UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0244

September Term, 2015

IN RE: LAIZEL J.

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Reed, J.

Filed: April 8, 2016

The Circuit Court for Prince George's County, sitting as the juvenile court, found Laizel J., appellant, "involved"[1] in committing the delinquent acts[2] of second-degree sex offense, fourth-degree sex offense, and second-degree assault. Appellant was placed on supervised probation. In this appeal, appellant presents the following question for our review:

> Is the evidence insufficient to support a finding that Appellant committed the delinquent act of second-degree sex offense?

Finding the evidence sufficient, we affirm.

BACKGROUND

In August of 2014, appellant was in the basement of a relative's house with his cousin ("J.J."), who was six years old at the time.[3] J.J. was sitting on a couch watching television, while appellant was sitting on a different couch "either on his phone or playing the [*sic*] video game." At some point, appellant approached the couch J.J. was on and asked her to pull her pants down, but J.J. refused. Despite J.J.'s remonstrations, appellant removed J.J.'s pants and underwear for her, then removed his own clothes and "got over

[1] "In juvenile proceedings the more precise term to use when referring to the plea of the respondent is 'not involved' [or involved] as opposed to 'not guilty' [or guilty]." *In re Christian A.*, 219 Md. App. 56, 62 n.6 (2014) (quoting In re Kevin Eugene C., 90 Md. App. 85, 87–88 n.2 (1992)) (alterations in original).

[2] "'Delinquent act' means an act which would be a crime if committed by an adult." Md. Code (2006, 2013 Repl. Vol.), § 3-8A-01(l) of the Courts and Judicial Proceedings Article ("CJP").

[3] J.J. testified that her uncle was also present in the basement but that he was in his bed, asleep.

top" of J.J., who was lying on her back. Appellant proceeded to—in J.J.'s words—"touch" J.J.'s "butt" and "vagina" with "his penis."[4] Appellant then turned J.J. around "towards the couch" and again "touched" her "butt" with his penis. At trial, J.J. indicated that appellant's penis felt "hard" and, importantly, that it "hurt" when appellant's penis "touched" specifically her "butt."

At some point following the incident, J.J.'s mother, based on a conversation with J.J.'s babysitter, "suspected that something was going on," so she spoke with J.J. and asked if appellant had ever "pulled his pants down" in front of her or touched her "in a way that he wasn't supposed to[.]" J.J. answered "yes" to both questions. That same day, after confronting appellant and his mother, J.J.'s mother reported the incident to the police.

A few days later, Prince George's County Police Detectives Travis Kelly and Patrick Devaney met with J.J. regarding the incident. During the interview, Detective Kelly showed J.J. two anatomical drawings, one male and one female, on which J.J. was asked to identify various parts of the human anatomy. Detective Kelly proceeded to circle various body parts on both drawings and ask J.J. to name the body part. When Detective Kelly circled the male and female genitalia, J.J. identified these parts as the "wee-wee" and "private part," respectively. When Detective Kelly circled each picture's "butt," more specifically the gluteal cleft and anus, J.J. identified these as the "butt." Detective Kelly was not, however, permitted to testify as to what J.J. told him regarding the incident.

[4] J.J. also referred to appellant's penis as his "wee-wee."

On October 28, 2014, a delinquency petition was filed in the circuit court, charging appellant with second-degree sex offense, third-degree sex offense, fourth-degree sex offense, and second-degree assault. Appellant's adjudicatory hearing[5] lasted roughly three days, between January 6, 7, and 8, 2015. After the State rested, appellant moved for a judgment of acquittal, solely regarding the second- and third-degree sexual offenses. As to the third-degree sex offense, the juvenile court granted appellant's motion for judgment of acquittal, finding that the State failed to demonstrate any of the four disjunctive modalities required in the statute, and that the State did not charge appellant under the statute's separate age difference subsection.[6]

[5] *See generally* CJP § 3-8A-18.

