Circuit Court for Wicomico County
Case No. C-22-CR-18-000407

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 122

September Term, 2019

TAVON JABIRE TULL

v.

STATE OF MARYLAND

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

JJ.

Opinion by Gould, J.

Filed: April 6, 2020

After a bench trial in the Circuit Court for Wicomico County, Tavon Jabire Tull was convicted of second-degree rape, third-degree sexual offense, and second-degree assault on a 21-month-old girl, A.S.[1] The court sentenced him to 20 years' imprisonment for the second-degree rape conviction and merged the other two convictions for sentencing purposes. In this appeal, Mr. Tull contends that the evidence was legally insufficient to sustain his convictions. We disagree and therefore affirm.

BACKGROUND FACTS AND PROCEEDINGS

On Monday, June 18, 2018, in the early afternoon, Lakisha Simpson brought her daughter, A.S., to the emergency department at Peninsula Regional Medical Center ("PRMC") because she had blood in her diaper and had been vomiting. A physical examination of A.S. revealed that she had suffered recent trauma to her vaginal vault, consistent with penetration by a finger or other object. Mr. Tull, who had a sexual relationship with Ms. Simpson and had been at her residence earlier that day, was arrested and charged for the assault on A.S.

Several individuals testified at trial about the comings and goings at Ms. Simpson's house on June 18th. At that time, Ms. Simpson and A.S. lived in a three-bedroom house in Salisbury. They stayed in a second-floor bedroom.

[1] Mr. Tull was acquitted of child sexual abuse and second-degree child abuse.

Ms. Simpson's close friend and Mr. Tull's cousin, Mechelle Fields, stayed in another bedroom on the second floor along with her fiancé, Bremante Tull ("Bremante"),[2] her 11-year-old daughter, N., and her infant niece, K. Ms. Fields routinely cared for A.S. while Ms. Simpson worked.[3]

From Friday, June 15th, through Sunday, June 17th, A.S. stayed with her grandmother, Shelly Thomas. Throughout the weekend, A.S. was happy and content. Ms. Thomas dropped A.S. off at Ms. Simpson's house between 4 and 5 p.m. on June 17th. Ms. Thomas changed A.S.'s diaper before she brought her home and did not observe any blood.

When A.S. was dropped off, Ms. Simpson was at work, but Ms. Fields was home. Bremante arrived home from work between 5:30 and 6:00 p.m. Ms. Fields bathed A.S. Ms. Fields testified that A.S. played, ate dinner, took a bath, and went to sleep. Ms. Fields did not observe any blood in A.S.'s diaper when she changed her or any injuries when she bathed her.

Sometime around 8 or 9 p.m., A.S. fell asleep and Bremante carried her into her bedroom and put her down on a couch. Bremante and Ms. Fields watched a movie together until Bremante also fell asleep. Bremante testified that he did not see A.S. again after he carried her to her bed. He left for work at 7 a.m. the next morning, before A.S. woke up.

[2] Bremante is also Mr. Tull's cousin. For ease of discussion, we refer to him by his first name.

[3] Ms. Simpson testified that she worked "13, 14 hours shifts" at her job in Ocean City, Maryland.

Meanwhile, Ms. Simpson arrived home from work between 12 and 1 a.m. on Monday, June 18, 2018. She went to her bedroom and found A.S. asleep on the couch. She texted Mr. Tull "to see what he was doing." She soon left her house and picked Mr. Tull up from his sister's house, five minutes away. She and Mr. Tull returned to the house and went into Ms. Simpson's bedroom, where A.S. slept. Ms. Simpson woke A.S. up because she wanted to spend time with her. After about 15 minutes, Ms. Simpson was ready to go to sleep and tried to get A.S. to lay down in bed with her, but "all [A.S.] wanted to do was play." Mr. Tull told Ms. Simpson, "[i]t's all right, I got her." He took A.S. into a "porch area" adjoining the bedroom and Ms. Simpson went to sleep.

