



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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January 4, 2023

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Re: *Commonwealth v. Herrarte*, FE 2020-241

Dear Mr. Villaroel and Ms. Zary:

This matter is before the court on the court's *sua sponte* reconsideration of the denial of Defendant's motion to strike Count One of the indictment at the close of the evidence at the trial in this matter on May 17, 2022. In denying the motion, the court stated that the testimony of the complaining witness "isn't incredible." Tr. 231. Following the denial of Defendant's motion, the jury found Defendant guilty of rape pursuant to Code § 18.2-61(A)(iii).

Upon review of the transcript of the testimony of the complaining witness, the court determined that the parties should file supplemental memoranda setting forth their positions on whether the testimony of the complaining witness was "inherently incredible." Both parties filed supplemental memoranda.¹

¹ The court did not request the parties to present their positions on whether the evidence was sufficient to sustain the verdict.

FACTS

The complaining witness testified on direct examination that, in early July, 2018, just prior to her 13th birthday (July 21) (Tr. of 5/16/22 at 227), she visited her maternal uncle's two-bedroom apartment where her maternal uncle lived with his minor son, his wife, their minor son, and his wife's son (the defendant)²; her grandfather was visiting at the time. Tr. of 5/16/22 at 194.

On cross-examination, however, the complaining witness testified that the events she described happened in "July of 2017" (Tr. of 5/17/22 at 84)³ and that the alleged incident occurred "going into seventh grade." Tr. of 5/17/22 at 14. She denied that the alleged events occurred "two weeks before [her] thirteenth birthday." *Id.* Further, she admitted that she had originally said that it was in 2018 (*id.*), but that her mother "corrected [her] and said it was 2017." *Id.* And she admitted that it was the prosecutor who told her that "the [2018] date was wrong." Tr. of 5/17/22 at 86.

The complaining witness further testified on direct examination that, while she was in the apartment, so was her grandfather, Defendant, and the two minor sons (Tr. of 5/16/22 at 197); Defendant was in his room by himself. After the complaining witness returned to the apartment after picking up food for lunch, she entered Defendant's room to ask him if he wanted some food. Tr. of 5/16/22 at 204. Upon entering Defendant's room, Defendant "got up and he closed the door" (Tr. of 5/16/22 at 205) and tried to grab her pants. *Id.* at 206. The complaining witness "thought that he shouldn't be doing that." *Id.* Defendant then tried to move the complaining witness's arm "to his lower parts of his body." *Id.* at 207. Defendant then:

puts his hands on my shoulders and he puts me down on the ground. He later proceeds to pull down my pants. And I'm trying to, like, hold my pants at the same time while he's doing it. With one arm he still proceeds to hold my shoulder while he's proceeding to lower my pants down. And later on after that I see that he's trying to lower down his shorts as well.

Tr. of 5/16/22 at 208-209.

During cross examination, the complaining witness admitted that, at the preliminary hearing, she had testified that Defendant "grabbed [her] vagina with his hand" (Tr. of 5/17/22 at 56), a fact she did not

² Defendant's date of birth is in June, 1998, so that, in July, 2018, he would have been 20 years old. He had no criminal or traffic charges on his record.

³ In July, 2017, Defendant would have been 19 years old.

mention at trial on direct examination. Her explanation for the omission was:

I don't remember exactly how it happened and when it happened. I mean, my memory compared to how it was before in 2019 isn't the same as it is now in 2022.

Tr. of 5/17/22 at 56-57.

The complaining witness additionally testified on direct examination that, as a result of the Defendant's action, she was "facing towards him" and "on my bottom" and her legs are "kind of in front of him." Tr. of 5/16/22 at 209. She also testified that, when Defendant pushed her down, she went "backwards" and that Defendant had to "lean over" her to get to her jean pants and underwear (Tr. of 5/16/22 at 209-210), that Defendant "was trying to pull" her jean pants and underwear "from the waist down" (Tr. of 5/16/22 at 210), and that he pulled her jean pants "past [her] knees," "lower than [her] underwear." Tr. of 5/16/22 at 211. On cross-examination, she clarified that her jean pants were "around [her] ankles." Tr. of 5/17/22 at 61-62. She did not provide any other testimony concerning the location of her underwear on her legs.

