Circuit Court for Cecil County
Case No.: CR-20-1118

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 875

September Term, 2021

SEAN RICHARDSON

v.

STATE OF MARYLAND

Reed,
Zic,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: November 16, 2022

Appellant, Sean Richardson, was convicted following a court trial in the Circuit Court for Cecil County of soliciting the creation of child pornography in violation of § 11-207(a)(4) of the Criminal Law Article, two counts of illegal possession of regulated firearms, one for a handgun and one for an AR-15 style rifle, in violation of § 5-133(b) of the Public Safety Article, and illegal possession of a rifle, in violation of § 5-205(b) of the Public Safety Article. Mr. Richardson was sentenced to ten years, with all but three years suspended, for soliciting the creation of child pornography, a concurrent sentence of one year and one day for illegal possession of a handgun, and a concurrent sentence of one year and one day for illegal possession of a rifle, with the remaining illegal possession of a regulated firearm merged at sentencing. A five-year period of supervised probation will commence upon Mr. Richardson's release. In this appeal, Mr. Richardson asks us to address the following questions:

1. Did the circuit court err in denying the motion to suppress evidence?
2. Is the evidence sufficient to sustain the convictions for soliciting the creation of child pornography (Count 3) and illegal possession of a regulated firearm, to wit: the rifle (Count 6)?

For the following reasons, we shall reverse Mr. Richardson's conviction on Count 6 and otherwise affirm the judgments.

BACKGROUND

At trial, Detective Joshua Leffew of the Elkton Police Department testified that he began an investigation with respect to Mr. Richardson on October 23, 2020. After receiving information "concerning messages within the Facebook Chat related to child pornography," Detective Leffew applied for a search warrant for the pertinent Facebook

account, identified as "sean.richardson.5201." The account included further information which led the detective to Mr. Richardson's residence in Elkton.

After obtaining information from Facebook, and pertinent to the case on appeal, the detective identified messages obtained from Facebook messenger between Mr. Richardson and a person identified as "M."[1] These messages were admitted without objection as State's Exhibit 5. We shall discuss this exhibit in more detail in the discussion that follows. Because Mr. Richardson lived outside his jurisdiction, Detective Leffew forwarded the information received to the Cecil County Sheriff's Office.

Detective Chase Armington of the Cecil County Sheriff's Office testified that he prepared a search warrant for Mr. Richardson's residence, as well as a warrant for his arrest, and those warrants were executed on December 2, 2020. During the course of the search, police seized a number of computers and cell phones, as well as firearms and ammunition. The firearms, identified in the transcript as an AR-15 Rifle and a Glock 17 handgun with associated property records were admitted into evidence. Although Detective Armington testified child pornography was found in connection with this case, he did not bring that evidence to court and no child pornography was admitted at trial.

After hearing argument, the trial court found Mr. Richardson guilty of Counts 3, 5, 6, and 8 of the indictment, respectively, soliciting child pornography, two counts of illegal possession of regulated firearms, and one count of possession of a rifle by a

[1] To preserve anonymity, we have chosen to represent this individual with a randomly assigned initial.

disqualified person. Pertinent to our discussion, the court was not asked to, and did not rule on, whether the AR-15 style rifle was a "regulated firearm," instead focusing on whether Mr. Richardson possessed that firearm. With respect to the solicitation of child pornography charge, the court found that, in the exchange between Mr. Richardson and the other individual, there were "explicit" requests for the child to touch the person, which would result in payment of additional remuneration. The court stated "I think the child in that situation kind of was the subject because there was a request for the child to perform, to act in that communication. So the Court is convinced."

We shall provide additional detail in the following discussion.

DISCUSSION

I. DENIAL OF MOTION TO SUPPRESS

Mr. Richardson contends the motions court erred by denying his motion to suppress evidence seized upon execution of one of the search warrants in this case, specifically, the warrant concerning his Facebook account, styled as "sean.richardson.5201."[2] Mr. Richardson argues there was not a substantial basis to conclude that the warrant was supported by probable cause. The State disagrees, as do we.

Initially, the parties both agree that the following facts, as set forth in the Application and Affidavit for a Search and Seizure Warrant, are pertinent to this issue:

[2] There was a separate search warrant for Mr. Richardson's house. There is no issue with respect to this other warrant.

> On 10/22/2020, the Elkton Police Department Facebook page received a message from a concerned citizen. Within the message the concerned citizen reports as she was conversing with "Sean Richardson" (Facebook user name **sean.richardson.5201**), he made several troubling and concerning comments regarding children and/or animals involved with sexual activities. The complainant provided snapshots of those Facebook communications with "Sean Richardson".
>
> Sean asks the complainant if anything in the adult chat room is "off limits" (referring to sexual activity) and then asks about kids and animals. The complainant replies pet play is acceptable but no actual kids or animals. Sean responds "I'd love to see her on her back getting fucked by you while a kid watches or while she holds them." The complainant informs Sean that is too far and no kids.
>
> Later in the conversation with Sean the complainant asks if he (Sean Richardson) wants to buy any content, to which Sean responds "Do you have any masturbating vids with the kid near you playing?" The complainant asks Sean if he is into kids, to which Sean responds "No I'm into you masturbating by the kid and asks if they could make (video recording) them for him?"
>
> At this point in the conversation the complainant tells Sean how terrible the request is and they would be reporting him. There is nothing further regarding this chat.

The search warrant was signed by a magistrate and, following further investigation, Mr. Richardson was charged, *inter alia*, with a violation of § 11-207(a)(4) of the Criminal Law Article. That statute provides as follows:

> (a) A person may not:
>
> . . . .
>
> (4) knowingly promote, advertise, solicit, distribute, or possess with the intent to distribute any matter, visual representation, or performance:

> (i) that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct; or
>
> (ii) in a manner that reflects the belief, or that is intended to cause another to believe, that the matter, visual representation, or performance depicts a minor engaged as a subject of sadomasochistic abuse or sexual conduct; . . .

Md. Code Ann., Crim. Law § 11-207.

Pertinent to our discussion, "sexual conduct" is further defined by statute as follows:

> (d) "Sexual conduct" means:
>
> (1) human masturbation;
>
> (2) sexual intercourse;
>
> (3) whether alone or with another individual or animal, any touching of or contact with:
>
> (i) the genitals, buttocks, or pubic areas of an individual; or
>
> (ii) breasts of a female individual; or
>
> (4) lascivious exhibition of the genitals or pubic area of any person.

Crim. Law § 11-101(d).

Prior to trial, Mr. Richardson's trial counsel filed a motion to suppress records and physical evidence, arguing, in part, that the search warrant lacked probable cause. More specifically, Mr. Richardson argued: "That assuming Defendant is the other participant in said conversation, nowhere in the purported dialogue does Defendant request to view a minor engaged as a subject of sadomasochistic or sexual abuse." (emphasis in original).

Counsel maintained this argument at the hearing on this motion, as well as an argument that the reliability of the "concerned citizen" set forth in the application was not established. After stating that the appropriate test was whether there was a substantial basis for the issuing magistrate to find probable cause, the court denied the motion to suppress, stating in part as follows:

> In review, looking at the application and affidavit, as mentioned, there is a paragraph that has a specific time frame. There is another paragraph that mentions the -- that identifies the specific target being sean.richardson.5201. That specific target was determined, it appears at least, through snapshots or some other way that they determined who it was.
>
> So I say that because it seems less fishing at this point once -- the more we take it and the more we narrow it down. And it's even narrowed further with the communication that was going on between whoever the concerned citizen was and the person at sean.richardson.5201, different communication as to children being around during sex acts. And it seems like there's questions of buying content with children being around during sex acts. That seems to be the extent of everything.
>
> But the Court looks at the narrow nature of the warrant as well. This wasn't a broad warrant that was giving -- that was allowing them to go into the house and things. I know we have different warrants later on [in this case] dealing with that. The narrow nature of this warrant with Facebook and specifically the Facebook account, the Court does believe that there was a substantial basis for the issuance of the warrant.

Our review of the ruling of suppression courts relies "solely upon the record developed at the suppression hearings." *Whittington v. State*, 474 Md. 1, 19-20 (2021) (quoting *Kelly v. State*, 436 Md. 406, 420 (2013), *cert. denied*, 574 U.S. 958 (2014)). The evidence and inferences drawn therefrom are considered "in the light most favorable

to the party who prevails on the motion[.]" *Id*. at 20. Further, we shall "defer to the motions court's factual findings and uphold them unless they are shown to be clearly erroneous." *Id*. (quoting *Lee v. State*, 418 Md. 136, 148 (2011)).

"The Fourth Amendment to the United States Constitution protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *State v. Johnson*, 458 Md. 519, 533 (2018) (quoting U.S. Const. amend. IV) (alteration in original). "Reasonableness within the meaning of the Fourth Amendment 'generally requires the obtaining of a judicial warrant.'" *State v. Johnson*, 458 Md. at 533 (quoting *Riley v. California*, 573 U.S. 373, 382 (2014)).

When evidence is seized pursuant to a search warrant, our review is not *de novo*, but instead is whether, based on the "four corners" of the warrant and its attachments, *Sweeney v. State*, 242 Md. App. 160, 185 (2019), the issuing judge had a "substantial basis" for finding probable cause to issue the warrant. *Carroll v. State*, 240 Md. App. 629, 649, *cert. denied*, 465 Md. 649 (2019). As the Court of Appeals explained:

> We do not conduct a *de novo* inquiry into whether the court order in this case was supported by probable cause, rather we must determine whether the "*issuing judge had a substantial basis* for concluding that the [court order] was supported by probable cause." [*Patterson v. State*, 401 Md. 76, 89 (2007)] (emphasis added) (citing *Greenstreet v. State*, 392 Md. 652 (2006)). This Court uses a deferential standard of review when evaluating an issuing court's determination of probable cause. *Stevenson v. State*, 455 Md. 709, 723 (2017); *Malcolm v. State*, 314 Md. 221, 229 (1988) ("As the key protection from unreasonable government searches, warrants continue to be favored [by] law."). "[S]o long as the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Stevenson*, 455 Md. at 723-24 (citation

> omitted); *see also Illinois v. Gates*, 462 U.S. 213, 236 (1983) ("[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review").

Whittington, 474 Md. at 31-32; *see also Stevenson*, 455 Md. at 723, 727 ("[I]n a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall" and, recognizing that "the information set forth in a warrant affidavit is to be considered in its totality") (citations omitted); *Moats v. State*, 230 Md. App. 374, 391 (2016) ("The evidence necessary to demonstrate a 'substantial basis' is less than that which is required to prove 'probable cause'"), *aff'd*, 455 Md. 682 (2017).

Mr. Richardson's argument here is twofold: (1) that the veracity and reliability of the "concerned citizen" in the application was not established; and, (2) the conduct at issue did not demonstrate that he was soliciting a minor engaged in sexual conduct. As for the first argument, generally, an officer may rely upon information received through an informant "so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." *Illinois v. Gates*, 462 U.S. 213, 242 (1983) (quoting *Jones v. United States*, 362 U.S. 257, 269 (1960)). However, this case does not involve an informant – it involves a "concerned citizen" informer. This Court has recognized a distinction between informants and citizen-informers:

> In *Dawson v. State*, 14 Md. App. at 34, this Court quoted with approval the Supreme Court of Colorado in *People v. Glaubman*, 485 P.2d 711, 717 (Colo. 1971):
>
> > "More often than not, the informant is paid or provides information in exchange for immunity from prosecution of his own misdeeds.

> "Our view, which is supported by a number of decisions, is that the citizen-informer, adviser, or reporter who acts openly to see that our laws are enforced should be encouraged, and his information should not be subjected to the same tests as applied to the information of an ordinary informer."

Carter v. State, 143 Md. App. 670, 678-79, *cert. denied*, 369 Md. 571 (2002).

Mr. Richardson relies upon *West v. State*, 137 Md. App. 314 (2001), *cert. denied*, 364 Md. 536 (2001). In *West*, this Court concluded that the affidavit made no showing of the informant's basis of knowledge, or reliability or veracity, stating only that the police received "numerous complaints from several different concerned citizens . . . ." *Id*. at 318, 329-30. Nonetheless, we did not exclude the evidence the police seized pursuant to the warrant based on *United States v. Leon*, 468 U.S. 897 (1984), the good faith exception. *West*, 137 Md. App. at 351. The State directs our attention to several cases that have distinguished *West*. These cases inform us that sometimes, a "greater showing of a basis of knowledge . . . could reasonably require a lesser degree of corroboration for probable cause." *Thompson v. State*, 245 Md. App. 450, 483 (citations omitted) (concluding that adequate corroboration gave a substantial basis to uphold the magistrate's finding of probable cause based on information from a confidential informant), *reconsideration denied* (June 24, 2020), *cert. denied*, 471 Md. 86 (2020), and *cert. denied*, 141 S. Ct. 1741 (2021); *see also Lindsey v. State*, 226 Md. App. 253, 264 (2015) (contrasting *West*, above, because "the initial information supplied by informant # 1 was not predicated on second-hand knowledge"), *cert. denied*, 447 Md. 299 (2016).

We conclude this case is more akin to the cases cited by the State. According to the Application and Affidavit for a Search and Seizure Warrant, the "police knew the

basis of the tipster's knowledge here: she had communicated directly with Richardson and shared screen captures of their conversation." This is supported by State's Exhibit 1, where it indicates that "the suspect utilized the Facebook messaging application to communicate with the other members of the Facebook community" during a certain two-day period. This "messaging application" appears to refer to Facebook Messenger, which has been described as follows:

> Facebook Messenger is a mobile tool that allows users to instantly send chat messages to friends on Facebook. Facebook users can receive these messages via their computer or any other mobile or electronic device when they are logged onto their Facebook accounts. Essentially, Facebook Messenger operates the same way mobile texting does, as only the persons sending and receiving the messages can view them and partake in the conversation.

State v. Wickes, 910 N.W.2d 554, 559 n.1 (Iowa 2018) (internal citations and quotations omitted); *see also State v. Harwood*, 238 A.3d 661, 664 n. 1 (Vt. 2020) ("Facebook Messenger is the messaging application associated with the Facebook social media platform. The format of the messages is analogous to a text message") (citation omitted).

The warrant application further states that "[t]he complainant provided snapshots of those Facebook communications with 'Sean Richardson.'" The affiant also stated that "[t]he Facebook account identified as (sean.richardson.5201) is owned and maintained by an unknown user. Your Affiant can further identify the Facebook account." And the affiant relied on his "investigation, training, knowledge and experience" in concluding that there was probable cause to believe evidence of child pornography was contained in the aforementioned Facebook account. *See Stevenson*, 455 Md. at 727 (observing that the

court must give "due weight" to an officer's training and experience as part of what allows them to make inferences and deductions that support a warrant). Considered in its totality, we conclude that there was a substantial basis for the magistrate to find probable cause in support of the application for a search warrant.

Mr. Richardson's secondary argument on the motion is that the information acquired from his Facebook account was not adequate to provide probable cause for a violation of Criminal Law § 11-207(a)(4). The State responds that, under the substantial basis standard, Mr. Richardson's argument is without merit. We concur.[3]

The application alleged that, in the Facebook messages received by the concerned citizen from Mr. Richardson, Mr. Richardson stated "I'd love to see her on her back getting fucked by you while a kid watches or while she holds them," "Do you have any masturbating vids with the kid near you playing?" and, "No I'm into you masturbating by the kid and asks if they could make (video recording) them for him?" The application further averred that there was probable cause to believe that evidence concerning a violation of Criminal Law § 11-207(a)(4) was contained within Mr. Richardson's Facebook account. As set forth previously, and pertinent to our discussion, Criminal Law § 11-207(a)(4) provides that a person may not:

> (4) knowingly . . . solicit . . . any matter, visual representation, or performance:

[3] Mr. Richardson's argument is similar to the one made in the second question presented as to sufficiency of the evidence. Although the suppression motion under current discussion involves a lesser standard of proof and a slightly different set of facts, our discussion of the statute and the case law applies to both arguments.

> (i) that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct; or
>
> (ii) in a manner that reflects the belief, or that is intended to cause another to believe, that the matter, visual representation, or performance depicts a minor engaged as a subject of sadomasochistic abuse or sexual conduct.

"Sexual conduct" is further defined by Criminal Law § 11-101(d) as "(1) human masturbation; (2) sexual intercourse; (3) whether alone or with another individual or animal, any touching of or contact with: (i) the genitals, buttocks, or pubic areas of an individual; or (ii) breasts of a female individual; or (4) lascivious exhibition of the genitals or pubic area of any person."

Both this issue and the next require us to apply standard rules of statutory interpretation. Those rules are as follows:

> "The interpretation of a statute is a question of law that this Court reviews *de novo*." *Johnson v. State*, 467 Md. 362, 371, (2020). We assume that the General Assembly's "intent is expressed in the statutory language and thus our statutory interpretation focuses primarily on the language of the statute to determine the purpose and intent of the General Assembly." *Id*. at 371, (cleaned up). "If the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, we will give effect to the statute as it is written." *Rogers v. State*, 468 Md. 1, 14, (2020), *cert. denied*, [ ] 141 S. Ct. 1052 (2021) (citation omitted). "In addition, we neither add nor delete words to a clear and unambiguous statute to give it a meaning not reflected by the words that the General Assembly used or engage in forced or subtle interpretation in an attempt to extend or limit the statute's meaning." *Id*. at 14 (citation omitted).

DeJarnette v. State, 478 Md. 148, 162 (2022).

Looking to the plain language of Criminal Law § 11-207(a)(4)(i), there does not appear to be much dispute that Mr. Richardson was knowingly soliciting sexual conduct. The issue presented really concerns whether Mr. Richardson's solicitation would amount to either: (a) a depiction of a minor engaged in sexual conduct under § 11-207(a)(4)(i); or, (b) "in a manner that reflects the belief, or that is intended to cause another to believe" that the solicitation was a depiction of a minor engaged in sexual conduct under § 11-207 (a)(4)(ii). Both of these require consideration of the definition of "sexual conduct" which includes (1) masturbation; (2) intercourse; (3) "whether alone or with another individual" any touching of the genitals, et cetera; or, (4) any "lascivious exhibition" of the genitals, et cetera. Crim. Law § 11-101(d).

When considering the plain language of the statute, we are reminded that "ordinary, popular understanding of the English language dictates interpretation of its terminology." *Blackstone v. Sharma*, 461 Md. 87, 113 (2018) (quoting *Schreyer v. Chaplain*, 416 Md. 94, 101 (2010)). Further, "the modern tendency of this Court is to continue the analysis of the statute beyond the plain meaning to examine 'extrinsic sources of legislative intent' in order to 'check [ ] our reading of a statute's plain language' through examining 'the context of a statute, the overall statutory scheme, and archival legislative history of relevant enactments.'" *In re S.K.*, 466 Md. 31, 50 (2019) (alteration in original) (citations omitted). Unless the text is ambiguous, "it is our duty to interpret the law as written and apply its plain meaning to the facts before us." *In re S.K.*, 466 Md. at 53.

We are persuaded that, under a plain reading of the statute, and as applied to the messages detailed in the application, that there was, at minimum, a substantial basis to find probable cause to support the search warrant. Mr. Richardson solicited depictions of the other person involved in the conversation engaged in masturbation, intercourse, touching "alone or with another individual" and "lascivious exhibition" of the genital or pubic areas of any person, all while a minor was present or being held by that person. This was "sexual conduct" under a plain reading of Criminal Law § 11-101(d). Further, under either, or both Criminal Law § 11-207(a)(4)(i) and (ii), these overt solicitations asked for depictions of a minor engaged as a subject of the sexual conduct, *or* in a manner that reflected the belief that the minor was engaged as such as subject.

Our interpretation is supported by a reading of *In re S.K.*, 466 Md. 31 (2019), a case cited by both parties. There, the Court of Appeals affirmed a juvenile adjudication for distributing child pornography, in violation of § 11-207(a)(4) of the Criminal Law Article, in a case where a sixteen-year-old female sent a sexually explicit text, also known as "sexting," from her cell phone. *In re S.K.*, 466 Md. at 41. The video included with that text depicted her performing fellatio on an unidentified male. *Id.* at 36-37. By way of background, the Court discussed the context for the laws against child pornography, and sexting in particular:

> The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material

> which requires the sexual exploitation of children is to be effectively controlled. Indeed, there is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.

In re S.K., 466 Md. at 49 (quoting *New York v. Ferber*, 458 U.S. 747, 759-60 (1982).

Pertinent to our discussion, the Court of Appeals considered whether the female who sexted the image could be considered engaged "as a subject" in the proscribed sexual conduct, as delineated by § 11-207 (a)(4). *In re S.K.*, 466 Md. at 52. In applying a plain language reading of the statute, the Court concluded there was no ambiguity in the statutory language: "we agree with the Court of Special Appeals and the State that a minor is *'engaged as a subject'* under the statute *'if she or he is a participant in, or the object of, such conduct*.'" *Id.* at 54 (emphasis added) (quoting *In re S.K.*, 237 Md. App. 458, 469 (2018), *aff'd in part, rev'd in part*, 466 Md. 31 (2019)). Recognizing that the underlying facts presented a "unique challenge," the Court concluded that S.K. could be both the "subject" and the distributor of child pornography and reaffirmed that "there is no question that the State has an overwhelming interest in preventing the spread of child pornography and has been given broad authority to eradicate the production and

distribution of child pornography." *In re S.K.*, 466 Md. at 54, 57. The Court held that S.K.'s conduct was covered by the statute and affirmed the adjudication. *Id*. at 57.[4]

A similar conclusion is warranted in this case. As set forth in the application, there was a substantial basis for the magistrate to find probable cause that Mr. Richardson solicited a matter depicting a minor as a subject in sexual conduct, or in a manner that reflected the belief or was intended to cause another to believe that the minor was engaged as a subject in sexual conduct. Moreover, as the State argues, we also uphold the search warrant under the good faith doctrine. *See Whittington*, *supra*, 474 Md. at 37 ("The good faith exception prevents the exclusion of evidence obtained pursuant to a warrant later shown to lack probable cause when law enforcement, in objective exercise of their professional judgment, reasonably relied on a warrant issued by a detached and neutral magistrate") (citing *United States v. Leon*, 468 U.S. 897, 920-21 (1984)). As the State argues: "[t]his was not a bare bones affidavit or a general warrant that failed to draw any connection between the Facebook account and the suspected crime." We are persuaded that the executing officers had a good faith basis to rely on the warrant and that the search of Mr. Richardson's Facebook account was lawful under the Fourth Amendment.

II. SUFFICIENCY OF EVIDENCE

[4] The Court then went on to consider Criminal Law § 11-203 – and reversed this Court's conclusion that it did not apply to cellphone videos. *In re S.K.*, 466 Md. at 64.

Mr. Richardson next asserts the evidence was insufficient to sustain his convictions for soliciting the creation of child pornography (Count 3) and illegal possession of a regulated firearm, to wit, the rifle (Count 6). The State disagrees. We shall address each of these arguments seriatim. We begin with the standard of review:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Maryland Rule 8-131(c). As explained by the Court of Appeals:

> This Court has consistently recognized and applied this rule when reviewing the sufficiency of evidence. *Credible Behavioral Health, Inc., v. Johnson*, 466 Md. 380, 388; *see also* [*State v. Manion*, 442 Md. 419, 431 (2015)] ("It is simply not the province of the appellate court to determine whether . . . [it] could have drawn other inferences from the evidence[.]").
>
> Maryland appellate courts accordingly adopt a deferential standard when reviewing sufficiency of evidence that asks whether "*any* rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original). For the reasons stated more fully herein, we decline to deviate from the deferential sufficiency of the evidence standard of review enunciated in *Jackson*, our jurisprudence, and the Maryland Rules.

State v. McGagh, 472 Md. 168, 193 (2021).

A. The Evidence was Sufficient to Sustain Mr. Richardson's Conviction for Solicitation of Child Pornography.

The pertinent facts follow. According to the transcript from State's Exhibit 5, on October 22, 2020, appellant, identified as Sean Richardson, engaged in a Facebook messenger conversation with M.[5] He initially asked her "[w]hat you offer?" and "[w]hat will/won't you do for a vid?" Mr. Richardson asked her to "[t]ell me about you so we can figure out a sexy taboo vid for you to make for me." He again asked "[w]hat taboo stuff will you do? What's off limits with you. I pay and pay goo so not an issue."

Mr. Richardson then asked her if she did "blood, animal, pedo, BDSM, ffm, fmm?" and "[h]ow open are you?" M replied, in part, "[w]hat do you mean by pedo? I've been through that a lot growing up." After Mr. Richardson asked her "[d]id you like it?" M replied, "[a]t the time I didn't really know lol around 8 I did it. It was a huge adrenaline feeling lol Buttt I probably wouldn't be who I am today[.]" Mr. Richardson replied, "[t]hat's sexy as hell!" and then inquired if she had "any girls you do things with now?"

After ascertaining that M was 35 years old and her female friend was 21 years old, the following then ensued:

> [M]: "How old were you thinking?"
>
> [Mr. Richardson]: "Not sure what do you have close to you?
>
> [M]: "I have no idea lol."
>
> [M]: "Don't wanna catch a caseeee though haha"
>
> [Mr. Richardson]: "Oh ok. No kids?"

[5] We shall clean up the Facebook Messenger conversation slightly, adjusting for punctuation and capitalization errors.

[Mr. Richardson]: "I'd pay for you and a daughter."

[Mr. Richardson]: "Nothing crazy."

[Mr. Richardson]: "How old is your daughter?"

[M]: "Like whattt? And I have a boy not a girl."

The conversation continued:

[Mr. Richardson]: "You ever do things with your son? Since you had things done to you?"

[Mr. Richardson]: "How old is he?"

[M]: "No, I probably would when hes older and legal lol I would hate to get caught upppppppp haha."

[M]: "He's 4"

[Mr. Richardson]: "That's a [sic] in age! Would you ever do a vid masturbating with him sitting with you?"

[M]: "Like him in the video?"

[M]: "Probably not."

[Mr. Richardson]: "Just sitting with you is all"

[M]: "I mean I wouldn't put him in the video though"

[Mr. Richardson]: "Oh ok that would just be a fun video. Wish you had someone you could do that with."

[M]: "Awhh Meee Tooo lol"

[Mr. Richardson]: "I would pay good money for something with you and a girl. Damn baby that would be sexy"

[M]: "What's good money to you? Lol And why would you want toooo? Are you a cop? Lol"

[Mr. Richardson]: "No I'm not a cop just a pervert. Money is up to you and what you can out in a video"

After discussing whether M would perform with a "young girl," Mr. Richardson continued:

> [Mr. Richardson]: "Or like I said. Your son sitting next to you while you are nude masturbating."
>
> [Mr. Richardson]: "I don't want him naked. Just sitting next to you."
>
> [M]: "Okaay."
>
> [M]: "He wouldn't be watching though or in the video maybe lol"
>
> [Mr. Richardson]: "I'd need to see him next to you. He doesn't have to watch you"
>
> [M]: "Okayy"
>
> [Mr. Richardson]: "Can you make that happen?"
>
> [M]: "Yess Depends what youll pay? Lol"
>
> [Mr. Richardson]: "What you want for that? And when can you deliver it?"
>
> [M]: "What's the most you'd pay? Or what would you wana pay for it? Lol and tomorrow"
>
> [Mr. Richardson]: "$60 for a 5 minutes video"
>
> [M]: "Oooo Definitely nottt"
>
> [Mr. Richardson]: "How much baby?"
>
> [M]: "At least 400, $80 per minute because it's pretty extreme. Lol"
>
> [Mr. Richardson]: "That's not extreme. If you were sucking or fucking him then yes. I'd go $100 for just masturbating in front of him"
>
> [M]: "Mmm Okay I'll think about it because that's to [sic] little for me lol"

> [Mr. Richardson]: "Well you want $80 for one minute masturbating in front of him? Remember we can make lots of videos if you want to play for the long game"
>
> [Mr. Richardson]: "We can do that"
>
> [M]: "Yeah lol Annddd Okaay"
>
> [Mr. Richardson]: "Okay let do a 1 min video of you masturbating nude next to him. I need a good shot of both of you. I'll agree to that. We can do more money in later vids but I want verification with the firsr [sic]"
>
> [Mr. Richardson]: "First."
>
> [Mr. Richardson]: "Sound like a deal?"
>
> [M]: "Haha Okaay Suree"

After discussing how to transfer funds, M asked Mr. Richardson: "Do you know anyone else that does stuffff like this for you too?" to which Mr. Richardson replied, "Yes I have a few" but that "[h]opefully you can be the best!" The discussion continued:

> [Mr. Richardson]: "More money if he touches you or gets closer to your pussy.
>
> [M]: "Yeah. But definitely not enough lol"
>
> [Mr. Richardson]: "How much for that? If he rubs your pussy?"
>
> [M]: "To [sic] much lol"
>
> [Mr. Richardson]: "Like number wise?"
>
> [M]: "Like pay his college much lol"
>
> [Mr. Richardson]: "Lol ok"

Mr. Richardson also asked "[y]ou have any other kids you are around that you can make vids with?" After M stated that she could not think of any right then, Mr.

Richardson stated "[e]ven if you babysit a baby girl I'm sure we can figure out a video and price baby." The exchange then ended with M giving Mr. Richardson her phone number for further discussions.

Count 3 of the indictment charged that Mr. Richardson "on or about October 22, 2020, at 14 White Pine Court, Elkton, MD, in the County of Cecil, did knowingly solicit the creation of sexually explicit content that depicts a minor engaged as a subject in sexual conduct." We set forth the language of the statute and the case law in the prior question presented. Summarizing § 11-207(a)(4), the statute prohibits the knowing solicitation of any matter, visual representation or performance that either: (1) depicts a minor engaged as a subject in sexual conduct; or (2) in a manner that reflects the belief, or that is intended to cause another to believe, that the matter depicts a minor engaged as a subject in sexual conduct. In the first question presented, we concluded that the language alluded to in the search warrant formed a substantial basis to find probable cause of a violation of this section. Whereas the language admitted at Mr. Richardson's court trial, and included in State's Exhibit 5, is even more graphic and detailed, we are persuaded the court could have rationally found that it met the greater standard of beyond a reasonable doubt.[6] *See generally, Winters v. State*, 434 Md. 527, 538 (2013) (observing

[6] Moreover, we note that the "gist" of the crime of solicitation is "'counseling, enticing or inducing another to commit a crime.'" *Denicolis v. State*, 378 Md. 646, 659 (2003) (citation omitted); *see also Monoker v. State*, 321 Md. 214, 220 (1990) ("The solicitation is complete once the incitement is made, even if the person solicited does not respond at all.") (discussing *Cherry v. State*, 18 Md. App. 252, 257-58 (1973)); *see also* Crim. Law § 3-324(a) (defining "solicit" under the crime of sexual solicitation of minors as meaning "to command, authorize, urge, entice, request, or advise a person by any (continued)

that "[p]roof beyond a reasonable doubt requires such proof as would convince [a person] of the truth of a fact to the extent that [he or she] would be willing to act upon such belief without reservation in an important matter in [his or her] own business or personal affairs") (alterations in original) (citations omitted).

Out-of-state cases support this conclusion. *See United States v. Lohse*, 797 F.3d 515, 518, 521-22 (8th Cir. 2015) (affirming conviction of producing child pornography when defendant "used and attempted to use a minor under the age of 18 to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct," specifically, when he created photographs of his penis on or near a sleeping child's face), *cert. denied*, 577 U.S. 1037 (2015); *United States v. Poulo*, 491 F.Supp.3d 1244, 1248-53 (M.D. Fla. 2020) (upholding convictions for "using" a minor "to engage in any sexually explicit conduct for the purpose of producing a visual depiction of such conduct" by creating images where he masturbated or displayed his erect penis in front of a five-year-old girl). *But see United States v. Howard*, 968 F.3d 717, 719 (7th Cir. 2020) (vacating defendant's conviction for producing child pornography when he took pictures of himself masturbating several inches from a sleeping child's clothed buttocks and head, and finding that the word "use" in the federal statute, narrowly construed, requires that the offender caused the minor to engage in sexually explicit conduct).

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means"); Crim. Law § 11-301(g) (defining "Solicit" in prostitution cases as "urging, advising, inducing, encouraging, requesting, or commanding another"). There is no dispute that Mr. Richardson solicited sexual conduct; the issue is the extent to which his solicitation was for a depiction, or in a manner reflecting the belief, or intending to cause that belief, of a minor engaged as a subject in that sexual conduct.

Here, the conversations admitted at trial included the following assertions attributed to Mr. Richardson: "Would you ever do a vid masturbating with him sitting with you?" "Just sitting with you is all;" "Your son sitting next to you while you are nude masturbating;" "I don't want him naked. Just sitting next to you;" "More money if he touches you or gets closer to your pussy;" and, "How much for that? If he rubs your pussy?" Although Mr. Richardson argues that these requests were "not serious," we conclude it was within the purview of the fact finder to find to the contrary. *See State v. Manion*, 442 Md. 419, 431 ("We do not second-guess the [trier of fact's] determination where there are competing rational inferences available") (alteration in original) (quoting *Smith v. State*, 415 Md. 174, 183 (2010)). The evidence was sufficient.

B. The Evidence was Insufficient to Establish that the AR-15 Rifle Recovered from Mr. Richardson's Residence met the Statutory Definition of a "Regulated Firearm."

We arrive at a different conclusion with respect to Count 6 of the indictment, charging Mr. Richardson with illegal possession of a regulated firearm (the rifle), in violation of § 5-133(b) of the Public Safety Article. *See* Md. Code Ann., Pub. Safety § 5-133(b). As to this final sufficiency challenge, and as will be discussed in more detail, the parties dispute whether the State proved that the rifle in question, an "AR-15," was a "regulated firearm" as defined by statute. *See* Pub. Safety § 5-101(r)(2).[7]

[7] Although this argument was not presented during argument on the motion for judgment of acquittal, we shall review the issue as required by Maryland Rule 8-131(c). *See Rivera v. State*, 248 Md. App. 170, 179 (2020) ("It has always been true, and remains so today, that there is no preservation requirement for sufficiency claims in cases tried without a jury").

At trial, Detective Armington testified as follows:

> Q. Okay. And where were the firearms found?
>
> A. The firearms were located upstairs in the master bedroom closet.
>
> Q. And would you recognize those firearms if you saw them here today?
>
> A. I would.
>
> Q. Once you found the firearms, what, if anything, did you do? Let me stop. You seized the firearms?
>
> A. Correct.
>
> Q. Why did you do that?
>
> A. Because I had contacted the Maryland Gun Center to run a check on the weapons themselves for the serial numbers, the make, model, etc. We were advised by the Maryland Gun Center that is staffed by the Maryland State Police that the guns were considered ghost guns. They were untraceable. They were build-out kits made at home. And then we were also advised on the information that I provided on Mr. Richardson that he was prohibited from possessing any type of firearms for two specific reasons.

Detective Armington then identified the firearm at issue as follows:

> Q. Can you identify what is here, sir, these two firearms?
>
> A. Again, sir, this one here, this green and black, it's an AR style rifle, was located in the master bedroom closet on a shelf. And this is the Glock firearm, 80 percent polymer lower with a Glock upper that we had also located in the bedroom.

The firearms and the associated property records, in other words, the chain of custody logs, were identified and admitted into evidence. There was no further testimony as to the type of rifle that was seized from Mr. Richardson's residence. The chain of

custody property log simply indicates that it was a "(1) green in color AR-15 rifle, no serial#, w/ sling and optic".

