VIRGINIA:

In the Court of Appeals of Virginia on **Friday** *the* **21st** *day of* **December, 2018.**

Charles Erskine Church, Appellant,

against Record No. 0264-18-2
Circuit Court Nos. CR17-F-2279 and CR17-F-2280

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Richmond

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

I. In a jury trial, appellant was convicted of sexual penetration with an object in violation of Code § 18.2-67.2(A)(1) and taking indecent liberties with a child in violation of Code § 18.2-370(A)(1).[1] Appellant contends that the trial court erred in refusing to dismiss the charges or grant him a new trial because the Commonwealth failed to meet its obligation under Brady v. Maryland, 373 U.S. 83 (1963), to disclose material exculpatory evidence.

The Trial

Karyn Jackson was the mother of the victim, A.C., and appellant's ex-wife. On the evening of Sunday, November 1, 2015, Jackson took A.C. and her younger sister, J.C., to appellant's apartment for visitation. A.C. was eleven years old, and J.C. was five. A.C. and J.C. were to remain in appellant's custody until Tuesday, November 3, 2015.

Jackson picked up A.C. after her basketball practice at about 7:00 p.m. on November 3, 2015. On the way home to their apartment, A.C. started crying. When Jackson asked what was wrong, A.C. said that "[t]

[1] The jury acquitted appellant of a second charge of sexual penetration with an object and fellatio.

tried to stick it in her," but she would not say more. A.C. said that she started crying on the way home and told her mother, "He put it in me."

A.C. testified at trial that on the evening of Monday, November 2, 2015, she and J.C. were alone in the apartment with appellant; appellant's wife, Peesha Barot, was at work until around midnight. Consistent with their nightly routine, A.C. texted appellant at about 7:00 p.m. to come upstairs to put the two girls to bed in the room they shared. A.C. was wearing a pink tank top, shorts with stars and peace signs on them, and underwear.[2] When appellant came upstairs, only A.C. was awake. Appellant said that "he was going to fuck [A.C.]." A.C. asked to speak to appellant in his room because she did not like his language.

After A.C. and appellant moved to appellant's bedroom, appellant repeated that he was going to "fuck" her. Appellant then removed his jeans and underwear and A.C.'s shorts and underwear. After putting A.C. down on the bed, he put his "front private part" in her "front private part." A.C. used a drawing to identify the penis as the male "front private part." A.C. stated that appellant was both on the outside and on the inside of A.C.'s "front private part" and that it hurt. Appellant also touched A.C.'s "butt" with his penis, both on the outside and the inside. A.C. said that it hurt when he put his penis in her "butt" and made her feel like she needed to "poop." Appellant touched his tongue and fingers to A.C.'s front private part, and put his mouth on her "boobs." Appellant had A.C. put her mouth on his penis, and he ejaculated in her mouth.

Appellant went downstairs, then returned with a glass of wine. By that point, A.C. had returned to her bedroom. Appellant went to A.C.'s room and said he was going to "fuck" J.C. A.C. protested that appellant should not because J.C. was so young and he would hurt her. To protect J.C., A.C. went back to appellant's bedroom with him. Appellant then "did everything the second time." Appellant threatened A.C. that if she told anyone what had happened "one of us would wind up dead." Appellant also said that "he was going to fuck the shit out of me if I told." A.C. knew appellant always kept his gun in his room.

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[2] At trial, A.C. stated that she could not remember anything about the underwear she was wearing on November 2, 2015.

During cross-examination of A.C., defense counsel asserted that she had not been advised in discovery that A.C. claimed appellant had made "threats" about abusing J.C. and that this testimony was inconsistent with A.C.'s statements during her medical examination and forensic interview. The trial court told the prosecutor to investigate whether A.C. had made prior inconsistent statements that had not been revealed to the defense. The trial court indicated that it would address any such matters the following day, and would permit further cross-examination of A.C. if needed. Upon further questioning by the defense, A.C. admitted that she did not mention during the medical examination and forensic interview that the reason she went to appellant's bedroom a second time was to prevent appellant from harming J.C. A.C. stated that it was difficult for her to answer the nurse examiner's questions about what had occurred and that she may have left out some details because "it was just too gross." The first day of trial concluded with A.C.'s testimony, but she was not released as a witness.

On the morning of the second day of trial, and in response to the trial court's direction that the prosecutor ensure that all of A.C.'s prior inconsistent statements had been provided to the defense, the prosecutor stated that A.C. mentioned during trial preparation that on the morning after the sexual abuse appellant had asked the child if he could do it again. The prosecutor also stated that before trial A.C. had not positively identified as her own a pair of underwear the police found in appellant's home, but that this fact was consistent with her trial testimony. The trial court offered to have A.C. resume the witness stand so that appellant could cross-examine her further, but appellant declined this option.

The Commonwealth proved that after A.C. reported the abuse to her mother on November 3, 2015, Jackson took A.C. to VCU Medical Center. Susan Flowers and Beverly Hoehing, pediatric nurse practitioners at the hospital, performed a sexual assault examination on A.C. A.C. told Flowers that appellant had threatened to kill her or anyone else who found out about the sexual assault. A.C. also told Flowers that her father had subjected her to two episodes of sexual conduct. Flowers and Hoehing completed a physical evidence recovery kit (PERK) on A.C. A.C. was tearful during the examination, and she had pain near her rectum. Flowers noted redness to the area around A.C.'s vulva and anus, and bruising around the anus, which

could have been caused by sexual assault. Hoehing swabbed both the exterior and the interior of A.C.'s rectum, and blood was detected there.

Briana Valentino conducted a forensic interview of A.C. at the Child Advocacy Center on November 4, 2015. A.C. told Valentino that appellant tried to stick his private in her front private part but "it didn't work." When asked if anything came out of appellant's private, A.C. said, "[N]ot that I know of." A.C. stated that she was forced to do something with her mouth to appellant's body, but that she did not want to talk about it. During the interview with Valentino, A.C. made a colorful drawing of the tank top and shorts she was wearing on the night of the attack. On cross-examination, Valentino testified that A.C. did not mention that there were two episodes of sexual conduct involving appellant and A.C. or that appellant had threatened to do the same things to J.C.

