Circuit Court for Cecil County
Case No. C-07-CR-20-000394

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 394

September Term, 2023

CHRISTIAN SHANE MCKENNA

v.

STATE OF MARYLAND

Graeff,
Zic,
Wilner, Alan M.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 9, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

On June 17, 2020, Christian Shane McKenna, appellant, was charged in the Circuit Court for Cecil County with sexual solicitation of a minor and false imprisonment. On October 7, 2022, the State entered a *nolle prosequi* on the false imprisonment charge. On January 25, 2023, a jury convicted appellant of sexual solicitation of a minor. The court sentenced appellant to ten years, all but seven years suspended, and five years of probation upon release.

On appeal, appellant presents one question for this Court's review, which we have revised slightly, as follows:

> Was the evidence insufficient to sustain the conviction for sexual solicitation of a minor?

FACTUAL AND PROCEDURAL BACKGROUND

In 2019, appellant was in a romantic relationship with a woman named Susan, the first cousin of the victim's paternal grandfather. Susan had a son named Michael, who appellant helped raise. M.S.,[1] the victim, and Michael hung out together as they started school. In late 2019, appellant and Susan ended their relationship.

Derek Smythe, the victim's father, testified that, in 2019, they lived in Perryville, Maryland. The appellant was his "father's first cousin's ex-boyfriend." Mr. Smythe and appellant were "[s]omewhat" close because appellant's girlfriend, Susan, was family, and they spent time together. Appellant sometimes drove his daughter and Susan's son Michael to and from school. Mr. Smythe stated that, after appellant broke up with Susan, appellant

[1] In the interest of privacy, we refer to the minor child by her initials, M.S.

stopped by his house, asking M.S. to come with him to pick up his belongings from Susan's house because appellant and Susan were not on good terms. Mr. Smythe allowed M.S. to go with appellant.

M.S. was born on July 23, 2007. Three days prior to her twelfth birthday, appellant came to her home, and she went with him to go to her cousin Michael's house. She testified that appellant was her "cousin's mom's boyfriend," and the two of them had interacted socially "off-and-on." Appellant told M.S. that they were going to Michael's house so he could get his stuff, but then the conversation "got weird." Appellant "started saying sexual things," "like if he could eat me out" and "I was the only girl for him and he's been waiting for me and stuff like that." When the prosecutor asked if appellant said anything else sexual to M.S., she stated that appellant asked if she wanted "to have sex," and he "kept asking if we could pull over and . . . he kept saying like can we fuck." The prosecutor asked if M.S. thought "he was actually going to do it," and M.S. said yes.

M.S. testified that, during the drive, appellant touched her leg, but there otherwise was no physical contact. On cross-examination, however, appellant's counsel refreshed M.S.'s recollection by playing a video clip of a police interview conducted on the date of the incident. M.S. then acknowledged that she told Detective Sarah Zak that appellant had not made physical contact with during the car ride. M.S. was in the car with appellant for 30 minutes to an hour.

After appellant dropped M.S. off at her friend's house, he sent her several text messages. The State entered a copy of the text messages into evidence. M.S. testified that

he was asking to see a picture of her, and he also texted: "I should have just taken what I wanted and shouldn't have been nice." M.S. went home and told her parents.

After telling her parents about the interaction with appellant, they went to the police station, where she gave a statement to Detective Zak. Detective Zak testified that M.S. stated that appellant told M.S.: "Just let me fuck you and eat you out real quick."

After the State rested its case, appellant's counsel moved for judgment of acquittal, arguing that there was no evidence of solicitation because appellant never "asked [M.S.] to do something to him." He asserted that solicitation, based on the definition in Black's Law Dictionary, meant to "urge her to do something to him, not for him to do something," and in this case, it was a "one-way street" because there was no request for M.S. to do "something in return."

The State argued that the dictionary definitions for solicitation advanced by appellant's counsel were inapposite because the legislature defined solicitation in the statute. Based on the statutory definition, appellant committed the crime of solicitation of a minor when he urged M.S. to engage in the activities of sexual intercourse and cunnilingus, which are unlawful under Md. Code Ann. Crim. Law ("CR") §§ 3-304 and 3-307 (2021 Repl. Vol.). In any event, even under the definition of solicitation proposed by appellant's counsel, appellant violated the statute because case law does not differentiate between "receiving and performing [a sex act]." The court denied the motion for judgment of acquittal.

Appellant then testified on his own behalf. He stated that he had known M.S. for several years because M.S. "hung out" with his ex-girlfriend's son Michael. On July 20, 2019, appellant had purchased a new phone from a store near where M.S. lived. He was "just kind of in the area" and wanted to talk with Michael, but because there was animosity between him and Susan, he wanted M.S. to accompany him to Michael's house. M.S.'s father was present when M.S. left with appellant.

Appellant drove with M.S. to Susan's house, but he got "cold feet" as he approached because Susan had called the police on him in the past. When appellant drove past the house, M.S. asked where they were going, and appellant told her he was going to just take her home after he got gas. M.S. asked appellant to drop her off at her friend's house instead. Appellant denied making any sexual statements to M.S. He stated that they had talked about his new phone, and he had M.S. install Facebook on his new phone because he was not tech savvy. Appellant then dropped M.S. off at her friend's house, which was a few houses from M.S.'s residence, and he returned home to Delaware, where he was staying with his sister.

