In The
Supreme Court of Virginia

RECORD NO. 140012

SAMIR ALLEN FARHOUMAND,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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ASSIGNMENT OF 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 That His Genitalia Was "Exposed" To Sight. (*preserved at J.A. 150-56, 174-77, 183-91, J.A. 575-91*).

II. The Court Of Appeals Erred In Holding That The Evidence Was Sufficient To Sustain The Defendant's Convictions Whether "Exposure" Can Be Proven By Evidence That A Person's Genitalia Is Either Seen Or Felt. (*preserved at J.A. 179-82, 318-20, 347-50, 356-57, 603-19*).

NATURE OF CASE AND MATERIAL PROCEEDINGS BELOW

The defendant was arrested on March 27, 2012, on four warrants charging that he exposed himself in violation of Code of Virginia Section 18.2-370(A)(1), to his then 13 to 15 year-old cousin during overnight stays at his cousin's home.[1] (J.A. 1-4). The defendant was between the ages of 21 and 23 at the time of the alleged offenses. A preliminary hearing was held on May 3, 2012. On May 21, 2012, the grand jury returned four indictments, each for a violation of Code of Virginia § 18.2-

[1] Section 18.2-370(A)(1) provides that any person 18 years of age or over, who, with lascivious intent, knowingly and intentionally "exposes" his or her sexual or genital parts to any child to whom such person is not legally married is guilty of a Class 5 felony.

370(A)(1). (J.A. 5-8). The indictments covered a period of two years divided into four consecutive time periods, with a single act of exposure charged in each indictment.

The defendant filed a motion for a bill of particulars prior to trial which the court denied. (J.A. 16-17). The motion was renewed on the day of trial and again denied. (J.A. 31-39).

Trial commenced on August 27, 2012, before the Honorable Randy I. Bellows, Circuit Judge for Fairfax County, without a jury. At the close of the Commonwealth's evidence, the defense moved to strike all four indictments. (J.A. 172-80). The court dismissed the first indictment because the complainant's testimony was insufficient to prove that an act of exposure had occurred within the time period covered by that indictment. (J.A. 191). The court noted similar credibility problems with the complainant's testimony concerning the last act of abuse but denied the motion to strike the fourth indictment because the indictment covered a nine month period from January 1, 2011 to September 3, 2011 and the court credited the complainant's testimony that abuse went on at every single school break. (J.A. 178-80, 182). The

court also ruled that that the mere touch of an otherwise unseen penis was sufficient to prove “exposure” and on that basis, denied the motion to strike the three remaining indictments. (J.A. 187-92).

At the close of the evidence, the court denied the defendant’s renewed motion to strike without explanation, (J.A. 339), and found the defendant guilty on the remaining three counts. (J.A. 362-63).

On November 15, 2012, the defendant argued two motions to set aside the verdict based on claims that the court had applied an improper definition of the term “expose,” and that the evidence failed to establish with requisite specificity whether any particular act of exposure occurred within the time frames of the individual indictments. Both motions were denied. (J.A. 694).

The court sentenced the defendant to concurrent terms of ten years imprisonment with six years suspended on each of the three counts (four times the recommended sentencing guideline), with active probation for ten years from the date of the defendant’s release from prison. (J.A. 706-14).

The defendant was awarded an appeal to the Court of Appeals on June 12, 2013. On December 3, 2013, the Court of Appeals issued an unpublished opinion adopting its prior holding in *Mason v. Commonwealth*, 98 Vap UNP 0309972a (1998) (*en banc*), that '"[e]xposure' means not only to 'lay open to view' but also to 'lay open to feel or to touch,'" and upholding each of the defendant's three convictions. (J.A. 715-25). On May 29, 2014, this Court awarded the defendant an appeal. This brief followed and is timely filed.

STATEMENT OF FACTS

Over the 2012 Christmas holidays, the complainant disclosed that he had been sexually abused by the defendant during the previous two to three year period. (J.A. 75, 82-83). According to the complainant, this abuse occurred in his home during the defendant's winter, spring and summer school breaks, (J.A. 71, 145-47), and included repeated acts of genital fondling, mutual masturbation and penis to penis contact. (J.A. 56, 65-73, 129, 148-49). The complainant also claimed that he saw the defendant's penis "once" or "rarely," but also testified that he

wasn't certain. (J.A. 67, 69, 73, 135). According to the complainant, each of the alleged incidents occurred late at night, in the dark, while he pretended to be asleep. (J.A. 69, 122, 136).

