Circuit Court for Wicomico County
Case No. C22-CR-17-000076

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1111

September Term, 2017

DALLAS FENTON

v.

STATE OF MARYLAND

Berger,
Arthur,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: May 30, 2018

Appellant, Dallas Fenton, was convicted on June 27, 2017, by a jury sitting in the Circuit Court for Wicomico County, of eight counts of third-degree sexual offense, one count of sexual solicitation of a minor, and one count of indecent exposure.[1] On August 9, 2017, the court sentenced appellant to thirty-eight years' incarceration, fifteen of which were suspended. That same day appellant noted this appeal. He presents three issues for our review.

> "1. Did the State fail to prove eight separate counts of third degree sexual offense?

[1]Maryland Code (2002, 2012 Repl. Vol.), § 3-307(a) of the Criminal Law Article (CL) provides that a defendant is guilty of third-degree sexual offense if, *inter alia*, that defendant:

> "(4) engage[s] in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old; or
> "(5) engage[s] in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old."

CL § 3-301(d)(1) defines a "sexual act" as:

> "[A]ny of the following acts, regardless of whether semen is emitted:
> "(i) analingus;
> "(ii) cunnilingus;
> "(iii) fellatio;
> "(iv) anal intercourse, including penetration, however slight, of the anus; or
> "(v) an act:
> "1. in which an object or part of an individual's body penetrates, however slightly, into another individual's genital opening or anus; and
> "2. that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party."

CL § 3-301(g)(1) defines "vaginal intercourse" as "genital copulation, whether or not semen is emitted." CL § 3-301(g)(2) goes on to explain that "'[v]aginal intercourse' includes penetration, however slight, of the vagina."

"2. Did the State fail to present sufficient evidence to sustain the conviction for indecent exposure?

"3. Did the lower court fail to fully credit Mr. Fenton for time served?"

Facts[2]

The female victim lived with her mother and two siblings in Salisbury. She celebrated her fourteenth birthday on March 31, 2016. Shortly thereafter she began communicating with appellant—then fifty-seven years of age—on "Whisper," a smartphone application which allows users to communicate anonymously by exchanging text messages and/or digital images. During their private dialogues on Whisper, appellant and the victim exchanged personal information. She informed appellant that she was fourteen years old, while appellant identified himself as a forty-seven-year-old husband and father of two. Eventually their communications became sexual in nature. At appellant's request, they exchanged nude photographs of themselves.

Appellant requested that they forego further use of Whisper in favor of video-chatting on Skype. They communicated via video-chat on at least two occasions prior to their first meeting in person. On both such occasions, appellant asked her "to show me touching myself … [i]n my vagina." As the victim did so, she could observe appellant masturbating. Appellant and the victim communicated on Whisper and/or Skype for "maybe a few weeks" prior to their first in-person encounter "[s]ometime in April" 2016.

[2]We present the facts in the light most favorable to the State.

On Friday and Sunday evenings of alternating weekends the victim was alone in her home for two to three hours, beginning around 5:30 or 6:00 p.m. while her mother made roundtrips to Easton, delivering and picking up the elder sibling to and from child visitation. Appellant's first three in-person encounters with the victim took place in her home while her mother made one of these trips.

Their first such encounter took place on either a Friday or a Sunday evening. Appellant asked her to remove her jeans. After she did so, appellant performed cunnilingus on the victim, touched her breasts, and digitally penetrated her vagina. The second such meeting likewise took place on a Friday or a Sunday evening. Appellant performed cunnilingus on her and touched her "the same as the first time." This encounter differed from the first, however, in that appellant engaged in fellatio with the victim. During the third encounter appellant again engaged in fellatio and cunnilingus with her.

The final in-person encounter occurred on Friday, May 20, 2016, the day on which the victim attended her class's eighth grade graduation prom. Shortly after 5:00 p.m., appellant, driving a pickup truck, picked up the victim from outside her house and drove to "one of the back roads down by [her] school." At trial the State asked the victim to describe the location at which appellant ultimately parked. She testified that "[i]t was a little bit off the road. In the woods." The State then asked, "Was there a dirt lane there or anything, or were you just in the grass?" The victim answered, "It was, like, gravel." After appellant parked they alighted the vehicle. Appellant engaged in sexual intercourse with

the victim while she sat on the tailgate of the truck. Thereafter, he dropped her off at her school.

