

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday, the 16th day of July, 2026.

Present: All the Justices

DAVID JASANTE CUNNINGHAM,

APPELLANT,

against

Record No. 250327

Court of Appeals No. 1140-23-4

COMMONWEALTH OF VIRGINIA,

APPELLEE.

UPON AN APPEAL FROM A
JUDGMENT RENDERED BY THE
COURT OF APPEALS OF VIRGINIA.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that the decision of the Court of Appeals should be affirmed.

David Jasante Cunningham was convicted of aggravated murder and two counts of object sexual penetration. The evidence proved that he brutally attacked, sexually assaulted, and murdered M.J., a 23-year-old woman with Down syndrome.

Cunningham appealed to the Court of Appeals, which affirmed his convictions in an unpublished opinion. *Cunningham v. Commonwealth*, Record No. 1140-23-4 (Feb. 25, 2025). We granted Cunningham an appeal as to one of his convictions for object sexual penetration, specifically, his conviction for penetrating the victim's anus. His murder conviction and his other conviction for object sexual penetration of the labia majora are not at issue in this appeal.

BACKGROUND

To secure a conviction for object sexual penetration, the Commonwealth must prove beyond a reasonable doubt that the defendant "penetrate[d] the [victim's] labia majora or anus." Code § 18.2-67.2. Penetration "can be proved by circumstantial evidence, and the penetration

‘need be only slight.’” *Horton v. Commonwealth*, 255 Va. 606, 612 (1998). Penetration with a finger is sufficient to convict a defendant of object sexual penetration. *Bell v. Commonwealth*, 22 Va. App. 93, 98-99 (1996). DNA analysis of anorectal swabs taken from the victim showed that Cunningham could not be eliminated as a contributor to the Y-chromosome DNA profile developed from those swabs. The key question on appeal is whether the anorectal swabs were properly collected. If they were, the presence of DNA evidence attributable to Cunningham in the anorectal sample establishes his guilt on the charge of object sexual penetration.

Cunningham advances several interrelated arguments to challenge his conviction. First, he stresses that there was no evidence of injury or trauma to the victim’s anus. Second, while he admitted to penetrating the labia majora, he never confessed to penetrating the anus. Third, the only evidence of object sexual penetration came from a cotton swab, collected by Dr. Audrea Williams, that revealed the presence of his DNA. That evidence was insufficient, Cunningham argues, because Dr. Williams testified that she swabbed the area *outside* of the victim’s anal cavity, as well as the internal cavity. Cunningham reasons that the DNA collected from the outside of the anus may have contaminated the DNA *inside* the anus during swabbing, thus contaminating the sample. As a result, Cunningham contends, the Commonwealth failed to prove the required element of penetration.

The Commonwealth responds by noting that Dr. Williams was not the only person to testify concerning the way the swabs were done. A supervising doctor, Dr. Gene Maya, also offered evidence. Relying on the standard of review, the Commonwealth contends that the jury could find that Cunningham was guilty of object sexual penetration.

As relevant to this appeal, Dr. Williams testified that she performed the autopsy on the victim. She also jointly collected the physical evidence recovery kit, known by its acronym, the PERK. Dr. Williams testified that she and Dr. Maya collected the PERK. Initially, Dr. Williams stated that she swabbed the “oral cavity” and that “[s]wabs were also taken of the vaginal and anal cavity.”

Dr. Williams then testified as follows:

Q: Now, the swab of the anus, it’s an anorectal swab; is that correct?

A: Yes.

Q: Does that mean that it’s swabbing externally and then slightly internally?

A: Yes.

Q: All right.

A: Not too far internal though.

Q: All right, but that’s what you did in this case?

A: Yes.

Q: With the swab that you took out of that kit?

A: Yes.

Q: All right. And you did that all at once obviously?

A: Yes.

On redirect examination, Dr. Williams testified as follows:

Q: Dr. Williams, I want to clarify a few things. You had mentioned that the PERK kit includes oral, vaginal, and anorectal swabs.

A: Yes.

Q: Okay. And just to clarify, when you’re swabbing someone’s anorectal cavity, what is the anorectal cavity?

A: That includes the external portion of the anus as well as the internal portion.

Q: Okay. So is the internal portion also swabbed as part of that swab?