A review of his videotaped interviews reveals the complainant was a sophisticated, verbal, highly intelligent and relaxed 15 year-old, not a scared child.

At trial, the defendant admitted to touching the complainant's penis over his pajamas (conduct not covered by the exposure statute) on up to eight occasions between March and August 2010, (a period covered by the second indictment), while he thought the complainant was asleep. The defendant denied having any other sexual contact with the complainant. (J.A. 164-69, 223-26, 233-35, 258-59, 275-76, 283).

Indictment 1

Indictment 1 covered the period September 2, 2009 through December 31, 2009, (fall of the complainant's eighth grade school year), during which the Commonwealth argued the first instance of abuse occurred. Initially, the complainant testified that the first incident occurred at the end of December 2008, or

the beginning of January 2009, (before the time period covered by the first indictment), while he was in the seventh grade. (J.A. 58-59, 66, 121). The complainant further testified that by the Spring 2009, (also before the period covered by the first indictment), "more sexual behaviors," including acts of mutual masturbation and penis to penis contact had occurred, all while, he pretended to be asleep. (J.A. 64-67, 71-72).

After he was confronted with transcripts of his prior statements to Fairfax County Police Detective Eugene Cooper and his preliminary hearing testimony, the complainant conceded that the abuse did not begin until January, February, or March 2010, (a period covered by the second indictment). (J.A. 100-102, 106, 112-21).

The first time any abuse occurred, the complainant said he was awakened in his bedroom to find the defendant touching his penis, (J.A. 59, 127, 129), but that the defendant did not place his (the complainant's) hand on the defendant's penis at that time. (J.A. 129). He also admitted telling Detective Cooper that the first incident of abuse involved only fondling, (a separate

crime distinct from exposure) that occurred at the end of the second quarter of eighth grade. (J.A. 108).

Beginning in September 2009, and throughout the eighth grade, the complainant said the defendant would come into his bedroom and would take his hand and place it on the defendant's penis. (J.A. 65). When pressed further, he admitted that he could not remember when acts of mutual masturbation first occurred, or whether the defendant had visited him at all during the spring or summer of eighth grade, or after eighth grade. (J.A. 71, 84).

The complainant agreed that he had been subjected to a lot of pressure about the dates of the alleged abuse by his mother who wanted the defendant to be prosecuted on felony charges, (requiring that the complainant be less than fifteen years of age), and that she had constructed a timeline out of events "that didn't have to do with [his] views." (J.A. 111-12). He also told Detective Cooper that his wanted to convince his mother that the defendant would be charged with felonies and that he knew that

if he was twelve years old when the offenses occurred, "it was a felony for sure." (J.A. 112).

Asked whether he had ever seen the defendant's penis, the complainant said that he was "not certain – rarely," and that "occasionally it was exposed, but most of the time it was inside his underwear." (J.A. 67, 69). At another point in his testimony, the complainant stated that he only saw the defendant's penis once but that once he figured out what was happening, he "wouldn't look." (J.A. 73, 135).

The trial court struck this indictment finding that the Commonwealth failed to prove that an act of exposure occurred during the complainant's eighth grade school year. (J.A. 178, 191).

Indictment 2

Indictment 2 covered the period January 1, 2010 through September 3, 2010, the winter and spring of the complainant's eighth grade school year and the summer before ninth grade. In granting the defendant's motion to strike the first indictment, the trial court expressly rejected the complainant's testimony that

visual *or* tactile exposure had occurred during his eighth grade school year, leaving only the summer before ninth grade. (J.A. 178).

The complainant subsequently revised his timeline, testifying that the first time his hand was placed on the defendant's penis, (tactile exposure), "must have been" before the ninth grade. (J.A. 146-47). When asked to describe the specific acts of abuse that occurred during the summer of 2010, the complainant stated only that "more severe events" happened "constantly," but was unable to recall a single act of abuse that took place during this period. (J.A. 69-70).

