UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2377

September Term, 2014

MALIK R. McCAULEY

v.

STATE OF MARYLAND

Kehoe,
Berger,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: January 11, 2017

Malik R. McCauley was convicted of attempted third degree sex offense in the Circuit Court for Cecil County. Appellant appeals his conviction and presents two issues, which we have reworded:

> I. Is attempted third degree sexual offense a crime?
>
> II. Based upon the evidentiary record before it, was there legally sufficient evidence to support the trial court's finding that McCauley had taken a substantial step or overt act towards the commission of third degree sexual offense?

We answer "yes" to both questions and will affirm the circuit court.

Background

Appellant, an adult, sought to inveigle a fourteen year-old high school student into a sexual relationship. As part of his scheme, appellant purchased a cell phone for the victim and exchanged text messages with her. When the victim's grandmother learned of their interaction, she notified the Maryland State Police. After an investigation, McCauley was charged with one count of sexual solicitation of a minor,[1] and one count of attempted third degree sexual offense.[2]

On the day of trial, counsel informed the court that the State intended to nol pros the sexual solicitation of a minor charge and to try the attempted third degree sex offense. There are several varieties of third degree sexual offense; the theory of the State's case was that McCauley violated Md. Code Ann., § 3-307(a)(4) or (5) of the Criminal Law

[1] Md. Code, Criminal Law Article § 3-324.

[2] Md. Code, Criminal Law Article § 3-307.

Article ("Crim. Law").[3] In lieu of presenting testimony, counsel proceeded on what they, inaccurately, termed "an agreed statement of facts." This consisted of a narrative presented to the court by the prosecutor together with text messages recovered from the cell phone. We set out the relevant portions of the transcript of the proceedings (emphasis added):

> THE PROSECUTOR: Judge, this is Malik R. McCauley, K-14-538. It's my understanding that with regard to Count 2 the defendant is going to be entering a not guilty plea. We'll read into the record an agreed statement of facts, and go from there. State will be nol-prossing Count 1.
>
> DEFENSE COUNSEL: That's correct, your Honor. And just to let the court know, there will be argument from each side after that.
>
> THE COURT: Okay. Now, Mr. McCauley, is that the way you want to proceed?
>
> THE DEFENDANT: Yes.
>
> . . . .
>
> THE PROSECUTOR: Judge, on 3-13-2014, [S.] responded to the North East Police Barracks -- State Police Barracks to report a possible crime again her granddaughter [D.].[4] S. told the trooper that [D.] had gotten into a strange man's car and drove off from Route 272 near Howard's Market to the Walmart at 75 North East Plaza.
>
> Once at the Walmart the man bought D. a cell phone. S. was concerned about this because D. is a fourteen-years-old, and the man was reportedly much older. She was able to describe the man . . . but only knew him as Malik. S. told the

[3] Section 3-307 states in pertinent part:

> (a) A person may not:
>
> . . . .
>
> (4) engage in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old; or
> (5) engage in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old.

[4] The prosecutor referred to Ms. S. and D. by their full names. We will substitute initials and, when appropriate, will dispense with the customary bracketing after the first instance of each name.

trooper that D.'s mother was aware of the incident, but did not wish to be involved. [S.] had the cell phone with her.

Trooper LeCompte then contacted D., who agreed to let him look at the software to identify Malik. She also signed a consent form for such. As the trooper was reading the text conversation between D. and Malik, he was listed on the phone as Boo -- and that's Malik listed on the phone as Boo. He received a text message from Malik. He then engaged him in a text conversation, attempting to identify him.

Judge, the text messaging with the trooper begins on 3-13 at 5:30 p.m. All other texts are between the victim and this defendant.

In speaking with the trooper via text [McCauley] wrote that he wanted -- the defendant said that he wanted to pick D. up at school tomorrow and hang out. In an earlier text message, which you will see, . . . **he said he wanted to fall back with D. The trooper then asked D. what was meant by the term fall back, and she said it was a reference to sex. If called to testify the defendant would say that fall back means -- is a reference to hang out and chill.**

The trooper continued texting Malik and made arrangements to meet him after school on 3-14 at 1430 hours. He then responded to the Walmart and retrieved video footages -- video footage of Malik and D. The video shows Malik with his arm around D. and at one time with his hand on her hip sliding to her buttocks. The video showed Malik buy D. the cell phone paying cash. There was no information exchanged, as it was a pay-as-you-go phone.