The complaining witness further testified on direct examination that Defendant also pulled "his bottoms" (*sic*) and his underwear down (Tr. of 5/16/22 at 211) so that she could see his penis. Tr. of 5/16/22 at 212. And, when asked how she would "describe" Defendant's penis, the complaining witness stated: "I wouldn't remember really how much (*sic*) to explain how it was. But I just remembered that I saw it." Tr. of 5/16/22 at 212. At the preliminary hearing, however, the complaining witness testified to the contrary -- that she did not see Defendant's penis. Tr. of 5/17/22 at 63.

In response to being asked (on direct examination) "[w]hat happens next," the complaining witness testified that Defendant "later proceeds to put his penis inside of my vagina." Tr. of 5/16/22 at 212.⁴ She provided no testimony concerning Defendant's position at the time (kneeling, lying on top of her, lying partially on top of her) or what he was doing with his hands. Defendant's alleged penetration caused "pain inside" her. Tr. of 5/16/22 at 212. She also testified that Defendant "was moving kind of like, you could say back and forth." Tr. of 5/16/22 at 214.

The complaining witness did not "yell or anything" (Tr. of 5/17/22 at 65), despite the fact that she knew her grandfather was in the apartment, nor did she resist Defendant: she testified that she "wasn't

⁴ The complaining witness confirmed that, when she used the term "vagina," she was referring to an "internal part" (Tr. of 5/16/22 at 213), *i.e.*, not an external part.

exactly resisting" (Tr. of 5/17/22 at 65) and she "wasn't exactly pushing him back or trying to defend herself in any sort of way." Tr. of 5/17/22 at 65-66.

The Commonwealth did not elicit any testimony from the complaining witness, or anyone else, that, during the alleged incident, Defendant threatened her or hit her, strangled her, or -- other than the alleged rape -- injured her in any way.

The complaining witness further testified on direct examination that, after Defendant allegedly penetrated her vagina, he "tried to turn [her] around, while he tried to do it I got up and I pushed and I left the room" (Tr. of 5/16/22 at 215) and went into the bathroom "down and across the hall." Tr. of 5/16/22 at 218. In the bathroom, she got "a paper towel" and "pass[ed] it through (sic) my vagina and I can see blood." Tr. of 5/16/22 at 219.

On cross-examination, the complaining witness testified that she "didn't know what the blood was from," while at the preliminary hearing, she testified that she "knew the blood was from sexual intercourse." Tr. of 5/17/22 at 75. When she exited the bathroom, she saw Defendant leaving the apartment. Tr. of 5/16/22 at 221. The Commonwealth did not elicit any testimony from the complaining witness that Defendant threatened her (or anyone else) if she told anyone about the alleged incident.

Before the complaining witness left the apartment, she did not tell anyone that anything had happened. Tr. of 5/16/22 at 220. She also did not tell anyone that anything had happened when she went from the apartment to the pool with her cousins (Tr. of 5/16/22 at 222) and with Defendant's mother (Tr. of 5/17/22 at 79) -- who testified that, at the pool, the complaining witness was "happy." Tr. of 5/17/22 at 211. She also did not tell her mother that anything had happened when her mother picked her up at the pool.⁵

The complaining witness did not tell her mother that anything had happened until after she went "back to [middle] school" (Tr. of 5/16/22 at 225), although she subsequently clarified that she "didn't tell her [mother] personally." Tr. of 5/16/22 at 225-226. Rather, her mother only "found out":

through the messages that I had with [Defendant's sister] Kathy. And not until after my freshman year [2019 to 2020] I had spoken up about it with my counselor.

⁵ The complaining witness's mother testified that, at "some point after that day," the complaining witness "had changed a lot," but told her mother that "[n]othing" was wrong. Tr. of 5/17/22 at 109.

Tr. of 5/16/22 at 225.⁶

The complaining witness did not indicate when she communicated with Kathy about the alleged incident.

The complaining witness's mother saw the messages with Kathy "in the beginning during 8th grade" (Tr. of 5/16/22 at 227), which was "a couple of months" after the alleged incident. Tr. of 5/17/22 at 83. The complaining witness testified that she did not tell her mother earlier because she "didn't know how I was going to be able to explain to my mom and how the family would have taken it." Tr. of 5/16/22 at 225.

On cross examination, however, as the complaining witness recanted her testimony that the alleged event happened in July 2018, and testified that it happened in July, 2017, she also testified that the alleged incident occurred "going into seventh grade" (Tr. of 5/17/22 at 14), so that her mother would have seen the messages in the beginning of 7th grade, not 8th grade.