The Court of Appeals found the complainant's testimony that the defendant abused him "throughout" eighth grade sufficient to sustain the allegation contained in Indictment 2, even though the trial court, acting as the trier of fact, disagreed. *Farhoumand v. Commonwealth*, No. 2087-12-4, 2013 WL 6230651, at * (Va. Ct. App. Dec. 3, 2013).

Indictment 3

Indictment 3 covered the period September 4, 2010 through December 31, 2010, the fall of the complainant's ninth grade school year. The complainant claimed that acts of abuse occurred "throughout the ninth grade." (J.A. 147-49). As with the first and second indictments, the evidence was not tied to a specific act of abuse or time when he recalled the defendant returning to Virginia during this period. Although the complainant stated that "more severe events" happened almost each time the defendant visited, he could not recall a single instance when any of these events occurred or a school break during this period when the defendant had stayed overnight at his home. He was also unable to recall a single time during this period when he saw the defendant's penis. (J.A. 147-49).

Indictment 4

Indictment 4 covered the period January 1, 2011 to September 3, 2011, the winter and spring of ninth grade and the summer before the tenth grade. The warrant corresponding to the fourth indictment initially charged a single act of exposure

between January 1, 2011 and July 31, 2011. This warrant was amended before the preliminary hearing to include the period January 1, 2011 through September 2, 2011. (J.A. 3). The grand jury extended the time frame covered by the fourth indictment until September 3, 2011, the date of the complainant's fifteenth birthday. (J.A. 7).

The complainant gave conflicting accounts of what occurred during the last incident and whether it occurred on September 2, 3, or 4, 2011. At trial, he claimed that the last incident occurred on September 2, 2011, a day before his fifteenth birthday – a necessary element of the statute. (J.A. 74, 123). He testified that he had a friend staying over who slept in his bed and that the defendant fondled and perhaps masturbated him while he slept on his bedroom floor next to the door. ("He lay down next to me on the floor, and proceeded to fondle me. He didn't do much. It was actually less severe than other times . . .") (J.A. 74, 129-30). He testified for the first time on cross-examination that during this last incident, the defendant caused the complainant's hand to be placed on his penis. (J.A. 129).

The complainant subsequently admitted that during his second interview with Detective Cooper, he stated that he was certain the last incident had occurred on September 3rd or 4th, *after* his fifteenth birthday, and that he remembered it very clearly because for the Baha'i religion, his family's faith, fifteen is a very important birthday. (J.A. 124, 126). He also acknowledged testifying at the preliminary hearing that the defendant did *not* place his hand on his penis on the last occasion, and that today (the day of trial), he "did not remember that well." (J.A. 129-30). He made no claim that he saw the defendant's penis during this incident.

The trial judge expressly rejected this testimony as sufficient to support a finding of guilt. "As to the incident that occurred on or about September 3rd, I think there is a problem."). (J.A. 180, 182). The Court of Appeals nevertheless determined that "the fact finder was entitled to conclude that the final incident occurred on September 2, 2011 and that during this last meeting, the appellant caused the victim's hand to be placed on his penis." *Farhoumand v. Commonwealth*, 2013 WL 6230651 at *4. "These

facts," the court said, "prove the allegations contained in indictment number 4." *Id*.

ARGUMENT

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 That His Genitalia Was Exposed to Sight. (Assignment of Error 1).

This Court applies a de novo standard when addressing a question of statutory interpretation. *Bennett v. Commonwealth*, 60 Va. App. 656, 665, 731 S.E.2d 40, 44 (2012); *Wright v. Commonwealth*, 275 Va. 77, 80-81, 655 S.E.2d 7, 9 (2008). In reviewing the sufficiency of the evidence, the standard of review is "whether the record contains evidence from which any 'rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Young v. Commonwealth*, 275 Va. 587, 591, 659 S.E.2d 308, 310 (2008).

The Court of Appeals rejected Farhoumand's claim that where the legislature has prohibited "exposure" of a genital part under Code of Virginia Section 370(A)(1), the mere touching of an otherwise unseen penis is insufficient for conviction.

Specifically, the court stated "we find 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,' [quoting *Webster's Third New International Dictionary* 802 (1981)], such a definition encompasses a tactile exposure as well as visual." *Farhoumand v. Commonwealth*, 2013 WL 6230651, at *2 (emphasis in original).