On 3-14-2014 the trooper texted Malik again saying, I'm bored. His response, meaning the trooper -- excuse me -- the defendant's response was that he would come to D.'s school earlier in the day and keep her company. The trooper continued to text him during the day firming up plans to meet.

Malik wanted to meet at the school and take D. away with him. The trooper wanted to avoid any confrontation at the school, and convinced him to meet somewhere else. At approximately 1535 hours after multiple texts and three failed meeting places, which were the school, Howard Market and the Flying J, it was finally arranged that they would meets at the Walmart.

. . . .

Trooper Holloway observed a man fitting the picture that they had printed from the Walmart security video footage of what appeared to be the defendant Malik, sitting in a Mercury Mountaineer in the Walmart parking lot. Troopers approached him, confirmed his name was Malik McCauley. He was there detained -- he was then detained for questioning. Trooper Parker drove the

victim, D. past Malik, and she confirmed that that is the man who bought her the cell phone.

Due to the nature of the investigation, Trooper LeCompte transported Malik back to the North East Barrack for questioning. While in route to the barracks the defendant said he was there to meet a girl named D., and that without any prompting, without any questions from the trooper. . . .

THE PROSECUTOR: He signed the Miranda warnings waiving his rights and agreeing to speak with the trooper. He then -- Malik then led the trooper throughout the encounters with D., to which the trooper made written notes. He spoke with the defendant first and then to D. and then to the defendant again. After these conversations their account of their meeting was similar. Both said they initially met in a Walmart in North East about three weeks ago. At that meeting defendant gave his number to D.'s cousin, and D. and Malik texted a few times, but then lost contact.

On 3-13-2014 they both stated that Malik, the defendant, saw D. walking on Route 272 and stopped to talk with her. That conversation led to D. . . . voluntarily getting into the defendant's car. Once in the car they both stated that the defendant asked what D.'s age was, and she told him she was in high school. Malik, the defendant, said -- told the trooper that D. said she was eighteen. D. told the trooper that she told the defendant, honestly I'm fourteen, to which . . . the defendant said that she looked like she was sixteen or seventeen.

They both agreed that they went to the Walmart store and Malik bought her a cell phone. They then both state that the defendant drove her from North East to Elkton[.]

Then the defendant took D. home[.] They both agreed that D. had him stop short of her house so that her mom would not see him drop her off. D. then hugged the defendant, who then kissed her on the cheek. Then D. exited the vehicle.

The trooper asked each of them what the intent of today's meeting -- what was their intent of today's supposed meeting. The victim told the trooper that she was under the impression this was going to -- this was going to develop a sexual relationship. The defendant told him that he wanted to hang out, but admitted that he intended a sexual relationship with D., who he still claimed he thought was eighteen years old.

All events occurred in Cecil County.

DEFENSE COUNSEL: Your Honor, that is the statement that was agreed upon by the state and by the defendant. The only, I think, additional information is we have the cell phone so we can let the court see the actual communication between the defendant and the victim, as well as the defendant and the police officer.

THE PROSECUTOR: Can I approach?

. . . .

(Whereupon, the judge read the text messages.)

THE COURT: All right. So I take it from looking at this cell phone text messages it starts with the alleged victim sending messages. And . . . then the defendant, what's up. The victim, chilling, just got in the house. What about you. I'm on my way to my cousin's house. That's what's up. After your class make sure you call me because I want to chill with you. All right. I got you. And honestly what I might just do is sneak out and chill because my mom isn't in a good mood. Okay. That's cool. What time you think. When's good for you. Whenever. I really didn't want you to leave. **We could have went somewhere to fall back. Whatever. I really didn't want you to leave. We could have went somewhere to fall back.** I feel you. I didn't want to leave either. So I guess just call me after you come from class. All right. I will. And again, the alleged victim, send me a picture for your contact photo. Defendant, I don't like taking pictures, babe. For me, please. I can do anything for you besides that. It's a bigger reason why, but once we get to really know each other I'll let -- I'll let you know. All right. Then the victim, all right. Sounds cool. Do you got a Facebook. No. Damn, babe. When I see you later on today I'll explain why.