The complaining witness did not "remember the exact words" she used in the alleged messages to Kathy; she "just remember[ed] telling her the situation had happened." Tr. of 5/16/22 at 223. The Commonwealth did not seek to introduce the messages as evidence at trial -- through the complaining witness, her mother, or Kathy.

After the complaining witness's mother allegedly saw the messages from the complaining witness to Kathy, neither the complaining witness nor her mother contacted the police. Tr. of 5/16/22 at 228. Rather, her mother "called . . . both of my uncles," one of whom was Defendant's stepfather (Tr. of 5/16/22 at 228), which resulted in a family meeting. Tr. of 5/16/22 at 229.⁷ During the family meeting, Defendant's stepfather "said to call the police" (Tr. of 5/17/22 at 136) "because that would be the right thing to do if something had happened." Tr. of 5/17/22 at 141.

Defendant's stepfather also testified that, at the meeting, the complaining witness:

never said that anything happened. She stayed quiet. She never said anything. We were waiting for her to talk and

⁶ As the complaining witness testified on cross examination that the alleged incident with Defendant occurred in early July, 2017 and her freshman year ended in or about June, 2020, the complaining witness's report to her counselor came almost 3 years after the alleged incident with Defendant.

⁷ The complaining witness's mother testified to her reaction to a conversation with the complaining witness after seeing the alleged messages: "I asked her why she hadn't defended herself." Tr. of 5/17/22 at 113.

only her mom talked. Her mom said something happened, I can tell you that.

Tr. of 5/17/22 at 136.

On cross examination, the complaining witness's mother agreed that she would "call[] the police if something bad happened to [her] daughter." Tr. of 5/17/22 at 123.

After the family meeting, neither the complaining witness nor her mother (nor her uncles) contacted the police. Tr. of 5/16/22 at 229.

Defendant's stepfather further testified that, "one or two years" after the meeting, the complaining witness's mother told him that the complaining witness:

was misbehaving at school, not going to class, doing inappropriate things. She thought [the complaining witness] was prostituting herself. So, they called [the complaining witness's] mom from the school and then she realized that she said that then.

Tr. of 5/16/22 at 137.

The complaining witness testified that, after she started back at middle school (which, based on her recanted testimony about when the alleged incident occurred, would have been in 7th grade, not 8th grade), she "would have an attitude a lot" (Tr. of 5/16/22 at 229) and she began cutting herself with razors she found in the bathroom (Tr. of 5/16/22 at 230), which her friends reported to a school counselor. Tr. of 5/16/22 at 232. Her mother testified, however, that the complaining witness "used a pencil not razor." Tr. of 5/17/22 at 119.

When the complaining witness met with her counselor (after her friends reported her to the counselor), she did not tell the counselor about the alleged incident with Defendant because, "while we were having our family discussion," she was "scared of the reaction of [her] family" and "thought that if [she] told" the counselor, the counselor "wouldn't believe [her]" or that, if the counselor "called the police something bad would happen." Tr. of 5/16/22 at 232-233. The complaining witness did not explain why, if her family had been told, she was scared of her family's reaction or why the counselor would not believe her or what was the "bad" thing that might happen if the police were called.

It was "not until after [her] freshman year [2019 to 2020,] [she] had spoken up about it with [her] counselor" (Tr. of 5/16/22 at 226), i.e., in or after June, 2020. She then had "to talk to the police." Tr. of 5/16/22 at 233. The complaining witness provided no explanation for why she waited until after her freshman year to tell her counselor

about the alleged incident.

The police officer who interviewed the complaining witness testified, however, that he was assigned the case in November, 2019 (Tr. of 5/17/22 at 156), which would have been the early part of the complaining witness's freshman year.

ANALYSIS

Kehinde v. Commonwealth, 1 Va. App. 342 (1986), explained that:

One essential element of rape is penetration, however slight, of a vagina by a penis. (citation omitted). This element, as with any other, may be established solely by the testimony of the victim *unless such testimony is inherently incredible or so contrary to human experience or usual human behavior as to render it unworthy of belief.*

1 Va. App. at 345 (emphasis added).

The italicized language was based upon *Snyder v. Commonwealth*, 220 Va. 792 (1980), which relied upon *Willis & Bell v. Commonwealth*, 218 Va. 560 (1977), and prior decisions such as *Vance v. Commonwealth*, 155 Va. 1028 (1930).

