Circuit Court for Montgomery County
Case No.: 129654C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 629

September Term, 2018

JOHN PRENTICE HICKS

v.

STATE OF MARYLAND

Meredith,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: September 6, 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.

Appellant, John Prentice Hicks, was convicted by a jury, sitting in the Circuit Court for Montgomery County, of first-degree rape, first degree sexual offense and second-degree assault. After appellant was sentenced to two consecutive life sentences, he timely appealed, and presents the following questions for our review:

1. Was it error to refuse to give a jury instruction on jurisdiction?
2. Should the court have suppressed the evidence seized from Appellant's bedroom?
3. Was the evidence sufficient to prove the charges beyond a reasonable doubt?

For the following reasons, we shall affirm.

BACKGROUND

At around 9:00 a.m. on April 12, 2016, G.W. boarded a Red Line metro train at the Medical Center stop, located in Bethesda. She was heading to her home located near the Glenmont station from her overnight job as a private certified nursing assistant.[1] After boarding the train, G.W. found a seat in the middle of the train and fell asleep for a short while. She woke at around 9:44 a.m. at the Fort Totten station, located in the District of Columbia, and saw appellant standing in front of her.[2]

[1] It is unnecessary to provide the victim's name in this case. *See Raynor v. State*, 440 Md. 71, 75 n 1 (2014) (declining to use sexual assault victim's name for privacy reasons); *State v. Mayers*, 417 Md. 449, 451 (2010) (identifying an 18-year-old sexual assault victim by her initials).

[2] Pertinent to the issues raised on appeal, we take judicial notice that the Fort Totten and Takoma stations are located in Washington, D.C., and that the Silver Spring, Fort Glen, Wheaton and Glenmont stations are located in Maryland. *See* https://www.wmata.com/schedules/maps/ ; *see also* Md. Rule 5-201(b) (judicial notice);

Appellant asked her several questions, including whether she was going to Glenmont and whether she had a boyfriend, but G.W. tried to ignore him. Appellant then pulled out a knife and grabbed her from her seat. As he was dragging her to the end of the Metro car, G.W. was cut by the knife as she tried to push it away from her.

Appellant dragged G.W. to a seat past a divider located at the end of the car. There, the lower half of her body was concealed by the divider, and her upper half was obscured behind tinted glass. As appellant continued to hold the knife at G.W.'s right side, he turned her around and told her to pull down her pants. Appellant pushed her head down and then G.W. felt appellant's penis "at the opening" of her vagina, "trying to get through[.]" G.W. testified that "I felt like something's going inside of my private area," meaning, her vagina, and that it was "almost penetrating" but not successful.

Appellant then turned G.W. back around and said "suck it[.]" G.W., who was pleading for appellant to stop, asked him to put the knife away, but appellant refused. At this point, G.W. was sitting down, bleeding from a cut on her hand, and appellant was standing over her, demanding fellatio and telling her "just do what I tell you to do and then I won't hurt you." Appellant then placed his penis inside G.W.'s mouth. After appellant ejaculated, G.W. spit the semen out into a tissue from her sling bag, and then threw the tissue to the floor of the Metro car. She then pulled her pants back up as appellant gave

Dashiell v. Meeks, 396 Md. 149, 174–75 (2006) ("Generally, judicial notice may only be taken of 'matters of common knowledge or [those] capable of certain verification'"); *Burral v. State*, 118 Md. App. 288, 295 (1997) (taking judicial notice of a topographic map prepared by the U.S. Geological Survey), *aff'd*, 352 Md. 707, *cert. denied*, 528 U.S. 832(1999).

her a tissue to clean her hands. Appellant exited the Metro car when the train arrived at the final stop at the Glenmont station. G.W. got off the train and sat down on a bench. Metro employees came over to her and provided assistance.

After G.W. reported that she had been sexually assaulted on the train to the Metro employees, the transit police were called to the scene. G.W. spoke to Officer Erin Cooper, of the Metro Transit Police Department, and provided a description of her assailant.[3] Officer Cooper then transported G.W. to Shady Grove Hospital for a sexual assault examination. G.W. told a nurse about the sexual assault, and a forensic examination of her genital area revealed a fissure located between her fossa navicularis and posterior fourchette.

At the hospital, G.W. also provided a description of her assailant to Metro Transit Detective Colin Dorrity. She was subsequently presented with photographs of several possible suspects and G.W. identified appellant as the man who sexually assaulted her. G.W. testified at trial that she was "100 percent" certain that appellant was that man, testifying that "I can recognize his eyes. I can recognize his face."

Other evidence was admitted for the purpose of identification. First, although the train car that was involved in the incident was an older train and did not have any surveillance cameras on board, surveillance cameras that were mounted at the Glenmont station captured an image of a man, matching the description given by the victim, exit the

[3] The Metro Transit Police Department's ("MTPD") jurisdiction includes the signatories on the WMATA compact, including Montgomery and Prince George's counties in Maryland, the District of Columbia, the city of Alexandria, Virginia, and Arlington and Fairfax counties in Virginia.] *See* https://www.wmata.com/about/transit-police/about.cfm

train at around the time of the incident. That man eventually went up the stairs and exited the station by using a SmarTrip card, *i.e.*, a permanent, rechargeable card used to pay Metrorail, at the gate. Based on the foregoing information, Metro investigators determined that a SmarTrip card used at the same time and location at the Glenmont station was registered to appellant.

After the train car involved in the incident was located and taken out of service, investigators found a tissue, a bloody bandage and blood in the area described by the victim. Mixtures of blood and semen were found on the tissue recovered from the crime scene. DNA testing was performed, and appellant could not be excluded as a source of blood, sperm, and epithelial cells found on the tissue. Appellant was also a possible contributor of sperm cells recovered from an oral swab taken from G.W.

Finally, and as will be discussed in more detail in the second question presented, police went to appellant's residence to execute an arrest warrant. Upon discovering certain items potentially related to the investigation in plain view, the police obtained a search warrant and then seized these, and other, items that were ultimately admitted into evidence at trial. The items included a black jacket, a pair of blue jeans, a knife, a pair of gray sneakers, a Samsung Galaxy cell phone, a D.C. identification in appellant's name, a Metro SmarTrip card, a Metro fare card, two condoms, a tank top shirt with a red stain, gray underwear with a red stain, and three watches.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant asserts that the trial court erred in not giving his requested instruction on territorial jurisdiction because there was some evidence that the sexual offenses occurred in the District of Columbia. The State disagrees, contending that the issue was not generated by the evidence admitted at trial.