Additional facts will be stated, as required, for the discussion of particular issues.

Discussion

I

The First Sufficiency Challenge

Appellant challenges the sufficiency of the evidence to support two of his eight convictions for third-degree sexual offense. He contends that "[t]he testimony of [the victim] and her mother contradicted the State's allegations that Mr. Fenton met with [the victim] in person on four separate occasions." In so doing, appellant relies on the following excerpts from defense counsel's cross examination of the victim:

> "Q. So all events would have occurred … between the month of April and May of 2016; is that a fair statement?
>
> "A. Yes.
>
> ….
>
> "Q. Okay. So was it about a month that you were Whispering, Skyping?
>
> "A. Yeah.
>
> ….
>
> "Q. So if it's roughly a month it's sometime toward the end of April, the first of May; correct?
>
> "A. Yes.
>
> ….

"Q. And of these four separate meetings you said the last one would have occurred on May 20th or 21st; correct? You said it was a Friday; right?

"A. Yes.

….

"Q. Now, of those three meetings you said they were on a Friday or Sunday; correct?

"A. Yes.

….

"Q. Okay. Well, why would they be on a Friday or a Sunday?

"A. Because that's when my mom would leave.

"Q. When you say your mom would leave, she would go to Easton for the weekend?

"A. No, she would go for, it would take her two or three hours to get back.

"Q. Okay. So flesh this out for me, she would go to Easton for what purpose?

"A. To drop my older brother off at my dad's. And pick him up.

….

"Q. And that was every Friday?

"A. It was every other Friday.

….

"Q. And on Sunday was it the same, leave at 5:30 or 6?

"A. Yeah.

....

"Q. And several days had passed in between; correct?

"A. Yes.

"Q. And did what occur – when we say several days passed, you testified that, if he came on a Friday would he come right back on the following Sunday? Or more time passed than that; right?

"A. Yeah, I think so.

….

"Q. … Was he ever there on a school night?

"A. No."

If all of the events occurred during April and May 2016, and the victim communicated with appellant via Whisper and Skype for one month prior to their first having met in person, appellant reasons, their first in-person encounter could have occurred no earlier than Sunday, May 1, 2016. Given that Mother's trips were on alternating weekends, appellant reasons, the second in-person encounter could have taken place no earlier than Friday, May 13. Accepting that (i) appellant never drove to the victim's home on a Sunday after having done so the Friday immediately before and (ii) the date of their final encounter was May 20 or 21, appellant reasons that he and the victim could have had no more than three in-person encounters. Accordingly, appellant concludes, "either the second or third alleged encounter between [the victim] and Mr. Fenton could not have occurred."

Standard of Review

"[W]e review a challenge to the sufficiency of the evidence in a jury trial by determining whether the evidence, viewed in a light most favorable to the prosecution, supported the conviction ..., such that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Allen v. State*, 402 Md. 59, 76-77 (2007) (citations omitted). In so doing, we do not reweigh the evidence admitted at trial. Rather, we defer to the fact-finder's resolution of conflicting evidence and assessments of witness credibility. *State v. Stanley*, 351 Md. 733, 750 (1998) ("Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder." (citation omitted)).

Sufficiency vs. Weight:
Distinct Evidentiary Assessments

As the State correctly notes, appellant challenges not the sufficiency of the evidence, but its weight. In effect, appellant urges us to accept as unquestionably accurate the victim's testimony regarding the approximate first and final dates on which she was abused, as well as the number of intervening days between each episode. Appellant thereby rejects the victim's testimony describing eight distinct instances of sexual acts or vaginal intercourse on four separate occasions.

It is not we, but the factfinder below, who is charged with resolving conflicting evidence and assessing witness credibility. In so doing, the jury is "'free to believe part of a witness's testimony, disbelieve other parts of a witness's testimony, or to completely discount a witness's testimony.'" *Holmes v. State*, 209 Md. App. 427, 438 (quoting *Pryor*

v. State, 195 Md. App. 311, 329 (2010)), *cert. denied*, 431 Md. 445 (2013). We defer to all such determinations. *Pryor*, 195 Md. App. at 329 ("Contradictions in testimony go to the weight of the testimony and credibility of the evidence, rather than its sufficiency, and we do not weigh the evidence or judge the credibility of the witnesses, as that is the responsibility of the trier of fact." (citations omitted)).