Vance held that a court "is not required to believe the statement of the prosecutrix" and that it is:

not required to believe that which is contrary to human experience and which we know to be incredible. We are not compelled to accept as true what in the nature of things could not have occurred in the manner and under the circumstances narrated.

155 Va. at 1032.

The Supreme Court has never questioned *Vance*, let alone repudiated it. Indeed, in one of its most recent discussions of inherent incredibility, *Willis & Bell, supra*, the Supreme Court cited *Vance* as authority. Moreover, the Court of Appeals has not questioned the vitality of *Vance*.

In *Willis & Bell, supra*, the Supreme Court discussed the factors which it considered in determining whether a person who complains of being a rape victim is, as a matter of law, inherently incredible. The first factor is a delay in reporting:

The failure to report an alleged rape by force and violence for an unreasonable period after the incident occurred casts suspicion and doubt on the truthfulness of the story of a

prosecutrix unless there is a credible explanation given for such a delay.

218 Va. at 563.

The victim in *Willis & Bell* did not report the alleged rape to the "sheriff of the county or a deputy" (218 Va. at 562, n.1) for "nearly a month" (228 Va. at 562) -- which the Supreme Court considered to be an unreasonable delay for which there was no credible explanation.

Willis & Bell further looked to whether the testimony of the prosecutrix was "corroborated" and whether it was "replete with contradictions and inconsistencies." 218 Va. at 563.

The Supreme Court thus concluded that, "[w]hen her testimony is considered along with her unexplained failure to report the alleged rapes for nearly a month and her attempt to withdraw the warrants that had been secured, her story is incredible as a matter of law." 218 Va. at 563-564.⁸

Since deciding *Willis & Bell*, the Supreme Court has not revisited its holding therein -- indeed, the Supreme Court has continued to cite it as authority⁹ and thus has not overruled it or even questioned its vitality. And, in the Court of Appeals' most recent decision involving inherent incredibility, *Kimble v. Commonwealth*, 22 Vap UNP 0831213 (August 2, 2022), the Court of Appeals applied the *Willis & Bell* factors. This court, therefore, must apply *Willis & Bell*.

The Delay In Reporting To The Police

In *Vance*, the Court reversed the defendant's conviction, noting that there were a number of factors that made the testimony of the 15 year old prosecutrix contrary to human experience, one of which was that it was:

unnatural and difficult to believe that an innocent helpless girl, immediately after the crime of rape had been committed against her, in an adjoining room to the one occupied by her grandfather, would make no appeal to him to shield her, or report to him the crime which had been perpetrated against her. It is also unnatural and difficult to believe that the prosecutrix, for more than a week, surrounded by her parents and other members of the family, would during all that time remain silent. She was not under the control or dominion of

⁸ In *Willis & Bell*, the prosecutrix "tried to withdraw the warrants because she was scared." 218 Va. at 563. In the case at bar, there was no evidence that the complaining witness was fearful of Defendant.

⁹ See, e.g., *Fisher v. Commonwealth*, 228 Va. 296, 299-300 (1984).

the accused, and every moment of the time she had an opportunity to report the offense.

155 Va. at 1031.¹⁰

With respect to this factor, the case at bar has similar facts.

The complaining witness testified that she did not tell her story to anyone immediately after the alleged incident -- even though, despite being 12 years old, she understood that merely trying to grab her pants was something that Defendant should not have done. In fact, the complaining witness went to the pool with her cousins and Defendant's mother as if nothing had happened, from where she was picked up by her mother, to whom the complaining witness said nothing. It was not until the complaining witness's mother allegedly saw the complaining witness's social media communication with Kathy that her mother found out what had allegedly happened with Defendant -- although there was no corroboration of the messages either by Kathy or by introduction of the messages.

Moreover, even after the complaining witness, her mother, and her uncles met (about 2 months following the alleged incident) to discuss what had happened, none of them -- the complaining witness, her mother, or her uncles -- reported the alleged incident to the police, despite one of the uncles having told the complaining witness and her mother that the complaining witness should report the incident to the police if something had actually happened and despite the complaining witness's mother agreeing that she would call the police if something bad happened to her daughter. And one of the uncles testified that the complaining witness never said that anything happened.

The alleged incident was not brought to the attention of the police (through the school counselor) until either November, 2019 (during the complaining witness's freshman year) or until after the

¹⁰ The other factors in *Vance* which made the victim's testimony improbable are not present in the case at bar:

The victim's adult "cousin and her eight year old sister were in the room at the time" -- but the adult cousin "failed to protect or assist her in her distress" and her sister did not "call[] to her grandfather for help" 155 Va. at 1030.