Prior to instructions, the court first made its thoughts known on this issue when it addressed appellant's motion for judgment of acquittal on the rape and sexual assault charges.[4] The court denied the motion for judgment of acquittal, stating, in part as follows:

> . . . She woke up just as the conductor was saying Fort Totten or the speaker was saying Fort Totten approaching.
>
> And it was at that time she observed that the defendant was on -- who she has identified in this trial and through a photo array -- was the only other person on the train with her. It was at that point or shortly after that he started a conversation with her about whether or not she had a boyfriend and something to the effect with her accent it was somewhat difficult for me to hear because she was looking at the jury but did she want to be his girlfriend or something to that effect and she just tried to ignore that and started looking at her cell phone.
>
> It was at that time the defendant then came to her, grabbed her, displayed the knife, dragged her to -- I'm going to call it the back of the car where we have heard about the partition and how each car is equipped for that car to become for the conductor.
>
> And it was at that area that he began forcing himself on her. She testified that as Ms. Fenton just said my notes reflect the same testimony that she did look and see the Silver Spring sign and that was at the time that he was forcing her over the seat in that back area on the metro and saw the sign for Silver Spring. The testimony has been in this trial that Silver Spring which I believe I could also take judicial notice of is in Montgomery County,

[4] During argument on the motion for judgment of acquittal, appellant raised this territorial jurisdiction ground only as to the rape and sexual assault charges, appearing to recognize that the assault was a continuing offense "because if one is to believe that the knife was held to [G.W.] up until Glenmont" that the victim "was put in fear up until Glenmont."

> Maryland but that's the testimony on the record and she testified that that's where that part of this event was taking place.
>
> The testimony collectively from other witnesses indicates through the metro transit authority and whoever else has testified using their data they have used that the time it takes the train to go between Takoma Park and Silver Spring is 2 minutes and 55 seconds. And that the platform at Takoma Park is in the District of Columbia but once the train start to leave the station again is immediately in Takoma Park. She testified -- I believe there is testimony in this case and this evidence is being considered at this point as the standard in the light most favorable to the moving party who is the State of Maryland.
>
> Under that analysis certainly the court, as I said, understands Silver Spring to be part of Montgomery County. That has not changed and the complaining witness has testified that it was at that point of this ordeal that the defendant was endeavoring to insert his penis. She testified with regard -- so on that basis counts 1 and 2 the motion for judgment of acquittal on jurisdictional grounds is denied.

After this motion was denied, defense counsel then argued for inclusion of the pattern instruction on territorial jurisdiction as to Counts 1 and 2, namely, first degree rape and sexual offense in the first degree, on the grounds that the victim indicated that this "happened immediately and this started at Fort Totten." That instruction provides:

> You have heard evidence that the crime of (offense) was not committed in the State of Maryland. While not all of the elements of the crime of (offense) must occur in Maryland, in order to convict the defendant, the State must prove, beyond a reasonable doubt, that at least one of the following elements of the crime occurred in Maryland: (essential element(s) for territorial jurisdiction).

See Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 5:09 (2018) ("MPJI-Cr").

Apparently, referring to testimony from the motions hearing, counsel elaborated: "So I think there is enough to have the jury decide, especially because the witness says that

it starts pretty much right away with an attempt. He was unable but an attempt at penetration." Counsel concluded:

> But anyway the first degree sex offense would also be an incident that could occur between those metro stops. There was certainly enough time for it to occur there and I think the jury should make that determination and all we're asking is for this, you know, brief instruction which is probably is no more than five sentences to just let them know that that's an issue.

After hearing from the State, the court declined to give the requested instruction. The court ruled, in part:

> Conversation that the defendant attempted to start with her in an effort to get her attention or whatever he was trying to do started at Fort Totten which is clearly in the District of Columbia and after that heading to Takoma Park is when he assaulted her for the first time by grabbing her, displaying the knife and dragging her to the back of the car. We have heard testimony from the metro transit authority collectively that -- and I'm not sure which one of the detectives. Maybe Morehouse.
>
> Testified that the platform is actually at Takoma Park in the district where the train stops or where it takes off again to go is actually in Montgomery County. Takoma Park has never moved its location. It has always stayed right where it is. And the distance that has been testified to time wise between Takoma Park which is the stop before Silver Spring and the Silver Spring stop where [G.W.] has testified that the defendant was endeavoring to insert his penis into her vagina by force at the Silver Spring stop. So that is not a situation where a car is at the line and is this car over in D.C. or is it in Montgomery County? Or where is it?
>
> Silver Spring is by metro two minutes and 55 seconds into the county. I don't know what the mileage is there but it is certainly not at the same place as what she has testified to. So I don't believe this instruction is appropriate considering the testimony that the complaining witness has provided. She also testified that when Mr. Hicks was unsuccessful in his efforts to complete his mission that he then forced her to perform fellatio on him as we have discussed and heard throughout this trial and that was after the Silver Spring station on the way to the Glenmont station.
>
> Well, Forest Glen I guess is the one after Silver Spring. So in that route which also continued to be in Montgomery County. I understand your

> argument as to count 1 and count 2 and not as to count 3. So I'm not going to give this instruction. Your objection is noted on the record and it is Maryland pattern instruction 5.09 territorial jurisdiction. I don't believe it is an appropriate instruction to give because it is not consistent with the testimony of the complaining witness which is the evidence before this jury and it is uncontroverted. . . .

Maryland Rule 4-325(c) provides: "The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." "[T]he decision whether to give a jury instruction 'is addressed to the sound discretion of the trial judge,' unless the refusal amounts to a clear error of law." *Preston v. State*, 444 Md. 67, 82 (2015) (citations omitted). In determining whether a trial court has abused its discretion we consider whether "(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction." *Bazzle v. State*, 426 Md. 541, 548 (2012) (citation omitted).

"The threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge. The task of this Court on review is to determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case . . ." *Bazzle*, 426 Md. at 550 (citations omitted). "[A] defendant needs only to produce 'some evidence' that supports the requested instruction[.]" *Bazzle*, 426 Md. at 551. (citations omitted); *accord Preston*, 444 Md. at 81 n.16. This threshold is not a high one: "'Some evidence is not strictured by the test of a specific standard. It calls for no more than what it says—some, as that word is understood in common, everyday usage.'" *Jarrett v. State*, 220 Md. App. 571, 586 (2014) (quoting

Malaska v. State, 216 Md. App. 492, 517 (2014)). "If there is any evidence relied on by the defendant which, if believed, would support his claim . . . the defendant has met his burden." *Bazzle*, 426 Md. at 551. And, "'[t]he source of the evidence is immaterial; it may emanate solely from the defendant.'" *Lee v. State*, 193 Md. App. 45, 55 (2010) (quoting *Dykes v. State*, 319 Md. 206, 216–17 (1990)).