[6] The third-degree sexual offense statute provides, in pertinent part:

> (a) A person may not:
>
> (1)(i) engage in sexual contact with another without the consent of the other; and
>
> (ii) 1. employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;
>
> 2. suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;
>
> 3. threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or
>
> 4. commit the crime while aided and abetted by another;
>
> * * *
>
> (3) engage in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim[.] (continued…)

With respect to the second-degree sex assault count, appellant argued that while J.J. testified that appellant had "touched" her "butt," there was no evidence of actual penetration. The court denied the motion, noting that the offense required only "the slightest amount" of penetration. After appellant neither testified nor called any witnesses, the juvenile court ultimately found appellant involved in the delinquent act of second-degree sex offense, and the two remaining lesser charges:

> And so [J.J.] says that at some point, as the State said, [appellant's] penis touched her anus. Did it go slightly in or not and I think as I said the critical things for me is that what she said when [appellant] touched her anus at that point [he was] hard. And that's why it hurt. And to me, that's why it was slight penetration. It wasn't just hard and [appellant] touched her. She said it hurt. What 7-year-old is going to make that up? No 7-year-old is going to know anything about that. That's what happened. So therefore . . . I find [appellant] involved as to second[-]degree sex offense, fourth[-]degree sex offense, and second[-]degree assault.

At appellant's disposition hearing,[7] on March 13, 2015, the juvenile court, after considering multiple pre-sentence investigatory reports, placed appellant on supervised probation. This appeal followed.

* * *

Md. Code (2002, 2012 Repl. Vol.), § 3-307 of the Criminal Law Article ("CL").

[7] *See generally* CJP § 3-8A-19.

DISCUSSION

A. Parties' Contentions

Appellant argues that the evidence adduced at trial was insufficient to support the juvenile court's finding of involved as to second-degree sexual offense.[8] Appellant contends that J.J.'s testimony was too ambiguous to support the juvenile court's conclusion that appellant penetrated J.J.'s anus with his penis—that being a required element of second-degree sexual offense. Appellant also avers that, although the juvenile court inferred from J.J.'s testimony that penetration had occurred, the testimony supported at least one additional non-inculpatory inference. As a result, the juvenile court's decision to choose one inference over the other was mere "speculation" requiring reversal.

The State counters that, while J.J. did refer to her "butt," as opposed to her "anus," "medically accurate testimony is not required, particularly from child witnesses," and thus, J.J.'s testimony "provided a reasonable basis from which the court could infer that at least slight penetration had occurred." The State further argues that any competing rational inferences drawn from the evidence should be resolved in favor of the fact-finder—here, the juvenile court. We agree with the State.

B. Standard of Review

In a recent delinquency appeal (with a substantially similar posture), we explained:

> When faced with a challenge to the sufficiency of the evidence, Maryland courts have applied the test set forth in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *See* Smith v. State, 415 Md. 174, 184,

[8] We note that appellant did not challenge the juvenile court's findings below, and indeed concedes the point in his brief now, that he committed a fourth-degree sex offense and a second-degree assault.

> 999 A.2d 986 (2010). We must determine "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." Jackson v. Virginia, 443 U.S. at 319, 99 S.Ct. 2781. *Accord,* Allen v. State, 402 Md. 59, 71, 935 A.2d 421 (2007). This inquiry is one of law, so that our review of this legal determination is plenary. *See* Hudson v. State, 152 Md. App. 488, 523, 832 A.2d 834, *cert. denied,* 378 Md. 618, 837 A.2d 928 (2003).
>
> "This same standard of review applies in juvenile delinquency cases. In such cases, the delinquent act, like the criminal act, must be proven beyond a reasonable doubt." In re Timothy F., 343 Md. 371, 380, 681 A.2d 501 (1996) (citation omitted). *Cf.* Branch v. State, 305 Md. 177, 182, 502 A.2d 496 (1986) (criteria for review of sufficiency same whether verdict rendered by jury or court). "Absent clear error, an appellate court will not set aside the judgment of the trial court." Matter of Tyrek S., 118 Md. App. 270, 273, 702 A.2d 466 (1997), *aff'd on other grounds,* 351 Md. 698, 720 A.2d 306 (1998).

In re James R., 220 Md. App. 132, 137-38 (2014) (affirming sufficiency of the evidence in juvenile court's finding of delinquency after 14-year-old's second-degree rape of his 13-year-old acquaintance).

C. Analysis

Under the Maryland Code, a sexual offense in the second degree occurs when an individual engages in a sexual act with another by force or threat of force without the other's consent. CL §3-306(a)(1). The term "sexual act" encompasses "anal intercourse, including penetration, however slight, of the anus[.]" CL § 3-301(e)(1)(iv). While our caselaw mainly provides instruction regarding what, exactly, constitutes *vaginal* penetration, any lack of instruction is of no moment to this case. For our purposes, "[t]here is no distinction with respect to the legal sufficiency of the evidence of penetration in the sexual offense case involving . . . anal intercourse." *Wilson v. State*, 132 Md. App. 510, 522-23 (2000).

