IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 140012

SAMIR ALLEN FARHOUMAND

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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STATEMENT OF THE CASE

The issue raised in this appeal is whether the evidence sufficiently proved the defendant, Samir Farhoumand, exposed his sexual or genital parts to a child under 15 years of age, in violation of Virginia Code § 18.2-370.

The defendant was convicted in a bench trial in the Fairfax County Circuit Court of three counts of violating Virginia Code § 18.2-370. The

court sentenced the defendant on each conviction to ten years in prison, with six years suspended, to be served concurrently. The court entered the final judgment orders on December 5, 2012. (App. 706-714).

The defendant, by counsel, appealed to the Court of Appeals of Virginia. That court subsequently affirmed the defendant's convictions in an unpublished opinion issued on December 3, 2013. (Record No. 2087-12-4) (App. 715-725). This Court granted the petition for appeal on May 29, 2014.

ASSIGNMENTS OF ERROR

The defendant has assigned the following errors:

> I. The Court of Appeals erred in holding that "exposure" is proven where genitalia is felt but not seen and in failing to dismiss the indictments where the evidence did not prove the defendant's genitalia was "exposed" to sight.
>
> II. The Court of Appeals erred in holding that the evidence was sufficient to sustain the defendant's convictions whether "exposure" is proven where genitalia is seen or felt.

(App. 726).

STATEMENT OF FACTS

On January 1, 2012, the defendant's younger cousin, in response to questioning by the defendant's sister, admitted the defendant had been

sexually molesting him. (App. 82-83). Following a police investigation, the defendant was charged with four counts of taking indecent liberties with a child under 15 years of age.[1] Each indictment charged the defendant had intentionally exposed his sexual or genital parts with lascivious intent within a specific time period, as follows:

> Indictment 1 (FE-2012-704) – "on or between" Sept. 3, 2009 and Dec. 31, 2009;[2]
>
> Indictment 2 (FE-2012-705 – "on or between" Jan. 1, 2010 and Sept. 3, 2010;
>
> Indictment 3 (FE-2012-706 – "on or between" Sept. 4, 2010 and Dec. 31, 2010;
>
> Indictment 4 (FE-2012-707) – "on or between" Jan. 1, 2011 and Sept. 3, 2011.

(App. 5-8).

The defendant filed a motion for a bill of particulars, contending he needed more certain dates regarding when the offenses alleged in indictments 2 and 3 had occurred. (App. 9-10). He conceded he had received sufficient information to prepare a defense to the charges in indictments 1 and 4. (App. 9). At the hearing held on the motion on June

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[1] The victim's date of birth is September 3, 1996. (App. 54). The defendant was born in 1988. (App. 1).

[2] The trial court granted the defendant's motion to strike Indictment 1. (App. 191).

8, 2012, the Commonwealth told the court the victim could not give more specific dates. (App. 15-16). The court denied the motion, stating the Commonwealth was not required to "muscle the alleged victim to provide more information," especially since the victim had been subject to cross-examination at the preliminary hearing. (App. 16-17).

The victim testified at trial that the defendant, who lived nearby with his parents, often stayed at the victim's house during the defendant's winter, spring and summer breaks from school.[3] (App. 56-57). The victim said the defendant had "ignore[d]" him in the past but had taken "special interest" in him in recent years. (App. 56). The victim said the defendant sexually molested him when he visited the victim's home, but the victim could not specify the dates on which these incidents had occurred. (App. 71, 73). The victim testified the first incident of sexual abuse occurred in the winter of 2009 when he was in seventh grade, continued while he was in eighth and ninth grades, and stopped in 2011 before he entered tenth grade.[4] (App. 58-59, 61-61, 74).

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[3] The defendant attended the University of Virginia from August 2006 – December 2009 and was a graduate dental student at UCLA from September 2010 – March 2012. (App. 219-221).

[4] The eighth grade school year began in September 2009 and ended in June 2010; the ninth grade school year began in September 2010 and ended in June 2011. (App. 63, 580).

The victim said the first time the defendant molested him he came into the victim's bedroom in the early morning while the victim was sleeping and fondled him. (App. 58-59). The victim said "when I woke up, it was kind of shocking to see what was happening, and I was terrified [and] I froze up." (App. 59).