Further, as the victim testified that "she resisted all she could" (*id.*), it "seems rather improbable that the grandfather, in an adjoining room, separated by a thin partition and only a few feet away, did not hear the loud talk, cursing, scuffling and other noises incident to such an affair." 155 Va. at 1031. The latter factor is irrelevant here as the complaining witness testified that she did not resist or cry out, even though she thought that Defendant should not be doing what he allegedly did.

complaining witness's freshman year (June, 2020), *i.e.*, assuming that the alleged incident occurred in July, 2017, either more than 2 years, or almost 3 years, after the complaining witness's mother and her uncles discussed the alleged incident.

While the complaining witness explained why she did not initially tell her middle school counselor about the alleged incident -- fear that she would not be believed or that, if the counselor called the police, something bad would happen -- she did not explain why the counselor would not believe her or what was the "bad" thing that might happen if the police were called.

The complaining witness also did not provide any explanation for not bringing the alleged incident to the attention of the counselor (and thus the police) for either more than 2 years, or almost 3 years, after her mother informed her uncles of the alleged incident.

Moreover, even if it is assumed that the complaining witness did not report the alleged incident to the counselor (and thus to the police) for either more than 2 years, or almost 3 years, after her mother informed her uncles of the alleged incident for the same reasons that she did not initially inform the counselor, *i.e.*, because she feared that she would not be believed or that something bad would happen, these explanations are not credible, particularly in light of the fact that her mother and her uncles had been told and in light of the fact that she did not explain either why the counselor would not believe her or what was the "bad" thing that might happen if the police were called.

In short, no explanation, let alone a credible explanation, was given for the unreasonable delay -- either a more than 2 year delay, or an almost 3 year delay -- in reporting the alleged incident to the police from the time the complaining witness and her mother met with her uncles. *Cf. Fisher v. Commonwealth, supra*, 228 Va. at 299-300 (10 year old victim was taken to ER on "the evening of the day of the offense" and she "made prompt complaint of the defendant's attack to her brother, and later to her grandmother, both on the day of the offense. The complaint to her brother was made at her first opportunity to speak to another person outside the defendant's presence") and *Kimble, supra*, *5 ("Miller reported the incident right after it happened").

The complaining witness's lack of explanation is in contrast to the explanation in *Bradley v. Commonwealth*, 196 Va. 1126 (1955):

Whatever was the lapse of time between the offense and the complaint of the prosecutrix, which was clearly less than two and one half hours, she was under the physical control of the defendant, among strangers and there was no one in whom she could confide. She reported the assault and described her

assailant as soon as she found friends.

196 Va. at 1136.

Moreover, the victim in *Bradley* was "nervous and crying" when she reported the assault to her friend, who "promptly called Investigator Churn, a police officer of Suffolk" 196 Va. at 1130.

By contrast, although Defendant here left the apartment within minutes of the alleged rape and the complaining witness was in the apartment with just her grandfather and her two minor cousins, she said nothing to her grandfather (and in testimony, provided no explanation for not telling her grandfather). Moreover, even if the complaining witness was hesitant to tell her grandfather, she was alone with her mother by later in the afternoon.

See also *Corvin v. Commonwealth*, 13 Va. App. 296 (1991), where the defendant was the juvenile victim's probation officer who told the juvenile victim that juvenile detention was a "living nightmare" and threatened to send him there unless the victim agreed to engage in sexual acts, and victim did not report incident for 14 months. The court thus found that the "victim's youth, fright and embarrassment certainly provided the jury with an acceptable explanation for his behavior *in these circumstances*." 13 Va. App. at 299 (emphasis added). There was no evidence in the case at bar that Defendant had threatened the complaining witness or even that she was fearful of Defendant.

There are also cases involving the "recent complaint" rule of Code § 19.2-268.2¹¹ which have excused a delay in reporting and are thus instructive. See, e.g., *Brown v. Commonwealth*, 37 Va. App. 169 (2001), which found that a 21 month delay in the reporting by an 11 year old girl of her grandfather taking indecent liberties with her (in violation of Code § 18.2-370) was permissible because "her grandfather told her not to tell and she 'didn't think anybody was going to believe me'" [and] "she felt scared and threatened by [her grandfather]." 37 Va. App. at 173. Thus, the court found the delay permissible because the fact that the victim thought she would not be believed was combined with the fact that the victim felt scared and threatened by the defendant. Again, there was no evidence in the case at bar that Defendant had threatened the complaining witness or even that she was fearful of Defendant.