In determining whether the State satisfied its burden of production, we do not make the sort of exculpatory inferences that appellant advocates. *Cerrato-Molina v. State*, 223 Md. App. 329, 351 ("At the end of the case and with respect to the burden of production, the exculpatory inferences do not exist. They are not a part of that version of the evidence most favorable to the State's case." (footnote omitted)), *cert. denied*, 445 Md. 5 (2015). The scope of our review is limited to the incriminating evidence adduced at trial.

Considering the evidence in the light most favorable to the State, a jury could have found beyond a reasonable doubt the essential elements of the crimes charged.

II

Appellant next contends that the evidence adduced at trial was insufficient to support a conviction for indecent exposure. Contrary to appellant's claim, when viewed in the light most favorable to the State, the evidence was sufficient such that the jury could have found the essential elements of indecent exposure beyond a reasonable doubt.

The common law crime of indecent exposure consists of the following three interrelated elements:

> "(1) a public exposure; (2) made willfully and intentionally, as opposed to inadvertently or accidentally; (3) which was observed, or was likely to have

> been observed, by one or more persons, as opposed to performed in secret, or hidden from the view of others."

Duran v. State, 180 Md. App. 65, 78 (2008) (citing *Wisneski v. State*, 398 Md. 578, 593 (2007)), *aff'd*, *State v. Duran*, 407 Md. 532 (2009).

The crime's *mens rea* consists of the general intent to expose oneself—not the specific intent to do so for a particular purpose. *Ricketts v. State*, 291 Md. 701, 713 (1981) ("Indecent exposure is a general intent crime that includes within its scope an innumerable variety of offenses, including acts that are reckless or negligent."); *Messina v. State*, 212 Md. 602, 606 (1957) ("Indecent exposure, to amount to a crime, must have been done intentionally. ... The essential intent is a general and not a specific intent."). This general intent may be inferred "[w]hen the defendant exposes himself at such a time and place that a reasonable person knows or should know that his or her act will be observed by others …." *Wisneski*, 398 Md. at 593. "Thus, reckless exposure, determined by time, place and manner, can inform intent." *Id*. at 594.

A jury could reasonably have inferred from the time, place, and manner of appellant's exposure that he had the requisite general intent. Appellant pulled down his pants in order to engage in sexual intercourse with the victim. He did so in broad daylight shortly after 5:00 p.m. in May. The situs was "a little bit off" of the backroad on which appellant had driven. The area was gravel, indicating that the county or some entity or person considered that the usage justified that expenditure. The victim testified that the site was less than a ten-minute drive from her school, which was hosting a dance at 6:00 or 7:00 that evening. In *Messina*, 212 Md. 602, the defendant "publicly" exposed himself

within the confines of his automobile that was parked on a well-traveled street. *Id*. at 604. In this case, the exposure was not within the confines of the truck, but in an open area adjacent to a less-traveled road.

The "observation" and "public" elements of indecent exposure effectively coalesce into a single requirement. *Wisneski*, 398 Md. at 595 ("A 'public' aspect also infuses the element of observation …."). In order for an exposure to be "observed," "'[i]t is not necessary … that the disgusting exhibition should have been actually seen by the public ….'" *Id*. (quoting *State v. Roper*, 18 N.C. (1 Dev. & Bat.) 208, 209 (1835)). *See also* L. Hochheimer, *The Law of Crimes and Criminal Procedure* 453 (1st ed. 1897). It is sufficient that, because of the time and location, others potentially could have been exposed to appellant's indecency. *Wisneski*, 398 Md. at 596. Similarly, "[a]n exposure is 'public' … if it occurs under such circumstances that it could be seen by a number of persons, if they were present and happened to look." *Messina*, 212 Md. at 606.

Viewing the evidence in the light most favorable to the State, it appears that the time and place at which appellant exposed himself were such that had a motorist happened by and glanced, the appellant's exposure would have been seen. Accordingly, we hold that the jury could have found each of the elements of indecent exposure beyond a reasonable doubt.

