences for each type of prohibited sexual acts as a separate prohibited course of conduct," "that the statute is ambiguous, after exhaustion of the tools of statutory construction," and that "the rule of lenity operates to prohibit multiple punishments." 452 Md. 255, 276 (2017). In response, the General Assembly amended the statute in 2019 "[f]or the purpose of establishing that acts constituting a continuing course of unlawful sexual conduct with a victim under the age of 14 years that occur in different periods of time are separate violations." 2019 Md. Laws ch. 47 (H.B. 712). Because Appellant was only indicted for one violation of CR § 3-315, neither *Bey* nor the General Assembly's response impacts our analysis in this case.

Instead of arguing that *this* evidence was legally insufficient to sustain Appellant's convictions, Appellant avers that deficiencies in V.'s testimony rendered it so unbelievable, that a factfinder was precluded from relying on her testimony to prove guilt beyond a reasonable doubt. Although, as in *Vogel v. State*, Appellant "does not specifically refer to *Kucharczyk v. State,* 235 Md. 334 [] (1964), it seems that he would have its teachings reach out to include the proposition that conflicting or impeachable testimony is so unreliable as to be entitled to no weight. *Kucharczyk* does not remotely stand for that proposition." 315 Md. 458, 471 n.6 (1989).

In *Kucharczyk*, an intellectually disabled sixteen-year-old boy testified both that the defendant attempted to rape him and that he did not attempt to rape him. 235 Md. at 337-38. The defendant was convicted of assault and battery and argued before the Court of Appeals that the evidence was insufficient to support his conviction. *Id.* at 335. The Court of Appeals agreed, noting "there were unqualified statements by the prosecuting witness that the crime for which the appellant was convicted never in fact occurred." *Id.* at 338. The Court held: "When a witness says in one breath that a thing is so, and in the next breath that it is not so, his testimony is too inconclusive, contradictory, and uncertain, to be the basis of a legal conclusion." *Id.*

Writing for this Court in *Bailey v. State*, 16 Md. App. 83, 95-97 (1972), Judge Moylan clarified the narrow application of the doctrine espoused in *Kucharczyk*:

> Despite the limited utility of the doctrine, the life of Kucharczyk has been amazing for the number of occasions on which and the number of situations in which it has been invoked in vain. Kucharczyk does not apply simply because a witness's trial testimony is contradicted by other statements which

> the witness has given out of court or, indeed, in some other trial. Nor does Kucharczyk apply where a witness's trial testimony contradicts itself as to minor or peripheral details but not as to the core issues of the very occurrence of the corpus delicti or of the criminal agency of the defendant. Nor does Kucharczyk apply where the testimony of a witness is 'equivocal, doubtful and enigmatical' as to surrounding detail. Nor does Kucharczyk apply where a witness is forgetful as to even major details or testifies as to what may seem improbable conduct. Nor does Kucharczyk apply where a witness is initially hesitant about giving inculpatory testimony but subsequently does inculpate a defendant. Nor does Kucharczyk apply where a witness appears initially to have contradicted himself but later explains or resolves the apparent contradiction. Nor does Kucharczyk apply where a State's witness is contradicted by other State's witnesses. Nor does Kucharczyk apply where a State's witness is contradicted by defense witnesses. Nor does Kucharczyk apply where a witness does contradict himself upon a critical issue but where there is independent corroboration of the inculpatory version. In each of those situations, our system of jurisprudence places reliance in the fact finder to take contradictions or equivocations properly into account and then to make informed judgment in assessing a witness's credibility and in weighing that witness's testimony. Even in a pure Kucharczyk situation, the ultimate resolution is solely in terms of measuring the legal sufficiency of the State's total case and not in terms of the exclusion of the contradictory witness's testimony.

Id. at 95-97 (citations omitted) (cleaned up). This Court underscored, in *Bailey*: "[i]t is then at the very core of the common law trial by jury (and its counterpart of a court sitting as a jury) to trust in its fact finders, after full disclosure to them, to assess the credibility of the witnesses and to weigh the impact of their testimony." *Id.* at 94.

Years later, in *Rothe v. State*, Judge Moylan revisited *Kucharczyk* to "lay to rest that misbegotten ghost." 242 Md. App. 272, 273 (2019). He explained that *Kucharczyk* was not merely subject to some limitation but inapplicable in virtually any other application. Judge Moylan expounded:

> It is here that we encounter, as legions of cases have encountered over the past 55 years, the massive disconnect between the case of Kucharczyk v.