See also *Woodard v. Commonwealth*, 19 Va. App. 24, 28 (1994) (noting the reasons for delay in reporting rape by minors: "fear of disbelief by others and threat of further harm from the assailant");

¹¹ "[T]he fact that the person injured made complaint of the offense *recently* after commission of the offense is admissible, not as independent evidence of the offense, but for the purpose of corroborating the testimony of the complaining witness." (emphasis added).

Terry v. Commonwealth, 24 Va. App. 627, 630-631 (1997) (10 month delay in reporting explained where 12 year old victim "feared her mother would not believe her" as "she also felt partially responsible for the rape because she had asked her mother if she could stay home that night" and "she feared [her father] would become angry, injure the defendant, and end up in jail"); and *Wilson v. Commonwealth*, 46 Va. App. 73, 84-85 (2005) ("abuse began in April 2000, when the daughter was 12 years old, and continued periodically until May 2003"; during that time period, Wilson "continuously threatened his daughter with physical harm and repeatedly instructed her not to tell anyone"; daughter delayed reporting because "she was afraid of her father," who had "hit her in the past, and because she was embarrassed and ashamed to admit that father was touching her inappropriately"). Once again, there was no evidence in the case at bar that Defendant had threatened the complaining witness or even that she was fearful of Defendant.¹²

Cf. Castelow v. Commonwealth, 29 Va. App. 305, 312 (1999) (in absence of evidence explaining "extraordinary delay" of 16 months, evidence fails to provide foundation from which trial judge could have found complaint by 13 year old girl met statutory requirement that it was made "recently after commission of the offense").

Lack Of Corroboration

As in *Willis & Bell, supra*, the complaining witness's testimony here was "wholly uncorroborated" 218 Va. at 563. See also *Vance, supra*, 155 Va. at 1030 ("only evidence in the record tending to support the charge is the uncorroborated testimony of the prosecutrix"). *Cf. Corvin, supra*, 13 Va. App. at 299 ("portions of the victim's testimony were corroborated"); *Bradley, supra*, 196 Va. at 1136 ("testimony of the prosecutrix was corroborated by several witnesses"); and *Kimble, supra*, at *6 ("Miller's testimony was corroborated by the phone records").

Kathy (to whom the complaining witness allegedly sent the messages) was not called by the Commonwealth to corroborate the testimony of the complaining witness -- nor did the Commonwealth seek to introduce the messages -- even though such evidence would have been admissible:

Evidence of an out-of-court complaint by an alleged rape victim is admissible, not as independent evidence of the offense, but as corroboration of the victim's testimony.

¹² The cause for delay in *Lindsey v. Commonwealth*, 22 Va. App. 11, 14 (1996) (victim "had been too frightened to tell her mother about the incident") has no bearing here as the delay of either more than 2 years, or almost 3 years, in reporting the alleged incident to the police was *after* the complaining witness's mother (and the uncles) were informed of the alleged incident.

Fisher, supra, 228 Va. at 300.

Further, the complaining witness's mother was not asked to corroborate the testimony of the complaining witness even though such evidence would have been admissible. See *Fisher v. Commonwealth, supra*.

The situation in *Vance* was somewhat similar: the purported witnesses, including eye witnesses, "were available as witnesses but were not called to testify. . . . No explanation is offered to clear up this unusual situation." 155 Va. at 1031.

Conflicts In The Complaining Witness's Testimony

As in *Willis & Bell, supra*, the complaining witness's "testimony on direct examination conflicted with her testimony on cross-examination and at the preliminary hearing." 218 Va. at 563. Cf. *Kimble, supra*, at *6 ("the description of the offenses that Miller gave at different times were consistent").

The most significant and material conflicts in the testimony of the complaining witness are the following:

First, the complaining witness testified on direct examination that the alleged incident occurred in early July, 2018, just prior to her 13th birthday (July 21). On cross-examination, however, the complaining witness testified that events she described happened in July of 2017 and she affirmatively denied that the alleged incident occurred two weeks before [her] thirteenth birthday. Further, she admitted that she had originally said that it was in 2018, but that her mother corrected her, telling her it was 2017. And she admitted that it was the prosecutor who told her that the 2018 date was wrong.