This was error because the Court of Appeals ignored the common meaning of the term "expose," and established rules of statutory construction.

A. The Court of Appeals Ignored The Plain Meaning Of the Word "Expose."

Code of Virginia, § 18.2-370(A)(1), the statute under which Farhoumand was tried, reads in pertinent part:

> Any person eighteen years of age or over, who, with lascivious intent shall knowingly and intentionally:
>
> (1) *Expose* his or her sexual or genital parts to any child to whom such person is not legally married . . . (emphasis added).

It is the duty of courts to employ the common meaning of the words used by the legislature. Thus, "[w]hen the language of

a statute is unambiguous, we are bound by the plain meaning of that language." *Ford Motor Co. v. Gordon*, 281 Va. 543, 549, 708 S.E.2d 846, 850 (2011) (quoting *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007)).

Additionally, "[t]he plain, obvious, and rational meaning of a statute 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 and internal quotations marks omitted).

In strictly construing the language of § 18.2-370(A)(1), it becomes clear that "expose" means only to "lay open to view" and not also to "lay open to feel or to touch." The plain meaning of an exposed object is completely at odds with one that is hidden or shrouded, even one that is felt but not seen. The Court of Appeals highlighted this distinction in one of its own prior opinions. In *Siquina v. Commonwealth*, 28 Va. App. 694, 508 S.E.2d 350 (1998), the court adopted the following definition of the term "expose:"

> 'Expose' originated as an adaptation of the Latin verb "exponere," which included the following definitions: 1) to put or bring out into the open, or 2) to put on show or display. 5 *The Oxford English Dictionary* 578 (2d ed. 1989); *Oxford Latin Dictionary* 651 (1982). Today, the definition has remained true to its roots. Webster's Third New International Dictionary 802 (1981), defines expose as "to lay open to view." In *Black's Law Dictionary* 579 (6th ed., 1990), "expose" is defined as: "To show publicly; to display; to offer to the public view . . . ."

Id. at 697-98, 508 S.E.2d at 352.

In Farhoumand's case, the Court of Appeals ignored this long established, plain, and rational meaning in favor of a strained construction that would extend the exposure statute to conduct far outside its intended reach. "Touching" is different from "exposure." The words have two different meanings, as commonly understood and as understood by the legislature. At the very least, because there is doubt whether "expose" might mean something more than to lay open to view, strict construction requires the narrower, more limited interpretation.

B. The Court of Appeals Ignored Established Rules Of Statutory Construction.

"In interpreting a statute, a court should always turn to one cardinal canon before all others . . . [C]ourts must presume that

a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

As with any question of statutory interpretation, the reviewing court's primary objective is "'to ascertain and give effect to legislative intent,'" as expressed by the language used in the statute. *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011) (quoting *Conger v. Barrett*, 280 Va. 627, 630, 702 S.E.2d 117, 118 (2010)). Likewise, in accordance with the principles of statutory construction of penal statutes, a court must not add to the words of the statute nor ignore the words of the statute and must strictly construe the statute and limit its application to cases falling clearly within it. *Turner v. Commonwealth*, 225 Va. 456, 459, 309 S.E.2d 337, 338 (1983); *Possey v. Commonwealth*, 123 Va. 551, 553, 96 S.E. 771, 771 (1918). This basic canon flows from the principle that courts must "assume . . . the legislature chose, with care the words it used when it enacted the relevant statute." *Barr v. Town and Country Properties, Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674

(1984). It was obvious to the Commonwealth, if not to the Court of Appeals, that sight rather than touch was required to give effect to the legislature's intent. ("THE COMMONWEALTH: 'Your honor, I think there has to be at least the opportunity to see the penis *. . .* At least exposed it in some way, where the complaining witness could have seen it.'"). (J.A. 152-53).