This evidently is where the officer kicks in. Okay. I'm at drug and alcohol now. And response is K. I'm out for tonight. I'll be back up tomorrow. Call me when you get out of school. I'll come pick you up. K. Where will you be waiting.

What time do you get out. 2:30. Okay. I will call you at 2:30 and come pick you up. You bringing the Caddy. No, I'm bringing my other car, the one I was telling you about. You got it fixed. Just needed to be inspected and new tags. You get something cool for your tag number. Yeah, I got your face on there. And then LOL if you sent me a pic I would have sent you one for your car. You can send me a pic of you. Pic. Huh. You don't trust me. I don't trust you. Just have to wait. That's crazy, babe, you do me like that. Got to go. Mom's freaking. See you. I will see you tomorrow then. I'm so bored. Do you want me to keep you company. I'm on my way down there, so hit me up and I'll come get you. K. Probably wouldn't go well you sitting next to me in class. See you soon. I get out at 2:30. Too much drama here. I'm bouncing. Meet you at Howard's same time. Where are you. I'm at Flying J. What's up. Where you are -- are you. Walking. That -- and it's E-A-D. Things got stupid in school. I'm about to come get you. Where do you want to meet me at. How about Walmart out front. K. How long. Because I'm -- because I'm about to be there. Five. Response is K. Wow, it's busy. Which car is yours. Just stay out front. About to pull up. I'm peeing now. There's a question mark. Peeing, can't talk.

> Is that the end of it? Okay.
> DEFENSE COUNSEL: Is the court prepared?
> THE COURT: Yes.

At this point, defense counsel presented his closing argument. He advanced two relevant contentions as to why the trial court should acquit McCauley.

First, counsel argued that, as a matter of law, Maryland does not recognize the crime of attempted third degree sexual offense when the sex offense in question is described in § 3-307(a)(3), (4), or (5). In support of this assertion, he directed the trial court's attention to *Moore v. State*, 388 Md. 623, 645–46 (2005), and *Maxwell v. State*, 168 Md. App. 1, 13–14 (2006). We will discuss these opinions later in this opinion.

Second, counsel argued that there were two potentially critical factual disputes. The first was as a dispute as to whether D. told McCauley that she fourteen (as she told the police) or sixteen (as he told the police). The second dispute was over the meaning of the term "fall back." He stated:

> [D.] says she took it as a sexual reference. He said it means just hang out and chill out. So those are disputed facts that we have within here[.]

Counsel argued that the resolution of this conflict was important because an attempt requires a "substantial step," which he equated to an "overt act." He asserted that the only possible overt act indicating McCauley's intention to engage in unlawful sexual activity with D. would be McCauley's use of the term "fall back" if the term was a reference to sexual activity, and that nothing in the stipulation other than D.'s statement suggested that the term had such a meaning.

After hearing additional argument from counsel and a response from the prosecutor, the trial court stated (emphasis added):

> I believe that a day or so before, maybe on this particular day, the defendant met with the victim. They got into—she got into his vehicle. And thereafter the defendant took the victim to Wal-Mart for the sole purpose of purchasing a phone where he — whereby, he could communicate with her either by phone or text messages.
>
> In relying on the court's memory of this long text between the victim and the defendant and the facts, it appears again that they rode around, they made three stops, two stops at a residence, one at a gas station. But, again, there was an indication that the parties at that time had a desire to have some type of sexual relationship or interaction, but, again, could not do it because the victim, I believe, had to go home. And the defendant took her home, dropping her off at – – nearby the house, not directly in front of her house; kissed her on the cheek.
>
> The court also recalls, again, the testimony from review of the video at Wal-Mart when the phone was being purchased; that, again, defendant at that time had his hands on the victim's hip area down around her buttocks. And then I think the following day is when we get into this, again, text where there's arrangements being made by the defendant to meet up with the victim, again after school for the purpose of fall back. **And it is clear to the court that based upon the statements of both the victim and the defendant that was their intent by this fall back to indeed have a sexual relationship.**
>
> The court considers all of the facts in this case — the totality of the acts of the defendant in this case is a substantial cut toward the completion of that, starting from their initial contact, the purchase of phone, the hand on the buttocks, driving around, contact the next day through all these text messages, and making arrangements to meet up with the defendant at the Wal-Mart store for the purpose of, again, picking her up, and then having some type of sexual relations with her.
>
> So the court is convinced beyond a reasonable doubt that the defendant is guilty of Count 2, attempted third-degree sex offense.