Ms. Simpson woke up a little before 6 a.m. Mr. Tull was gone and A.S. was asleep on the couch. Ms. Simpson texted Mr. Tull and learned that he was back at his sister's house. She left her house and picked him up for a second time. When they returned to Ms. Simpson's house, she took a shower. A.S. continued to sleep.

When Ms. Simpson finished her shower, she and Mr. Tull had sex in the adjoining room. Ms. Simpson got dressed for work, packed A.S.'s diaper bag, and left the house with Mr. Tull for twenty minutes. She dropped Mr. Tull off and returned home, where A.S. was still sleeping.

Around 7 or 7:30 a.m., Ms. Simpson picked a still-sleeping A.S. up to take her to Ms. Fields's bedroom down the hall. In the hallway, Ms. Simpson put A.S. down while she locked her bedroom door, telling her she needed to walk. A.S. cried the entire time she

was walking down the hallway. It was unusual for A.S. to cry during that time because she liked to wake up N.

Ms. Fields also noticed that A.S. was not acting normally. She testified that, ordinarily, A.S. is "ready to play" in the morning. On this day, however, A.S. went right back to sleep. Around 8:30 or 9 a.m., Ms. Fields changed A.S.'s diaper and noticed "a little blood." Ms. Fields called Ms. Simpson to alert her, but Ms. Simpson was not concerned because Ms. Fields thought it was from constipation. A.S. was not hungry and went back to sleep. When A.S. woke up a short time later, she vomited. Ms. Fields called Ms. Simpson again to see if she could leave work early.

A.S. wanted Ms. Fields to hold her constantly. When Ms. Field was forced to put A.S. down so that she could change K.'s diaper, A.S. cried and "tried to lift her left leg and couldn't because it was hurting."

Ms. Simpson left work early and came home. When Ms. Simpson arrived home, A.S. vomited again and there was blood in her vomit. Ms. Simpson and Ms. Fields immediately drove A.S. to PRMC, arriving around noon. When a nurse examined A.S., her "[w]hole diaper was full of blood."

Corporal Christine Kirkpatrick, who was then assigned to the Child Advocacy Center at the Wicomico County Sheriff's Office, responded to PRMC around 3 p.m. She interviewed Ms. Simpson and Ms. Fields about A.S.'s behavior and symptoms. She also collected and processed samples for forensic testing, including swabs taken from A.S., Ms. Simpson, Ms. Fields, Mr. Tull, and Bremante, and bedding and clothing belonging to A.S.

While at PRMC, Ms. Simpson texted Mr. Tull that A.S. was hospitalized. Mr. Tull responded, "so what you think [happened?]" Ms. Simpson told him A.S. had been "touched." Later, Ms. Simpson and Corporal Kirkpatrick left PRMC and went to look for Mr. Tull but were unable to locate him. That evening, Mr. Tull texted Ms. Simpson "you died bitch."[4]

At 4:30 p.m., Cheryl Greenfarb, a registered nurse in the emergency department at PRMC, performed a Sexual Assault Forensic Exam ("SAFE exam") on A.S. She observed injuries to A.S.'s vagina consistent with trauma. A.S.'s vagina was "extremely swollen," making it "hard to visualize a lot of her internal parts in the vaginal vault." The area was bloody, and dripping with serosanguinous fluid, which is produced as the body tries to heal.

At Mr. Tull's subsequent bench trial, Nurse Greenfarb, who was admitted as an expert in SAFE exams, opined that A.S. sustained a traumatic injury to her vagina caused by penetration with an object or a finger. Eunice Esposito, the forensic nurse coordinator at PRMC, also testified as an expert in SAFE exams. Nurse Esposito explained that A.S. returned for a follow-up appointment at PRMC a few days after her initial visit and again on June 25, 2018. At the first follow-up examination, which was performed by a different nurse, A.S. was not well-healed, but by the June 25, 2018 appointment, Nurse Esposito observed "significant healing." Nurse Esposito further opined based upon her review of photographs taken by Nurse Greenfarb and the medical records that the trauma sustained

[4] Ms. Simpson testified that Mr. Tull texted her, "you're a dead bitch." We quote the text message itself, a photograph of the text was admitted into evidence at trial.

by A.S. "was a fairly recent event." She noted that the blood was "fresh," that clear "serous" fluid also was present, which is indicative of open wounds. Nurse Esposito estimated that the traumatic injury occurred "about midnight" on June 18, 2018. She opined that A.S. would have experienced "discomfort and/or pain" because of the trauma.