It is also a settled principle of statutory construction that the legislature understood what it was doing by using different language in similar statutes. "When the General Assembly uses two different terms, it is presumed to mean two different things." *Brown v. Commonwealth*, 284 Va. 538, 545, 733 S.E.2d 638, 641 (2012) (citing *Forst v. Rockingham Poultry Marketing Cooperative, Inc.*, 222 Va. 270, 278, 279 S.E.2d 400, 404 (1981)). It must also be presumed that "the legislature acted deliberately in using different language in similar statutes, and that judgment should be respected by the courts." *Brown v. Commonwealth*, 284 Va. at 545, 733 S.E.2d at 641. As this Court stated in *Brown*:

> "[W]hen the General Assembly includes specific language in one … statute, but omits that language from another … statute, [courts] must presume that the exclusion of the language was intentional" because under these circumstances, it is evident that the General Assembly "knows how" to include such language in a statute to achieve an intended objective; thus the "omission of [such] language [in another statute] represents an unambiguous manifestation of a contrary intention." (quoting *Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 100, 546 S.E.2d 696, 702 (2001)).

Id. at 545, 733 S.E.2d at 641.

The legislature could have easily employed other words had it intended a broader or different meaning. For example, the statute could have said "expose to sight or to touch," or "expose or make contact with." It could also have said "expose or display" as it did in Code of Virginia, § 18.2-387, Virginia's indecent exposure statute. It did none of these, for very good reasons.

Indeed, the Court of Appeals was forced to explain away its own *en banc* decision in *Moses v. Commonwealth*, 45 Va. App. 357, 611 S.E.2d 607 (2005), in which it interpreted § 18.2-387. Section 18.2-387 prohibits any person from making "an obscene *display or exposure* of his . . . private parts . . . in any public

place, or in any place where others are present . . .” (emphasis added). Moses was observed fully clothed masturbating in front of a child in a grocery store. Although his penis was never visually exposed, the court held that his actions constituted an obscene “display” of his private parts.

Relying on the statute’s disjunctive language (prohibiting either an obscene “*display or exposure*”), the court found Moses’ public masturbation to be an obscene “display” falling within the purview of the statute. 45 Va. App. at 364, 611 S.E.2d at 610. As the court said, “[w]ords in a statute should be interpreted, if possible, to avoid rendering words superfluous.” *Id*. at 362, 611 S.E.2d at 610 (quoting *Cook v. Commonwealth*, 268 Va. 111, 114, 597 S.E.2d 84, 86 (2004)); *Zhou v. Zhou*, 38 Va. App. 126, 136, 562 S.E.2d 336, 340 (2002) (observing that “basic canons of statutory construction” exclude interpretations rendering statutory language “superfluous”). “Unless the word ‘display’ is superfluous, it must mean something different from ‘exposure.’” 45 Va. App. at 363, 611 S.E.2d at 610.

Additionally, the rule of statutory construction requiring courts to construe all statutes in *pari materia* required the Court of Appeals to construe § 18.2-370(A) "in such manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious and just in their operation." *Hood v. Commonwealth*, 280 Va. 526, 542, 701 S.E.2d 421, 430 (2010), *quoting Waller v. Commonwealth*, 278 Va. 731, 737, 685 S.E.2d 48, 51 (2009) (internal quotation marks and citations omitted). "Statutes which relate to the same subject matter should be read, construed and applied together so that the legislature's intention can be gathered from the whole of the enactments." *Alger v. Commonwealth*, 19 Va. App. 252, 450 S.E.2d 765 (1994), quoting *Black's Law Dictionary* 791 (6th ed. 1990). Furthermore,

> [p]roper construction seeks to harmonize the provisions of a statue both internally and in relation to other statutes. Legislative purpose can best be "ascertained from the act itself when read in light of other statutes relating to the same subject matter." *Moreno v. Moreno*, 24 Va. App. 190, 197, 480 S.E.2d 792, 796 (1997) (citation omitted). The doctrine of *pari materia* teaches that "statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great, connected homogenous system, or a simple

> and complete statutory arrangement." *Id*. at 24 Va. App. at 198, 480 S.E.2d at 796 (citation omitted).

Id. at 256, 450 S.E.2d at 767.

Code of Virginia, § 18.2-67.4:2, which is part of the homogenous system of statutes prohibiting the abuse of children, provides that:

> <u>Sexual abuse of a child under 15 years or age; penalty</u>.
>
> Any adult who, with lascivious intent, commits an act of sexual abuse, as defined in Section 18.2-67.10 with any child 13 years of age but under 15 years of age is guilty of a class one misdemeanor.

