Circuit Court for Montgomery County
Case No. 138771C

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 158

September Term, 2023

JAMES WALKER MCCLAIN

v.

STATE OF MARYLAND

Graeff,
Arthur,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 13, 2024

A jury in the Circuit Court for Montgomery County convicted James McClain, appellant, of one count of second-degree rape, one count of attempted second-degree rape, and two counts of third-degree sex offense. The court sentenced appellant to a total term of 35 years' imprisonment, with all but 18 years suspended.

On appeal, appellant presents one question for our review, which we have rephrased,[1] as follows:

Was the evidence sufficient to support appellant's convictions?

For reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The victim in this case, K.S., is an adult female who suffers from several disabilities, including autism and mental disorders. K.S. testified that her disabilities inhibit her ability to communicate and process information.

On July 17, 2021, K.S. was at the Wheaton Metro Station waiting for a bus when she was approached by a man, whom she later identified as appellant. Appellant struck up a conversation with K.S., and the two eventually left the bus stop and walked to a nearby secluded area. K.S. testified that, while she and appellant were in the secluded area, appellant touched her breasts and buttocks, had her perform fellatio on him, and attempted, unsuccessfully, to have vaginal intercourse with her. Afterward, K.S. left the secluded area

[1] Appellant phrased the question as: "Was the evidence adduced by the prosecution insufficient to persuade any rational trier of fact beyond a reasonable doubt that [appellant] violated Md. Crim. Law Art. § 3-304, § 3-307 and § 3-310 and was guilty of rape, attempted rape and two counts of third degree sexual offense?"

and located the Metro Station manager, who called the police. The police responded to the area a short time later, and K.S. reported the incident to the responding officers.

Appellant was subsequently arrested and charged with multiple crimes, including attempted second-degree rape (vaginal intercourse), in violation of Md. Code Ann., Crim. Law ("CR") § 3-310 (2021 Repl. Vol.); second-degree rape (fellatio), in violation of CR § 3-304; and two counts of third-degree sexual offense (touching of K.S.'s breasts and buttocks), in violation of CR § 3-307. The statutes proscribing second-degree rape and third-degree sexual offense state, in relevant part, that a person may not engage in vaginal intercourse, a sexual act, or sexual contact with a victim who the person performing the act knows or reasonably should know "is a substantially cognitively impaired individual." CR §§ 3-304(a)(2), 3-307(a)(2). The statute proscribing second-degree rape provides that a person may not engage in fellatio or vaginal intercourse with another "by force, or the threat of force, without the consent of the other." CR § 3-304(a)(1).

I.

Trial

K.S. testified on her behalf. When she was called to the stand, she carried a stuffed animal. After defense counsel objected, the court held a bench conference, during which the State proffered that K.S. was "very nervous" and that the stuffed animal made "her feel calm when she talks." K.S. eventually agreed to put the stuffed animal at her feet while she testified.

K.S. then testified that she was 23 years old, and she had graduated high school at the age of 19. While in high school, she was enrolled in "special education" and other programs for "people with disabilities." Her disabilities included "autism cognitive disorder," and she had been diagnosed with "mental disorders, schizoaffective disorder, psychosis, bipolar, and major depressive disorder." When asked how her disorders affected her everyday life, K.S. responded: "I process information slower, and I repeat myself over and over again. I get awkward in social situations and get anxiety. And I have a hard time communicating. I get annoyed really easily." K.S. testified that she worked at Amazon Fresh, where she bagged groceries. She worked with a program called "Independence Now," which helps "people with disabilities become independent," and it had helped her to get a job and find housing.

The day K.S. saw appellant, she was at the Metro Station waiting for a bus. Appellant walked up to her and "started talking." They talked for approximately ten to 20 minutes. When asked what she was thinking about during the conversation, K.S. responded: "My personal problems. The background, at the back of my mind I thought I was going to do something."