In determining whether there was some evidence to support the pattern territorial jurisdiction instruction, we begin with the general proposition that "a court must have territorial jurisdiction over a criminal defendant to exercise its jurisdiction, or power, over that defendant." *Khalifa v. State*, 382 Md. 400, 421 (2004). "[O]nly when an offense is committed within the boundaries of the court's jurisdictional geographic territory, which generally is within the boundaries of the respective states, may the case be tried in that state." *State v. Butler*, 353 Md. 67, 72-73 (1999); *see also Pennington v. State*, 308 Md. 727, 730 (1987) ("The general rule under the common law is that a state may punish only those crimes committed within its territorial limits").

Further, "when the 'evidence raises a genuine dispute' over Maryland's territorial jurisdiction, 'territorial jurisdiction becomes an issue the State must prove,' and it must prove it 'beyond a reasonable doubt.'" *West v. State*, 369 Md. 150, 158 (2002) (quoting *State v. Butler*, 353 Md. at 79, 81); *see also Jones v. State*, 172 Md. App. 444, 454 (observing that jurisdiction may be proven by circumstantial evidence), *cert. denied*, 399 Md. 33 (2007). "[T]he evidence must raise a genuine dispute about where the crime was committed. 'A bald conclusory assertion that the offense was not committed within Maryland's territorial jurisdiction . . . is not, by itself, sufficient to create a dispute as to

territorial jurisdiction -- there must be some supportive evidence.'" *Jones*, 172 Md. App. at 453–54 (quoting *Butler*, supra, 353 Md. at 79).

Moreover, "[i]f the various elements of a given offense do not all occur within the borders of a single state, it becomes necessary to decide in which state or states the offense has been 'committed.'" *Pennington*, 308 Md. at 730. Maryland follows the common law rule concerning territorial jurisdiction which "generally focuses on one element, which is deemed 'essential' or 'key' or 'vital' or the 'gravamen' of the offense, and the offense may be prosecuted only in a jurisdiction where that essential or key element takes place." *West*, 369 Md. at 158–59 (footnote omitted).

Here, appellant only takes issue with the first two charges - first degree rape and first degree sexual offense. The Court of Appeals has stated:

> Rape and first degree sexual offense, like homicide offenses, are forms of aggravated assault. Maryland law is clear that the essential or key element of such offenses, for purposes of territorial jurisdiction, is the specifically proscribed harmful physical contact. The proscribed harmful physical contact in rape-the gravamen of the crime-is the unlawful "vaginal intercourse." The proscribed and harmful contact in a first degree sexual offense is the coerced "sexual act."

West, 369 Md. at 162 (ultimately holding there was no territorial jurisdiction in Maryland because, although the victim was abducted in Maryland, she was subsequently sexually assaulted and forced from the car in the District of Columbia) (internal citations omitted);

see also State v. Baby, 404 Md. 220, 252 n. 19, 260 (recognizing that the essential elements of rape include force, threat of force and penetration).[5]

Here, most of the victim's testimony during trial about the precise location of the sexual offenses occurred after the conclusion of her direct examination. During cross-examination, G.W. agreed generally with defense counsel's questions focusing broadly on the timing of "the crime" and "the incident." For instance, defense counsel asked G.W. whether "the crime occurred in this case between Fort Totten and Takoma stations" and she replied:

> I – when, when the announcement was made, Fort Totten, transfer to Green and Yellow Line. I did notice the man was not yet still talking to me. So what – I told the police officers that the crime happened between Fort Totten, after Fort Totten – between Fort Totten and Takoma Park.

G.W. also testified that the "incident" ended after the Wheaton stop and "towards the end of the line" at Glenmont. However, on redirect examination, G.W. focused on more specifics, testifying that she first observed appellant after Fort Totten and before the Takoma station. G.W. then testified as follows:

> Q. Okay. And when he grabbed you –
>
> A. Uh-huh.
>
> Q. – how long did it take you to move to the other end of the train?
>
> A. It was, it was quick because he was moving very fast.

[5] Effective October 1, 2017, the crimes formerly delineated as sexual offense in the first degree and sexual offense in the second degree have been recodified as subsections of first degree rape and second-degree rape, respectively. See Md. Code (2002, 2012 Repl. Vol., 2018 Supp.) §§ 3-303 (a) (1) (ii), 3-304 (a) of the Criminal Law Article; *see also* 2017 Md. Laws Ch. 162 (H.B. 647).

Q. Okay. And when you got to the back of the train, where were you, if you know, when he attempted to –

A. When –

Q. – when he told you to pull your pants down?

A. I remember, I remember – what I remember exactly is that when he, I was bending over, I was in Silver Spring.

Q. Okay.

A. Yeah.

Q. And when you say bending over, is that when your hands were on the, on the Metro seat?

A. Yes.

Q. Okay. And –

A. So maybe I'm – actually the crime started between Takoma towards Silver Spring.

Q. Okay. And you remember Silver Spring when –

A. Yes, because –

Q. – he was behind you?

A. Yeah. I, I was, because my, my – I was in the corner. I was guided. So my, my eyes saw the, the sign on the platform said Silver Spring.

Q. Okay. And what about when he had you suck his penis – do you have –

A. It was between – yeah. When, when I was facing him, I was seated, I remember. It was dark already. So we were in the tunnel. So that's Glenmont – ah, no, sorry. That's Forest Glen station.

Thereafter, on recross-examination, defense counsel returned to when "it" started, as G.W. testified:

Q. The visit [sic], the – you said that this happened over a few stops?

A. Uh-huh.

Q. So did the train stop and did the doors open at each one of those places?

A. I remember vividly, it was in Silver Spring. That's why I was made aware, because –

Q. I understand that, but you said it started at Fort Totten?

A. Yeah.

Additional evidence concerning the timing and location of the offenses came through other witnesses. Officer Erin Cooper, the Metro Transit Police officer who spoke to G.W. at the Glenmont station, testified that G.W. told her details about the sexual assault, including that appellant first approached her with a knife at the Forest Glen station in Montgomery County, Maryland. Detective Dorrity also testified that G.W. told him that her assailant first approached her after they left the Takoma station. He then displayed the knife used in the sexual assault in Forest Glen, located in Montgomery County, Maryland.