III

Appellant claims that "[t]he lower court failed to fully credit [him] for time-served before sentencing" as required by Maryland Code (2001, 2008 Repl. Vol.), § 6-218 of the

Criminal Procedure Article (CP). While appellant's Maryland commitment record reflects his having been incarcerated for 182 days prior to sentencing, appellant stresses that he was initially arrested in Virginia on December 29, 2016—223 days before he was sentenced in Maryland on August 9, 2017.[3] Appellant asks that we direct the circuit court to correct the commitment record and credit appellant with an additional forty-one days for time served (223-187 = 41).

The State argues that where a fugitive was incarcerated in another state, the CP § 6-218 credit is not triggered until the fugitive waives extradition or else is returned to Maryland. Quoting the Massachusetts Appeals Court, the State explains the rationale underlying such a rule:

> "[T]he continuing days of out-of-State custody are attributable to the defendant's failure to submit to the jurisdiction of Massachusetts to answer the subject offenses. Unless the defendant waives extradition, Massachusetts is required to undertake rendition procedures under the [Uniform Criminal Extradition Act], with the attendant passage of time during which the defendant remains in confinement in the foreign jurisdiction. Thus, it is fair to mark time from that point because, in effect, the defendant holds the key to wind the clock to begin ticking the count for jail time credits. As a matter of sound administration to ensure accurate record keeping for the calculation of jail credits for time held in a foreign jurisdiction, the date of signing of the extradition waiver before a judge provides a written entry of record, and use

[3]Appellant has a typographical error in his brief according to which 233 days (not 223) elapsed between the date of appellant's initial arrest in Virginia and the date on which he was sentenced.

Appellant was incarcerated presentencing for 2 days in December (excluding the date of his arrest); 31 days in January; 28 days in February (2017 was not a leap year); 31 days in March; 30 days in April; 31 days in May, 30 days in June; 31 days in July; and 9 days in August (including the date of sentencing). *See* Maryland Code (2014), § 1-302 of the General Provisions Article.

> of this official record will lessen uncertainty and the prospect of error in the calculation of extra-jurisdictional jail time credits."

Commonwealth v. Frias, 760 N.E.2d 300, 306 (Mass. App. Ct. 2002).

The State points out, however, that numerous cases make no distinction between time served in the demanding state and the foreign jurisdiction. It cites *State v. Duran*, 960 A.2d 697, 703-07 (N.H. 2008); *Nieto v. State*, 70 P.3d 747, 747-48 (Nev. 2003); *State v. Cooper*, 990 P.2d 765, 765-66 (Kan. Ct. App. 1995); *Nutt v. State*, 451 N.E.2d 342, 344-45 (Ind. Ct. App. 1983); *State v. Johnson*, 400 A.2d. 516 (N.J. Super. Ct. App. Div. 1979); *State v. Willis*, 376 N.W.2d 427, 429 (Minn. 1985); *State ex rel. George v. Hunt*, 327 So. 2d 375, 378 (La. 1976); *People ex. rel Bradley v. Davies*, 309 N.E.2d 82, 82-84 (Ill. App. Ct., 4th Dist. 1974); *People v. Havey*, 160 N.W.2d 629, 636 (Mich. Ct. App. 1968); *People v. Nagler*, 21 A.D. 2d 490, 494 (N.Y. App. Div. 1st Dept. 1964).

Appellant's pre-sentence report reflects his arrest on December 29, 2016, in Accomack County, Virginia, for having been a "Fugitive From Justice."[4] Appellant was incarcerated during the week following his arrest. On January 6, 2017, he was extradited

[4]As the State suggests in its brief, this designation supports the inference that appellant was arrested pursuant to a "Governor's Warrant of Rendition," pursuant to Va. Code Ann. § 19.2-86, which provides:

> "**Fugitives from justice**; duty of Governor
> Subject to the provisions of this chapter, the provisions of the Constitution of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, the Governor shall have arrested and delivered up to the executive authority of any other of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this Commonwealth."

to Maryland and re-arrested on multiple charges for offenses against the victim. Also on January 6, the district court issued a temporary commitment order requiring appellant to be held without bail pending a bond review hearing. At that hearing the court denied appellant bond.

The State filed an indictment with the circuit court on February 6, 2017, charging appellant with, *inter alia*, the offenses of which he was convicted. That same day, the court issued another arrest warrant and ordered that appellant be held without bail. From his January 6 extradition until his sentencing on August 9, 2017, appellant was continuously incarcerated in Maryland.