At some point during the conversation, appellant asked K.S. "to take a walk with him." K.S. said no, but she later agreed "because [she] trusted him." The two walked "past the manager and past the garage" to a "blue door that went to the back of the station." Upon going through the blue door, K.S. observed that "[t]here were flies everywhere." K.S. testified that there were no other people in the area, and she had never been to that

part of the station before. Appellant asked her for a hug, so she hugged him. K.S. testified that appellant then touched her "inappropriately" on "[t]he butt area." Shortly thereafter, appellant "took his penis out" and told K.S. to "[l]ick [her] fingers and suck on it." K.S. "didn't want to do that" and told appellant, "no, no, no." K.S. testified that she was scared. Appellant asked what she was scared of, and she "did it anyway." It made her feel "uncomfortable." K.S. testified that she performed fellatio on appellant for approximately two minutes. The next thing she remembered was appellant touching her breast and vagina with his hand. K.S. stated that she "[s]ort of" told appellant to stop, but she could not remember exactly what she said. Approximately one minute later, appellant told K.S. to turn around and place her hands on a nearby wall. K.S. complied, and appellant pulled K.S.'s pants down and tried to "stick his penis inside" K.S.'s vagina and anus. K.S. pulled her pants back up several times, but appellant kept pulling them back down. K.S. told appellant "it's not a good idea," and, at one point, she tried to physically move appellant off of her. K.S. testified that the encounter ended when appellant "stopped trying." She felt regret and shame.

K.S. and appellant subsequently left the secluded area and walked back toward the bus stop. K.S. walked with appellant because she "trusted him again." When the bus did not come, appellant took her to an elevator, but she decided not to follow him and walked away. K.S. then went to the Metro station manager's office and "reported it." The police arrived a few minutes later, and K.S. reported the incident.

Detective Alexandria MacKinnon testified that she responded to the Wheaton Metro Station on July 17, 2021, after receiving a call for a reported sexual assault. Detective MacKinnon interviewed K.S., and she began by asking for permission to record the conversation with her body camera. K.S. "seemed confused by the term body camera," but after Detective MacKinnon explained the term in greater detail, K.S. stated that she did not want to be recorded. During the ensuing interview, Detective MacKinnon observed that K.S. seemed "slightly off, almost slower than what a normal conversation would entail." Detective MacKinnon "had to repeat or reframe phrases."

Detective Abigail Gaines interviewed K.S. at the hospital following the incident. Detective Gaines stated that, although she did not have any difficulty interviewing K.S., she "did have to interview [K.S.] in a different style than [she] would with a typically developed adult." K.S. "spoke and asked questions like a child," which caused the detective to adjust the interview to "more of a child-like interview." Detective Gaines testified that "[i]t was clear and evident" that K.S.'s "cognitive function was low."

The State also played a recorded conversation appellant had with the police. Appellant stated that he went to the Wheaton Metro Station, encountered K.S., and began a conversation with her. Appellant stated that K.S. suggested that the two walk to a nearby secluded area. Upon arriving to the area, appellant "knew something was wrong" because there were "flies flying" and "shit on the floor." At that point, appellant thought that K.S. "don't got it all there." Appellant explained that there were "certain people" who "might

be two seconds off" or "four seconds off." Appellant added that it was "like she was a child," that "something's not right," and that "something's wrong with her."

At the conclusion of the evidence, the trial court instructed the jury on the applicable law related to the elements of attempted second-degree rape, second-degree rape, and third-degree sexual offense:

> In order to convict [appellant] of second degree rape based upon the use of force or threat of force, and without consent, the State must prove that . . . the act was committed by force or threat of force[,] and that the act was committed without [K.S.'s] consent. . . .The amount of force necessary depends upon the circumstances. No particular amount of force is required. Evidence that [K.S.] physically resisted is not required. Consent means actually agreeing to [the act] rather than merely submitting as a result of force or threat of force.
>
> In order to convict [appellant] of second degree rape based upon the other person's substantial cognitive impairment, the State must prove that . . . [K.S.] was substantially, cognitively impaired at the time of the act[,] and [appellant] knew, or reasonably should have known of [K.S.'s] condition.
>
> A person is substantially cognitively impaired if she suffers from an intellectual disability or suffers from a mental disorder; and is substantially unable either to understand the nature of her conduct or to resist [the act]. If you find that [K.S.] was substantially, cognitively impaired, it is not a defense if you believe that she apparently consented to the act of fellatio.
>
> In order to convict [appellant] of second degree rape, you must all agree that he committed a second degree rape against [K.S.] either, A, by force or threat of force, and without her consent; or, B, while [K.S.] was substantially cognitively impaired; but you do not have to all agree on the mode of the commission of the crime; and I will again instruct you that he is not being charged here with second degree rape by vaginal intercourse. That only relates to the attempt charge.
>
> [Appellant] was also charged with the crime of third degree sexual offense. There are two separate charges of third degree sexual offense. In order to convict him of third degree sexual offense, the State must prove that [appellant] had sexual contact with [K.S.]; [K.S.] was substantially