The police searched appellant's Richmond apartment on November 4, 2015. From a pile of clothing on the floor of the bathroom near the laundry hamper, Detective Steven Jones seized a pair of Barbie underwear, a pair of shorts colored with peace signs and stars, a pink tank top, and a pair of men's underwear. The police seized the first three items of clothing because they had received information about the clothing A.C. said she had worn on the night of the incident, and the detective "found these items in the dirty clothes." Jones stated the clothing he collected "matched the description of the clothing that the young lady was wearing on the night of the incident." The Barbie underwear, a child size eight, was in the laundry pile directly beneath the shorts with the peace signs and stars. At the time of the incident, A.C. wore child size eight underwear, and J.C. wore child size four underwear.

A DNA mixture profile was developed from the inside crotch area of the Barbie underwear. Neither appellant nor A.C. could be eliminated as the two contributors to the DNA mixture. The Commonwealth's forensic analyst admitted that a transfer of DNA could occur when clothes are combined together in a laundry pile.

Dr. Phillip Danielson testified for the defense as an expert in forensic DNA analysis and recovery. He characterized the DNA found on the Barbie underwear as trace DNA that contained a mixture of genetic

material from at least two people; Danielson opined that the presence of an allele that did not match A.C. or appellant made it likely that there was a third contributor in the mixture. Danielson stated that there was "a very good chance" that the Barbie underwear could have picked up DNA as a result of being deposited with other laundry or in the washing process. Danielson further opined that, considering A.C.'s description of sexual contact with appellant and the other surrounding circumstances, it was likely that detectable amounts of DNA would have been deposited on her body.

Called as a defense witness, Barot testified that in the fall of 2015 appellant often drank heavily; his behavior was "angry, erratic, loud, [and] intimidating" when he drank. In addition to being physically and verbally abusive to Barot, appellant would "get in [A.C.'s] face and scream" when he had been drinking. A.C. told appellant several times that she hated him and no longer wanted to live with him. Barot stated that when she returned home from work at about midnight on November 2, 2015, she checked on A.C. and J.C. At that time, A.C. did not appear to be crying, and Barot noticed no "red flags" or anything out of the ordinary to indicate that the child had been sexually abused.

Pretrial Discovery

During pretrial discovery, the Commonwealth provided appellant with the video recording of A.C.'s interview with Valentino and a transcription of that video. The Commonwealth further provided appellant with a copy of Flowers' report regarding A.C.'s examination, including the statements A.C. made during the exam. In an email on June 16, 2017, the prosecutor advised defense counsel that during the assault appellant's tongue touched A.C.'s breasts and her "butt." In addition, by email on July 9, 2017, the prosecutor advised appellant that A.C. had alleged that oral sex had been involved in the incident and that Barot had disclosed that A.C. showed no "red flags" to indicate abuse on the night of the incident.

Brady Claims

Appellant alleges that the Commonwealth repeatedly failed to meet its disclosure obligations under Brady. "There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been

suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). "The accused has the burden of establishing each of these three components to prevail on a Brady claim." Mercer v. Commonwealth, 66 Va. App. 139, 146 (2016) (quoting Commonwealth v. Tuma, 285 Va. 629, 635 (2013)). Ultimately, "[t]he remedial relief to be granted by the trial court following a discovery violation or upon the late disclosure of evidence is within the trial court's discretion and will not be disturbed on appeal unless plainly wrong." Novak v. Commonwealth, 20 Va. App. 373, 389 (1995) (quoting Moreno v. Commonwealth, 10 Va. App. 408, 420 (1990)).

Appellant presents his Brady claim in three parts. First, he alleges that the Commonwealth failed to disclose, before trial, that A.C. could not identify the Barbie underwear as hers. Second, he contends that the Commonwealth failed to timely disclose what he characterizes as A.C.'s prior inconsistent statements. Third, he claims that the Commonwealth did not timely disclose that Barot reported that A.C. exhibited no "red flags" of sexual abuse on the night of the incident. We address each claim in turn, noting that the due process inquiry requires us to consider whether the evidence at issue was exculpatory on an item-by-item basis. Lovitt v. Warden, 266 Va. 216, 245 (2003).

Appellant argues that A.C.'s inability to identify the Barbie underwear was exculpatory because it "affected the admissibility of the evidence itself and the DNA analysis done on the underwear." As addressed below, however, the underwear and the analysis were relevant and admissible even though A.C. did not identify the garment as her own. Moreover, "[w]hether evidence is exculpatory and whether evidence is admissible are discrete inquiries. That evidence is exculpatory and must be disclosed in discovery does not automatically make such evidence admissible at trial, nor does its exculpatory status make it more worthy of admission than other evidence." Payne v. Commonwealth, 65 Va. App. 194, 215 n.17 (2015), aff'd, 292 Va. 855 (2016). While appellant may have chosen to pursue a different trial strategy had he known that A.C.

could not identify the underwear, "the mere possibility of an alternative trial strategy [that] *might* produce a more beneficial result is not the proper test for a Brady violation."[3] Mercer, 66 Va. App. at 149.

Appellant maintains that the Commonwealth did not timely reveal A.C.'s claim that oral sex was involved in the incidents, her statement that she acquiesced to the second episode of sexual abuse to protect her sister from appellant, and that A.C. claimed that appellant asked her for sex again the morning after the incident. "Late disclosure does not take on constitutional proportions unless an accused is prejudiced by the discovery violations depriving him of a fair trial." Moreno, 10 Va. App. at 417. "Brady is not violated, as a matter of law, when impeachment evidence is made '"available to [a]defendant [] during trial"' if the defendant has 'sufficient time to make use of [it] at trial.'" Tuma, 285 Va. at 635 (quoting Read v. Virginia State Bar, 233 Va. 560, 564-65 (1987)). "'The point in the trial when a disclosure is made . . . is not in itself determinative of timeliness[,]" even if the witness in question has completed her testimony, as "the trial itself [i]s far from over.'" Id. at 636 (quoting United States v. Darwin, 757 F.2d 1193, 1201 (11th Cir. 1985)).

All of A.C.'s statements that appellant characterizes as prior inconsistent statements were disclosed to him before or during trial.[4] The Commonwealth provided information about the oral sex allegation to the defense by email twice, on June 16 and July 9, 2017, thus allowing appellant to develop his trial strategy and use the information to his benefit. See id. at 637. On the second day of trial, the trial court provided appellant with the opportunity to cross-examine A.C. further regarding this, as well as whether A.C.

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[3] In any event, the fact that A.C. did not identify the Barbie underwear prior to trial was not impeachment evidence because it was consistent with her trial testimony that she could not remember anything about the underwear she wore on the night of the incident. Nor has appellant demonstrated how that circumstance was exculpatory. A.C.'s inability to identify the Barbie underwear had no tendency to prove that appellant was not guilty of the charged offenses. "The fact that additional information that might have been used in the examination of a witness is discovered after the witness testifies does not render the examination infirm." Massey v. Commonwealth, 67 Va. App. 108, 129 (2016). Having concluded the evidence was not exculpatory or impeaching, "we are not required to consider the issue of the materiality of that evidence." Lovitt, 266 Va. at 245.