In turn, § 18.2-67.10 ("General definitions"), defines "sexual abuse" as:

> . . . an act committed with the intent to sexually molest, arouse, or gratify any person where:
>
> a. The accused intentionally touches the complaining witness's intimate parts or material directly covering such intimate parts;
>
> b. The accused forces the complaining witness to touch the accused's, the witness's own, or another person's intimate parts or material directly covering such intimate parts . . .

The existence in § 18.2-67.4:2 of a clear, precise, and specific prohibition on the touching of a child's intimate parts or

the material directly covering such intimate parts, and a corresponding prohibition on forcing a child to touch the accused's intimate parts or material directly covering such intimate parts, makes it obvious that § 18.2-370(A) must cover acts *other* than these. There is no other way to harmonize the two statutes. "Laws are presumed to be passed with deliberation, and with a knowledge of all existing laws on the same subject and their various provisions." *Somers v. Commonwealth*, 97 Va. 759, 761, 33 S.E. 381, 382 (1899). It cannot be the case that the legislature enacted these two distinctly worded statutes to cover the same conduct, particularly where the language of one must be stretched beyond its limits to reach that result.

Lastly, principles of statutory construction of penal statutes require that any reasonable doubt as to their meaning to be resolved in favor of the defendant. *Ansell v. Commonwealth*, 219 Va. 759, 761, 250 S.E.2d 760, 761 (1979). In order to convict, the defendant's acts "must be within both the letter and the spirit of the statute; and [the defendant] is entitled to any reasonable

doubt in the construction of the statute." *Price v. Commonwealth*, 209 Va. 383, 385, 164 S.E.2d 676, 678 (1968). The defendant "is as much entitled 'to the benefit of a reasonable doubt about the law as about the facts.'" *Id*., 209 Va. at 386, 164 S.E.2d at 679 (*quoting Enoch v. Commonwealth*, 141 Va. 411, 436, 126 S.E. 222, 230 (1925)). To the extent that there is doubt about the meaning of the term "expose," that doubt must be resolved in favor of the defendant. To hold otherwise is simply to endorse prohibited vagueness. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly . . . [L]aws must provide explicit standards for those who apply them.").

Accordingly, the Court of Appeals incorrectly ruled that "expose" as used in § 18.2-370(A) includes a non-visual touching, and that "exposure" was sufficiently proven by the touching of the defendant's otherwise unseen penis.

C. The Evidence Did Not Prove That The Defendant's Genitalia Was Exposed To Sight.

The Commonwealth also failed to prove beyond a reasonable doubt that the defendant's penis was exposed to sight during any one of the time periods covered by the three indictments. Although the Court of Appeals acknowledged the complainant's testimony that he had seen the defendant's penis "once" or "rarely," it omitted any mention of that testimony from its analysis of the facts or the definition of "exposure" it applied. The trial court likewise omitted any discussion of that testimony when describing the evidence it believed was sufficient to support the defendant's convictions.

The evidence as a whole must exclude every reasonable theory of innocence. *Commonwealth v. Hudson*, 265 Va. 505, 513, 578 S.E.2d 781, 785 (2003). Here, the complainant's uncertain testimony about having seen the defendant's penis "once" or "rarely" was not sufficiently convincing to exclude every reasonable hypothesis except that of guilt. See *Coleman v. Commonwealth*, 226 Va. 31, 53, 307 S.E.2d 864, 876 (1983); *Taylor v. Commonwealth*, 61 Va. App. 13, 30, 733 S.E.2d 129,

137-38 (2012). Nor did the Commonwealth's evidence exclude the reasonable hypothesis that the one time the complainant said he saw the defendant's penis was during the time period covered by the first indictment.

For these reasons, the defendant's convictions should be vacated and the indictments dismissed.

II. The Evidence Was Insufficient To Sustain The Defendant's Convictions Whether "Exposure" Is Proven By Sight Or Touch. (Assignment of Error 2).[2]

In reviewing the sufficiency of the evidence, the standard of review is "whether the record contains evidence from which any 'rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Young v. Commonwealth*, 275 Va. 587, 591, 659 S.E.2d 308, 310 (2008).