Detective Dorrity testified that, on a "typical day" "there is roughly a three minute time between each station" from Fort Totten to Glenmont. He explained that the Takoma station is on the border between D.C. and Maryland, and that "the confines of the station and the platform are within the confines of the District of Columbia. Once you have left along that track, you are essentially in Montgomery County almost immediately up on the train exiting Takoma Station."

Contrary to appellant's claim that the instruction was supported by some evidence on the sexual offense counts, we are persuaded by this record that the essential elements of first degree rape and first degree sexual offense, the forcible vaginal intercourse, and

coerced fellatio at knifepoint, were perpetrated in Maryland. Accordingly, no instruction on territorial jurisdiction was required or warranted in this case.

II.

Appellant next challenges the court's denial of his motion to suppress evidence seized from Trinidad Avenue in Washington, D.C., after police entered to execute an arrest warrant. Appellant asserts that it was plain error for the police to use cell site location information through his cell phone to locate him and that reversal is required under *Carpenter v. United States*, 138 S. Ct. 2206 (2018). The State responds that the location was appellant's residence and the seizure of evidence was pursuant to an arrest warrant and the search warrant, obtained after the incriminating items were seen in appellant's bedroom in plain view, was reasonable under the Fourth Amendment. The State also asserts that plain error review is unwarranted on the issue of the police's use of cell site location information to locate appellant's cell phone.

We begin with our standard of review, restated recently by the Court of Appeals as follows:

> "When reviewing a hearing judge's ruling on a motion to suppress evidence under the Fourth Amendment, we consider only the facts generated by the record of the suppression hearing." *Sizer v. State*, 456 Md. 350, 362, 174 A.3d 326, 333 (2017) (citation omitted). We review the evidence and the inferences drawn therefrom in the light most favorable to the prevailing party. *Id*.
>
> Suppression rulings present a mixed question of law and fact. *Swift v. State*, 393 Md. 139, 154, 899 A.2d 867, 876 (2006) (citations omitted). We recognize that the "[hearing] court is in the best position to resolve questions of fact and to evaluate the credibility of witnesses." *Id*. Accordingly, we defer to the hearing court's findings of fact unless they are clearly erroneous. *Bailey v. State*, 412 Md. 349, 362, 987 A.2d 72, 80 (2010). We do not defer

> to the hearing court's conclusions of law. *Id*. "[W]e review the hearing judge's legal conclusions de novo, making our own independent constitutional evaluation as to whether the officer's encounter with the defendant was lawful." *Sizer*, 456 Md. at 362, 174 A.3d at 333 (citation omitted).

Thornton v. State, __ Md. __, No. 51, Sept. Term 2018 (filed August 6, 2019) (slip op. at 12–13).

Here, according to the evidence elicited at the suppression hearing, Detective Brandon Twentymon, of the Metro Transit Police Department, became involved in this case on or around April 12, 2016. Based in part on Metro video surveillance footage, which showed appellant inside a Metro station wearing blue jeans and a black jacket, appellant was identified as a possible suspect in the aforementioned sexual assault case. Thereafter, Detective Twentymon found a number of possible addresses associated with appellant. The detective also obtained a cell phone number that was known to have been associated with appellant in the past. The detective then obtained an exigent order directing the cellular provider to provide location information for the phone associated with that phone number. Based on that information provided, Twentymon and other unidentified detectives responded to Trinidad Avenue, Northeast Washington D.C. to conduct further surveillance. Detective Twentymon received regular updates from the cellular provider indicating that the particular cell phone in question was located inside the residence.

After two hours of covert surveillance of the residence, Detective Collin Dorrity, of the Metro Transit Police, arrived with an arrest warrant for appellant from a court in

Montgomery County, Maryland.[6] At around 6:00 or 6:30 p.m., Detectives Twentymon and Dorrity, as well as Detective Aaron France, also of the Metro Transit Police, approached and then knocked on the door to the residence in question in order to serve the arrest warrant.

Appellant's mother answered the door and Detective Twentymon asked her if appellant was home. According to the detective "[s]he said he was and at just about the same time, the defendant appeared at the top of the stairs which were directly in front of the front door." Detective Twentymon asked appellant's mother to step outside and then ordered appellant to come down the stairs. Appellant complied without further incident. Appellant was then handcuffed, patted down for weapons, and then directed to sit on the living room couch. Detective Twentymon then testified as follows:

> Q. Okay, did there come a time that you went anywhere in the house other than the living room?
>
> A. Yes.
>
> Q. And where did you go?
>
> A. Upstairs to the defendant's bedroom.
>
> Q. Why did you go upstairs to the defendant's bedroom?
>
> A. In preparation for transporting the defendant to the processing facility, he requested that we get a jacket and some shoes from his bedroom. Detective France first went up the bedroom to retrieve the shoes and the

[6] Detective Dorrity later testified that he obtained the arrest warrant for appellant after speaking earlier that day to the victim, G.W., and obtaining a description of her assailant. G.W. confirmed this at a subsequent hearing on the pending motions that, when she met with the detective, she identified a photograph of the man who sexually assaulted her on the train.

jacket. He then came back down moments later and asked me to come back upstairs with him. He –

THE COURT: Who is he?

THE WITNESS: Detective France.

BY [PROSECUTOR]:

Q. Go ahead.

A. Detective France walked into the defendant's bedroom and drew my attention to some clothing that was next to the defendant's bed. I observed a black jacket that was consistent with what was worn during the commission of the crime and what was visible in the Metro surveillance footage, as well as a pair of jeans and there was also a cell phone on the defendant's bed that was streaming a pornographic video. Visible on the pocket of the jeans was a folding knife that was consistent with what was described as being used during the commission of the crime.

Detective France provided additional details concerning the entry to execute the initial arrest warrant. When appellant was seated in handcuffs on the living room couch, Detective France noticed that appellant was wearing gym shorts and a t-shirt and was bare foot. After asking him if he wanted a pair of shoes to wear, appellant responded affirmatively and asked the detective to retrieve a pair of gray New Balance shoes from his upstairs bedroom. Detective France went upstairs, found the shoes, returned downstairs, and then helped put the shoes on appellant's feet.