Detective Kyle Pattman of the Cecil County Sheriff's Office, accepted as an expert in the operation and maintenance of firearms, testified that he assisted in the execution of the search warrant at Mr. Richardson's residence. Detective Pattman tested the rifle that was seized, identifying it simply as an "AR 15 platform rifle," and determined that the firearm was operable. He also testified that there was no serial number on the rifle and that was not typical for firearms.[8] He explained:

> A. Yes. Typically the layman's term they use is called, quote, ghost guns. That being that these firearms that are ghost guns do not contain any sort of serial number, unique identifying number that would be used to be registered with or that would be logged -- used when they're sold by an establishment. Typically those firearms are logged in per the ATF to log books and then they're logged out when they're sold to customers. This firearm and other firearms like these ghost guns do not require a background check. They do not have serial numbers so they cannot be registered and they are not able to be tracked basically.
>
> Q. And is this something -- is a ghost gun something that you could purchase from a licensed firearms dealer?
>
> A. You can. Or you can go on the internet and actually order them off of what's called an 80 percent kit or, you know, unfinished firearm kit.

Pertinent to our discussion, § 5-101(r) provides, in part:

[8] Effective June 1, 2022, the Public Safety Article will include several provisions to address the prevalence of untraceable firearms, *i.e.*, ghost guns. *See* S. 387, 2022 Leg., 444th Sess. (Md. 2022). This includes expanding the definition of "firearm" to include such firearms. *Id.*

> (r) "Regulated firearm" means:
>
> (1) a handgun; or
>
> (2) a firearm that is any of the following specific assault weapons or their copies, regardless of which company produced and manufactured that assault weapon:
>
> . . . .
>
> (xv) Colt AR-15, CAR-15, and all imitations *except* Colt AR-15 Sporter H-BAR rifle; . . .

Pub. Safety § 5-101(r) (emphasis added).[9]

Mr. Richardson notes that "[t]he statute does not classify every AR-15 style rifle as a regulated firearm" and, indeed, provides an exception for the Colt AR-15 Sporter H-BAR rifle. Given the evidence adduced at trial, Mr. Richardson argues the State failed to prove that the rifle was one of the specific assault weapons enumerated by statute or that it was a copy of any particular enumerated firearm. Indeed, Mr. Richardson's contention is that the State also did not *disprove* that the firearm was not within the exception.

The State responds that the evidence showed that Mr. Richardson possessed an "AR-15 style rifle that contained no serial number and was assembled as part of a build-from-home kit. Such a gun was untraceable." For that reason, the State infers that the rifle could not have been a Colt AR-15 Sporter H-BAR rifle, the only AR-15 style rifle excepted by statute.

[9] Although there are other firearms listed with the "AR" designation, neither party claims those listings apply here. *Id*.

Mr. Richardson replies by directing our attention to *Mackall v. State,* 283 Md. 100 (1978), a case concerning when the State must prove that a particular weapon is not one of a class excepted by the dangerous weapons statute. That statute, Criminal Law § 4-101(a)(5)(1) provides that a "weapon" includes a "dirk knife, bowie knife, switchblade knife, [and] star knife," but does not include "a penknife without a switchblade." In order to convict a person for carrying a deadly weapon pursuant to this statute, the State must prove, beyond a reasonable doubt, that the purported deadly weapon did not fall within the exception for a penknife. *Stanley v. State*, 118 Md. App. 45, 56 (1997), *aff'd in part and vacated in part on other grounds*, 351 Md. 733 (1998). A penknife is defined as "any knife with the blade folding into the handle." *Thornton v. State*, 162 Md. App. 719, 736 (2005), *rev'd on other grounds*, 397 Md. 704 (2007). While a penknife originally was considered to be a small pocketknife used to make or sharpen quill pens, modern penknives are "commonly considered to encompass any knife with the blade folding into the handle, some very large." *Mackall*, 283 Md. at 113 n.13.

In *Mackall*, the Court of Appeals held there was insufficient evidence to prove the weapon was not a penknife where the witnesses merely described it as a "knife," with no elaboration. *Id.*at 108 n. 8 ("The various witnesses who testified that a knife was used, referred to the weapon only as a 'knife.' There was no description of it whatsoever, and no attempt was made by Mackall or the State to elicit a description"). Likewise, the Court reversed the conviction in *Washington v. State*, 293 Md. 465, 475 (1982), where the "testimony described the knife only as a 'long silver knife' and a 'sharp pointed object.' There was a total absence of evidence tending to show that the knife was not a

penknife."

We are persuaded by Mr. Richardson's argument on this count. Here, the State proved that the rifle was a green and black, AR style or AR 15 platform rifle, with no serial number. This is not one of the firearms enumerated in Public Safety Article § 5-101(r)(2). Furthermore, although § 5-101(r)(2) includes in its definition "copies" of the enumerated weapons, and subsection (xv) also includes "all imitations," there was no evidence to that effect. As Mr. Richardson points out in his reply brief, the rifle could have been *either* a copy of a prohibited weapon, *or* a copy of the exception. Ultimately, the State's argument amounts to a concession that, although it did not prove what type of firearm the rifle *was*, the fact finder could infer what it *was not*. Because this fails to meet the State's burden of proving the elements of the offense, namely that the firearm was a "regulated firearm," beyond a reasonable doubt, we shall reverse Mr. Richardson's conviction on Count 6.

JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY ON COUNT 6 REVERSED, ALL OTHER COUNTS AFFIRMED. COSTS TO BE ASSESSED ONE-HALF TO APPELLANT AND ONE-HALF TO CECIL COUNTY.