> State, with its microscopically narrow holding that has never been repeated, and the so-called Kucharczyk Doctrine, a bloated attack on the legal sufficiency of evidence generally and based ostensibly on the Kucharczyk case. In the actual case, the State's entire case of guilt had consisted of the uncorroborated testimony of a single witness whose testimony was rent by unresolved contradictions about the very happening of the crime itself. The issue was not credibility per se. It was rather the utter absence of any plausible assertion that the crime had even taken place.
>
> In the years since 1964, however, the defense bar has created a wildly exaggerated Kucharczyk Doctrine that has taken on a mythic life of its own. The doctrinal mantra is that any significant attack on the credibility of a State's witness will serve to exclude that witness's testimony from evidence and thereby erode the legal sufficiency of the State's case by diminishing it to nothing.

Id. at 276. The "axiomatic truth" is that "[f]rom time immemorial, the assessment of testimonial credibility has always been the fundamental responsibility of the factfinder, jury or trial judge, as a matter of fact" and "is not and never was the function of appellate review, as a matter of law." *Id.* at 283. Judge Moylan concluded: "The simple message of this opinion is that the so-called Kucharczyk Doctrine, if it ever lived, is dead. It has been dead for a long time. Forget it. Damaged credibility is not necessarily inherent incredibility. That is all that needs to be said." *Id.* at 285; *see also Correll v. State*, 215 Md. App. 483, 502 (2013) ("It is not a proper sufficiency argument to maintain that the [trier of fact] should have placed less weight on the testimony of certain witnesses or should have disbelieved certain witnesses.").

Returning to the case before us, we are unpersuaded that any of the supposed contradictions raised by Appellant eroded the legal sufficiency of the evidence. The circuit court judge, who was sitting as the fact finder, recognized inconsistencies in V.'s testimony and explained why he still found V. credible. Specifically, the court noted that V. could

have disclosed the abuse earlier than February 27, 2018, but found her reasons for disclosing the abuse on that date credible. V. testified that this date was the first time that Appellant threatened V. Moreover, we previously explained that *Kucharczyk* does not apply "where a witness is initially hesitant about giving inculpatory testimony but subsequently does inculpate a defendant." *Rothe*, 242 Md. App. at 280 (quoting *Bailey*, 16 Md. App. at 96).

The court also weighed V.'s testimony concerning the instances of sexual abuse. While the court acknowledged that V.'s "testimony did differ from the previous statement at the Child Advocacy Center in one major way" relating to whether she performed fellatio on Appellant the morning of February 27, 2018, the court noted that "she was consistent in her description of the threat that was given" and that her "testimony concerning the oral sex that had been disclosed . . . was accepted by this [c]ourt as substantive evidence." Again, *Kucharczyk* is not applicable "where a witness does contradict himself upon a critical issue but where there is independent corroboration of the inculpatory version." *Id.* at 281 (quoting *Bailey*, 16 Md. App. at 96-97).

Further, instead of finding V. less credible for this erosion in her memory, the court found "significant credibility" to her testimony, because she continued to maintain that she did not remember at trial as she had described in her interview at the Safe Place. The court found V.'s testimony compelling, noting that she had offered "very specific details . . . why [the abuse] occurred and progressed and evolved into more times and to different types of sexual acts."

Finally, the court considered Appellant's theory that V. had transferred his sperm with a towel but found this theory "problematic" and "not credible." The court assigned no weight to it, crediting Dr. Mounkes' testimony that the deposit of DNA on V.'s body was "certainly consistent with direct transfer" and did not result from transmission from a towel.

In short, none of the alleged inconsistencies identified by Appellant entitle reversal for legal sufficiency. The circuit court, as fact finder, was entitled to credit all, parts, or none of V.'s testimony and to resolve contradictions and inconsistencies in the evidence. *See Correll*, 215 Md. App. at 502; *Pryor v. State*, 195 Md. App. 311, 329 (2010) ("Contradictions in testimony go to the weight of the testimony and credibility of the evidence, rather than its sufficiency, and we do not weigh the evidence or judge the credibility of the witnesses, as that is the responsibility of the trier of fact."). Having considered the record as a whole, we conclude that the evidence presented was more than sufficient to prove Appellant's guilt beyond a reasonable doubt.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

The correction notice(s) for this opinion(s) can be found here:

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