> cognitively impaired at the time of the act; and [appellant] knew, or reasonably should have known, of [K.S.'s] condition.

Appellant moved for judgment of acquittal at the close of the State's case, and he renewed the motion at the close of all the evidence. The court denied both motions as they relate to the charges at issue on appeal.[2]

After appellant was convicted and sentenced, this appeal followed.

DISCUSSION

Appellant contends that the evidence was insufficient to sustain his convictions. He does not dispute that the actions on which the charges were based occurred. Instead, he argues that the State failed to prove: (1) that K.S. was "substantially cognitively impaired" at the time of the incident; or (2) that the act of fellatio and the act of attempted vaginal intercourse that served as the basis for the charges of second-degree rape and attempted second-degree rape were perpetrated by force or threat of force.

The State contends that, when considering the evidence in a light most favorable to the State, a rational jury could reasonably conclude that K.S. was substantially cognitively impaired and that appellant engaged in fellatio and attempted vaginal intercourse by force or threat of force and without K.S.'s consent. The State argues, therefore, that the evidence was sufficient to sustain appellant's convictions.

[2] Appellant was charged with an additional count of second-degree rape based on the allegation that he penetrated K.S.'s vagina with his hands. The court ultimately granted appellant's motion as to that charge of second-degree rape because there was no evidence that appellant penetrated K.S.'s vagina with his hands.

"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." *Scriber v. State*, 236 Md. App. 332, 344 (2018). "When making this determination, the appellate court is not required to determine 'whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt.'" *Roes v. State*, 236 Md. App. 569, 583 (2018) (quoting *State v. Manion*, 442 Md. 419, 431 (2015)). "This is because weighing the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact." *Scriber*, 236 Md. App. at 344 (quoting *Darling v. State*, 232 Md. App. 430, 465 (2017)).

"We defer to any possible reasonable inferences the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *Fuentes v. State*, 454 Md. 296, 308 (2017). In short, "the limited question before an appellate court 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." *Scriber*, 236 Md. App. at 344 (quoting *Darling*, 232 Md. App. at 465).

Rape in the second degree is addressed in CR § 3-304. It provides, in relevant part, as follows:

> (a) A person may not engage in vaginal intercourse or a sexual act with another:
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> (1) by force, or the threat of force, without the consent of the other;
>
> (2) if the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual.

Sexual offense in the third degree is addressed in CR § 3-307. It provides, in relevant part, as follows:

> (a) A person may not:
>
> (1) (i) engage in sexual contact with another without the consent of the other; and
>
> * * *
>
> (2) engage in sexual contact with another if the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual.

We begin with appellant's contention that the State failed to prove that K.S. is "substantially cognitively impaired." As the Supreme Court has explained, when a second-degree rape or third-degree sexual offense charge involves a substantially cognitively impaired individual, the State does not have to prove lack of consent because such an individual is incapable of consenting, and the lack of consent is "implicit in the victim's

condition." *Fuentes*, 454 Md. at 310 (quoting *Travis v. State*, 218 Md. App. 410, 431 (2014)).[3]

CR § 3-301(f) defines "substantially cognitively impaired" as follows:

> (f) "Substantially cognitively impaired individual" means an individual who suffers from an intellectual disability or mental disorder, either of which temporarily or permanently renders the individual substantially incapable of:
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> (1) appraising the nature of the individual's conduct;
>
> (2) resisting vaginal intercourse, a sexual act, or sexual conduct; or
>
> (3) communicating unwillingness to submit to vaginal intercourse, a sexual act, or sexual contact.