At that point, appellant asked the detective if he could retrieve his jacket.[7] Detective France, and possibly one other detective, then returned upstairs to appellant's bedroom. There, the detective saw a pile of clothes on top of a gray Tupperware container near the

[7] Detective France maintained that none of the police officers had their weapons out and that appellant's demeanor was "[c]alm, compliant" and that there was "no threat" presented by either appellant or his "elderly" mother throughout the encounter.

bed. A pair of blue jeans was resting on top of a jacket. Detective France picked up the jacket and, as he did so, the jeans fell down, revealing a "knife clipped to the inside of one of the pockets." Detective France conceded that "the knife wasn't visible until I picked up the jacket, in other words, the knife was face down and then it fell over as I moved the jacket and we realized there was a knife sitting there." He also agreed that he knew that there was an allegation that a knife was used in connection with the sexual assault.

Detective France then testified that he checked appellant's jacket, for purposes of officer safety, and found a SmarTrip card and a condom inside. After setting those items aside, Detective France gave appellant his jacket. He then informed other detectives that there were items of evidentiary value inside the house and that "[w]e should stop everything that we're doing and maybe go get a search warrant."

At this point, and deciding not to touch anything else in the house for the time being, the officers remained downstairs and began the process of applying for a search warrant for "the defendant's mother's house, well, his house since he was residing there." Detective Twentymon obtained a search warrant for the residence at around 9:00 p.m. that evening and the warrant was executed shortly thereafter. A black Helly Hansen jacket, a pair of jeans, a pair of gray New Balance tennis shoes, a folding knife, a Samsung Galaxy cell phone, a condom, a SmarTrip Metro card and a fare card were subsequently seized pursuant to the warrant.

During argument on this motion, appellant's counsel relied on *Steagald v. United States*, 451 U.S. 204 (1981), to argue that the police needed a search warrant, and not merely an arrest warrant, to search appellant's mother's residence. The court inquired if,

based on the argument that the residence in question was actually his mother's, whether appellant had standing to contest a search.[8] Appellant responded that "we're not conceding that it's not his house," just that the police did not know for certain that it was appellant's residence. Appellant argued that the police needed a search warrant before they entered his bedroom. Further, the failure to obtain a search warrant before they entered appellant's bedroom amounted to an illegal search and the subsequent search warrant was tainted by that illegality.[9]

The State responded that the police had a valid arrest warrant for appellant at that location, they confirmed that appellant was present at the residence, and that a search warrant was not required to enter the residence and place appellant under arrest. The State also argued that Detective France did not go upstairs to search appellant's room but, instead, had consent because he did so at appellant's express request to retrieve his shoes and a jacket prior to transporting him to the police station. Further, the knife was discovered in plain view in appellant's pants when the jacket was retrieved.[10]

[8] The State's argument with respect to "standing" appears limited to a contention that appellant had no standing to challenge his mother's expectation of privacy. Considering our holding on this issue, it is unnecessary to address this argument further.

[9] Appellant also argued the search was illegal under *Arizona v. Hicks*, 480 U.S. 321 (1987), a case where the police entered a home under exigent circumstances, and then intentionally moved suspicious stereo equipment in order to look at the serial numbers to determine if that equipment was stolen. That argument is not being pursued on appeal.

[10] In response to appellant's claim that the police were not certain that the residence in question belonged to appellant, the State conceded that there were three known addresses associated with appellant and that appellant's cell phone was "pinging off that address." As explained in the second part of our discussion on this question presented, no further argument about the cell phone location technology was offered at the motion hearings.

The court denied the motion to suppress, primarily relying on *Payton v. New York*, 445 U.S. 573 (1980), concerning the execution of arrest warrants. The motions court found that "the defendant was believed to be in his mother's home, and he was observed by the officer at the top of the stairs." The court further found that "this home that the police entered was, in fact, the defendant's residence. Although the court agreed it did not know who owned the home, "the officers knew that the defendant had previously used his mother's address as his place of residence." The court also found that the "defendant's cellphone, GPS, indicated, or the cellphone was giving off pings that he was in the home. And it was reasonable for the officers to believe that the defendant resided in his mother's home." And, in fact, when the mother answered the door, appellant was found inside.

The court continued that "the defendant, himself, directed the police to go upstairs to retrieve the items that he asked for." The court found that the three police detectives were "credible" and "very professional." After the officers went upstairs to retrieve the requested items, they saw other items of evidentiary value, according to the court, "they decided it was prudent to get a search warrant which they did do." The court then stated, after finding appellant's mother to be credible as well, that "I find that the defendant gave consent for the officers to go into his room to retrieve those two items of clothing. And then, in retrieving those two items of clothing, the officers saw what was in plain view, specifically, some watches, a condom, and blue jeans." The court then denied the motion to suppress, concluding that "the State did prove that the defendant freely and voluntarily gave consent to search his room."

A. The search and seizure from appellant's residence, following execution of both an arrest warrant and a separate search warrant, was lawful under the Fourth Amendment.

The Fourth Amendment to the Constitution of the United States, made applicable to the States through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), guarantees, *inter alia*, " [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." It further provides that this right "shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id*. Notably, "[t]he Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Probable cause is key to understanding the reasonableness of a search or seizure under the Fourth Amendment. *See Pacheco v. State*, __ Md. __, No. 17, Sept. Term, 2018 (filed August 12, 2019) (slip op. at 9) ("The probable cause standard has been described generally as a '"practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act'") (quoting *Maryland v. Pringle*, 540 U.S. 366, 370 (2003), in turn, quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)). "Probable cause, moreover, is 'a fluid concept,' 'incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.'" *McCracken v. State*, 429 Md. 507, 519–20 (2012) (quoting *Pringle*, 540 U.S. at 370–71).

Pertinent to the issue before us, police may enter the residence of a suspect in order to effectuate a lawful arrest warrant. *Payton v. New York*, 445 U.S. 573 602–03 (1980) ("[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within"). "An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense and thus the warrant primarily serves to protect an individual from an unreasonable seizure." *Steagald v. United States*, 451 U.S. 204, 213 (1981). The Court of Appeals discussed and explained the differences between *Payton* and *Steagald* as follows:

> In *Payton*, the Court held that an arrest warrant suffices to authorize law enforcement to enter the home of the subject of the arrest warrant, if, at the time of the entry, the police have reason to believe the arrestee is in his or her home. In *Steagald*, the Court held that an arrest warrant does not authorize law enforcement to enter a third person's home to arrest the subject of the arrest warrant, even if the officers have reason to believe the subject of the arrest warrant is inside that home. In that latter scenario (and absent valid consent to enter or exigent circumstances), the law enforcement officers may not enter the home of the third person to execute an arrest warrant, unless the officers are armed with a warrant to search the home of that third party, and the search warrant is supported by the probable cause-based averment of the affiant that the subject of the arrest warrant is in the home of such third person. An arrest warrant for the subject believed to be in the home of the third party will not suffice to authorize entry into the third party's home.