The DNA analysis was largely inconclusive. No semen or spermatozoa were detected in swabs taken from A.S.'s vagina, mouth, or diaper. Mr. Tull's fingernail clippings tested negative for the presence of blood.

At the close of the State's case, defense counsel made a motion for judgment of acquittal on all counts. Defense counsel argued that the fact that Mr. Tull was present at Ms. Simpson's house on June 18, 2018 was, by itself, insufficient to establish his criminal agency, particularly given the presence of other adults who had the opportunity to assault A.S. Defense counsel also argued that as a matter of law, Mr. Tull could not be found guilty for child sex abuse because he was not a part of A.S.'s family.

The trial court granted defense counsel's motion for judgment of acquittal on the charge of child sexual abuse, reasoning that Mr. Tull was not A.S.'s parent, was not a household or family member, and did not have permanent or temporary care or custody of A.S. See Md. Code Ann., Crim. Law ("CL") § 3-602(b) (2002, 2012 Repl. Vol.) (prohibiting "[a] parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor" or "[a] household member or family member" from "caus[ing] sexual abuse to a minor"). The court otherwise denied the motion.

After Mr. Tull elected not to testify and the defense rested, defense counsel renewed the motion for judgment of acquittal on the remaining four counts, which the court denied.

The court heard closing arguments and then ruled. The court observed that there was no dispute that A.S. was injured and that the injury resulted from penetration of her vagina, satisfying that element of the relevant crimes.[5] The court credited Ms. Thomas' testimony that A.S. was "fine" when she was dropped off at home on Sunday, June 17, 2018 around 4 p.m. and the testimony of Ms. Fields that when she bathed A.S. later that evening, she did not notice any blood or injuries.

Turning to June 18, 2018, the court credited Ms. Simpson's testimony that A.S.'s demeanor was "playful" and not distressed around 1 a.m. when she woke her up. The court found that thereafter, Mr. Tull took over watching A.S. while Ms. Simpson slept for several hours. The court credited Ms. Simpson's testimony that A.S. was asleep when she woke up a little before 6 a.m. and continued to sleep until it was time for Ms. Simpson to leave for work, close to 8 a.m. The first time A.S. acted "fussy" was after Ms. Simpson woke her up to take her to Ms. Fields's room.

[5] The second-degree rape statute prohibits, among other actions, "vaginal intercourse or a sexual act with another" by force or threat of force, or if the victim is under age 14 and the actor is more than 4 years older than the victim. CL § 3-304. The third-degree sex offense statute prohibits an actor who is 4 years older than a victim under the age of 14 from engaging in "sexual contact" with the victim. CL § 3-307(a)(3).

A "sexual act" is defined to include any act "in which an object or part of an individual's body penetrates, however slightly, into another individual's genital opening . . . and . . . that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party." CL § 3-301(d)(1)(v). "Sexual contact" includes "intentional touching of the victim's . . . genital . . . area for sexual arousal or gratification, or for the abuse of either party." CL § 3-301(e)(1).

Considering this timeline, the court ruled:

> [T]he conclusion that I would draw and what the evidence shows to me beyond a reasonable doubt is that not just that [Mr. Tull] . . . had the opportunity earlier in the evening, but that the child's behavior, *that he was the only one that had the opportunity and the time for it to occur where the child's behavior would indicate that it could have occurred*. The child had no evidence of injury when [she] returned from being in grandmom's care. Ms. Fields testified that she gave the child a bath and clothed her to put her to bed. The child was fine. Bremante . . . was alone with the child to put the child to bed but that when mom got home that night the child did not indicate or show any indication of any injuries, wanted to play, wanted to move around, got down. That the child then was asleep at 5:00 a.m. and slept the entire morning, which would indicate to the [c]ourt that if someone had come in who would have the opportunity while mom was away, that the child would . . . have been awake when she arrived back; the child was asleep that entire time. And then when the child finally is awoken the child is fussy, when Ms. Fields changes the diaper that there was distress. That the child appeared to be in physical distress as well as having blood in her diaper.
>
> From the evidence that the [c]ourt has in front of it the [c]ourt can only draw the conclusion that not just did Mr. Tull . . . have the opportunity but was the only one, based on the child's behavior and the timeline, that would have had the opportunity to have committed this offense. And that the child's behavior further substantiates that he was the one that committed this offense.