The victim said that when he was in eighth grade, the defendant would masturbate him, or would masturbate himself after putting the victim's hand on the defendant's penis. (App. 65, 67). The victim pretended to be asleep during these incidents. (App. 69). He said he "rarely" saw the defendant's penis, as "occasionally it was exposed, but most of the time it was inside" the defendant's underwear. (App. 67, 69).

The victim further said that when he was in ninth grade, the defendant would lift him onto the defendant's stomach and place their penises so that they touched. (App. 71-72). The victim said the defendant either pulled down his clothes or pulled his penis through the fly of his pants. (App. 73). The victim said he saw the defendant's penis once when he was in ninth grade because he "wasn't sure what was happening, but once [he] figured it out, [he] "wouldn't look," although he could feel the defendant's penis. (App. 73).

The victim testified the last incident of abuse occurred a day before his 15th birthday in September of 2011. (App. 74). The victim had asked a friend to spend the night; the friend slept in the victim's bed and the victim slept on the floor near the door of his bedroom. (App. 74). The victim initially said the defendant came to his room, lay on the floor next to him, and "fondle[d]" him. (App. 74). When asked on cross-examination, however, whether the defendant had placed the victim's hand on the defendant's penis during that encounter, the victim replied, "to be quite honest, it's difficult to remember but if I had to say . . . today, for the court officially, I would say yes." (App. 129-130).

Detective Eugene Cooper of the Fairfax County Police Department testified that he interviewed the victim on January 20 and February 5, 2012. (App. 206). Cooper said the victim consistently described the ways in which the defendant had sexually abused him. (App. 217). Cooper also said the victim first told him the abuse began when he was in eighth grade but later said it started a year earlier when he was in seventh grade. (App. 217).

The defendant testified at trial. (App. 218). He said he had been aware of his homosexuality since he was nine years old but had not revealed that information because he had not wanted to disappoint his

parents. (App. 221-222). He said he had been at the victim's house eight times in 2010 and admitted he had touched the victim's penis eight times between March and August 2010.[5] (App. 225, 234, 258-259). He did not recall exactly the first or last times he fondled the victim. (App. 300, 370). The defendant denied having placed the victim's hand on his own penis or positioning the victim on top of him, and he said he never made his penis visible to the victim. (App. 228-229).

The defendant said he thought he "could express all [his] sexual desires without hurting anybody" because he thought the victim was asleep. (App. 225). Farhoumand said he would ask the victim the next day "'How did you sleep last night?' and [the victim] didn't say anything." (App. 224). The defendant said he was "horrified" when he learned in January 2012 that the victim had not been asleep. (App. 223). The defendant then attempted to commit suicide and was hospitalized in California. (App. 223-224). The defendant also had attempted suicide in August 2011, and his mother had confronted him about his homosexuality then. (App. 311, 635).

The defendant filed two motions to set aside the verdict. He argued in one motion the evidence was insufficient to convict him because he had

[5] The Los Angeles police officers who interviewed the defendant in January 2012 testified he had told them he sexually abused the victim four times. (App. 234). The defendant told the victim during a telephone call in 2012 he had molested him about 15 times. (App. 77-78, 234, 367, 370).

not visibly exposed his penis to the victim, the victim's testimony did not establish the abuse had occurred during the times alleged in the indictments, and the victim's testimony was "inconsistent, unbelievable, and unclear." (App. 575-576). In a supplemental motion, filed by a different attorney, the defendant contended he had not been informed of the specific charges because there was no bill of particulars, his double jeopardy rights had been affected, and he had not been able to present additional alibi evidence. (App. 603-619). The trial court denied both motions after hearing argument on November 15, 2012. (App. 638, 694).

ARGUMENT

THE EVIDENCE PROVED BEYOND A REASONABLE DOUBT THE DEFENDANT EXPOSED HIS SEXUAL OR GENITAL PARTS TO THE MINOR VICTIM, AS CHARGED IN INDICTMENTS 2, 3, AND 4.[6]

Standard of Review

The essence of the defendant's appeal is that the evidence was insufficient to sustain his convictions. A challenge to the sufficiency of the evidence addresses "whether the record contains evidence from which any 'rational trier of fact could have found the essential elements of the crime

[6] The trial court granted the defendant's motion to strike Indictment 1. (App. 191).