A: Yes. That whole area, the external, but not so far into the rectum though.

Q: Okay.

A: It’s not that far in.

Q: But it does go in?

A: Yes.

Dr. Maya, the Assistant Chief Medical Examiner at the Northern District of the Virginia Medical Examiner's Office, also testified. He explained that he supervised and observed Dr. Williams during the entire autopsy. He provided guidance and direction to ensure that "the techniques were performed properly." Dr. Maya was also present during the collection of the PERK. With respect to the anorectal swabs, Dr. Maya testified that "four swabs are inserted into the rectum and kind of twisted all inside the rectum. Those were placed to dry and then placed in an envelope after collection."

THE JURY COULD CONCLUDE FROM THIS EVIDENCE THAT
CUNNINGHAM WAS GUILTY OF OBJECT SEXUAL PENETRATION

When reviewing a challenge to the sufficiency of the evidence, "[a]n appellate court does not 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'" *Williams v. Commonwealth*, 278 Va. 190, 193 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). "Rather, the relevant question is whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (citation omitted). We review the sufficiency of evidence supporting a conviction "in the 'light most favorable' to the Commonwealth." *Bowman v. Commonwealth*, 290 Va. 492, 494 (2015) (quoting *Commonwealth v. Hudson*, 265 Va. 505, 514 (2003)).

Under settled law, "[i]f there is evidence to support the conviction, the reviewing court is not permitted to substitute its judgment, even if its view of the evidence might differ from the conclusions reached by the finder of fact at the trial." *Commonwealth v. Taylor*, 256 Va. 514, 518 (1998). Appellate courts must defer to the factfinding of the jury or judge. "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.” *Id.* It is the jury’s role to “consider all the evidence and resolve any conflicts.” *Powell v. Commonwealth*, 268 Va. 233, 237 (2004).

The jury had before it the testimony from Dr. Maya, who explained that he was present and exercising a supervisory role. He observed Dr. Williams swab the victim’s body in preparing the PERK. Part of Dr. Maya’s role was to make sure that “the techniques were performed properly.” He specifically testified that the “four swabs are inserted into the rectum and kind of twisted all *inside* the rectum.” The jury could accept this testimony and reasonably conclude that the swabbing was done correctly.

Dr. Williams initially said she swabbed the “anal cavity.” Then, she testified that an anorectal swab includes swabbing the external area and then the internal area. It is not clear if she meant that the *same swab* would be used to cover the internal and external areas or whether different swabs would be used to gather evidence from each area. The issue was not developed further on cross-examination or on redirect. At any rate, this testimony contrasts with that of Dr. Maya, who testified his role was ensuring that “the techniques were performed properly” and that “four swabs are inserted into the rectum and kind of twisted all *inside* the rectum.” It was the jury’s responsibility to sift this testimony, and to resolve any differences between Dr. Maya’s and Dr. Williams’ testimony. The jury did not act arbitrarily when it credited the testimony of the more experienced, supervising medical examiner, Dr. Maya, and disregarded that portion of Dr. Williams’ testimony indicating that the swabs may not have been performed properly.

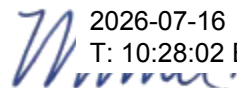
Cunningham posits that Dr. Williams’ and Dr. Maya’s testimony were not in conflict, because Dr. Maya addressed his supervisory role and the swabbing generally, whereas Dr. Williams testified more specifically about how she conducted the swabbing. Because the

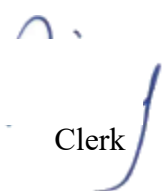
testimony was not in conflict, Cunningham argues, the jury and this Court are required to accept Dr. Williams' testimony. We decline to cabin the jury's factfinding role, and our review of jury factfinding, in this fashion. A jury is apt to view the evidence as a whole and to make credibility and factfinding decisions accordingly. A jury is not required to line up each fact and to determine whether the witnesses' testimony establishes a conflict on a discrete fact. The jury had evidence before it that the swabbing was done properly, and we cannot say that it acted arbitrarily in crediting that evidence. Therefore, the evidence was sufficient for the jury to conclude that Cunningham was guilty of object sexual penetration.

This order shall be certified to the Court of Appeals of Virginia and to the Circuit Court of the City of Alexandria.

A Copy,

Teste:

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 Clerk