Appellant was sentenced to three years imprisonment, with all but 90 days suspended. Appellant was also instructed to register as a sex offender.

Analysis

I. Attempted Third Degree Sex Offense

Appellant's first contention on appeal is that attempted third degree sex offense is not a crime. Appellant argues that "the common law crime of attempt is not possible when the actual crime attempted to be committed is a strict liability crime and requires no *mens rea*." Appellant asserts that "[t]he Court [of Appeals] has held that crimes that do not involve intent to do a criminal act generally fall outside the scope of the crime of attempt." In support of this proposition, he cites *Cox v. State*, 311 Md. 326 (1988). The issue in *Cox* was whether Maryland recognized the crime of attempted manslaughter. In answering that question in the affirmative, the Court noted, in dicta, that

> There is an exception, however, to the general rule that attempt applies to all offenses. Crimes that do not involve intent to do a criminal act generally fall outside the scope of the crime of attempt. If there is no intent to do a wrongful act, then usually there is no crime of attempt.

Id. at 331.

The problem with appellant's reliance on that case is that, in contrast to *Cox*, there was evidence before the trial court in this case indicating that appellant very much intended to commit an act that he knew was wrongful: the joint stipulation reveals that the victim would have testified that she told appellant that she was fourteen years old, upon entering his vehicle, and that appellant admitted to the police that he intended to develop his relationship with the victim into a sexual one.

Appellant also cites *Moore v. State*, 388 Md. 623 (2005), but *Moore* is factually inapposite. The relevant issue in *Moore* was whether (emphasis added):

> the crime of attempted third degree sexual offense, predicated upon either [Crim. Law] § 3-307(a)(4) or § 3-307(a)(5), covers the situation where the defendant, who is over 21 years of age, contacts and arranges to meet another person for a sexual act or vaginal intercourse, where the defendant travels to the arranged meeting place, **where the defendant believes that the other person is 14 years old, but where the other person is actually an adult undercover police officer**.

Id. at 626.

The Court ultimately concluded that the statute did not. After reviewing cases analyzing the concept of attempt at common law, including *Cox*, and after quoting the passage from *Cox* that we have previously quoted, the Court concluded:

> Since the offense under § 3-307(a)(4) and (5) has no intent element or *mens rea* element with regard to the "victim's" age, it follows that, absent a change in the statute, there can be no crime of attempt such as charged in the present indictment.

Id. at 645.

We discussed the scope of *Moore* in *Maxwell v. State*, 168 Md. App. 1, 13–14 (2006):

> The [*Moore*] Court did not hold that there could be no conviction for attempted third degree sexual offense under other circumstances involving an actual 14-year-old. But in Moore's situation, because there was no 14-year-old ever actually involved, Moore could not have committed the crime of third degree sexual offense under CL § 3-307(a)(4) or (5), and consequently, there could be no liability for a lesser included common law attempt. Further, as the Court of Appeals pointed out, there was no statutory provision that criminalized Moore's actions taken in the mistaken belief that he was dealing with a 14-year-old. Because the would-be victim was an adult, Moore could not be convicted of either a third degree sexual offense under CL § 3-307(a)(4) or (5), or an attempt to commit such offense.

We believe that the reasoning enunciated in *Maxwell* is applicable to the case before us. In contrast to *Moore*, there is an actual victim in this case, not a police officer masquerading as a child. We decline to extend *Moore* beyond its unusual facts, and we hold that an accused may be convicted of attempted third degree sex offense when, as here, there is an actual victim who is a member of the class protected by the statute.