beyond a reasonable doubt.'" *Young v. Commonwealth*, 275 Va. 587, 591, 659 S.E.2d 308, 310 (2008) (citation omitted). The appellate court reviews the evidence in the light most favorable to the Commonwealth, the party prevailing below. *See Perry v. Commonwealth*, 280 Va. 572, 578, 701 S.E.2d 431, 435 (2010). This deferential standard also applies "to any reasonable and justified inferences the fact-finder may have drawn from the facts proved." *Sullivan v. Commonwealth*, 280 Va. 672, 676, 701 S.E.2d 61, 63-64 (2010). The appellate court will affirm the judgment unless it is plainly wrong or lacks supporting evidence. *Bolden v. Commonwealth*, 275 Va. 144, 147, 654 S.E.2d 584, 586 (2008). The appellate court is "not permitted to reweigh the evidence," *Nusbaum v. Berlin*, 273 Va. 385, 408, 641 S.E.2d 494, 507 (2007), and may not substitute its judgment for the fact finder's, even if its conclusions of facts differ from those reached by the fact finder at trial. *See Commonwealth v. McNeal*, 282 Va. 16, 20, 710 S.E.2d 733, 735 (2011). Additionally, this Court's examination of the record "is not limited to the evidence mentioned by a party in trial argument or by the trial court in its ruling." *Bolden*, 275 Va. at 147, 654 S.E.2d at 586.

To the extent, however, that the case presents a question of statutory construction regarding the definition of "expose" as used in Virginia Code § 18.2-370, this Court conducts a *de novo* review on appeal. *See, e.g., Giles*

v. Commonwealth, 277 Va. 369, 373, 672 S.E.2d 879, 882 (2009). The facts, however, are considered in the light most favorable to the Commonwealth, the party that prevailed below. *See Giles*, 277 Va. at 373, 672 S.E.2d at 882.

The basic rules of statutory construction require a court to determine the legislature's intent. *See*, *e.g.*, *Tucker v. Commonwealth*, 268 Va. 490, 493, 604 S.E.2d 66, 68 (2004); *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003). "[A] statute should be read to give reasonable effect to the words used and to promote the ability of the enactment to remedy the mischief at which it is directed." *Mayhew v. Commonwealth*, 20 Va. App. 484, 489, 458 S.E.2d 305, 307 (1995). "The wisdom and propriety of the statute come within the province of the legislature." *City of Newport News v. Elizabeth City County,* 189 Va. 825, 831, 55 S.E.2d 56, 60 (1949). "[C]ourts are concerned only as to whether the determination of the legislature has been reached according to, and within, constitutional requirements." *Id.*

In interpreting a statute, its "plain, obvious, and rational meaning . . . is to be preferred over any curious, narrow, or strained construction, . . . and a statute should never be construed in a way that leads to absurd results." *Meeks v. Commonwealth*, 274 Va. 798, 802, 651 S.E.2d 637, 639

(2007) (citations omitted). The context in which a term is used is also a factor in determining its meaning, as words and phrases in a statute should be given their ordinary and usually accepted meaning unless a different intention is apparent. *See id.*; *Woolfolk v. Commonwealth*, 18 Va. App. 840, 847, 447 S.E.2d 530, 534 (1994) (citing *Huffman v. Kite*, 198 Va. 196, 199, 93 S.E.2d 328, 331 (1956)). And even though penal statutes are strictly construed against the Commonwealth, a criminal defendant is not "entitled to benefit from an 'unreasonably restrictive interpretation' of [a] statute." *Holloman v. Commonwealth*, 221 Va. 196, 198, 269 S.E.2d 356, 357 (1980) (citation omitted).

Analysis

As pertinent to this appeal, Virginia Code § 18.2-370(A)(1) provides that "[a]ny person 18 years of age or over, who, with lascivious intent, knowingly and intentionally . . . [e]xpose[s] his or her sexual or genital parts to any child [under the age of 15 years] to whom such person is not legally married, or propose[s] that any such child expose his or her sexual or genital parts to such person" is guilty of a Class 5 felony.

The defendant argues he should not have been convicted of violating Code § 18.2-370 because (1) the evidence did not prove the victim saw the defendant's genitalia, and (2) neither the indictments nor the victim's

testimony provided a date certain for the offenses and did not link particular acts committed by the defendant to specific dates.[7]

Trial Court Did Not Err in Finding Defendant Exposed His Penis to the Victim

The defendant argues, as he did at trial, that the Commonwealth did not prove he violated Code § 18.2-370 because there was no evidence the victim actually saw the defendant's penis.