[4] Notwithstanding the timeliness of the disclosures, appellant has failed to demonstrate how A.C.'s acquiescence to the second episode of sex to protect J.C., or A.C.'s claim that appellant asked her for sex on the morning after the crimes, was exculpatory or could have been used to impeach A.C.

permitted a second episode of sexual abuse to protect J.C. and that A.C. claimed that appellant asked her for sex again on the morning of November 3, 2015. Appellant did not exercise the option to recall A.C., who had not been released as a witness, nor did he request a continuance to review that evidence in light of his trial strategy. Thus, appellant had the opportunity to make effective use of the evidence of the statements at trial, and there was no Brady violation as a matter of law. Id.

Finally, regarding Barot's report of A.C.'s demeanor on the night of the incident, it is undisputed that the Commonwealth disclosed this information by email two days before trial. In fact, appellant called Barot as a defense witness. Barot testified that she had noted nothing amiss when she checked on A.C. upon returning home from work at around midnight on November 2, 2015. Thus, the evidence was not suppressed because the Commonwealth disclosed it to appellant before trial, and he used it to his benefit. Id.

Not only has appellant failed to establish that the Commonwealth suppressed Brady material, he also has not demonstrated resulting prejudice. To prove prejudice in the Brady context, a defendant must show that "'there is a reasonable probability' that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense." Strickler, 527 U.S. at 289. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. at 289-90 (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)).

In this case, "[c]onfidence in the verdict remains intact" notwithstanding appellant's Brady claims. Mercer, 66 Va. App. at 151. Although appellant challenged A.C.'s testimony with incomplete or inconsistent statements that she had made, the jury credited A.C.'s clear account of the sexual abuse appellant inflicted. She reported the crimes to her mother as soon as she left appellant's custody. A physical examination of A.C. revealed injury that was consistent with sexual abuse. The DNA evidence connected appellant to A.C. and corroborated her testimony. We find no indication that the timing of the Commonwealth's disclosures denied appellant a fair trial, and the trial court did not err in denying appellant's motion to dismiss or for a new trial on Brady grounds.

II. Appellant argues that the trial court erred in admitting the Barbie underwear, and the related DNA analysis, into evidence because it was irrelevant and lacked foundation. On appeal, this Court "reviews a trial court's ruling admitting or excluding evidence for abuse of discretion." Payne v. Commonwealth, 292 Va. 855, 866 (2016).

"'Relevant evidence' means evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence." Va. R. Evid. 2:401. "The scope of relevant evidence in Virginia is quite broad, as '[e]very fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant.'" Commonwealth v. Proffitt, 292 Va. 626, 634 (2016) (quoting Virginia Elec. & Power Co. v. Dungee, 258 Va. 235, 260 (1999)) (alteration in original).

The offenses with which appellant was charged occurred at appellant's home on the night of November 2, 2015. The Barbie underwear was found in a pile of laundry in appellant's home on November 4, 2015. The underwear, which was A.C.'s size, was directly beneath shorts that matched A.C.'s description of the pants she wore on the night of the crimes. A mixture of genetic material to which both appellant and A.C. contributed was on the crotch of the underwear. These facts and circumstances tended to prove that A.C. had worn the underwear and that appellant's DNA had been transferred to her body. Thus, the underwear, and the related DNA analysis, constituted relevant evidence to corroborate A.C.'s testimony that appellant sexually assaulted her.

Appellant argues that the Commonwealth provided "no foundation that the underwear was the same underwear that the complainant wore on the night of the alleged assault." "A proper foundation must be laid for the introduction of all evidence. The burden is upon the party offering real evidence to show with reasonable certainty that there has been no alteration or substitution of it." Sabo v. Commonwealth, 38 Va. App. 63, 79 (2002) (quoting Horsley v. Commonwealth, 2 Va. App. 335, 338 (1986)). But the attendant circumstances provided the requisite foundation, considering the size of the underwear and its location in the laundry pile with A.C.'s other clothing that she already recalled wearing on the night of the assault. The

record contains no suggestion, and appellant does not argue, that there was any alteration or substitution of the underwear seized by the police and tested at the state laboratory. Having determined that the underwear was relevant and supported by a proper foundation, we find no abuse of discretion in the trial court's decision to admit the underwear and the DNA test results into evidence.

III. Appellant contends that the trial court erred in denying his motion to dismiss the charges against him based upon prosecutorial vindictiveness. Appellant maintains that the trial court's ruling violated his Fourteenth Amendment right to due process. "We review a trial court's factual findings on prosecutorial vindictiveness for plain error, but we review its legal analysis *de novo*." Barrett v. Commonwealth, 41 Va. App. 377, 392 (2003), aff'd, 268 Va. 170 (2004).

On January 6, 2016, a City of Richmond grand jury indicted appellant for rape of a child under the age of thirteen and two counts of sodomy of a child under the age of thirteen. If convicted under the 2016 indictments, appellant faced a sentence of five years to life imprisonment for each charge. Code §§ 18.2-61(B) and 18.2-67.2(B). The trial court granted the Commonwealth's motion to *nolle prosequi* the charges on June 21, 2016, because appellant faced federal charges involving child pornography. After a federal judge granted appellant's motion to suppress evidence in that case, the federal charges against appellant were dismissed. In May of 2017, a City of Richmond grand jury indicted appellant upon charges of sexual penetration with an object and taking indecent liberties. The charges included an allegation that appellant, then over the age of eighteen, committed sexual penetration with an object upon a child under thirteen, which carried a penalty of mandatory life imprisonment. Code § 18.2-67.2(B)(2).

Appellant moved to dismiss the charges on grounds of prosecutorial vindictiveness. At a hearing on appellant's motion to dismiss, the prosecutor explained that the 2016 charges were *nolle prosequied* because of procedural challenges inherent in pursuing state and federal charges simultaneously. In addition, the prosecutor who assumed responsibility for the case in 2017 believed it was appropriate to charge and seek a mandatory life sentence under the circumstances. The trial court found that, after the federal judge granted the motion to suppress and the charges were dismissed, the Commonwealth's decision to charge appellant

with crimes involving a greater penalty upon conviction did not demonstrate vindictiveness, and denied appellant's motion to dismiss.