(Emphasis added).

The court found Mr. Tull guilty of second-degree rape, third-degree sexual offense, and second-degree assault. The court acquitted Mr. Tull of second-degree child abuse for the same reasons it had granted the motion for judgment of acquittal for child sexual abuse. See CL § 3-601(b)(1) (prohibiting a "parent, family member, household member, or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor" from "caus[ing] abuse to the minor"). This timely appeal followed.

STANDARD OF REVIEW

"When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence [and] will not set aside the judgment of the trial court on the evidence unless clearly erroneous, . . . giv[ing] due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). A finding of fact is not "clearly erroneous" "if there is competent or material evidence in the record to support the court's conclusion." Brown v. State, 234 Md. App. 145, 152 (2017) (quotation omitted).

As this Court has explained, "the ultimate appellate review of the sufficiency of the evidence, if triggered, is precisely the same in a jury trial and in a bench trial alike." Chisum v. State, 227 Md. App. 118, 129 (2016). 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." McClurkin v. State, 222 Md. App. 461, 486 (2015) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in Jackson)). We "view[ ] not just the facts, but 'all rational inferences that arise from the evidence,' in the light most favorable to the prevailing party[,]" Smith v. State, 232 Md. App. 583, 594 (2017) (quotation omitted), giving "due regard to the fact finder's findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." Potts v. State, 231 Md. App. 398, 415 (2016) (cleaned up).

"It is well-settled that circumstantial evidence alone is sufficient to support a conviction, provided the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused." Ware v. State, 170 Md. App. 1, 29 (2006) (cleaned up). Further, "if two inferences reasonably could be drawn, one consistent with guilt and the other consistent with innocence, the choice of which of these inferences to draw is exclusively that of the fact-find[er] . . . and not that of a court assessing the legal sufficiency of the evidence." Ross v. State, 232 Md. App. 72, 98 (2017).

DISCUSSION

Mr. Tull contends that the evidence was legally insufficient to support a rational inference beyond a reasonable doubt that he, and not another individual, committed the crimes. Specifically, he contends that the timeline gave Bremante an equal opportunity to commit the crimes and, as such, the trial court could not have drawn a rational inference that Mr. Tull was the perpetrator. Constrained as we are to view the evidence in the light most favorable to the State, we disagree.

Mr. Tull relies upon Wilson v. State, 319 Md. 530 (1990), and Warfield v. State, 315 Md. 474 (1989), for the proposition that a defendant's opportunity to commit a crime, standing alone, is insufficient to support a finding of guilt. Wilson and Warfield both are theft cases. In Wilson, three rings were stolen from the closet of the master bedroom in a house where the defendant was employed as a housecleaner. 315 Md. at 532. On the day the rings went missing, multiple people were inside the home and had access to the closet.

Id. at 533-34. There was no evidence that the defendant was in the master bedroom on the day the rings went missing, though there was evidence that he cleaned upstairs in the home that day. Id. at 537. On that evidence, the Court of Appeals reversed the defendant's conviction, concluding that "it would not permit a rational factfinder to find, beyond a reasonable doubt, that it was inconsistent with any reasonable hypothesis of [his] innocence." Id. at 538.

In Warfield, a small can containing loose change went missing from a detached garage. 315 Md. at 478-79. The owner had hired the defendant to shovel snow on her property the same day she discovered that the coins were missing. Id. at 479-80. She observed the defendant coming out of the garage and confronted him as he did not have permission to be inside it. Id. There was no other evidence linking the defendant to the theft and the owner's testimony was conflicting and vague as to the last time she was certain that the coins had been present in the garage. Id. at 480-81. On this evidence, the Court of Appeals held that "the circumstantial evidence d[id] not reach so far as to permit a rational fact-finder to conclude beyond a reasonable doubt that [the defendant] stole the coins." Id. at 493.