Jones v. State, 425 Md. 1, 29 (2012) (footnote omitted).

Here, we are persuaded that the residence at Trinidad Avenue, Washington, D.C., was appellant's residence. Accordingly, *Payton* controls and the officer's entry into the threshold of the home to arrest appellant, pursuant to the arrest warrant, was lawful under

the Fourth Amendment.

Next, following along the timeline of events, we also conclude that Detective France's brief trip up to appellant's bedroom was at appellant's request and was reasonable under the totality of the circumstances. Even to the extent that this entry could be characterized as a search, this Court has explained that a search committed without a warrant "does not violate the Fourth Amendment if a person consents to it." *Varriale v. State*, 218 Md. App. 47, 53 (2014), *aff'd*, 444 Md. 400 (2015), *cert. denied*, 136 S.Ct. 898 (2016); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (explaining that to be valid, consent to search must be voluntary, based on the totality of the circumstances); *Turner v. State*, 133 Md. App. 192, 207 (2000) ("[C]onsent to search not only may be express, by words, but also may be implied, by conduct or gesture"). And, the fact that appellant was in custody does not undermine consent in this case. *See Miles v. State*, 365 Md. 488, 530 (2001) ("[A] person in custody may still give valid consent to a search"); *see also Doering v. State*, 313 Md. 384, 402, 545 A.2d 1281, 1290 (1988) ("Although custody is a factor to be considered in determining voluntariness, it is not dispositive, and a person in custody may validly consent to a search") (quoting *United States v. Watson*, 423 U.S. 411, 424 (1976)).

Once Detective France was lawfully in appellant's bedroom, for the limited purpose of retrieving his shoes and jacket, the plain view doctrine came into play. "The plain view doctrine of the Fourth Amendment requires that: (1) the police officer's initial intrusion must be lawful . . . (2) the incriminating character of the evidence must be 'immediately apparent;' and (3) the officer must have a lawful right of access to the object itself." *Sinclair*

v. State, 444 Md. 16, 42 (2015) (citations omitted). Given our prior discussion, Detective France was in appellant's bedroom lawfully, under the arrest warrant and pursuant to consent, and was performing a task to which he was given express consent by appellant, namely, retrieving his jacket. When the detective lifted the jacket from underneath a pair of jeans, a knife was visible on one of the pockets of the jeans. A SmarTrip card was also found inside the jacket when the detective checked the jacket before handing it over to appellant for purposes of officer safety. *See In re: David S.*, 367 Md. 523, 541 (2002) ("*Terry* does not require a police officer to be *certain* that a suspect is armed in order to conduct a frisk for weapons"); *see also New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985) (noting that "the requirement of reasonable suspicion is not a requirement of absolute certainty: 'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . . .'").

Knowing the potentially incriminating nature of these items, considering the nature of the allegations in this case, we conclude, under the totality of the circumstances, that the officers discovered the items lawfully, and inadvertently, in plain view. *Cf. Arizona v. Hicks*, 480 U.S. 321, 325 (1987) (holding that officer's act of purposefully moving stereo components in order to look at the serial numbers to see if the stereo was stolen amounted to an unlawful search). We also are persuaded that, based on the foregoing sequence of events, the officers acted reasonably and that there was a substantial basis supporting the issuance of the search warrant in this case. "[S]o long as the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Stevenson v. State*, 455 Md. 709, 723–24 (2017) (quoting

Gates, *supra*, 462 U.S. at 236, in turn, quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)), *cert. denied*, 138 S. Ct. 705 (2018). Because the subsequent seizure of the items in question were pursuant to a lawfully issued search warrant, we hold that the motions court properly denied the motion to suppress.

B. We decline to exercise plain error review to consider appellant's claim that the location of his cell phone was unlawfully tracked by law enforcement.

For the first time, appellant now asks us to remand this case for further proceedings because the real-time use of a cell site location tracking device to find his cell phone amounted to plain error under *Carpenter v. United States*, 138 S. Ct. 2206, 2220–23 (2018). In *Carpenter*, the prosecutors obtained cell phone records by court orders that directed two cell phone carriers to disclose "'cell/site sector [information] for [Carpenter's] telephone[] at call origination and at call termination for incoming and outgoing calls' during the four-month period when the string of robberies occurred." *Carpenter*, 138 S. Ct. at 2212. The Supreme Court concluded that this acquisition of historical cell-site location information ("CSLI") records constituted an unlawful Fourth Amendment warrantless search. *Carpenter*, 138 S.Ct. at 2222–23. However, the Court was very careful to emphasize that its decision was "a narrow one" that did not apply to, among other things, "real-time" cell site location information. *Id*. at 2220. Second, the Court's decision was limited to

determining that obtaining such historical cell site location information (1) is a search, and (2) generally requires a warrant. *Id.*[11]

In this case, by contrast, evidence that the police tracked the location of appellant's cell phone in real time was admitted both at the motions hearing and at trial without objection. Perhaps for that reason, and as the State observes in its brief, "the record does not contain detailed evidence regarding the 'exigent order' that the detectives obtained" to authorize tracking of appellant's cell phone.[12] The issue presented asks us to expand *Carpenter* to real time tracking based on an inadequate record. We decline to do so. *See, e.g.*, *Morris v. State*, 153 Md. App. 480, 506–07 (2003) (noting that the five words, "[w]e decline to do so [,]" are "all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation.") (emphasis omitted); *see also Savoy v. State*, 420 Md. 232, 243 (2011) (explaining that review for plain error is reserved for error that is "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial").

Although our analysis could end here, our conclusion is supported by the case of *State v. Copes*, 454 Md. 581 (2017). There, a murder victim's cellphone was stolen and

[11] We note that, in *Carpenter*, after the case was remanded by the Supreme Court, the Sixth Circuit concluded the agents acted in good faith reliance on the federal statute, 18 U.S.C. § 2703 (d), when they originally obtained the CSLI at issue. *See United States v. Carpe*nter, 926 F.3d 313, 318 (6th Cir. 2019).

[12] Detective Twentymon testified that the police had an exigent order and that they "were receiving intelligence from the cell phone provider of the phone's GPS location, latitude and longitude. They were sending it to us just about every 15 minutes. It never moved from the first time that they sent us the location to when we eventually located the phone and the defendant inside the residence."

believed to be in the possession of someone with knowledge of the crime. *State v. Copes*, 454 Md. at 586. With advances in technology permitting investigators to possibly locate that cellphone, which had remained active after the murder, the police obtained a pen register trap and trace order. That order authorized the seizure of historical CSLI regarding that cellphone, as well as the use of a cell site simulator, a device that emulates a cell tower and allows its user to obtain real-time location information. *State v. Copes*, 454 Md. at 595–96.