"It is well established that the choice of offenses for which a criminal defendant will be charged is within the discretion of the Commonwealth's Attorney." Kauffmann v. Commonwealth, 8 Va. App. 400, 410 (1989). Indeed, "the institution of criminal charges, as well as their order and timing, are matters of prosecutorial discretion." Bradshaw v. Commonwealth, 228 Va. 484, 492 (1984). Nevertheless, prosecutorial discretion "is not 'unfettered.' Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints." Wayte v. United States, 470 U.S. 598, 608 (1985). Particularly, "the decision to prosecute may not be '"deliberately based upon"' . . . the exercise of protected statutory and constitutional rights . . . ." Id. (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

> To punish a person because he has done what the law plainly allows him to do is a due process violation "of the most basic sort" . . . . For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.

United States v. Goodwin, 457 U.S. 368, 372 (1982) (quoting Bordenkircher, 434 U.S. at 363).

In Goodwin, the Court held that no presumption of vindictiveness arose where the prosecution sought and obtained greater charges after plea negotiations failed and the defendant moved for a jury trial. Id. at 384. The Court found that "[t]here is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting." Id. at 381. "In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance." Id. The Court recognized that pre-trial rights and procedural protections "inevitably impose some 'burden[s]'" on prosecutors, but found it unlikely that prosecutors would "seek to penalize and to deter" such routine trial practices. Id. Thus, "[a] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct." Id. at 382.

We find that no presumption of vindictiveness arose in this case where, prior to any trial, the Commonwealth sought charges involving a greater potential punishment merely because a federal court granted appellant's motion to suppress and the federal charges were dismissed. The 2016 indictments were *nolle prosequied* to permit the federal charges to proceed. Independent from the federal proceeding, the Commonwealth, in the exercise of reasonable discretion, obtained new indictments in 2017. We will not presume that the prosecutor intended to punish appellant with the increased penalties in the 2017 indictments because appellant obtained suppression of evidence in federal court.

Nonetheless, "a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." Id. at 384. "A finding of actual vindictiveness occurs 'only in a rare case' as it would require a defendant to produce direct evidence, such as evidence of a vindictive statement made by a prosecutor." Barrett, 41 Va. App. at 396 (quoting Goodwin, 457 U.S. at 380-81); see also Battle v. Commonwealth, 12 Va. App. 624, 630 (1991) (finding actual vindictiveness where prosecutor threatened, and was granted, a *nolle prosequi* for the stated purpose of increasing the prosecutorial risk to defendant and forcing him to relinquish an advantage gained by a favorable decision on his motion to suppress evidence).

Appellant produced no evidence of actual vindictiveness by the prosecutor in obtaining the 2017 indictments. The trial court credited the prosecutor's explanation for why that the 2016 indictments were *nolle prosequied* and new indictments were sought in 2017. It found there was no indication of prosecutorial vindictiveness in the procedure. In the absence of affirmative evidence to the contrary, we find no basis to disturb this finding or to conclude that the trial court erred in denying appellant's motion to dismiss.

IV. and V. Appellant challenges the sufficiency of the evidence to support his convictions of sexual penetration with an object and taking indecent liberties with a child. When reviewing a challenge to the sufficiency of the evidence, this Court considers the evidence in the light most favorable to the Commonwealth, the prevailing party below, and reverses the judgment of the trial court only when its decision is plainly wrong or without evidence to support it. See Farhoumand v. Commonwealth, 288 Va.

338, 351 (2014). "[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 trial." Linnon v. Commonwealth, 287 Va. 92, 98 (2014) (quoting Lawlor v. Commonwealth, 285 Va. 187, 224 (2013)).

Appellant maintains that A.C.'s testimony was inconsistent, inherently incredible, and unworthy of belief. However, "determining the credibility of the witnesses and the weight afforded the testimony of those witnesses are matters left to the trier of fact." Parham v. Commonwealth, 64 Va. App. 560, 565 (2015). "To be 'incredible,' testimony 'must be either so manifestly false that reasonable men ought not to believe it, or it must be shown to be false by objects or things as to the existence and meaning of which reasonable men should not differ.'" Juniper v. Commonwealth, 271 Va. 362, 415 (2006) (quoting Cardwell v. Commonwealth, 209 Va. 412, 414 (1968)). "The mere fact that a witness may have . . . given inconsistent statements during the investigation of a crime does not necessarily render the testimony unworthy of belief." Id. "This circumstance is appropriately weighed as part of the entire issue of witness credibility, which is left to the [fact finder] to determine." Id.; see also Fordham v. Commonwealth, 13 Va. App. 235, 240 (1991) ("Prior inconsistent testimony is a factor in determining the credibility of a witness, but it does not automatically render the witness' testimony incredible."). As long as a witness testifies to facts which, if true, are sufficient to sustain a guilty verdict, "then the fact that the witness' credit is impeached by contradictory statements affects only the witness' credibility . . . . If the trier of the facts sees fit to base the verdict upon that testimony there can be no relief in the appellate court." Smith v. Commonwealth, 56 Va. App. 711, 718-19 (2010) (quoting Swanson v. Commonwealth, 8 Va. App. 376, 379 (1989)).

Appellant also argues that the Commonwealth failed to prove that appellant penetrated A.C.'s anus with his penis. To sustain appellant's conviction under Code § 18.2-67.2(A)(1), the Commonwealth was required to prove that he penetrated A.C.'s anus with any "inanimate or animate object." Code § 18.2-67.2(A).

A.C. testified that on the night of November 2, 2015, while appellant's wife was away and J.C. was asleep, appellant subjected her to two episodes of sexual abuse involving multiple sexual acts. During these events, appellant's "front private part," which she identified as a penis, was both outside and inside her "butt," and made her feel like she needed to "poop." A.C.'s description of the painful assault was consistent with anal penetration. When examined by Flowers the next day, A.C. had pain in her rectum, as well as bruising and redness that could have been caused by blunt force trauma. Moreover, blood was found on the exterior and interior of A.C.'s rectum, which was not a normal finding and could have been caused by sexual abuse. After the incidents, appellant told A.C. not to tell and threatened her with violence if she did. A.C. made her initial report when she was safe with her mother, and she did not want to return to the home where appellant had abused her. From these facts and circumstances, a reasonable finder of fact could find beyond a reasonable doubt that appellant penetrated A.C.'s anus with an object and that he was guilty of sexual penetration with an object and taking indecent liberties.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

It is ordered that the Commonwealth recover of the appellant the costs in this Court, which costs shall include a fee of $400 for services rendered by the Public Defender on this appeal, in addition to counsel's necessary direct out-of-pocket expenses, and the costs in the trial court.