The Commonwealth's evidence was insufficient to prove "exposure" either by sight or touch. At trial, the Commonwealth elicited testimony from the complainant describing a pattern of abuse, referring only to the school years during which he claimed

[2] Argument II is not necessary if the Court agrees with Argument I and should not be seen as agreeing that "expose" could mean "touch."

the required acts of sexual abuse occurred. The defendant thus stands convicted of three offenses for which there was no factual specificity, and, more importantly, no proof that a distinct crime meeting an agreed upon definition of "exposure" occurred during each of the three time periods carved out by the indictments.

Indictment 2

Indictment 2 covered the period from January 1, 2010 through September 3, 2010, the winter of the complainant's eighth grade school year through the summer before ninth grade. The only evidence of sexual abuse during this period that the trial court credited was the complainant's testimony that the first time his hand was placed on the defendant's penis "*must have been*" before the ninth grade. (J.A. 177-78, 181). The Commonwealth presented no evidence explaining the complainant's discredited testimony, or what he meant by "more severe events." For all the Commonwealth or the court knew, the complainant could have been referring to some other sexual act not covered by the indictment or the term "exposure." The weakness in the Commonwealth's evidence was further compounded by the

complainant's complete inability to recall whether the defendant had a school break when he spent the night at the complainant's house during any period covered by the second indictment. (J.A. 68-69).

The Court of Appeals concluded that the trial court was free to accept the complainant's testimony that "appellant had inappropriate contact with the victim during the eighth grade, which includes January 1 through the end of the school year," and therefore found the evidence sufficient. "[I]t is 'the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" (quoting *Kelly v. Commonwealth*, 41 Va. App. 250, 257-58, 584 S.E.2d 444, 447 (2003) (*en banc*)). *Farhoumand v. Commonwealth*, 2013 WL 6230651, at * 3-4. It is obvious from a review of the record that the trial judge rejected the Commonwealth's evidence that conduct constituting exposure occurred during the eighth grade. (J.A. 177-78, 181, 191). As the Court of Appeals correctly stated, appellate courts "do not 'substitute [their] judgment for

that of the trier of fact' even if [their] opinion were to differ." (quoting *Wactor v. Commonwealth*, 38 Va. App. 375, 380, 564 S.E.2d 160, 162 (2002)). 2013 WL 6230651, at * 3. Unfortunately, the court did not adhere to this well established rule.

There was scant, if any, credible evidence from which the Court of Appeals could reliably conclude that the defendant's bare penis was "exposed" to either the complainant's sense of touch or sight during this time period. Therefore, the court erred in finding that the evidence proved an act of "exposure" covered by the second indictment beyond a reasonable doubt. As a result, the defendant's conviction should be vacated and Indictment 2 dismissed.

Indictment 3

Indictment 3 covered the period from September 4, 2010 through December 31, 2010, the fall of the complainant's ninth grade school year. Again, the Commonwealth made no attempt to establish a factual basis tying a specific instance of abuse to a

school break when the defendant spent the night at the complainant's home during the period of this indictment.

While the complainant testified that he engaged in acts of mutual masturbation with the defendant "throughout" the ninth grade school year, (J.A. 69-70, 145-47), and "constantly," (J.A. 147-78), the defendant's alibi evidence established that during the period covered by the third indictment, the defendant was only present in Virginia a total of seventeen days when the complainant and his family were not out of the country (J.A. 260-263).[3] As with the second indictment, the complainant could not recall a school break when the defendant stayed overnight at his house during this period – the last Christmas holiday before he brought the abuse to light. (J.A. 68-69).

The Court of Appeals' attempt to overcome this failure of proof was also unconvincing. The only evidence cited by the court that incidents of tactile exposure occurred between

[3] The Court of Appeals found that the defendant provided "extensive evidence" at trial that he could not have had any contact with the victim on many of the days set forth in the indictments. *Farhoumand v. Commonwealth*, 2013 WL 6230651 at *6.