The trial court, finding persuasive an unpublished en banc opinion of the Court of Appeals, *Mason v. Commonwealth,* 98 Vap UNP 0309972a (1998) (en banc),[8] concluded exposure could occur by touch as well as sight, and that the evidence proved the victim had felt, as well as seen, the defendant's penis. (App. 170, 174-176, 185-192, 651-658). The Court of Appeals affirmed the trial court's ruling. (App. 715-725).

In *Mason*, the defendant was charged with taking indecent liberties with a minor in violation of Code § 18.2-370. One of the victims testified the defendant had rubbed his penis on her vagina and the other victim

[7] The defendant argued in the Court of Appeals that the trial court erred in denying his motion for a bill of particulars. That court, citing Rule 5A:20(c), held the defendant had waived the argument because it was not encompassed within his assignment of error. (App. 724). The defendant has not raised the issue in this Court.

[8] Although not binding precedent, unpublished opinions can be considered for their persuasive value. *See* Rules 5:1(f) and 5A:1(f).

testified the defendant had touched her between her legs with his "'private part.'" The incidents occurred at night in a dark room, and neither girl said she saw the defendant's penis. The defendant argued he did not expose himself in violation of the statute because "proof of visual perception" was required. 98 Vap UNP 0309972a, at 2.

The Court of Appeals, sitting *en banc*, rejected Mason's argument. The Court stated:

> As defined in the Webster's Third New International Dictionary 802 (1991), 'expose' means 'to lay open to view: lay bare: make known: set forth: exhibit, display.' Common usage of the word 'expose' also encompasses more than 'lay open to view.' For example, a person is exposed to a toxin even though the person may have no visual perception of the substance. 'Exposure' means not only to 'lay open to view but also to 'lay open to feel or to touch.'

98 Vap UNP 0309972a, at 2. The Court of Appeals concluded "[t]he evidence proved that Mason physically touched the victims' genitals with his bare penis, and this conduct was sufficient to support the trial court's finding that Mason 'knowingly and intentionally ... expose[d] ... his genital parts' in violation of Code § 18.2-370." *Id*.

In deciding Farhoumand's case, the Court of Appeals found "the reasoning in *Mason* persuasive, in that 'expose' means not only to lay bare to view, but to feel or touch." (App. 719). The Court determined, based on the dictionary definition of "expose," there was "no compelling reason to

conclude that the display of nudity must be limited to a *visual* display. Indeed, if exposure is defined as 'make known' or 'lay bare,' such a definition encompasses a tactile exposure as well as visual." (App. 718) (emphasis in original).

The Court further observed, "to limit exposure to visual observation unduly limits the behavior that the statute intends to prevent. Children should not be subjected in any sensory capacity to the sexual or genital parts of an adult who harbors lascivious intent." (App. 719). *See Uribe v. State*, 7 S.W.3d 294, 297 (Tex. App. 1999) ("Requiring the State to prove that the victim saw the accused's exposed genitals or understood the nature of the victimization would undermine the purpose of the statute, and in addition, afford less protection to certain children, such as those who are very young, blind, or severely mentally challenged.")

The defendant argues *Mason* was wrongly decided and is of no consequence after the decision of the Court of Appeals in *Moses v. Commonwealth*, 45 Va. App. 357, 611 S.E.2d 607 (2005) (en banc), which affirmed the defendant's convictions for making an obscene display or exposure in violation of Code § 18.2-387. Moses masturbated in public in view of two young girls while fully clothed, and he contended a conviction under § 18.2-387 required that he be at least partly nude. *Id*. at 359-60,

611 S.E.2d at 608. A majority of the Court of Appeals rejected his argument, concluding that because the statute proscribed both "expose" and "display" the two words were intended to have different meanings, and that a man masturbating in public could violate § 18.2-387 by displaying his "'person' or 'private parts' while not exposing his penis to sight." *Id.* at 363-64, 611 S.E.2d at 610-11.