In *Fuentes*, 454 Md. at 307, the Court held that expert testimony or a medical diagnosis is not required to show that "a victim lacked the mental capacity to consent to sexual acts." Rather, the fact finder may assess the individual's relevant cognitive abilities based on lay evidence, including the individual's own testimony. *Id.* at 313-14. *Accord People v. Miranda*, 132 Cal. Rptr. 3d 315, 323 (Cal. Ct. App. 2011) ("The question whether a person possesses sufficient resources—intellectual, emotional, social, psychological—to determine whether to participate in sexual contact with another is an assessment within the ken of the average juror, who likely has made the same determination at some point." (quoting *People v. Cratsley*, 653 N.E.2d 1162, 1165 (N.Y. 1995))).

Here, the jury was able to observe K.S. and assess her relevant cognitive abilities while she testified. That testimony began with K.S. walking to the witness stand carrying

[3] When *Fuentes v. State,* 454 Md. 296, 308-09 (2014), was decided, the statute used the terms "a mentally defective individual" and "a mentally incapacitated individual."

a stuffed animal. K.S. testified that, while in high school, she had been enrolled in "special education" and other programs for "[p]eople with disabilities." She testified that she subsequently obtained housing through a program that helps "people with disabilities become independent," and her disabilities included "autism cognitive disorder" and various "mental disorders." As K.S. explained, those disabilities caused her to "process information slower," to "get awkward in social situations and get anxiety," and to have difficulty communicating.

The detectives also indicated that K.S. had limited cognitive abilities. Detective MacKinnon, the police officer who interviewed K.S. at the scene, reported that K.S. "seemed confused by the term body camera." Detective MacKinnon "had to repeat or reframe phrases," and K.S. seemed "slightly off," "almost slower than what a normal conversation would entail." Detective Gaines, who interviewed K.S. at the hospital following the incident, reported that she interviewed K.S. "in a different style than [she] would with a typically developed adult," that K.S. "spoke and asked questions like a child," and that the detective had to engage in "more of a child-like interview." Detective Gaines added that "it was clear and evident" that K.S.'s "cognitive function was low."

Indeed, in his recorded interview with the police following the incident, appellant admitted that K.S. acted like "a child" and that "something [was] wrong with her." When asked to elaborate, appellant stated that there were "certain people" who "might be two seconds off" or "four seconds off." Appellant added that it appeared as if K.S. "don't got it all."

From that evidence, and K.S.'s explanation of what happened, a reasonable jury could have found that K.S. was a "substantially cognitively impaired individual," i.e., that she suffered from an intellectual disability or mental disorder that rendered her incapable of consenting to the sexual acts. A reasonable jury also could have found that appellant knew or reasonably should have known that K.S. was substantially cognitively impaired. Indeed, appellant does not contend that the evidence was insufficient to support a finding in that regard.

Appellant contends that there was evidence that suggested that K.S. understood the nature of her conduct and had the capacity to communicate her unwillingness to engage in the charged conduct. Appellant was free to argue that to the jury, but at this point, when deciding the sufficiency of the evidence, we are not concerned with whether the jury could have, or even should have, reached a different result or drawn contrary inferences. *See Fuentes*, 454 Md. at 307-308; *see also Jordan v. State*, 246 Md. App. 561, 599, *cert. denied*, 471 Md. 120 (2020) ("An inference need only be reasonable and possible; it need not be necessary or inescapable.") (citations and quotations omitted). Rather, we must look at the evidence in a light most favorable to the State and determine whether that evidence could have persuaded any jury to find appellant guilty of the charged crimes. It is up to the jury to resolve conflicts in the evidence, even when those conflicts are generated by a single witness. *See Westley v. State*, 251 Md. App. 365, 419 (2021) (in resolving conflicts in the evidence, the jury is free to "accept all, some, or none of the testimony of a particular

witness"). The evidence was sufficient to support appellant's convictions of attempted second-degree rape, second-degree rape, and third-degree sexual offense.[4]

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

[4] Because the evidence was sufficient to support the convictions based on sexual conduct with a substantially cognitively impaired individual, we need not address whether the evidence was sufficient to show that the sexual conduct was "by force, or the threat of force, without the consent of the other." Md. Code Ann., Crim. Law § 3-304(a)(1) (2021 Repl. Vol.).