The issues before the Court of Appeals included whether the order authorizing the use of the cell site simulator: (1) required the issuance of a search warrant under the Fourth Amendment supported by probable cause; and, (2) whether the order was the functional equivalent of such a warrant. *State v. Copes*, 454 Md. at 586–89, 604. Recognizing that this Court had decided that use of a cell site simulator was a search under the Fourth Amendment in *State v. Andrews*, 227 Md. App. 350 (2016), *see State v. Copes*, 454 Md. at 615–16, the Court of Appeals declined to offer a decisive opinion on these questions. *State v. Copes*, 454 Md. at 626.

Instead, the Court concluded that even if the use of the cell site simulator violated Mr. Copes' Fourth Amendment rights, the exclusionary rule would not require suppression because the detectives acted in "objectively reasonable good faith" based on the prior judicial approval supplied by the order. *State v. Copes*, 454 Md. at 586–87, 626–29. The Court held that "based on existing case law, it was objectively reasonable for the detectives to believe that their use of the cell site simulator pursuant to the court order was permissible under the Fourth Amendment. Given that the Supreme Court has instructed that

suppression should be a 'last result' and not a 'first impulse,' this is an appropriate case for application of the good faith exception." *State v. Copes*, 454 Md. at 629–30; *see also Kelly v. State*, 436 Md. 406, 426 (2013) (although recognizing that the installation and use of a GPS device on a target's vehicle is a Fourth Amendment "search," under *United States v. Jones*, 565 U.S. 400, 404 (2012), where existing Maryland law permitted GPS tracking of vehicle, the police acted in "objectively reasonable reliance on that authority" and the search would be upheld under the good faith doctrine). A similar result would likely apply under the circumstances presented here. Accordingly, we decline to overlook the lack of preservation to exercise plain error review of appellant's claim regarding the tracking of his cellphone in this case.

III.

Appellant also asserts that the evidence was insufficient on the charges of first degree rape and first degree sexual offense because the State failed to prove: (A) territorial jurisdiction; and, (B) the penetration element of rape. The State disagrees, responding that the evidence was sufficient under the applicable standard of review. We concur.[13]

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

[13] Appellant does not challenge the sufficiency of the evidence of second degree assault. We note that, at trial, appellant's only argument as to the assault charge concerned whether appellant was identified as the perpetrator, and not that proof of that crime failed on jurisdictional grounds.

(2011)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[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). In doing so, the jury is free to "accept all, some, or none" of a witness's testimony. *Correll v. State*, 215 Md. App. 483, 502 (2013), *cert. denied*, 437 Md. 638 (2014).

Further, "[w]e 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference.'" *Cox v. State*, 421 Md. 630, 657 (2011) (quoting *Bible v. State*, 411 Md. 138, 156 (2009)). This Court has noted that in this undertaking, "the limited question before us 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.'" *Smith v. State*, 232 Md. App. 583, 594 (2017) (quoting *Allen v. State*, 158 Md. App. 194, 249 (2004), *aff'd*, 387 Md. 389 (2005)).

Finally, we will not reverse a conviction on the evidence "'unless clearly erroneous.'" *State v. Manion*, 442 Md. 419, 431 (2015). This applies to cases based upon both direct and/or circumstantial evidence because, as the Court of Appeals has explained, "[a] valid conviction may be based solely on circumstantial evidence." *State v. Smith*, 374 Md. 527, 534 (2003) (citing *Wilson v. State*, 319 Md. 530, 537 (1990)).

A. The evidence of territorial jurisdiction in Maryland was sufficient.

We have already discussed the territorial jurisdiction issue elsewhere in this opinion. In sum, G.W. testified that she saw the sign for the Silver Spring Metro station when

appellant began to rape her. The coerced fellatio occurred after that, as the train continued through Maryland to the Glenmont station. "[I]t is well established in Maryland that the testimony of even a single eyewitness, if believed, is sufficient evidence to support a conviction." *Marlin v. State*, 192 Md. App. 134, 153, *cert. denied*, 415 Md. 339 (2010); *see also Branch v. State*, 305 Md. 177, 184 (1986) ("The issue of credibility, of course, is one for the trier of fact"). We hold that the evidence was sufficient to establish territorial jurisdiction in Maryland for the sex offenses.

B. The evidence of vaginal penetration was legally sufficient.

Section 3-303 of the Criminal Law Article provides that "[a] person may not: (1) engage in vaginal intercourse with another by force, or the threat of force, without the consent of the other; and (2)(i) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon . . ." Md. Code (2002, 2012 Repl. Vol., 2018 Supp.), § 3-303 of the Criminal Law Article. ("Crim. Law"). Crim. Law §§ (g)(1) and (2) defines "[v]aginal intercourse" as "genital copulation, whether or not semen is emitted" and states that it "includes penetration, however slight, of the vagina."

In *Kackley v. State*, 63 Md. App. 532, *cert. denied*, 304 Md. 298 (1985), this Court stated that "[t]he proof [of penetration] may be supplied by medical evidence, by the testimony of the victim, or by a combination of both." *Id*. at 537 (internal citations omitted). There, evidence of penetration was established by the testimony of the victim, along with testimony from the child's examining physician that the victim had "superficial abrasions on the posterior aspects of the vaginal opening" and fresh blood on the child's underwear. *Id*. at 538. As this Court explained:

> [T]he victim need not go into sordid detail to effectively establish that penetration occurred during the course of a sexual assault. Where the key witness to the prosecutor's case rests with the victim's testimony, the courts are normally satisfied with descriptions which in light of all surrounding facts, provide a reasonable basis from which to infer that penetration has occurred.

Id. at 537.

Pertinent to the facts herein, this Court has also explained that "[i]t is a well-settled principle of rape law that the penetration that is required is penetration only of the labia majora. No penetration of or entry into the vaginal canal itself is now or has ever been required." *Wilson v. State*, 132 Md. App. 510, 519 (2000). As the Court of Appeals has also explained, "[p]enetration, however slight, will sustain a conviction for the same, but the proof thereof must sustain a *res in re*; that is, an actual entrance of the sexual organ of the male within the labia (majora) of the pudendum (the external folds of the vulva) of the female organ, and nothing less will suffice." *Craig v. State*, 214 Md. 546, 547 (1957) (citing I Wharton, *Criminal Law* (12th Ed.), sec. 697); *see also Barber v. State*, 231 Md. App. 490, 502, 532 (providing detailed descriptions and diagram of the female anatomy, including, but not limited to, the labia majora, the fossa navicularis, and the posterior fourchette), *cert. denied*, 453 Md. 10 (2017).