The Court of Appeals held in Farhoumand's case that the holding in *Moses* did not invalidate the holding in *Mason*, noting "*Moses* simply distinguishes between a naked penis and one covered by clothing." (App. 718). The *Moses* Court noted that "[i]f 'exposure' can only mean some degree of nudity, then 'display' necessarily means something different[,]" *Moses*, 45 Va. App. at 363, 611 S.E.2d at 610, but contrary to the defendant's contention, the Court did not say expressly that "exposure" must mean only a ***visual*** display of a penis.

As in *Mason*, the victim here testified Farhoumand positioned their bodies so that their penises touched and the victim felt the defendant's bare penis on his penis. (App. 73). The victim also testified that on other occasions, the defendant placed the victim's hand on the defendant's naked penis and then masturbated himself. (App. 65, 67). The victim said the defendant either pulled down his own pants or pulled his penis through

the fly of his pants. (App. 68-69, 73). Thus, as both the trial court and the Court of Appeals concluded, the evidence proved the defendant exposed his genital parts in violation of Code § 18.2-370.

In a Texas case with similar facts, *Balfour v. State*, 993 S.W.2d 765 (Tex. App. 1999), the defendant contended he could not be convicted of "indecency with a child by exposure," because there was no evidence "anyone actually saw his genitals." *Id*. at 769. The 12-year-old female victim testified she had been awakened in the early morning by "'somebody feeling on me, and somebody's penis on me." *Id*. at 766. She said she got out of bed after the touching stopped and saw a "man in the hallway outside her room with his back to her zipping up his pants." *Id*. The defendant admitted he had taken his penis out of his pants while touching the girl because it made him "feel good." *Id*. at 769. The court affirmed Balfour's conviction, following the holding of *Miller v. State*, 243 S.W.2d 175, 176 (Tex. Crim. App. 1951), which had construed "exposure" for purposes of the Texas indecent exposure statute and had concluded the definition "need not be limited to the meaning 'exposed to sight.'" *Id*.

Citing *Siquina v. Commonwealth*, 28 Va. App. 694, 698, 508 S.E.2d 350, 352 (1998), the defendant contends the established meaning of "expose" is "to lay open to view." (Def. Br. 15-16). His contention,

however, ignores the complete definition of exposure, which, as the Court of Appeals stated in its decision, is "'lay open to view, lay bare, make known, exhibit.'" (App. 718) (quoting *Webster's Third New International Dictionary* 802 (1981)). Thus, "exposure" is not limited to sight and may involve any sensory perception, including touch, hearing, smell, and taste. Furthermore, the actual holding in *Siquina* does not support the defendant's argument.

In *Siquina*, the mother of a five-year-old girl discovered the defendant standing closely behind the child; the defendant's erect penis was visible to the mother when she pulled the girl away, although the child had seen only the defendant's underwear when he unzipped his pants. *Id*. at 697, 508 S.E.2d at 352. The defendant argued the evidence was insufficient to convict him of taking indecent liberties with a minor because the child victim had not actually seen his sexual or genitalia parts. *Id*. The Court of Appeals rejected his argument and affirmed the conviction. *Id*. The court held that Code § 18.2-370 applies to any "intentional display by an adult, with lascivious intent, of his or her genitals in the presence of a child where a reasonable probability exists that they might be seen by that child, regardless of the child's actual perception of such a display." *Id.* at 699, 508 S.E.2d at 353.

In Farhoumand's case, the victim testified he had seen the defendant's penis, albeit "rarely," because he pretended to be asleep and "wouldn't look." (App. 67, 73). The fact that the incidents occurred at night in a dark room does not foreclose the reasonable likelihood the victim would have seen the defendant's penis if he had not feigned sleep. Because the victim had the opportunity to see the defendant's penis, whether or not he actually did so, exposure occurred. *See Siquina*, 28 Va. App. at 698, 508 S.E.2d at 352 ("[W]hether an object is actually seen by its intended audience is irrelevant to whether that object has been exposed."); *see also Holley v. Commonwealth*, 38 Va. App. 158, 164, 562 S.E.2d 351, 354 (2002) (affirming conviction for taking indecent liberties with a child and holding that "[a]n indecent exposure must be either in the actual presence and sight of others, or in such a place or under such circumstances that the exhibition is liable to be seen by others") (citation omitted).