Admittedly, our analysis is all the more difficult in the present case, as the victim was just seven years old when she testified. *See Wilson,* 132 Md. App. at 518 ("Especially in rape cases involving very young victims, the evidence of penetration is frequently very problematic."). Nevertheless, proof of penetration does not require any particular evidence or set of facts to be sufficient; "[t]he proof may be supplied by medical evidence, by the testimony of the victim, or by a combination of both." *Kackley v. State,* 63 Md. App. 532, 537 (1985) (internal citations omitted). In light of such evidence, proof of penetration has been established when "the totality of the circumstances support a reasonable inference that penetration occurred during the course of a sexual assault[.]" *Simms v. State,* 52 Md. App. 448, 454 (1982). Moreover, when the only evidence of penetration stems from the testimony of the victim, proof of penetration may be established even when the testimony lacks particular detail:

> While much has been written concerning the type of evidence necessary to prove penetration, it is clear that the victim need not go into sordid detail to effectively establish that penetration occurred during the course of a sexual assault. Where the key to the prosecutor's case rests with the victim's testimony, the courts are normally satisfied with descriptions which, in light of all the surrounding facts, provide a reasonable basis from which to infer that penetration has occurred.

Simms, 52 Md. App. at 453 (internal citations omitted).

Applying these principles to the present case, we hold that the evidence adduced at trial was sufficient to support the juvenile court's finding of involved as to second-degree sexual assault. J.J. testified that, at the time of the sexual assault, both she and appellant were nude and that appellant's penis was "hard." J.J. testified that, while she was lying on her back facing the ceiling, appellant proceeded to get over top of her and "touch" her

"vagina" and "butt" with his penis. J.J. then testified that appellant turned her around "towards the couch" and again "touched" her "butt" with his penis. Although J.J. reported being "touched" on both her "vagina" and "butt," she specifically experienced pain only on her "butt." In light of this testimony, a reasonable inference can be drawn that J.J.'s sensation of pain was the result of penetration, however slight, of her anus. *See Canter v. State*, 224 Md. 483, 485 (1961) (noting that although proof of penetration is necessary to support a charge of sodomy, "slight evidence may suffice.").

Appellant nevertheless claims that the evidence was insufficient because "the State presented no evidence that his penis ever touched, much less penetrated, her anus." Appellant notes that, from an anatomical standpoint, the anus is "the opening at the lower end of the alimentary canal through which solid waste is eliminated from the body," whereas the "butt," which is short for "buttocks," is "either of the two rounded prominences on the human torso that are posterior to the hips and formed by the gluteal muscles and underlying structures." Therefore, according to appellant, "the anus is clearly different from the buttocks." Consequently, because J.J. never testified that appellant touched her "anus," appellant argues that the evidence was insufficient to support the juvenile court's finding of actual penetration.

We find appellant's argument unavailing. To begin with, we do not find that J.J.'s failure to specifically reference her "anus" was fatal to the State's case. *See Kackley*, 63 Md. App. at 538 (eleven year old's testimony that the defendant penetrated her "hole" was sufficient to establish vaginal penetration even though the victim "did not speak in sophisticated or clinical terms in describing her ordeal"). Given J.J.'s age at the time of

her testimony, a reasonable inference can be drawn that she was referencing her anus when she said "butt," as a seven-year-old is unlikely to use anatomically correct terms when referring to intimate areas of her body. Such an inference is particularly reasonable in light of J.J.'s use of the term "wee-wee" when referencing appellant's penis.

Moreover, when Detective Kelly circled the gluteal cleft and anus on each of the anatomical drawings, J.J. identified these as the "butt," providing further credence to the notion that J.J. was not speaking about her buttocks when she used the term "butt." As the juvenile court stated when defense counsel made the same argument during his motion for judgment of acquittal: "Well she described [her anus] as her butt. What do you call the butt if it's not the anus?"[9] Based on this inference, which was reasonable in light of the evidence presented, the court found that appellant touched J.J.'s anus with his penis and that J.J.'s sensation of pain was the result of penetration, however slight.