Appellant acknowledged that State's Exhibit Number 3 was a printout of text messages between him and M.S., and he admitted to sending those messages. He did not remember what he meant when he texted: "Then send me a pic to prove it's you, one I'll never forget." He stated that he did not recall receiving a photo from M.S. With respect to his text stating: "I should have just took what I wanted instead of being nice," he stated that he may have been referring to a picture, but he did not know for sure. He testified

that he had "no idea" what he meant when he texted "[p]ic of you, and then skin." When asked whether he had made any sexual statements to M.S., appellant testified:

> Absolutely not. We've -- I mean, we had a -- you know, never hung out or anything other than, you know, her being over there with Michael and stuff. And I would never say anything like that. Absolutely not. We may not [have] had [sic] the greatest relationship, but I most certainly wouldn't say anything like that to her.

On cross-examination, appellant stated that he intended no "ill will" toward M.S. in his text messages to her.

At the close of the evidence, appellant's counsel renewed his motion for judgment of acquittal. The court denied it, and the jury subsequently convicted appellant of sexual solicitation of a minor.

This appeal followed.

DISCUSSION

Appellant contends that the evidence was insufficient to sustain his conviction for sexual solicitation of a minor. Although he acknowledges that the testimony and evidence of text messages sent to M.S. "unquestionably shows" that he "expressed his desire to engage in conduct that constitutes second degree rape or third degree sex offense," he argues that the evidence does not support a finding that he "asked or urged or otherwise solicited M.S. to engage in" such prohibited conduct.

The State contends that the evidence was legally sufficient to support appellant's conviction for sexual solicitation of a minor. It asserts that a rational juror could conclude

that appellant was not merely expressing a desire to engage in sexual activities, but was "soliciting (i.e., 'urging, enticing, or requesting')" M.S. to engage in such activities.

We recently explained the applicable standard of review in determining the sufficiency of evidence:

> When assessing a challenge to the sufficiency of the evidence, we assess "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. McGagh*, 472 Md. 168, 184, 244 A.3d 1117 (2021). "We do not measure the weight of the evidence; rather, our concern is only whether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Taylor v. State*, 346 Md. 452, 457, 697 A.2d 462 (1997). A valid conviction may be based solely on circumstantial evidence. *Wilson v. State*, 319 Md. 530, 536, 573 A.3d 831 (1990). Thus, the limited question for our review is "not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Allen v. State*, 158 Md. App. 194, 249, 857 A.3d 101 (2004).

Mungo v. State, 258 Md. App. 332, 363, *cert. denied*, 486 Md. 158 (2023). Further, "the finder of fact has the 'ability to choose among differing inferences that might possibly be made from a factual situation . . . .' That is the fact-finder's role, not that of an appellate court." *Smith v. State*, 415 Md. 174, 183 (2010) (quoting *State v. Smith*, 374 Md. 527, 534 (2003)).

CR § 3-324(b)(1) provides, in pertinent part, as follows:

> A person may not, with the intent to commit a violation of § 3-304 or § 3-307 of this subtitle . . . knowingly solicit a minor, or a law enforcement

> officer posing as a minor, to engage in activities that would be unlawful for the person to engage in under § 3-304 or § 3-307 of this subtitle.[2]

"The crime of sexual solicitation of a minor, therefore, has three elements: (1) solicitation; (2) of a minor or a law enforcement officer posing as a minor; and (3) to engage in a prohibited sex act." *Choudry v. State*, 231 Md. App. 656, 660 (2017).

Appellant challenges only the first element. He contends that, although he expressed a desire to engage in unlawful conduct, the evidence was insufficient to support a finding that he *solicited* M.S. to engage in such conduct. We disagree.

The statute defines "solicit" to mean "command, authorize, urge, entice, request, or advise a person by any means . . . ." CR § 3-324(a). In *Poole v. State,* 207 Md. App. 614, 635 (2012), this Court found that the evidence was insufficient to support a solicitation conviction where the defendant complimented the victim, led her to a locked room, and then assaulted her. In that case, the defendant did not request that the victim engage in prohibited activity; "he just acted."

Here, by contrast, M.S. testified that appellant was requesting her to engage in sexual conduct, explaining that he "kept asking" if they could pull over, and he "kept saying like *can we* fuck." (Emphasis added). She further testified that appellant said, "[j]ust let me fuck you and eat you out real quick." A rational jury could conclude, based on these

[2] Appellant does not dispute that his statements to M.S. invoked conduct that would constitute second degree rape under Md. Code Ann. Crim. Law ("CR") § 3-304 (2021 Repl. Vol.), or a third degree sex offense under CR § 3-307. M.S. testified that she was almost 12 years old on July 20, 2019, and appellant testified that he was 54 years old on the trial date, January 25, 2023.

statements alone, that appellant's repeated statements, including saying the words "can we" and "just let me," constituted urging and requesting M.S. to engage in prohibited sexual conduct with him.[3] Accordingly, the evidence was sufficient to support appellant's conviction for solicitation of a minor in violation of CR § 3-324(b).

JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[3] The text messages also are circumstantial evidence of appellant's intent with regard to his earlier statements to M.S. *See Sewell v. State*, 239 Md. App. 571, 607 (2018) (the prosecution may prove intent with circumstantial evidence and reasonable inferences).