II. The Sufficiency of the Evidence

Appellant next asserts that the evidence presented to the court through the joint statement of facts was not sufficient to sustain his conviction. The crime at issue is sexual offense in the third degree, codified at Crim. Law § 3-307. In pertinent part, the statute prohibits persons who are "at least 21 years old" from engaging in a sexual act or vaginal intercourse with a person who is "14 or 15 years old." Crim. Law §§ 3-307(a)(4) and (5). "A person is guilty of a criminal attempt when with intent to commit a crime, he [or she] engages in conduct which constitutes a substantial step toward the commission of that crime, whether or not his [or her] intention is accomplished." *Lane v. State*, 348 Md. 272, 284 (1997) (quoting *Townes v. State*, 314 Md. 71, 75 (1988)). Moreover, "[t]he act in furtherance of the intent must go 'beyond mere preparation.'" *Id*. (quoting *Cox v. State*, 311 Md. 326, 330 (1988)).

Appellant's sufficiency argument is premised on what he asserts are conflicts in the parties' joint stipulation of evidence. He asserts that the statement of facts contained conflicting statements from appellant and the victim about the victim's age and the

meaning of the phrase "fall back," as used in the text messages between appellant and the victim.

McCauley's argument brings into focus a fundamental problem in the way that the evidence in this case was presented to the trial court. Chief Judge Charles E. Orth, Jr.'s opinion for this Court in *Barnes v. State*, 31 Md. App. 25, 35 (1976), both identified the problem and provided the solution.

Chief Judge Orth explained (emphasis added):

> There is a distinction between an agreed statement of facts and evidence offered by way of stipulation. **Under an agreed statement of facts both State and the defense agree as to the ultimate facts.** Then the facts are not in dispute, and there can be, by definition, no factual conflict. The trier of fact is not called upon to determine the facts as the agreement is to the truth of the ultimate facts themselves**. There is no fact-finding function left to perform. To render judgment, the court simply applies the law to the facts agreed upon.** If there is agreement as to the facts, there is no dispute; if there is dispute, there is no agreement. . . .
>
> On the other hand, when evidence is offered by way of **stipulation, there is no agreement as to the facts which the evidence seeks to establish.** Such a stipulation only goes to the content of the testimony of a particular witness if he were to appear and testify. **The agreement is to what the evidence will be, not to what the facts are.** Thus, the evidence adduced by such a stipulation may well be in conflict with other evidence received. **For the trier of fact to determine the ultimate facts on such conflicting evidence, there must be some basis on which to judge the credibility of the witness whose testimony is the subject of the stipulation**, or to ascertain the reliability of that testimony, to the end that the evidence obtained by stipulation may be weighed against other relevant evidence adduced.

In *Barnes*, as in the instant case, the case was submitted to the court on "a statement of facts on a not guilty plea." *Id.* at 26. As in this case, it became clear that the parties actually were not in agreement as to a critical fact. In *Barnes*, the factual dispute

concerned the defendant's subjective intent; in the present case, the factual disputes identified by McCauley both at trial and on appeal were (1) whether he knew that D. was not yet sixteen years old; and (2) what his and D.'s understanding was of the phrase "fall back." Additionally, in *Barnes*, as in the present case, neither the defendant nor the relevant State's witness actually testified.

This Court reversed the conviction in *Barnes* because (emphasis added):

> There was evidence, which, if found credible, was sufficient in law to support a finding that Barnes concealed the merchandise, and there was evidence, which, if found credible, was sufficient in law to support a finding that Barnes did not conceal the merchandise. . . . [T]he court resolved this conflict by . . . finding as a fact that Barnes concealed the merchandise. It necessarily follows, that in order to find beyond a reasonable doubt that the offense was committed and that Barnes committed it, the court did not believe Barnes, and rejected her version that she did not conceal the merchandise . . . . The rub here is that, in the circumstances, there was no proper basis on which the court could resolve the conflict . . . . Neither witness from whom the evidence emanated appeared before the court; the court was merely told what the witnesses would say if they testified. There were simply no factors apparent from the record before us which would enable the court to judge the credibility of either witness, or the reliability of the evidence offered through them. **The court expressed no reasons for the finding inherent in its verdict and gave no clue as to why it concluded, in the face of the conflicting evidence, [that] Barnes concealed the merchandise. As we see it, in the circumstances, the only way the court could have resolved the conflict in the evidence, and made a factual finding that the merchandise was concealed, was by arbitrary choice.** We believe a choice so made to be capricious, and a determination of guilt beyond a reasonable doubt may not be properly bottomed on it. Therefore, the judgment of the court on the evidence was clearly erroneous, and we shall reverse it.

