UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0803

September Term, 2015

NELSON BERNARD CLIFFORD

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Arthur, J.

Filed: May 10, 2016

On May 8, 2015, a jury sitting in the Circuit Court for Baltimore City found appellant, Nelson Bernard Clifford, guilty of two counts of third-degree sexual offense and one count of theft of less than $500.00. The jury acquitted Clifford of charges of first-degree sexual offense, second-degree sexual offense, attempted first-degree rape, attempted second-degree rape, first-degree burglary, third-degree burglary, fourth-degree burglary, and theft of more than $500.00.

The circuit court sentenced Clifford to two, concurrent 30-year terms of incarceration for the sexual offense convictions and to a consecutive 18 months of incarceration for the theft conviction.

QUESTIONS PRESENTED

Clifford presents two questions for review, which we have rephrased as follows:

1. Did the trial court err in denying Clifford's motion to dismiss the indictment for pre-indictment delay?
2. Was there sufficient evidence to sustain the conviction of either of the third-degree sexual offenses?

For the reasons set forth below, we answer no to the first question and yes to the second. We affirm the convictions.

FACTUAL BACKGROUND

On September 30, 2007, between 5:00 and 6:00 a.m., K.A. was awakened in her Baltimore apartment by an unknown man. She testified that the man was wearing a dark hoodie pulled very tightly around his face and that he was lying on the floor next to her bed. Before K.A. could react, the man pushed her back down on the bed, climbed on top of her, removed her underwear and shirt, put his mouth on her vagina, and then tried to

penetrate her vagina with his penis. K.A. said that she was "crying," and she remembered "[b]eing very scared . . . that [she] was going to die . . . [b]ecause there was a strange person in [her] house." She felt as though she "was going to be harmed – because," she said, "that's what usually happens . . . on TV." K.A. said that she struggled with the assailant, "did a lot of moving around," and successfully prevented him from penetrating her with his penis. The man then grabbed two belts near the bed and tied K.A.'s legs and hands together. He called her "baby," told her not to cry, and said that he would not hurt her. After asking K.A. whether she had any money or guns, the man left.

After the man left, K.A. freed herself. She found a black cell phone in her apartment that had not been there earlier and did not belong either to her or to her boyfriend. She called the police, who arrived soon after. Paramedics took her to the hospital for a forensic examination. A few days later, she realized that her laptop computer and approximately $40.00 was missing from her home, prompting her to call the police once again.

K.A. did not know her assailant, did not see his face, and could not identify Clifford as the intruder. She was uncertain about how the assailant entered and left her home, but she testified that the kitchen window was closed when she went to bed and was found open after the attack.

Clifford was identified as a possible assailant from the contacts on the cell phone that K.A. found in her bedroom, from DNA recovered from her nightshirt, and from DNA recovered from one of the belts that was used to restrain her.

While testifying in his own defense, Clifford admitted to being in K.A.'s apartment. Clifford's description of his interaction with K.A. was, however, starkly different from K.A.'s version.

Clifford claimed that while he was looking for a prostitute, he came across K.A. "sitting on some steps." He said that he asked K.A. if she was "working," that she responded that she was, and that she told him to drive to the back of her apartment building. He said that K.A. asked him to enter her apartment through the back door so that no one would see him. Once they were inside the apartment, Clifford said, K.A. agreed to perform oral sex on him for $40.00, but demanded payment up-front. Clifford claimed that after he ejaculated into K.A.'s mouth, she ran to the bathroom. He testified that while K.A. was gone, he took the $40.00 from her purse and quickly left the apartment. Clifford denied taking anything else.

We shall include additional facts as they are pertinent to the following discussion.

DISCUSSION

I. Pre-Indictment Delay

Although the assault occurred on September 30, 2007, and the State had identified Clifford as the potential assailant as early as November 2007, it did not formally indict Clifford until more than six years later, on November 26, 2013. In the interim, on November 1, 2007, Clifford had been arrested and charged with the assault against K.A. and a contemporaneous assault on another woman, but the State entered a *nolle prosequi* on the charges involving K.A. on December 11, 2007. Later, on April 23, 2008, a DNA report linked Clifford to the assault on K.A., but the State took no immediate action

against him. The State indicted Clifford in this case only after he had been acquitted of committing similar offenses against three other women and was about to begin a fourth trial involving similar offenses against yet another woman. On this record, Clifford moved to dismiss the indictment on the ground of pre-indictment delay.