This Court's records reflect that the Office of the Public Defender for the City of Richmond is counsel of record for appellant in this matter.

Costs due the Commonwealth
by appellant in Court of
Appeals of Virginia:

Public Defender $400.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Marty K P. Ring

Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on **Friday** *the* **8th** *day of* **March, 2019.**

Charles Erskine Church, Appellant,

against Record No. 0264-18-2
Circuit Court Nos. CR17-F-2279 and CR17-F-2280

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Richmond

Before Judges Humphreys, Petty and Chafin

This petition for appeal is granted in part and denied in part. And an appeal is awarded to the petitioner from a judgment of the Circuit Court of the City of Richmond, dated February 2, 2018, with respect to the following assignments of error:

I. The trial court erred in denying Mr. Church's motion to dismiss, or for a new trial, based on violations of his 14th Amendment rights to exculpatory evidence as specified in Brady v. Maryland.

II. The trial court erred in admitting Commonwealth's Exhibit 3, the underwear, and the related DNA evidence and testimony.

No bond is required. The clerk is directed to certify this action to the trial court and to all counsel of record.

Pursuant to Rule 5A:25, an appendix is required in this appeal and shall be filed by the appellant at the time of the filing of the opening brief.

The remainder of the petition for appeal in this case remains denied for the reasons set forth in the order of this Court dated December 21, 2018.

This Court's records reflect that the Office of the Public Defender for the City of Richmond is counsel of record for appellant in this matter.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Kristen M. McKenzie

Deputy Clerk

CERTIFICATE OF CLERK

I, Cynthia L. McCoy, Clerk of the Court of Appeals of Virginia, do hereby certify that on March 8, 2019 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the trial court indicated in the order and to all counsel of record.

Given under my hand this 8th day of March, 2019.

Cynthia L. McCoy, Clerk

By: Kristen M. McKenzie

Deputy Clerk

COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Decker, Judges Petty and Huff
Argued at Richmond, Virginia

PUBLISHED

CHARLES ERSKINE CHURCH

v. Record No. 0264-18-2

COMMONWEALTH OF VIRGINIA

OPINION BY
CHIEF JUDGE MARLA GRAFF DECKER
NOVEMBER 12, 2019

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND
Walter W. Stout, III, Judge Designate

Lauren Whitley, Deputy Public Defender, for appellant.

A. Anne Lloyd, Assistant Attorney General (Mark R. Herring, Attorney General; David M. Uberman, Assistant Attorney General, on brief), for appellee.

Charles Erskine Church appeals his convictions for object sexual penetration of a child and taking indecent liberties with a child, in violation of Code §§ 18.2-67.2(A)(1) and 18.2-370(A)(1).[1] He argues that the trial court erred by denying his motion to dismiss due to a failure to timely disclose exculpatory evidence. The appellant also contends that the trial court erroneously admitted a pair of girl's underwear into evidence, along with related DNA evidence and testimony. For the reasons that follow, we affirm the convictions.

[1] The record was sealed by the circuit court. Nevertheless, this appeal necessitates unsealing relevant portions of the record in order to resolve the issues raised by the appellant. Consequently, "[t]o the extent that we mention facts found only in the sealed record, we unseal only those specific facts, finding them relevant to our decision in this case. The remainder of the previously sealed record remains sealed." Du v. Commonwealth, 292 Va. 555, 560 n.3 (2017).

I. BACKGROUND[2]

The appellant was tried by a jury and convicted for sexually abusing his daughter (the victim).[3]

On the evening of Sunday, November 1, 2015, the victim's mother took her and her younger sister to the appellant's apartment. At the time, the victim was eleven years old, and her sister was six. The children were scheduled to remain in the appellant's custody until Tuesday, November 3, 2015.

On Tuesday evening, the mother picked up the victim from basketball practice. During the drive home, the victim started crying. When her mother asked what was wrong, she said that "he tried to stick it in her," but she would not say more.

After the victim told her mother about the abuse, the mother took her to a hospital. Two pediatric nurse practitioners performed a sexual assault examination on her. During the exam, the victim identified the appellant as the person who hurt her. There was redness to the area around the victim's vulva and anus and bruising around the anus. She was tearful and had pain near her rectum.

The next day, an employee of the Child Advocacy Center conducted a forensic interview of the victim. She told the interviewer that the appellant "tried to stick his private in her front private part" but "it didn't work." She also said that she did not know if anything "came out of" the appellant's "private." Further, the victim revealed that she was forced to do "something" with her mouth to the appellant's body but she did not want to talk about it. During the

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[2] Under the applicable standard of review, we view the evidence in the light most favorable to the Commonwealth, as the prevailing party below. See, e.g., Riner v. Commonwealth, 268 Va. 296, 303 (2004).

[3] This opinion refers to the appellant's daughter as "the victim," her mother as "the mother," and the appellant's wife at the time of the offenses as "the stepmother."

interview, the victim made a colorful drawing of the tank top and shorts she had worn on the night of the attack.

The police searched the appellant's apartment on November 4, 2015, the day after the victim told her mother about the crimes. Detective Steven Jones, with the Richmond Police Department, seized a pair of shorts with peace signs and stars printed on them, a pink tank top, a pair of girl's underwear, and a pair of men's underwear. The items were found together in a pile of clothing on the floor of the bathroom near the laundry hamper. The shorts and tank top matched the description of the outfit that the victim said she wore on the night of the offenses. A pair of girl's underwear, a child's size eight, was in the laundry pile directly beneath the shorts.[4] At the time of the incident, the victim wore child's size eight underwear, and her sister wore a child's size four.

At the appellant's jury trial, forensic experts testified regarding DNA evidence. Biological matter was collected from the inside crotch area of the girl's underwear. From that material, a DNA mixture profile was developed. The Commonwealth's forensic experts opined that the genetic material was from two people. Neither the appellant nor the victim could be eliminated as the contributors to the DNA mixture.[5]

A defense expert in forensic DNA analysis and recovery characterized the genetic material found on the girl's underwear as trace DNA. He opined that the presence of an allele that did not match the victim or the appellant made it likely that a third person contributed to the mixture. He also stated that there was "a very good chance" that the girl's underwear could have "picked up" DNA as a result of being deposited with other dirty laundry.

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[4] The trial court admitted the underwear into evidence over the appellant's objection.