September 4, 2010 and December 31, 2010 was a text message the defendant sent to the complainant on September 7, 2010, asking "How was your first day of school[,]?" *Farhoumand v. Commonwealth*, 2013 WL 6230651 at *4. This was scant proof that the defendant had physical contact with the complainant "from as early as September 7, 2010 and continuing into the ninth grade school year" as the Court of Appeals found. *Id*. Nor did the court attempt to explain why an articulate 16 year old witness was unable to recall life-altering events that he claimed had occurred throughout the year before he reported the alleged abuse.

There was simply no evidence from which the Court of Appeals could conclude beyond a reasonable doubt that the defendant's penis was exposed to either the complainant's sense of sight or touch during the time period covered by the third indictment. As a result, the defendant's conviction should be vacated and Indictment 3 dismissed.

Indictment 4

Indictment 4 covered the period from January 1, 2011 through September 3, 2011, the winter and spring of the complainant's ninth grade school year and the summer before tenth grade. During the nine month period covered by the fourth indictment, the defendant was only in Virginia from June 11-24, 2011 and September 1-3, 2011 (as little as three months before the complainant reported he had been abused). (J.A. 266-72, 616).

At trial, the complainant testified that the last time the defendant touched him was September 2, 2011, one day before his fifteenth birthday. (J.A. 74, 123-24, 126). During this testimony, he claimed that the defendant fondled him briefly while he pretended to be asleep on his bedroom floor. He also testified for the first time on cross-examination that he recalled the defendant had also masturbated his penis. After he was confronted with his preliminary hearing testimony, the complainant admitted that he did not remember the incident "that well" and that he had previously testified that on the first

and last occasion, he had not been made to touch the defendant's penis. (J.A. 129-30).

Not only did the complainant's testimony fail to establish the "exposure" charged in the fourth indictment (as opposed to a misdemeanor sexual battery), but the remainder of his testimony was shown to be false. The complainant reluctantly conceded telling Detective Cooper that he "clearly" remembered that the fondling on his bedroom floor occurred *after* his 15th birthday. (J.A. 122, 124). The time stamp on a photograph taken by the defendant on September 2, 2011 also established that the defendant was awake and interacting with other members of the complainant's family until at least 11:42 p.m., the night before the complainant's fifteenth birthday. (J.A. 272-275).

The Commonwealth's reliance on this incident as the offense charged in the fourth indictment turned the indictment into a moving target that resulted in a juridical example of bait and switch to which the Court of Appeals also fell victim. Although the trial judge believed that the Commonwealth had failed to prove an act of exposure on or about September 3, 2011, the

Court of Appeals upheld the defendant's conviction on this count finding that the fact finder was entitled to conclude that "the final incident occurred on September 2, 2011, and that during this last meeting, the appellant caused the victim's hand to be placed upon his penis." 2013 WL 6230651, at *4. Unfortunately, for a second time, the Court of Appeals failed to follow the established rule that appellate courts do not substitute their judgment for that of the trier of fact even if their opinions differ. *Wactor v. Commonwealth*, 38 Va. App. at 380, 564 S.E.2d at 162.

Accordingly, the Court of Appeals incorrectly ruled that the incident on or about September 3, 2011 was sufficient to sustain the defendant's conviction on the fourth indictment. As a result, the defendant's conviction should be vacated and Indictment 4 dismissed.

CONCLUSION

For these reasons, the defendant requests that this Honorable Court vacate his three convictions and dismiss Indictments 2, 3, and 4.

Respectfully submitted,

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CERTIFICATE AND REQUEST FOR ORAL ARGUMENT

I hereby certify that pursuant to Rule 5:26(h), one electronic version in PDF format on CD of the Brief and Appendix, fifteen printed copies of this Brief and ten printed copies of the Appendix, were hand-filed with the Clerk of the Supreme Court of Virginia on July 8, 2014. On this same day, and one electronic version of the Brief and Appendix in PDF format, three printed copies of the Brief, and one printed copy of the Appendix, were served, via UPS Ground Transportation on:

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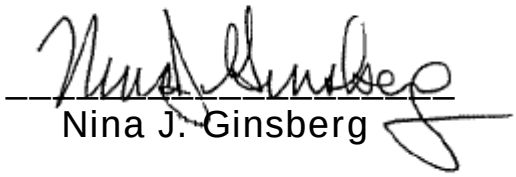
This Brief contains 6,297 words.



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