In *Clark v. State*, 364 Md. 611 (2001), the Court of Appeals adopted a two-part test for determining when a pre-indictment delay in bringing a prosecution violates a defendant's due process rights. To secure a dismissal because of pre-indictment delay, the Court held that a defendant must prove (1) that he or she suffered "actual prejudice" and (2) that the State "purposefully" delayed the indictment "to gain a tactical advantage." *Id*. at 645.

In *Clark* the defendant had been a suspect when the crime occurred in 1982, but the State did not charge him until 15 years after the offense, when an accomplice changed his story and implicated himself and Clark. *Id.* at 615-18. By that time, two of three eyewitnesses had died, a suspect had also died, and Clark claimed that an alibi witness had died as well. *Id.* at 618. The State conceded that the delay had prejudiced Clark, but argued that it had not delayed the prosecution to gain a tactical advantage. *Id.* at 619. Rather, the State argued that the delay had occurred because it had insufficient information to mount a prosecution until the accomplice implicated Clark. *Id.* In addition, at the time of the offense in 1982, the State did not have access to DNA testing, which showed a statistically significant correlation between Clark's DNA and the saliva on a bandana that was found at the crime scene. *Id.* at 618, 648. Even though Clark "concededly suffered actual prejudice" because of the loss of witnesses and other

suspects, the Court of Appeals affirmed Clark's convictions because he had no evidence that the State purposefully "delayed [his] arrest to gain a tactical advantage over him." *Id*. at 646-47.

In the present case, Clifford alleges that the State delayed in indicting him to gain a tactical advantage, but he does not clearly explain how the delay benefitted the State at his expense. He alleges that the State delayed the indictment because it considered this case to be weaker than the several similar cases against him. He complains that the State indicted him only after he had been acquitted in three other cases and only a week before the trial in the fourth case (which, he says, also ended in an acquittal). Before the circuit court, he complained that the State had discovered no new evidence since the DNA analysis in April 2008 and that the State recharged him simply because it "wanted to use this case as a safety net to prevent him from walking out of the courtroom in the event that he was acquitted in the fourth case."

None of Clifford's complaints come close to establishing that the State purposefully delayed the indictment in order to gain a tactical advantage over him. At most, Clifford has established that the State regarded this as a weak case, which it pursued only after other, stronger cases had failed. Clifford offers no reason to conclude that the State purposefully gained some tactical advantage over him by tabling what it considered to be a weaker case while attempting to convict him in what it considered to be stronger ones.

But even if Clifford had shown that the State purposefully delayed charging him with the intent to gain a tactical advantage, his due process claim fails anyway because he cannot show he suffered actual prejudice by the delay.

Clifford claims he was prejudiced by the delay because he could not investigate and establish an alibi defense. Given that Clifford's DNA was found in K.A.'s apartment (as was a telephone that he had left behind), that he admitted having a sexual encounter with K.A., and that his defense was that the encounter with K.A. was consensual, his argument has no merit.[1]

Clifford also claims that he was prejudiced by the delay because the State lost the SIM card[2] in the telephone that he left in K.A.'s apartment, and the phone records were no longer available because of the passage of time. The State had alleged that the telephone belonged to one of Clifford's other victims, and Clifford argued that the loss of evidence prevented him from "prob[ing] whether the two complainants actually knew each other, contrary to what they told police." Again, his argument lacks merit. It made little difference whether the victims did or did not know one another. On the other hand,

[1] We do not understand Clifford to be arguing that the passage of time prevented him from concocting a false alibi and forced him to admit to having been present in K.A.'s apartment.

[2] "A Subscriber Identity Module (SIM) card is a portable memory chip used mostly in cell phones that operate on the Global System for Mobile Communications (GSM) network. These cards hold the personal information of the account holder, including his or her phone number, address book, text messages, and other data. When a user wants to change phones, he or she can usually easily remove the card from one handset and insert it into another." http://www.wisegeek.com/what-is-a-sim-card.htm (last viewed Apr. 28, 2016).

it made at least some difference that the phone contained contact information for Clifford's family members: like the DNA, the phone confirmed Clifford's identity as the person whom K.A. identified as her assailant.

In short, Clifford has failed to satisfy either prong of the test set forth by the Court of Appeals in *Clark*. Consequently, we hold that the circuit court did not err in denying the motion to dismiss the indictment.

II.

Clifford claims that the evidence was not legally sufficient to support either of his convictions for third-degree sexual offense. We disagree.