[5] One expert explained the likelihood of the appellant and the victim not being the contributors and the DNA coincidentally matching a random person was between one in 140 million and one in 1.3 trillion.

The victim testified at trial. She explained that on the evening of Monday, November 2, 2015, she and her sister were alone in the apartment with the appellant. The two girls went to bed, and the victim's sister fell asleep. Around 7:00 p.m., the appellant entered the bedroom and told the victim that "he was going to fuck" her.

According to the victim, after she and the appellant moved to his bedroom, he removed her shorts and underwear and then his jeans and underwear. After he put the victim down on the bed, he put his "front private part" in her "front private part." The victim testified that the appellant's "private part" was on both the outside and the inside of her "front private part" and that it hurt. She also said that she felt pain when the appellant touched the inside and outside of her "butt" with his penis. She described the pressure as feeling like she needed to "poop." According to the victim, at some point the appellant touched his tongue and fingers to her "front private part" and put his mouth on her breasts. He also put her mouth on his penis and "something came out" into her mouth.

The victim explained that after these assaults she went back to her bedroom. A short while later, the appellant returned and said he was going to "fuck" her sister. To protect her sister, the victim went back to the appellant's bedroom with him, and he "did everything again." He threatened the victim not to tell anyone what had happened or "one of [them] would wind up dead." She knew that the appellant always kept his gun in his room.

The victim was asked about what she wore on the night of the attack. She testified that on that night, she wore shorts with peace signs and stars printed on them, a pink tank top, and underwear. She could not describe her underwear.

During cross-examination of the victim, defense counsel raised an objection concerning discovery. Out of the presence of the jury, counsel asserted that the Commonwealth had not disclosed that the victim claimed the appellant had threatened to abuse her sister and that this

testimony was inconsistent with the victim's statements during her medical examination and forensic interview. The trial court instructed the prosecutor to investigate whether the victim had made prior inconsistent statements that had not been revealed to the defense. The court indicated that it would address any such matters the following day. After the discussion, the appellant finished cross-examining the victim, but the court did not release her as a witness.

On the morning of the second day of trial, the prosecutor reported that during trial preparation the victim mentioned that on the morning after the sexual abuse, the appellant had asked her if he "could do it again." The prosecutor also explained that before trial, the victim had not positively identified the girl's underwear as her own. In response, the trial court offered to have the victim retake the witness stand so that the appellant could question her further, but the appellant declined. Instead, he made a motion to dismiss the charges based on the late disclosure of exculpatory evidence. In the alternative, the appellant asked for a new trial. The court denied the motions.

The stepmother, who was a defense witness, testified that when she returned home from work at about midnight on November 2, 2015, she checked on the victim and her sister. At that time, the victim did not appear to be crying, and the stepmother did not notice anything out of the ordinary.

The jury found the appellant guilty of object sexual penetration of a child in violation of Code § 18.2-67.2(A)(1) and taking indecent liberties with a child in violation of Code § 18.2-370(A)(1).[6] The trial court imposed the jury's sentence of a life term of imprisonment for object sexual penetration of a child and one year for the indecent liberties offense, with the court suspending that year.

[6] The jury found the appellant not guilty of sodomy with a child and a second count of object sexual penetration of a child.

II. ANALYSIS

The appellant argues that the trial court erred in refusing to dismiss the charges or grant him a new trial because the Commonwealth failed to meet its obligation under Brady v. Maryland, 373 U.S. 83 (1963), to disclose material exculpatory evidence. He also contends that the trial court erred in admitting the girl's underwear and the related DNA analysis and testimony into evidence.

A. Brady Claims

In reviewing the denial of a Brady motion, the trial court's factual findings will not be disturbed absent clear error. See Walker v. Kelly, 589 F.3d 127, 140 (4th Cir. 2009). In contrast, we review the trial court's legal conclusions *de novo*. See id.

Under Brady, due process requires that the prosecution disclose evidence favorable to the accused that is material to guilt or punishment. Commonwealth v. Tuma, 285 Va. 629, 634 (2013); see Robinson v. Commonwealth, 231 Va. 142, 150 (1986). However, Brady does not provide a general right to discovery in criminal cases. Tuma, 285 Va. at 635.

A Brady violation has three components. First, the prosecution must have suppressed the evidence, either purposefully or inadvertently. Id. at 634. Second, the evidence at issue "must be 'favorable to the accused, either because it is exculpatory, or because it is impeaching.'" Id. (quoting Skinner v. Switzer, 562 U.S. 521, 536 (2011)). Third, the evidence must be "material" under Brady, meaning "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Id. at 634-35 (quoting Smith v. Cain, 565 U.S. 73, 75 (2012)); see also Massey v. Commonwealth, 67 Va. App. 108, 125 (2016) (describing the third prong as whether the accused was prejudiced). "The accused has the burden of establishing each of these three components to prevail on a Brady claim." Mercer v. Commonwealth, 66 Va. App. 139, 146 (2016) (quoting Tuma, 285 Va. at 635).

The appellant argues that the Commonwealth belatedly disclosed three types of evidence in violation of Brady. First, he alleges that the Commonwealth failed to disclose before trial that the victim could not identify the girl's underwear as the pair she wore on the night of the offenses or as hers. Second, he contends that the Commonwealth suppressed the victim's "prior inconsistent statements." Third, he argues that the Commonwealth did not timely disclose that the stepmother reported that the victim exhibited no "red flags" of sexual abuse on the night of the incident. For the reasons that follow, we conclude that the appellant has failed to demonstrate that his due process rights as set forth in Brady were violated.

1. Inability to Identify Underwear

The appellant suggests that the victim's inability to specifically identify the underwear was exculpatory because it "related to the credibility and value of the DNA evidence." He also contends that it was exculpatory because it "undermined the admissibility of the underwear and the DNA evidence." Further, the appellant contends that this evidence was exculpatory because it "challenged the credibility" of the investigation and if he had known about this problem, he "would have conducted his own investigation into the lack of identification of the underwear."

We are unpersuaded that the facts that the victim could not remember wearing the underwear in question on the night of the offenses or whether it belonged to her were somehow favorable to the appellant. Other evidence in the record sufficiently established that she wore them on the night of the offenses. The police detective found the underwear directly underneath the shorts that the victim wore that night and described in detail. Viewing the record in the light most favorable to the Commonwealth, the victim's DNA was on the inside crotch of the underwear. In addition, evidence established that the victim wore size eight underwear, the same size as the underwear at issue. Although the appellant suggests on brief that he might have been able to prove that the underwear belonged to the victim's sister, she wore size four underwear.

For these reasons, we hold that the victim's inability to identify the underwear was not exculpatory. See, e.g., United States v. Bartko, 728 F.3d 327, 338 (4th Cir. 2013) ("Evidence is 'exculpatory' and 'favorable' if it 'may make the difference between conviction and acquittal' had it been 'disclosed and used effectively.'" (quoting United States v. Wilson, 624 F.3d 640, 661 (4th Cir. 2010))).

Finally, the appellant suggests that the evidence was exculpatory because if known, he would have changed his pre-trial and trial strategies. However, "the mere possibility that an alternate trial strategy *might* [have] produce[d] a more beneficial result is not the proper test for a Brady violation."[7] Mercer, 66 Va. App. at 149. Here, as in Mercer, the appellant's theory that the evidence would have provided the basis for different legal strategies before and during trial does not provide a basis for a valid Brady claim. Id.

For these reasons, the facts that the victim could not specifically identify the underwear as hers or as the pair that she wore on the night of the offenses were not exculpatory. Consequently, this evidence does not provide the basis for a valid challenge under Brady.[8]

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[7] The appellant also contends that the Commonwealth affirmatively represented before trial that the victim had positively identified the underwear. To the extent that this argument relates to the Brady prong that the evidence must be "favorable" to the accused, we briefly address it. The appellant submits that the certificate of analysis contains the affirmative representation that the victim identified the underwear as hers. This factual interpretation, however, is undercut by the record. The certificate of analysis describes the underwear as belonging to the victim. It does not provide how the underwear was identified as such and falls far short of an affirmative representation that the victim identified it.

[8] Because we find that the appellant failed to meet his burden to prove that the evidence was favorable to him, we do not address the other two prongs of the Brady analysis. See, e.g., Tuma, 285 Va. at 635 (holding that the defendant's Brady claim failed on one prong and declining to conduct any further Brady analysis). For this reason, we also do not address the Commonwealth's discussion of the verdict being "worthy of confidence," as this term relates to the Brady component of materiality or prejudice. See Hicks v. Dir., Dep't of Corr., 289 Va. 288, 299 (2015); Tuma, 285 Va. at 640 (Lemons, J., concurring).

2. Inconsistencies in the Victim's Statements

The appellant maintains that the Commonwealth did not timely reveal the victim's claims that (1) the incidents included oral sex, (2) the appellant had threatened to sexually abuse her sister, and (3) the appellant asked her for sex again the morning after the incident.

"Brady is not violated, as a matter of law, when impeachment evidence is made ""available to [a] defendant[] during trial"" if the defendant has 'sufficient time to make use of [it] at trial.'" Tuma, 285 Va. at 635 (alterations in original) (quoting Read v. Va. State Bar, 233 Va. 560, 564-65 (1987)). Further, "[t]he point in the trial when a disclosure is made . . . is not in itself determinative of timeliness," even if the witness in question has completed her testimony, as "the trial itself [i]s far from over." Id. at 636 (quoting United States v. Darwin, 757 F.2d 1193, 1201 (11th Cir. 1985)).

The victim's statements that the appellant characterizes as prior inconsistent statements were disclosed to him either before or during trial.[9] On the first day of trial, the victim testified that the appellant had made her put her mouth on his penis and threatened her sister. The appellant objected based on Brady. After discussion between counsel and the trial judge regarding the Brady challenge, the appellant cross-examined the victim. He asked her about the threats to her sister and highlighted that she had not reported that information earlier. In addition, the appellant asked the victim why she had told the forensic interviewer that the appellant had not done "something to any other part" of her body.

On the second day of trial, the prosecutor reported that the victim had also mentioned that the appellant asked her for sex on the morning after the sexual abuse. In light of the Brady

[9] The Commonwealth disclosed some statements related to oral sex to the appellant before trial. During pre-trial discovery, the Commonwealth provided the appellant with the recorded statement of the victim that he had forced her to do "something" with her mouth to his body. Similarly, the Commonwealth informed the appellant by email that the victim alleged that he had touched her breasts and "butt" with his tongue.

challenge, the court provided the appellant with the opportunity to cross-examine the victim further regarding the purportedly inconsistent statements. The appellant did not exercise the option to recall the victim. Nor did he request a recess or continuance to review his strategy in light of that information. Thus, the appellant had the opportunity to make effective use of the evidence of the statements at trial and chose not to do so. He also failed to request a recess or continuance in order to consider whether his trial strategy should be altered in light of the complete information. Consequently, no Brady violation occurred.[10] See id. at 635-37.

3. The Stepmother's Observations

The appellant's last contention is that the Commonwealth committed a Brady violation by its late disclosure of the stepmother's report of the victim's demeanor on the night of the incident.

Evidence is not suppressed for Brady purposes when the Commonwealth discloses it in time for effective use by the defense at trial. See Tuma, 285 Va. at 637. The Commonwealth disclosed the stepmother's statement by email shortly before trial. In fact, the appellant called the stepmother as a defense witness. She testified that she noticed nothing amiss when she checked on the victim upon returning home from work at around midnight on November 2, 2015.

The record shows that the Commonwealth disclosed this information before trial and that the appellant made use of it. Thus, the Commonwealth did not suppress this evidence pursuant to Brady.[11] See, e.g., Lovitt v. True, 403 F.3d. 171, 184 (4th Cir. 2005); Tuma, 285 Va. at 637.

In conclusion, the appellant has failed to establish a violation of his due process protections set forth in Brady. The victim's inability to identify the underwear was not favorable

[10] See supra note 8.

[11] See supra note 8.

to the appellant. Further, the record does not demonstrate, for purposes of a Brady analysis, that the Commonwealth suppressed the purportedly inconsistent statements made by the victim or the stepmother's report that she noticed nothing wrong on the night of the offenses. Accordingly, the trial court did not err in denying the appellant's motions to dismiss or for a new trial.[12]

B. Admissibility of Evidence

On appeal, this Court "reviews a trial court's ruling admitting or excluding evidence for abuse of discretion." Payne v. Commonwealth, 292 Va. 855, 866 (2016). "This bell-shaped curve of reasonability governing our appellate review rests on the venerable belief that the judge closest to the contest is the judge best able to discern where the equities lie." Du v. Commonwealth, 292 Va. 555, 564 (2016) (quoting Sauder v. Ferguson, 289 Va. 449, 459 (2015)). A reviewing court can conclude that "an abuse of discretion has occurred" only in cases in which "reasonable jurists could not differ" about the correct result. Commonwealth v. Swann, 290 Va. 194, 197 (2015) (quoting Grattan v. Commonwealth, 278 Va. 602, 620 (2009)). "[B]y definition," however, a trial court "abuses its discretion when it makes an error of law." Robinson v. Commonwealth, 68 Va. App. 602, 606 (2018) (quoting Dean v. Commonwealth, 61 Va. App. 209, 213 (2012)).