Second, the complaining witness testified that she could see Defendant's penis, while at the preliminary hearing, she testified to the contrary -- that she did not see Defendant's penis.

Third, on cross-examination, the complaining witness testified that she did not know what the blood was from, while at the preliminary hearing, she testified that she knew the blood was from sexual intercourse.

Fourth, during cross examination, the complaining witness admitted that, at the preliminary hearing, she testified that Defendant had grabbed her vagina with his hand, a fact she did not mention on direct examination. Her explanation was:

I don't remember exactly how it happened and when it happened. I mean, my memory compared to how it was before in 2019 isn't the same as it is now in 2022.

Tr. of 5/17/22 at 56-57.

In view of the lack of a credible explanation for not reporting the alleged incident for either more than 2 years, or almost 3 years, after her mother informed her uncles of the alleged incident, the lack of corroboration, and the contradictions and inconsistencies in the complaining witness's testimony, as well as the complaining witness's candid admission that "I don't remember exactly how it happened and when it happened" and that "my memory compared to how it was before in 2019 isn't the same as it is now in 2022" (Tr. of 5/17/22 at 56-57), "suspicion and doubt" must, as a matter of law, be cast "on the truthfulness of the story" of the complaining witness. *Willis & Bell*, 218 Va. at 563.

There were also unexplained gaps in the testimony of the complaining witness which are either contrary to human experience or, in the nature of things, could not have occurred in the manner and under the circumstances narrated.

First, the complaining witness testified that, when Defendant pushed her down, she went "backwards" and that Defendant had to "lean over" her to get to her jean pants and underwear, that he pulled her jean pants past her knees, which was lower than her underwear, and that her jean pants were all the way down. Given the position of her legs relative to Defendant ("kind of in front of him") and the positions of her jean pants and her underwear, the complaining witness provided no explanation of how it was even physically possible for Defendant to be able to penetrate her vagina.¹³

Second, the complaining witness here did not cry out at any time during the incident to which she testified, despite the fact that she knew her grandfather was in the apartment, nor did she offer any resistance to Defendant when he was penetrating her vagina.

In sum, as in *Willis & Bell*, the complaining witness's "story is incredible as a matter of law." 218 Va. at 564.

CONCLUSION

Having found that the complaining witness's story was inherently incredible as a matter of law, the court should have granted Defendant's motion to strike the evidence at the conclusion of all the

¹³ While "penetration of any portion of the vulva - which encompasses the 'external parts of the female sex organs considered as a whole' and includes, beginning with the outermost parts, the labia majora, labia minora, hymen, vaginal opening and vagina, 4 J.E. Schmidt, *Attorneys' Dictionary of Medicine* V-106 (18th ed. 1990) - is sufficient to show penetration," *Love v. Commonwealth*, 18 Va. App. 84, 88 (1994), the complaining witness did not testify that Defendant penetrated any part of her vulva other than her vagina.

evidence. The court now grants Defendant's motion and, pursuant to Rule 3A:15(c), will enter a judgment of acquittal.

An appropriate order will enter.

Sincerely yours,



Richard E. Gardiner
Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA)	
)	
v.)	FE 2020-241
)	
ERIK FABRICIO HERRARTE)	
)	
Defendant)	

ORDER

THIS MATTER came before the court on the court's *sua sponte* reconsideration of the denial of Defendant's motion to strike Count One of the indictment at the close of the evidence at the trial in this matter on May 17, 2022, and

THE COURT, having reviewed the memoranda filed by counsel for the Commonwealth and for the Defendant, and having reviewed the transcript of the trial testimony,

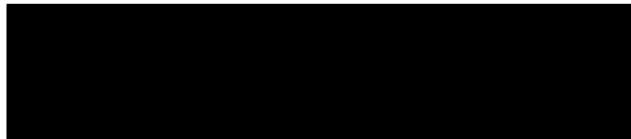
THE COURT hereby finds that the complaining witness's story was inherently incredible as a matter of law for the reasons set forth in the court's letter opinion of today's date and,

THE COURT further finds that the court should have granted Defendant's motion to strike the evidence at the conclusion of all the evidence, it is hereby

ORDERED that Defendant's motion to strike the evidence at the conclusion of all the evidence is GRANTED and, it is further

ORDERED, pursuant to Rule 3A:15(C), that Defendant is ACQUITTED of Count One of the indictment.

ENTERED this 4th day of January, 2023.



Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE
PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT
TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA