UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 994

September Term, 2016

JAMES PAUL STEPHENS, JR.

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Nazarian,
Salmon, James P.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: March 27, 2017

After a jury trial in the Circuit Court for Wicomico County, James Paul Stephens, Jr., appellant, was convicted of sexual abuse of a minor by a household or family member, second-degree sexual offense, two counts of third-degree sexual offense, and second-degree assault. Stephens was sentenced to fifteen years incarceration for sexual abuse of a minor and a consecutive term of life, with all but fifteen years suspended, for the second-degree sexual offense. For sentencing purposes, the conviction for second-degree assault was merged with the sentence for second-degree sexual assault. No sentences were imposed for the two counts of third-degree sexual assault. This timely appeal followed.

I.
ISSUES PRESENTED

Stephens presents three issues for our consideration, which we have reordered and rephrased, slightly, as follows:

> I. Did the circuit court err in denying the motion to suppress Stephens's cell phone and its contents?
>
> II. Must the sentence imposed for second-degree sexual assault be vacated because it is illegal?
>
> III. Was the evidence sufficient to sustain Stephens's conviction for sexual abuse of a minor?

For the reasons that follow, we shall hold that the sentence imposed for second-degree sexual offense is illegal and remand for resentencing on that count. In all other respects, we shall affirm.

II.
FACTUAL BACKGROUND

Z., who was born on May 13, 2006, testified that in 2015 he lived at his home in Salisbury with his mother, father, and three sisters. Z. met Stephens, whom he referred to as "Jay Rock," in the summer of 2015, when Stephens began staying at his home "[a]lmost every weekend." Stephens would sleep on one of the two couches in the living room, which was on the first floor of the house. Z. would sometimes go downstairs to watch television and sleep on one of the couches. According to Z., Stephens played "footsie" with him on about two occasions, licked his big toe and put that toe in his mouth on one occasion, played with Z.'s "ding along"[1] using his hand, and on three occasions, "pull[ed] out his ding along and put [Z.'s] foot on it." "Maybe twice," Stephens "put his ding along inside [Z.'s] butt," which hurt Z. "a little bit" and made him "feel mad a little bit." Z. told his mother that he had pain in his butt, but did not tell her what had caused the pain because he thought he "would have gotten in trouble." Eventually, in October 2015, Z. told his mother what had been happening.

Z.'s mother, Ms. C., testified that she had known Stephens for seventeen years, that he was a friend of her husband, and that she considered Stephens to be "family." Stephens stayed at her home on Fridays, Saturdays, and Sundays beginning in August and continuing through October 2015. For much of September 2015, Ms. C. was not at her house because she was incarcerated, but she returned home on September 25, 2016. In October, Stephens spent an entire week at Ms. C.'s home.

[1] Z. referred to his penis as his "ding along."

On October 15, 2015, while Stephens and Ms. C.'s husband were out of the house, Ms. C. saw Stephens' cell phone charging. She suspected that Stephens had secretly taken pictures of her, so she looked through pictures stored in his phone. She saw some pictures of herself and some pictures of Z. She also saw a video of Stephens on her living room couch playing "footsies" with Z.

Ms. C. testified that she spoke with Z., who told her that Stephens had "touched on him." Although Z. had never before disclosed that information to Ms. C., in August 2015, he had complained that his butt was hurting. Ms. C. thought maybe Z. was constipated, and when he continued to complain, she looked at his butt, but did not see anything wrong.

Ms. C. called Stephens, let him know what she had seen on his phone, and told him she knew what he had been doing with Z. She then called the police.

Salisbury Police Officer Seamus Lynch arrived at Ms. C.'s home and spoke with her and Z. Z. told Officer Lynch that Stephens sexually assaulted him. After speaking with Ms. C. and Z., Officer Lynch took Stephens's cell phone from Ms. C., placed it in a sealed bag, and submitted it to "Salisbury Police property" at police headquarters. Ms. C. denied editing or adding anything to Stephens's phone prior to giving it to Officer Lynch. After a search warrant was obtained for Stephens's phone, Salisbury Police Detective Ed Fissel extracted and copied the data from the phone and saved it on a "thumb" drive and a disc.

Jennifer Wehberg, M.D., a pediatrician at the Wicomico County Child Advocacy Center, testified as an expert in pediatrics and sexual assault forensics ("SAFE") exams. On October 22, 2015, she conducted a SAFE exam on Z. for the purpose of looking for

"injuries on the child in conjunction with physical or sexual abuse." Dr. Wehberg examined Z.'s rectal area and genital urinary area, including his penis and testicles, and found them to be "within normal limits." Z. had "[n]o bruising," "good tone, no fissures, no hemorrhoids," and "his genital urinary system was also within normal limits with no evidence of trauma." According to Dr. Wehberg, the normal results of the exam were "consistent with the history provided by the child" because the tissue in "the anal rectal region" has "some elasticity to it," and "things that affect the anal region do not necessarily cause long standing scarring injury[.]" Dr. Wehberg opined that if an individual had had anal sex that resulted in some tearing, it would heal within two to three days.

Katie Beran, a licensed social worker with the Wicomico County Department of Social Services who was assigned to the Child Advocacy Center, conducted a recorded interview with Z. that was played for the jury.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

Stephens contends that the circuit court erred in denying his motion to suppress his cell phone and its contents.

In considering the denial of a motion to suppress evidence under the Fourth Amendment to the United States Constitution, "'we view the evidence adduced at the suppression hearing, and the inferences fairly deducible therefrom, in the light most favorable to the party that prevailed on the motion[,]'" in this case the State. *Corbin v.*

State, 428 Md. 488, 497-98 (2012)(quoting *Williamson v. State*, 413 Md. 521, 531-32 (2010)). We accept the factual findings of the suppression court "'unless they are clearly erroneous,'" but undertake our own independent constitutional appraisal "'by reviewing the relevant law and applying it to the unique facts and circumstances of the case.'" *Grant v. State*, 449 Md. 1, 14-15 (2016)(quoting *State v. Wallace*, 372 Md. 137, 144 (2002)).

At the hearing on the motion to suppress, Officer Lynch testified that on October 15, 2015, he was dispatched to an address on Delaware Avenue in Salisbury for a report of an assault on a juvenile. Once at the home, he made contact with Ms. C., who informed him that she had located a video of her minor son Z. on Stephens's cell phone, which had been left charging at Ms. C.'s house. According to Ms. C., the video depicted the naked feet of Z., while he was asleep on the couch in her home. Ms. C. told Officer Lynch that she had looked at Stephens's cell phone because she suspected him of taking photographs of her. Ms. C. handed Officer Lynch the cell phone and he seized it as evidence of sexual assault crimes. Officer Lynch did not search the phone.

Officer Lynch next met with Z., who stated that on multiple occasions in the preceding month, Stephens had been touching him, touching his genitals, rubbing his feet, pulling him on top of him, and wrapping his legs around him. In addition, the child told Officer Lynch that Stephens had taken his [Z.'s] hand, pulled it towards his penis, and forced him to touch it.

Stephens moved to suppress the video on the ground that his cell phone was illegally seized by the police without either a warrant or probable cause. The court denied the motion, ruling that Officer Lynch had probable cause to seize the phone.

Stephens contends that Officer Lynch was made aware only that the phone contained a video depicting Z.'s bare feet. Stephens asserts that the police had no probable cause to believe that the cell phone contained evidence of sexual touching and, therefore, the phone was seized illegally. As a result, the contents of the cell phone should have been suppressed as fruit of the poisonous tree, notwithstanding the fact that the search was conducted pursuant to a search warrant. We will not address the merits of this contention.

During Ms. C.'s testimony at the merits trial, she identified the video that she had seen on Stephens's cell phone. When the State sought to enter into evidence the "data extraction video" that had been obtained from Stephens's phone by the police, the following colloquy occurred:

> THE COURT: Any objection?
>
> [DEFENSE COUNSEL]: Just to clarify, the item that's State's 4 is.
>
> [PROSECUTOR]: The data extraction.
>
> [DEFENSE COUNSEL]: That particular video?
>
> [PROSECUTOR]: It is not, it's the entire data extraction.
>
> [DEFENSE COUNSEL]: Then at this point what I'd say I don't object to it coming in subject to redaction or limitation, unless there's other authentication of the remainder.
>
> [PROSECUTOR]: If we can mark this as 4A.
>
> THE COURT: The DVD has more material on it than just this video?
>
> [PROSECUTOR]: That's correct.
>
> THE COURT: Okay. Well, we'll admit the portion of the video which contains – of the DVD that contains this video, but otherwise it is not. Which

> means also that if the jury wants to see it during deliberations they would have to be displayed only this portion of it.

Thereafter, the video was played for the jury.

An affirmative acquiescence to the admission of evidence effects a waiver of any prior objection a defendant might have made to the admission of that evidence. *See Carroll v. State*, 202 Md. App. 487, 513 (2011), *aff'd*, 428 Md. 679 (2012)(defense counsel's affirmative withdrawal of motion to suppress constitutes a waiver precluding appellant review); *Jackson v. State*, 52 Md. App. 327, 332 (1982)("[I]f a pretrial motion is denied and at trial appellant says he has no objection to the admission of the contested evidence, his statement effects a waiver[.]"); *Erman v. State*, 49 Md. App. 605, 630 (1981)(when defense counsel specifically advises that there is no objection to the admission of evidence, that affirmative acquiescence effects a waiver of the objection). In this case, defense counsel's statement that he did not object to the data extraction being admitted subject to redaction or limitation, constituted an affirmative acquiescence to the admission of that evidence and, as a result, a waiver that precludes appellate review.

Even if this issue had not been waived, Stephens would fare no better. The Fourth Amendment protects against warrantless searches and seizures by the government, not by private individuals. *See State v. Collins*, 367 Md. 700, 707-08 (2002); *Fitzgerald v. State*, 153 Md. App. 601, 658 (2003), *aff'd*, 384 Md. 484 (2004); *Bratt v. State*, 62 Md. App. 535, 542 (1985). Ms. C. seized Stephens's cell phone, looked through it, discovered what she perceived to be incriminating evidence, and later handed over the phone to the police. Her actions did not constitute governmental action. The police next acted properly by obtaining

a search warrant for the phone. As a result, even if Stephens had not acquiesced to the admission of the video at trial, the trial court would have acted properly in admitting it because it was not barred by the Fourth Amendment's prohibition against warrantless searches and seizures.

II.

Stephens next contends that the sentence imposed for his second-degree sexual offense conviction was illegal and must be vacated. The State agrees and so do we.

Stephens was charged by way of an indictment with violating § 3-306(a) of the Criminal Law Article, which provides:

> (a) *Prohibited.* – A person may not engage in a sexual act with another:
>
> (1) by force, or the threat of force, without the consent of the other;
>
> (2) if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the sexual act knows or reasonably should know that the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual; or
>
> (3) if the victim is under the age of 14 years, and the person performing the sexual act is at least 4 years older than the victim.
>
> (b) *Age considerations.* – A person 18 years of age or older may not violate subsection (a)(1) or (2) of this section involving a child under the age of 13 years.
>
> (c) *Penalty*. – (1) Except as provided in paragraph (2) of this subsection, a person who violates this section is guilty of the felony of sexual offense in the second degree and on conviction is subject to imprisonment not exceeding 20 years.
>
> (2)(i) Subject to subparagraph (iv) of this paragraph, a person 18 years of age or older who violates subsection (b) of this section is guilty of the felony

> of sexual offense in the second degree and on conviction is subject to imprisonment for not less than 15 years and not exceeding life.
>
> (ii) A court may not suspend any part of the mandatory minimum sentence of 15 years.
>
> (iii) The person is not eligible for parole during the mandatory minimum sentence.
>
> (iv) If the State fails to comply with subsection (d) of this section, the mandatory minimum sentence shall not apply.
>
> (d) *Required notice*. – If the State intends to seek a sentence of imprisonment for not less than 15 years under subsection (c)(2) of this section, the State shall notify the person in writing of the State's intention at least 30 days before trial.