CP § 6-218(b)(1) provides:

> "A defendant who is convicted and sentenced shall receive credit against and a reduction of the term of a definite or life sentence, or the minimum and maximum terms of an indeterminate sentence, *for all time spent in the custody of a correctional facilit*y, hospital, facility for persons with mental disorders, or other unit *because of*:
>
> "(i) the charge for which the sentence is imposed; or
>
> "(ii) *the conduct on which the charge is based*."

(Emphasis added).

We review *de novo* a trial court's denial of an appellant's request for credit against his sentence for time served. *Johnson v. State*, 236 Md. App. 82, 88 (2018).

The Court of Appeals addressed the purpose of what is now CP § 6-218 in *Fleeger v. State*, 301 Md. 155, 165 (1984), explaining:

> "the General Assembly sought to ensure that a defendant receive as much credit as possible for time spent in custody as is consistent with constitutional

> and practical considerations. An obvious corrollary [*sic*] is that the General Assembly sought to minimize the amount of dead time [*i.e.*, time spent in custody that is not credited to a valid sentence]. Simply stated, we believe that no legitimate legislative policy is advanced by maximizing dead time or by withholding credit that is due a defendant under the crediting statute."

See also Dedo v. State, 343 Md. 2, 9 (1996); *Haskins v. State*, 171 Md. App. 182, 196 (2006); *Toney v. State*, 140 Md. App. 690, 692 (2001).

The plain language of CP § 6-218(b) and the General Assembly's intent, as recognized in *Fleeger*, require that credit be given for time served regardless of the state(s) of confinement. *Wilson v. Simms*, 157 Md. App. 82, 96 ("All of the subsections [of CP § 6-218] apply to time spent in custody in other jurisdictions." (citing *Chavis v. Smith*, 834 F. Supp. 153, 159)), *cert. denied*, *Wilson v. State*, 382 Md. 687 (2004). The State's initial contention therefore lacks merit.

In the alternative, the State argues that appellant "is not entitled to additional time served because his incarceration in Virginia was not attributable to the Maryland offense at issue." Presuming that appellant was initially arrested pursuant to a governor's warrant "authoriz[ing] the arrest of the accused in Virginia to deliver him to the demanding state," the State reasons, appellant "was not incarcerated on the underlying Maryland charge or conduct."

Granted, it is not clear from the record whether the Maryland *charges* on which appellant ultimately was convicted were specified as the bases for appellant's initial incarceration in Virginia. We can confidently conclude, however, that the *conduct* because

of which appellant was incarcerated in Virginia was the *same conduct* on which were based the charges on which he was convicted.

Appellant was arrested and incarcerated for having been a "Fugitive From Justice." His designation as "fugitive" was not, however, derived from any criminal conduct other than that for which he was charged, convicted, and sentenced in Maryland. Had appellant *already* been arrested for those crimes and either escaped from a place of confinement or refused a court order to report thereto, he may well have been arrested and confined for conduct based on the independent charges of first or second-degree escape. CL § 9-404; CL § 9-405. The appellant in this case did not, however, derive the designation "fugitive" from any such intervening criminal conduct.[5]

Appellant's commitment record reflects his incarceration for 182 days prior to sentencing on August 9, 2017. The commitment record principally accounts for the days appellant was incarcerated after the case was removed to the circuit court on February 6, 2017. Given that the record reflects appellant's having been continuously confined for 223

[5]As the United States Supreme Court explained in *Hogan v. O'Neill*, 255 U.S. 52, 56 (1921):

> "To be regarded as a fugitive from justice it is not necessary that one shall have left the state in which the crime is alleged to have been committed for the very purpose of avoiding prosecution, but simply that, having committed there an act which by the law of the state constitutes a crime, he afterwards has departed from its jurisdiction and when sought to be prosecuted is found within the territory of another state."

(Citations omitted).

days following his December 29 arrest, the court failed to credit him with an additional forty-one days for time served.

For the foregoing reasons, we enter the following mandate.

SENTENCE VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR WICOMICO COUNTY FOR REVISION OF THE SENTENCE CONSISTENT WITH THIS OPINION.

IN ALL OTHER RESPECTS, THE JUDGMENTS OF CONVICTIONS ARE AFFIRMED.

COSTS TO BE PAID 75% BY THE APPELLANT AND 25% BY WICOMICO COUNTY.