The standard for appellate review of evidentiary sufficiency 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.'" *Tracy v. State*, 423 Md. 1, 11 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder." *State v. Stanley*, 351 Md. 733, 750 (1998) (citing *Binnie v. State*, 321 Md. 572, 580 (1991)). "We do not re-weigh the evidence, but 'we do determine whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *State v. Smith*, 374 Md. 527, 534 (2003) (quoting *White v. State*, 363 Md. 150, 162 (2001)).

The State charged Clifford with two third-degree sexual offenses in violation of Md. Code (2002, 2012 Repl. Vol.), § 3-307 of the Criminal Law Article ("CL"). Section 3-307 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[.]

Section 3-301 of the Criminal Law Article defines "sexual contact" as "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party."

A.

On Count 3, the verdict sheet asked whether Clifford "[d]id unlawfully commit sexual offense in the Third Degree, to wit: mouth on vagina upon K.A. on September 30, 2007." On Count 6, the verdict sheet contained identical language, except that it substituted "penis on genital area" for "mouth on vagina."

A third-degree sexual offense involves unconsented "sexual contact" together with an aggravating factor – in this case, placing the victim in fear of serious physical injury to

herself. On both third-degree sexual offense charges, Clifford argues that the evidence was insufficient to show that he "threaten[ed], or place[d] the victim in fear, that the victim . . . imminently w[ould] be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping." Even though K.A. testified that she was "crying" and was "very scared . . . that [she] was going to die," Clifford argues that her fear was unreasonable. He dismisses her reported emotions as the product of a "fertile imagination" fueled by "grisly dramas" on television.

It is true that, to support a conviction for a third-degree sexual offense, the victim's fear must not only be genuine, but must also be reasonable. *Kackley v. State*, 63 Md. App. 532, 542 (1985). Typically, however, "the question of the reasonableness of a victim's fear or apprehension is a question of fact for the jury." *Kackley*, 63 Md. App. at 542; *see also State v. Rusk*, 289 Md. 230, 245 (1981).

Here, the evidence was sufficient. K.A. testified that she was afraid that she was going to die when an uninvited stranger appeared in her bedroom, with his face covered, and sexually assaulted her in the pre-dawn hours immediately after she awoke to his presence. On those facts, a rational jury could reasonably have found that K.A.'s fear was both genuine and reasonable.

B.

Clifford's final argument pertains only to Count 6, which charged him with committing a third-degree sexual offense by putting his penis on K.A.'s "genital area." Clifford claims the evidence was insufficient to show actual "sexual contact," an essential element of a third-degree sexual offense. CL § 3-307. He stresses, among other things,

that K.A. did not explicitly testify that she saw or felt the assailant's penis,[3] that she did not tell the detective that the assailant tried to penetrate her vagina, and that a forensic nurse examiner reported that there was "no penile contact" in "the labial/vagina area."

On the other hand, K.A. testified that the assailant was "trying to penetrate [her] with [his] penis." On cross-examination, she responded affirmatively when asked whether she believed that the assailant was "trying to put his penis inside" her. In addition, on cross-examination, K.A. testified that she told the nurse examiner that "the suspect tried to put his penis in [her] vagina" and that she "believe[d]" that she "had told the [responding] officer that the man tried to put his penis in her vagina."

The question here is whether the evidence, viewed in the light most favorable to the State, was sufficient to establish "sexual contact." CL § 3-301(f) defines "sexual contact" to mean "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party."

Because the General Assembly did not define the term "intimate area," the Court of Appeals has "assume[d] the legislature intended the word 'intimate' to be understood as it is in common parlance." *Bible v. State*, 411 Md. 138, 153 (2009).

> "Intimate" is commonly defined as "[v]ery personal; private [.]" *See*, *e.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 917 (4th ed., Houghton Mifflin Co. 2006). "Private," in turn, is defined as "[s]ecluded from the sight, presence, or intrusion of others[.]"

Id.

[3] As K.A. was evidently on her stomach during the assault, it would have been difficult for her to see the assailant's penis.

Bible held that the buttocks were included within the definition of "intimate area" because a reasonable person would recognize the extremely personal nature of that part of the anatomy. *Id*. at 156.

K.A. testified that Clifford removed her clothes, lay on top of her, and tried without success to penetrate her vagina with his penis. We are persuaded that her testimony, coupled with her testimony regarding her statements to the responding officer and the nurse examiner, would, if believed, permit a rational trier of fact to find that Clifford's penis made contact with an "intimate area" of her body. As a result, the evidence was legally sufficient to support the conviction of the offense charged in Count 6.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.