Other jurisdictions have reached similar conclusions. In *State v. Bryan*, 130 P.3d 85 (Kan. 2006), the Kansas Supreme Court, in interpreting Kansas's lewd and lascivious behavior statute,[9] determined the legislature

[9] As pertinent in *Bryan*, the statute defined lewd and lascivious behavior as "publicly exposing a sex organ or exposing a sex organ in the presence of a person who is not the spouse of the offender and who has not consented thereto, with intent to arouse or gratify the sexual desires of the offender or another." 130 P.3d at 887.

intended "to criminalize lewd and lascivious behavior whether or not the victim has actually seen or perceived the offending act or acts." *Id*. at 92. The facts in *Bryan* were that the defendant entered his 13-year-old daughter's room and reclined, naked, on her bed with his left hand on his erect penis. *Id*. at 87. The child's mother saw the defendant in the room, but the daughter testified she was asleep when the defendant was present and did not recall seeing him. *Id.* The court opined that the meaning of "expose" was confined to the act itself and contained no requirement of awareness; thus, "the act of exposing can be accomplished without anyone actually seeing what has been exposed." *Id.* at 88. The court concluded that "[i]f the intent is to arouse or gratify the offender's sexual desires, it is the offender's awareness of the victim that is relevant and not the victim's awareness of the offender's exposed sex organ." *Id.* at 92.

In *Clemens v. State*, 733 S.E.2d 67 (Ga. Ct. App. 2012), the defendant's girlfriend saw the naked defendant kneeling over the sleeping child victim and masturbating. *Id*. at 71. The Georgia Court of Appeals held that a victim need not see the offender, or even be awake, for a child molestation conviction to stand, noting the fact that the victim apparently did not awaken during the incident did "not render [the defendant's] conduct

any less culpable under Georgia law."[10] *Id.* *See DeLong v. State*, 714 S.E.2d 98, 101 (Ga. Ct. App. 2011) (where the defendant's ex-wife observed him and a child asleep in the same bed with their underwear pulled down, the court held that "mere exposure of sexual organs to a child is sufficient evidence of child molestation, and neither physical contact with the child nor the child's actual sight of the sexual organs is required").

Certainly, the evidence in this case proved the defendant was guilty of violating Code § 18.2-370, whether the exposure of his penis was by touch or sight. Adopting Farhoumand's interpretation of Code § 18.2-370 would effectively nullify the statute and lead to an absurd result. Under his view, the statute, which is intended to protect children from sexual abuse, would preclude criminal liability from accruing whenever a defendant took steps to prevent the victim from seeing what the defendant was doing, such as covering the victim's eyes or ensuring the room was dark, or the victim was blind and unable to see. Such an interpretation would mean a defendant could sexually molest any child with impunity. A defendant

[10] The Georgia statute prohibiting child molestation provides: "A person commits the offense of child molestation when such person . . . does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person." Ga. Code Ann. § 16-6-4 (2014). Georgia courts have interpreted the statute to suggest that "exposure" is included within the "immoral or indecent act" language.

should not be able to escape responsibility for his aberrant conduct simply because the victim, as here, pretended to be asleep. *See Arnold v. State*, 545 S.E.2d 312, 315 (Ga. Ct. App. 2001) ("Although the evidence showed that [the defendant] was unsuccessful in his attempt to coax [the victim] to look at his exposed penis, his conduct is rendered no less culpable by the victim's good judgment in turning her head away."). Strictly interpreting "expose" to require that the victim actually see the defendant's penis would lead to an absurd result that would render Code § 18.2-370 "incapable of operation." *Cook v. Commonwealth*, 268 Va. 111, 116, 597 S.E. 2d 84, 87 (2004).

Evidence Proved Offenses Occurred Within Time Periods Set Forth in Indictments

An indictment is not invalid if it omits, or states "imperfectly, the time at which the offense was committed when time is not the essence of the offense." Va. Code § 18.2-226(6). Moreover, the Commonwealth may prove a charged crime was committed "on a date different from that alleged in the indictment." *Harris v. Commonwealth*, 185 Va. 26, 34, 37 S.E.2d 868, 871 (1946).

> When time is not an element of the crime charged, the ... verdict will stand if the evidence is sufficient to prove beyond a reasonable doubt that a crime occurred and that the defendant committed the crime, even though the evidence is such that

> there may be a reasonable doubt as to the day on which the offense occurred.

Marlowe v. Commonwealth, 2 Va. App. 619, 623-24, 347 S.E.2d 167, 170 (1986); *accord Clifford v. Commonwealth*, 48 Va. App. 499, 516-20, 633 S.E.2d 178, 186-88 (2006), *rev'd on other grounds*, 274 Va. 23, 645 S.E.2d 295 (2007); *see Clinebell v. Commonwealth*, 235 Va. 319, 321, 368 S.E.2d 263, 264 (1988) (holding that indictments were "legally sufficient" even though they did not specify the exact dates of the offenses at issue).

The Court of Appeals held in *Marlowe* that where the indictment stated crimes involving two minor children occurred "on or about" a certain date, and the evidence established the crimes took place near that date, the jury was not required to find the offenses were committed on a specific date. The Court observed:

> To require that a child *or any witness* be able to recall the exact date an event occurred in his or her life in order to obtain a conviction would too often preclude prosecutions in this type of case where the victims are children and the crimes are not discovered until some time after their commission. The Commonwealth's case would too often fail because it could not specify the exact date of the offense against the child.

Marlowe, 2 Va. App. at 625-26, 347 S.E.2d at 171 (emphasis added).

The Court of Appeals reached a similar conclusion in *Clifford*. The defendant in *Clifford* was charged with aggravated sexual battery of four sisters, who were all under thirteen years of age. 48 Va. App. at 504, 633

S.E.2d at 180. The indictments alleged the offenses occurred "on or about April 1, 2004, through May 31, 2004," but evidence was presented that one of the charged incidents may have taken place in late March 2004. *Id.* at 518-19, 633 S.E.2d at 187-88. The Court found no merit to the defendant's argument that the evidence failed to prove the offense was committed within the specific time charged. *Id.* at 520, 633 S.E.2d at 188. The Court noted that the defendant had been a frequent guest in the children's home and had admitted "rubbing their 'tummies' and 'backs,'" although he denied any inappropriate, sexual touching. *Id*. at 517, 633 S.E.2d at 186. Additionally, the evidence established he had committed aggravated sexual battery of one of the girls "on numerous occasions, both prior to and during the time frame alleged in the indictment." *Id*. at 519, 633 S.E.2d at 187. The Court thus found the "proof regarding when the abuse occurred was sufficient to support [Clifford's] convictions. *Id.* at 520, 633 S.E.2d at 188.

Although the victim in this case was older than the victims in *Marlowe* and *Clifford*, he should not be held to a higher standard of recall. *Marlowe* does not stand for the principle that only young children are given latitude when testifying about the date on which an offense occurred. The victim here was a juvenile who had been sexually molested by an older family member, whom he described in an interview with a police detective as a

"very violent" person. (App. 429). The victim testified he "tried to block out most of the events," and it was "kind of hard to pinpoint" specifically the incidents of abuse because it was "very traumatic" and made him "go back to those times." (App. 70, 90).

Indictment 2 covered the time period from January 1, 2010 through September 3, 2010, during which time the victim was in the eighth grade. (App. 6, 63). The victim testified the defendant came to his house during the defendant's winter, spring, and summer breaks from college and that the sexual abuse began when the victim was in seventh grade and continued throughout eighth and ninth grades. (App. 56-59, 61-62, 71). The victim said that when he was in eighth grade the defendant placed the victim's hand on the defendant's penis and masturbated and the victim saw the defendant's penis. (App. 65, 67, 69).

Farhoumand testified at trial he had touched the victim's penis eight times between March 2010 and August 2010, when he had visited at the victim's home, but he did not recall the exact dates.[11] (App. 225, 258-259,

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[11] In asserting the sexual abuse began in March 2010, the defendant pointed to an incident on March 2, 2010, in which he drew a mustache on the victim while he was sleeping and then took a picture of him. (App. 117-118, 258). The victim testified at the preliminary hearing that the incident occurred "before the abuse happened." (App. 117). At trial, the victim clarified that he had meant the defendant drew the mustache before molesting him that night, "not before the abuse started." (App. 118). The

300, 370). He alleged he had only fondled the victim and had never made his penis visible. (App. 228-229).

"The fact finder, who has the opportunity to see and hear the witnesses, has the sole responsibility to determine their credibility, the weight to be given their testimony, and the inferences to be drawn from proven facts." *McNeal*, 282 Va. at 22, 710 S.E.2d at 736 (citation omitted). The fact finder may choose "between competing accounts offered by different witnesses" and also resolve "conflicts in a single witness' testimony, accepting that part of the testimony it deems credible and rejecting the portion it deems incredible." *Id*.