Appellant insists that, although J.J. may have been referring to anal penetration when she stated that it "hurt," an equally plausible conclusion is that it hurt because appellant was pressing against her buttocks, which, according to appellant, is not the same as anal penetration and would not support appellant's conviction for second-degree sex

[9] Although the juvenile court, in finding appellant involved as to second-degree sex offense, erroneously stated that J.J. testified that appellant's penis touched her "anus," we find the juvenile court's mischaracterization of J.J.'s testimony to be inconsequential in light of the court's statement that J.J. "described [her anus] as her butt." Moreover, given that sufficient evidence existed to permit a reasonable inference that J.J. was referring to her anus when she said "butt," we cannot say that the court's findings regarding J.J.'s testimony were clearly erroneous. *See Morris v. State*, 153 Md. App. 480, 489 (2003) ("The basic rule of fact-finding review . . . is that the appellate court will defer to the fact-findings of trial judge or jury whenever there is some competent evidence which, if believed and given maximum weight, could support such findings of fact.").

offense. Because the evidence "equally supports two versions of events," appellant avers that the juvenile court's finding as to one version was mere "speculation." Citing *Bible v. State*, 411 Md. 138, 157 (2009), appellant concludes that "when the evidence equally supports two versions of events, and a finding of guilt requires speculation as to which of the two versions is correct, a conviction cannot be sustained."

Appellant's reliance on *Bible* is misplaced. As the Court stated in *Smith v. State*, 415 Md. 174 (2010), the notion that a conviction cannot stand in the face of competing inferences is "not the focus of the standard to be applied when reviewing the sufficiency of the evidence in criminal cases." *Id.* at 183. Instead, as noted above, "the proper standard of review . . . is 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." *Id.* at 184 (internal citations omitted). This standard "applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Id.* at 185. Moreover, the "speculation" we are concerned with is not a fact-finder's decision to *choose* one inference over another, as appellant suggests, even if both inferences rest on circumstantial evidence alone. *See Smith*, 415 Md. at 185. Rather, it is when the chosen inference *itself* is supported solely by mere speculation or conjecture that the evidence becomes insufficient to sustain a conviction. *Id*.

In the present case, the inference of penetration was supported by more than mere speculation. As discussed, circumstantial evidence was presented that Appellant touched J.J.'s butt with his penis, which caused pain. In conjunction with the anatomical drawings

and J.J.'s age at the time of her testimony, a reasonable inference can be drawn that J.J. was referring to her anus when she said "butt." An equally plausible inference can be drawn that J.J.'s sensation of pain was caused by penetration, however slight. Although appellant may be correct that other rational inferences may be drawn from this evidence, "[w]e do not second-guess the [fact-finder's] determination where there are competing rational inferences available." *Id.* at 183.

Appellant seeks to bolster his insufficiency argument by relying on the Court of Appeals' holding in *Craig v. State*, 214 Md. 546, 549 (1957) (evidence of vaginal penetration was insufficient to sustain the defendant's conviction of rape). In that case, the victim, an eight-year-old child, testified that her attacker "messed" with her and that he "put his private in [her] legs." *Id.* at 549. The Court determined that "[w]hat an eight[-]year[-]old child meant by language of this nature is subject to too much conjecture and speculation to form a basis upon which to support a conviction of [rape.]" *Id.* Based on that holding, appellant concludes that the evidence in the present case was insufficient because "the evidence presented here is even weaker than the testimony found to be insufficient in *Craig*."

We disagree. Whereas the victim in *Craig* testified, somewhat ambiguously, that her attacker "messed" with her, J.J. specifically stated that appellant's penis touched her "butt," which the juvenile court reasonably inferred to mean "anus." In addition, J.J. testified that she felt pain when appellant's penis "touched" specifically her "butt," yet she did not report feeling pain when appellant's penis "touched" her "vagina." Based on this testimony, the juvenile court reasonably concluded that the pain was caused by penetration.

Therefore, despite any "weaknesses" alleged by appellant, the testimony in the present case was sufficient to establish an inference of penetration, however slight. *See Simms*, 52 Md. App. at 454 ("[W]e . . . 'are unwilling to promulgate a rule of law that requires an unoffending female to lay bare the facts of her ravishment to the extent of showing its accomplishment in all its sordid details.'") (citation omitted).

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.