Md. Code (2012 Repl. Vol., 2015 Supp.), § 3-306 of the Criminal Law Article ("CL").[2]

The jury was instructed that in order to convict Stephens of second-degree sexual offense, the State was required to prove "first, that the Defendant committed anal intercourse with Z.; second, that Z. was under 14 years of age at the time of the act; and third, that the Defendant was then at least four years older than Z." No other instruction was given with respect to a violation of CL § 3-306. Thus, although there are three modalities of second-degree sexual assault, the record is clear that Stephens was prosecuted only for a violation of CL § 3-306(a)(3).

Stephens was given a mandatory minimum sentence of fifteen years pursuant to CL § 3-306(c)(2)(i). That enhanced punishment did not apply to the modality under which Stephens was convicted. Instead, Stephens should have been sentenced pursuant to CL §

[2] Effective October 1, 2016, the Legislature substituted the phrase "substantially cognitively impaired" for "mentally defective" twice in subsection (a)(2). *See* Md. Code (2012 Repl. Vol., 2016 Supp.), § 3-306 of the Criminal Law Article.

3-306(c)(1) to a term of incarceration not exceeding twenty years. Accordingly we shall vacate the sentence imposed for second-degree sexual offense and remand for resentencing.

III.

Stephens argues that the evidence was insufficient to sustain his conviction for sexual abuse of a minor. In considering a challenge to the sufficiency of the evidence, we 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.'" *Grimm v. State*, 447 Md. 482, 494-95 (2016)(quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)). "[W]e defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)), *cert. denied*, 448 Md. 726 (2016). We will not reverse a conviction on the evidence "'unless clearly erroneous.'" *Id.* (quoting *State v. Manion*, 442 Md. 419, 431 (2015)).

Stephens was charged with sexual abuse of a minor by a household or family member in violation of CL § 3-602(b)(2), which provides that "[a] household member or family member may not cause sexual abuse to a minor." The term "household member" is defined as "a person who lives with or is a regular presence in a home of a minor at the time of the alleged abuse." CL § 3-601(a)(4). At the close of the State's case, and again at the close of all the evidence, defense counsel moved for judgment of acquittal, arguing, among other things, that Stephens was not a family or household member of Z's family. Defense counsel maintained that Stephens was not around the home all the time, did not

provide care, comfort, or support, or "those type of familial obligations that we think of of a family or household member[.]" Stephens claimed to have been at Z.'s house because Z.'s father was "having a real bad time because his wife had gotten in trouble." He argued the statute required more than "a casual acquaintance staying in a house." The trial court denied Stephens's motions.

On appeal, Stephens makes the same argument. Acknowledging that there was evidence that he spent the night at Z.'s house on some weekends in August and for a week in October, he maintains that the evidence was insufficient to establish that he was a household member for purposes of CL § 3-602(b)(2). We disagree.

The testimony of Z. and Ms. C. provided sufficient evidence from which the jury could find that Stephens was a "regular presence" at the family's home. Z. testified that beginning in the summer of 2015, Stephens stayed at his home "[a]lmost every weekend." Ms. C. testified that she had known Stephens for seventeen years, that he was a friend of her husband, and that they considered Stephens to be "family." According to Ms. C., Stephens stayed at her home on Fridays, Saturdays, and Sundays beginning in August and continuing through October 2015, and in October, he stayed for an entire week. From this evidence, the jury could have concluded that Stephens was a regular presence in Z.'s home at the time the crimes occurred.

SENTENCE FOR SECOND-DEGREE SEXUAL OFFENSE VACATED; CASE REMANDED FOR RESENTENCING; JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED IN ALL OTHER RESPECTS. COSTS TO BE PAID ONE HALF BY APPELLANT AND ONE HALF BY WICOMICO COUNTY.