The Court of Appeals distinguished Wilson and Warfield in Deese v. State, 367 Md. 293 (2001). In Deese, a 3-year-old boy died because of blunt force injury to his head. Id. at 296, 298. The defendant, who was the boyfriend of the child's mother, was convicted by a jury of child abuse and second-degree felony murder based upon child abuse. Id. at 295-96. He argued, in part, that the evidence was legally insufficient to sustain his

conviction for felony murder because it was unclear when the child sustained the injuries that caused his death and, thus, that another person could have inflicted the injuries. Id. at 308. The Court of Appeals held that the evidence was legally sufficient to prove the defendant's criminal agency, explaining that

> the evidence most favorable to the State [showed] that [the child] was fine on February 8, that [the defendant] had exclusive custody over [the child] for several hours on this day, that [the mother] found her son dead later that day, and that he died due to blunt force head injuries caused by force of a magnitude at work in car crashes and falls from significant heights.

Id. at 314. The Court reasoned that because the defendant had the exclusive opportunity to inflict the injuries to the child during the period when the injuries reasonably could have occurred, the case was unlike Wilson and other cases in which the circumstantial evidence was held to be too weak to sustain a conviction.

Here, like Deese, and in contrast to Wilson and Warfield, there was circumstantial evidence permitting a rational inference that A.S. was injured within an approximately 4-hour period *and* that Mr. Tull was the only person with the opportunity to inflict the injuries during that timeframe. Nurse Esposito testified that the injuries to A.S. had occurred recently, sometime after midnight on June 18, 2018, and would have caused discomfort and pain. This testimony squares with the evidence of A.S.'s behavior. The trial testimony revealed that A.S. was behaving normally and had no evidence of trauma in her diaper area on June 17, 2018 between 4 and 5 p.m., when she was dropped off at home by Ms. Thomas; that she continued to behave normally while Ms. Fields cared for her that evening and had no evidence of trauma during her diaper change or her bath; that she fell asleep around 9

p.m. and was put to bed by Bremante; and that she was playful at 1 a.m. on June 18, 2018, when Ms. Simpson woke her in the night.[6] The first time that A.S. exhibited any physical distress was upon waking on June 18, 2018 around 7:30 a.m. At that time, she cried, was disinterested in playing, and fell back to sleep upon being left with Ms. Fields, which was unusual. Shortly thereafter, Ms. Fields detected a "little" blood in A.S.'s diaper and she vomited for the first time. A.S. also had difficulty lifting her leg. From this evidence, the trial court reasonably could infer that A.S. sustained trauma sometime after 1 a.m. and before Ms. Simpson woke up a little before 6 a.m. to find A.S. sleeping on the couch.

Mr. Tull's argument boils down to the notion that the evidence allows for the inference that it was Bremante, not Mr. Tull, who assaulted A.S., and thus the State did not prove that Mr. Tull was guilty beyond a reasonable doubt. That argument, however, rests on the premise that Bremante was not truthful when he testified that after putting A.S. to bed on the night of the 17th, he didn't see her again before going to work at 7 a.m. the next morning. But the trial court was entitled to believe Bremante's testimony, and, in fact, did. With Bremante ruled out as a suspect, the court's conclusion that only Mr. Tull had the opportunity to commit the assault was amply supported by the evidence.

[6] We reject Mr. Tull's assertion that the evidence showed that A.S. was distressed when she was awoken around 1 a.m. He relies upon Ms. Simpson's testimony that when she tried to put A.S. in bed to lay down with her, A.S. "started crying." Ms. Simpson further testified, however, that all A.S. "wanted to do was play." The trial court reasonably inferred from this testimony that A.S. began crying because she did not want to lay down in the bed with Ms. Simpson, not because she was in pain. It is not our role to second-guess the inference drawn by the trial court, which was not clearly erroneous.

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