Thus, as the Court of Appeals observed, the trial court was free to accept the defendant's testimony that he and the victim were together during the time period stated in Indictment 2, but reject Farhoumand's testimony that he did nothing more than fondle the victim.[12] (App. 721). Moreover, in rejecting the defendant's testimony, the court could infer he

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victim further testified the mustache incident "was in the middle of the time period where abuse was happening." (App. 143).

[12] The defendant testified he had limited contact with the victim during the time frames set forth in Indictments 3 and 4 (September 4, 2010 – September 3, 2011) because he was at dental school in California or with his friends or parents. (App. 262-271). The trial court was entitled to reject this testimony as well.

was lying to conceal his guilt. *See Rollston v. Commonwealth*, 11 Va. App. 535, 548, 399 S.E.2d 823, 831 (1991).

Given the "clandestine nature of the crime," where the only witnesses were the perpetrator and the victim, the victim's testimony alone, if believed by the fact finder, was sufficient to support the convictions, as "[a] requirement of corroboration would cause most sex offenses to go unpunished." *Fisher v. Commonwealth*, 228 Va. 296, 299, 321 S.E.2d 202, 203-04 (1984). The victim's testimony was not inherently incredible. *See id.* at 299-300, 321 S.E.2d at 204. Accordingly, the Court of Appeals properly upheld the defendant's conviction on Indictment 2. (App. 721).

Indictment 3 covered September 4, 2010 through December 31, 2010, and Indictment 4 covered January 1, 2011 through September 3, 2011. (App. 7, 8). The victim was in ninth grade during these time periods. (App. 580).[13] The victim testified that when he was in ninth grade, the defendant continued to place the victim's hand on the defendant's penis and the defendant also positioned the victim's body so that their penises were touching; the victim said he saw the defendant's penis once, but then

[13] The defendant sent the victim a text message on September 7, 2010, asking him about his first day of school. (App. 249).

"wouldn't look" at it. (App. 71-73). However, the victim felt the defendant's penis. (App. 73).

With respect to Indictment 4, the victim further testified the last incident of abuse occurred on the day before his 15th birthday, which was on September 3, 2011. (App. 74). Although there was a dispute in the evidence regarding whether the last incident occurred before or after the victim's birthday, the Court of Appeals properly concluded that the trial court was entitled to accept the victim's trial testimony and reject evidence to the contrary. (App. 722). *See McNeal*, 282 Va. at 22, 710 S.E.2d at 736; *Rollston*, 11 Va. App. at 548, 399 S.E.2d at 831. The trial court also was entitled to accept the victim's testimony that the defendant placed the victim's hand on the defendant's penis during that incident.[14] (App. 722). The evidence thus established that the defendant violated Code § 18.2-370 as charged in Indictments 3 and 4.

Viewed under the applicable standard of review, the Court of Appeals did not err in holding "the record contains sufficient evidence to sustain the allegations contained in each of the aforementioned indictments." (App. 722).

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[14] Although the victim gave conflicting accounts of what occurred during the last incident, when asked whether the defendant had placed the victim's hand on the defendant's penis, the victim replied, "If I had to say today, for the court officially, I would say yes." (App. 129-130).

CONCLUSION

For these reasons, the judgments of the Court of Appeals of Virginia and the Fairfax County Circuit Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On August 4, 2014, the required copies of this brief were hand-delivered to the Clerk's Office of this Court for filing and and one electronic PDF copy was submitted to this Court by email. Three copies of the brief were mailed to counsel for appellant, Nina J. Ginsberg, DiMuro Ginsberg,

P.C., 1101 King Street, Suite 610, Alexandria, VA 22314; one copy each was mailed to co-counsel for appellant, Jonathan Shapiro, Greenspun Shapiro, P.C., 3955 Chain Bridge Road, Fairfax, VA 22030, and David B. Hargett, Hargett Law, PLC, 11545 Nuckols Road, Suite C, Glen Allen, VA 23059. An electronic PDF copy of the brief was emailed to each of appellant's counsel at nginsberg@dimuro.com; js@greenspunlaw.com; and dbh@hargettlaw.com.

The undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 6,259 words.

The Commonwealth desires to present oral argument in this case.

_____
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