31 Md. App. at 34–35.

Returning to the case before us, the parties stipulated that (1) if he were called as a witness, appellant would testify that the victim told him that she was eighteen years old, but that the victim would testify that she told appellant that she was fourteen; and (2) the

victim would testify that the term "fall back" "was a reference to sex," but that appellant would testify that "fall back . . . is a reference to hang out and chill."

Appellant's first contention, namely, that the joint stipulation cannot support his conviction because his version of what the victim said regarding her age differed from the victim's version, is not persuasive. Crim. Law §§ 3-307(a)(4) and (5) are strict liability criminal offenses, so "the defendant's knowledge of the 'victims' age" is not an element of the offense. *Moore v. State*, 388 Md. 623, 644 (2005). Accordingly, that appellant's and the victim's accounts of her statement regarding her age conflict is of no significance. The record is clear that appellant was 27 years old and the victim was 14 years old during the relevant time period. The age requirements of Crim. Law §§ 3-307(a)(4) and (5) were satisfied.

Appellant's second contention is that the evidence presented was not sufficient to support his conviction for attempted third degree sex offense because appellant and the victim offer different definitions of the phrase "fall back." This is a closer issue, but we are not persuaded that the trial court erred. This is because appellant's text message to the victim, stating that he wished to "fall back" with her, was not the only piece of evidence to support the inference that appellant intended to have a sexual relationship with the victim. A review of the interactions between appellant and the victim on March 13 and 14, 2014, reveals that the accumulated evidence presented to the court was more than sufficient to support appellant's conviction for attempted third degree sex offense.

The joint stipulation not only establishes that appellant undertook a number of affirmative acts in an effort to engage in a sexual relationship with the victim, but also confirms that appellant's intentions were salacious. Appellant, at best a casual acquaintance of the victim, initiated contact with her when he stopped to talk to her after seeing her walking along the side of the road. The victim ultimately entered his vehicle. Thereafter, appellant drove to Walmart where he purchased a cell phone for the victim, providing a means of surreptitious communication between them. Security video footage from the Walmart, a description of which was provided in the joint stipulation, captured appellant walking through Walmart with the victim. Significantly, the video showed appellant with his arm around the victim and at one point with his hand on her hip sliding to her buttocks. After procuring the cell phone, appellant and the victim returned to his vehicle. Appellant made several stops and then dropped the victim off near her home. At the victim's request, appellant dropped the victim off before her house in order to avoid having her mother see them together. Before the victim exited appellant's vehicle, she hugged him and he kissed her on the cheek. Appellant and the victim continued to communicate via text message, before the victim's grandmother sought police intervention later that afternoon.

The joint stipulation also reveals that appellant made multiple efforts to get together with the victim on March 14. The most concerted of appellant's efforts to see the victim was the rendezvous that the State Trooper arranged at the Walmart on the afternoon of March 14, where appellant was ultimately apprehended. We also note that, in response to

a text message sent from the victim's phone by the State Trooper, stating that she was bored, appellant offered to come to her school and keep her company.

Most significantly, appellant admitted to the police that he intended to have a sexual relationship with the victim. Moreover, the victim's intentions were the same.

In order to support a guilty verdict for an attempt charge, the State must present evidence that the defendant took concrete steps towards the commission of the crime. There was evidence of several such steps taken by appellant. The most obvious was that appellant purchased a cell phone for a 14 year old who was a virtual stranger. This evidence, considered in light of the nature of the text messages and appellant's admitted intention to have sexual relations with the victim, is a basis from which a fact-finder could reasonably conclude that appellant provided the cell phone to the victim as a means of surreptitiously communicating with her to achieve his goal of having sexual intercourse with her. Thus, we conclude that there was sufficient evidence to establish that appellant took at least one substantial step toward the commission of a third degree sex offense.

THE JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.