"The proponent of the evidence bears the burden of establishing . . . the facts necessary to support its admissibility." Perry v. Commonwealth, 61 Va. App. 502, 509 (2013) (quoting Bell v. Commonwealth, 49 Va. App. 570, 576 (2007)). "The measure of the burden of proof with respect to factual questions underlying the admissibility of evidence is proof by a preponderance

[12] In light of the conclusion that no Brady violation occurred, we do not address the appellant's contention that dismissal or a new trial were the only appropriate avenues for relief. See generally Novak v. Commonwealth, 20 Va. App. 373, 389 (1995) ("The remedial relief to be granted by the trial court following a discovery violation or upon the late disclosure of evidence is within the trial court's discretion and will not be disturbed on appeal unless plainly wrong." (quoting Moreno v. Commonwealth, 10 Va. App. 408, 420 (1990))).

of the evidence." Atkins v. Commonwealth, 68 Va. App. 1, 9 (2017) (quoting Bloom v. Commonwealth, 262 Va. 814, 821 (2001)). Once this threshold for proving admissibility has been met, any gaps in the evidence are relevant to the trier of fact's assessment of its weight rather than its admissibility. See Kettler & Scott, Inc. v. Earth Tech. Cos., 248 Va. 450, 459 (1994).

The appellant suggests that the pair of girl's underwear and related DNA evidence were irrelevant because the circumstances did not connect the underwear to the offenses charged. He also argues that the Commonwealth provided "no foundation" that the victim wore that pair of underwear "on the night of the alleged assault." On these bases he argues that the evidence should not have been admitted. We disagree.

1. Relevance

Evidence relating to a point properly at issue in a case is relevant and, therefore, admissible if it has "any logical tendency, however slight," to establish that point. Ragland v. Commonwealth, 16 Va. App. 913, 918 (1993). "'Relevant evidence' means evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence." Va. R. Evid. 2:401. "The scope of relevant evidence in Virginia is quite broad, as '[e]very fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant.'" Commonwealth v. Proffitt, 292 Va. 626, 634 (2016) (alteration in original) (quoting Va. Elec. & Power Co. v. Dungee, 258 Va. 235, 260 (1999)). In order to be admissible as relevant, evidence must "tend[] to prove a matter that is properly at issue in the case." Id. at 635 (alteration in original) (quoting Brugh v. Jones, 265 Va. 136, 139 (2003)).

The pair of girl's underwear was found in the appellant's home less than two days after the occurrence of the sex offenses for which the appellant was charged. The underwear was the

victim's size and directly beneath shorts that matched the victim's description of those that she wore on the night of the crimes. A mixture of genetic material to which both the appellant and the victim contributed was found on the crotch of the underwear. These facts and circumstances tended to prove that the victim wore the underwear on the night of the offenses and the appellant's DNA was transferred to her body. Thus, the underwear, and the related DNA analysis, constituted relevant evidence to corroborate the victim's testimony that the appellant sexually assaulted her, and they were admissible for that purpose.

2. Foundation

"A proper foundation must be laid for the introduction of all evidence." Sabo v. Commonwealth, 38 Va. App. 63, 79 (2002) (quoting Horsley v. Commonwealth, 2 Va. App. 335, 338 (1986)). The burden is on the party offering the evidence, in this case the Commonwealth, "to show with reasonable certainty that there has been no alteration or substitution of it." Id. (quoting Horsley, 2 Va. App. at 338).

Viewing the entire record, the Commonwealth presented evidence sufficient to establish an adequate foundation for this evidence to be admitted. Detective Jones collected the underwear less than two days after the offenses occurred. He found it in the laundry pile with the victim's other clothing that she wore on the night of the assaults. In addition, the pair of underwear was the victim's size, and the only other child in the house was the victim's sister, who wore underwear four sizes smaller. Further, viewing the evidence in the light most favorable to the Commonwealth, the victim's DNA was found on the inside crotch of the underwear. The appellant challenges the factual inference that the underwear in fact belonged to the victim or that she wore it on the night of the assaults based on the possibility that the DNA was transferred to the underwear from other clothing in the laundry pile. However, the Commonwealth met its burden of proving by a preponderance of the evidence that the underwear

belonged to the victim and was worn by her on the night of the assaults. See Bloom, 262 Va. at 821. Since "this threshold for proving admissibility" was met, the appellant's challenges to the probative value of the underwear and related DNA evidence goes to the trier of fact's assessment of weight rather than admissibility. See Kettler, 248 Va. at 459.

For these reasons, the trial court acted properly within its discretion by admitting the underwear and the DNA test results of the genetic material collected from the underwear into evidence.

III. CONCLUSION

We hold that the alleged late disclosures of evidence did not violate the requirements of Brady. Further, the trial court did not err in admitting the underwear and related DNA evidence. Accordingly, we affirm the appellant's convictions for object sexual penetration of a child and taking indecent liberties with a child.

Affirmed.

VIRGINIA:

In the Court of Appeals of Virginia on **Thursday** *the* **12th** *day of* **December, 2019.**

Charles Erskine Church, Appellant,

against Record No. 0264-18-2
Circuit Court Nos. CR17-F-2279 and CR17-F-2280

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing En Banc

Before the Full Court

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 12th day of November, 2019 and grant a rehearing *en banc* thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that it is appropriate to grant the petition for rehearing *en banc* in this case. Code § 17.1-402(D).

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: 

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 30th day of July, 2020.

Charles Erskine Church, Appellant,

against Record No. 200031
Court of Appeals No. 0264-18-2

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

And it is ordered that the Commonwealth recover of the appellant the costs in this Court and the costs in the courts below.

Justice Chafin took no part in the resolution of the petition.

Costs due the Commonwealth
by appellant in Supreme
Court of Virginia:

Public Defender $950.00 plus costs and expenses

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 9th day of October, 2020.

Charles Erskine Church, Appellant,

against Record No. 200031
Court of Appeals No. 0264-18-2

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on July 30, 2020 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Chafin took no part in the resolution of the petition.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: 

Deputy Clerk