In this case, after the court heard appellant's motion for judgment of acquittal, contending there was insufficient evidence of penetration, it denied that motion, finding as follows:

> With regard to the argument on count 1 the first degree rape charge with regard to the issue of penetration on direct she testified that once she grabbed her with the knife displayed he pushed her -- dragged her to the back of the train which if my memory serves me was car 4004 to that back area,

> pushed her head down and she grabbed onto the seat. He had ordered her to pull her pants down. She did so. She continued to cry and beg him to stop. She said she felt quote something going inside her private area, her vagina and his penis.
>
> And she testified, as I said earlier, that she could feel his penis there at her vagina and she used the term kissing her vagina to describe what she was feeling. He was not able to complete his mission at that point. And at that point she has testified that he then ordered her to turn -- turned her around and ordered her with the knife still displayed to perform fellatio on him and ejaculated in her mouth.
>
> The evidence indicates that a fissure, which is not a normal occurrence on any part of one's anatomy unless something causes it -- we don't know what caused it but there was the presence of a fissure observed by Ms. Harrison when she conducted the PERK kit test for the forensic evidence collection and that is noted in her report. Certainly, Ms. Harrison noted in her report no sign of any penetration. No indication of that.
>
> That was a medical observation clinically that she made in that report and she testified that this fissure was at the 6:00 p.m. Area of the hymen and the DNA analysis which includes samples taken from [G.W.'s] mouth where the sperm was ejaculated indicating the presence of the defendant's bodily fluids in her mouth. So on that basis the motion for judgment of acquittal on sufficiency and whether or not the evidence in the light most favorable to the State whether they have met their burden the motion is denied as to all three counts. . . .

The court's denial of the motion was not clearly erroneous. On direct examination, G.W. agreed she initially reported that a man "tried to rape me inside the Metro." G.W. testified that appellant pushed her head down and then G.W. felt his penis "at the opening" of her vagina, "trying to get through[.]" G.W. testified that "I felt like something's *going inside of* my private area," meaning, her vagina, and that it was "almost penetrating" but not successful. (emphasis added).

On cross-examination, G.W. testified that "I felt at first his penis is in, in between my legs." She agreed with defense counsel that she told the police and the nurses that the

man "attempted to penetrate" her.[14] But, G.W. explained that "I remember the word, telling them that he, *his private part is right into my vagina*. I felt it, like, kissing or trying to insert[.]" (emphasis added). She repeated that she told the nursing staff that "I felt him, like, kissing – if this is my vagina, his penis is right there, trying to insert himself." She testified that she never used the word "penetrate" to describe the incident. But, she testified "it was there, but he suddenly stopped. So he did not fully accomplish what he wanted to do, like to insert totally into my vagina his private part."

There was also medical evidence from which the jury could infer penetration. Shirl Harrison, accepted as an expert in sexual assault and forensic nursing, examined G.W. at Shady Grove Hospital. Upon physical examination of G.W.'s genital area, Harrison discovered a fissure "between the [fossa navicularis] and the posterior fourchette." She explained that the fossa navicularis was located between the "hymen and the posterior fourchette." Reference to the medical diagram of the female genital area in *Barber, supra*, 231 Md. App. at 532, as well as other internet sources and medical literature, supports a conclusion that the fissure on the victim's genitals was located within the labia majora. *See* Sommers, *Defining Patterns of Genital Injury from Sexual Assault: A review*, Trauma Violence Abuse, vol. 8(3), pp. 270–80 (July 2007) (www.ncbi.nlm.nih.gov/pmc/articles/PMC3142744/) ("The most common locations for genital injury in female teenagers and women are the posterior fourchette (tense band of tissue that connects the two labia minora), labia minora (two thin inner folds of skin within

[14] Officer Cooper and Detective Dorrity testified that G.W. told them her assailant "attempted to penetrate her vagina" but was "unable to do so."

the vestibule of the vulva), hymen (thin membrane composed of connective tissue that overlies the vaginal opening), and fossa navicularis (shallow depression located on the lower portion of the vestibule and inferior to the vaginal opening)");World Health Organization, *Guidelines for Medico-Legal Care for Victims of Sexual Violence, Annex 2,* p.133,http://www.who.int/violence_injury_prevention/resources/publications/en/guidelines_annex2.pdf ("The fossa navicularis is the concave area between the posterior attachment of the hymen to the vaginal wall and the posterior fourchette (or commissure); The posterior fourchette is the point where the labia minora meet posteriorly and fuse together"); Goss, ed., *Gray's Anatomy*, p. 1330 (29th ed. 1973) (describing the location of the fourchette, or frenulum of the labia, and the fossa navicular); *see also Pettit v. Erie Ins. Exch*., 117 Md. App. 212, 228 (1997) (taking judicial notice of a definition in a medical treatise) (citing *Faya v. Almaraz*, 329 Md. 435, 444 (1993)), *aff'd*, 349 Md. 777 (1998).

Ultimately, there are few facts, including even ultimate facts, that cannot be established by inference. As this Court pointed out in *Evans v. State*, 28 Md. App. 640, 702-03 (1975), *aff'd*, 278 Md. 197 (1976):

> In a real sense, the whole decision-making process is the process of drawing inferences. From fact A, we infer fact B. From a confession, we infer guilt. From the pulling of a trigger, we infer an intent to harm. From the possession of recently stolen goods, we infer the theft. From the motive, we infer the criminal agency. From the presence of the sperm, we infer the penetration. From the muddy footprints on the living room rug, we infer the unlawful entry. The whole phenomenon of circumstantial evidence is the phenomenon of inferring facts in issue from facts established.

Id. Accord Moore v. State, 73 Md. App. 36, 45 (1987) (when trying to establish that manner of entry to home fit a "signature" pattern under "other crimes" analysis, one can infer intruder used same method of entry as appellant used in other crimes).

Here, there was direct evidence, from the victim's testimony, that appellant's penis penetrated her labia majora. There was also evidence of a fissure in the same area, which, circumstantially, permitted the fact finders to draw the rational inference of penetration. Thus, we conclude the evidence was sufficient to support appellant's conviction for first degree rape.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE ASSESSED TO APPELLANT.