Circuit Court for Howard County
Case No. 13-K-18-0588879

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1165

September Term, 2018

STATE OF MARYLAND,

v.

SEAN J. AGRANOV

Leahy,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: August 6, 2019

On July 7, 2018, a grand jury sitting in Howard County indicted Sean J. Agranov, appellee, on two counts of sexual solicitation of a minor in violation of Section 3-324 of the Criminal Law Article. Appellee moved to dismiss the indictment as defective for failure to include a material element of the crime and failure to contain a definite statement of the essential facts of the offense charged. On August 2, 2018, following a hearing, the Circuit Court for Howard County dismissed the indictment without prejudice. This timely appeal followed, and appellant, the State of Maryland, presents the following question for our review:

1. Did the court err in dismissing the indictment for failure to adequately state the offense of sexual solicitation of a minor?

For reasons to follow, we reverse the judgment of the circuit court.

BACKGROUND

On March 5, 2018, Detective Carly Dorsey created a profile on a social networking application, MeetMe, that is intended to connect users with new people nearby who share similar interests. The profile described Detective Dorsey as an 18-year-old female from Columbia named "Julieta," who indicated she was "[j]ust looking for friends." On that same day, Agranov, who described himself as a 46-year-old male from Clarksville, Maryland named "Joe F.," commenced an email exchange with Detective Dorsey who was posing as "Julieta." The exchange eventually transitioned into a text message conversation, in which "Julieta" told Agranov she was 14-years-old. The two discussed meeting during the day while "Julieta" would pretend to be too sick to attend school. In response to "Julieta" telling Agranov she was a virgin, he stated "[w]e won't change that unless you

decide you want to." When "Julieta" asked whether Agranov would have condoms available, he stated that he would. He also stated that he would give "Julieta" a "BJ lesson" if she wanted and informed her that "BJ" stood for "blow job." He told "Julieta" she had to tell him she was 17-years-old because "[a]ccording to the law ["Julieta"] need[ed] to be 17 in order for [them] to have fun the way [they] discussed." Twice "Julieta" told Agranov she was 14-years-old, to which he replied, "yes you need to tell me you are 17[,] I think you understand now." "Julieta" then responded she was 17.

Agranov and "Julieta" also exchanged photographs,[1] and eventually agreed to meet at a specified location. When Agranov arrived at the meeting place, he matched a photograph of "Joe F." that was sent to "Julieta" during the text conversation. Agranov was then arrested and advised of his *Miranda* rights, which he agreed to waive. He confessed to communicating with "Julieta" on the MeetMe app and to discussing sexual acts with her. Agranov admitted that "Julieta" told him she was 14-years-old and insisted he was going to tell her to wait until she was older to engage in the proposed sexual acts.

On July 7, 2018, Agranov was charged with two counts of sexual solicitation of a minor. The indictment stated:

> The Jurors of the State of Maryland, for the body of Howard County, do on their oath, present that **SEAN J AGRANOV**, on or about and in between March 5, 2018 through March 6, 2018, in Howard County, did, knowingly solicit a law enforcement officer posing as a minor to engage in activities that would be unlawful under 3-307 of the Criminal Law Article of Maryland, to

[1] During a motions hearing held on August 2, 2018, the parties stipulated that all photographs transmitted to Agranov were of a woman over the age of 18 at the time the photographs were taken, one of which was a photograph of a female detective from the neck down who was over the age of 21.

> wit: oral sex, in violation of CR 3-324 of the Annotated Code of Maryland, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.
>
> (Sexual Solicitation of a Minor – CR 3-324, 11604).
>
> The Jurors of the State of Maryland, for the body of Howard County, do on their oath, present that **SEAN J AGRANOV**, on or about and in between March 5, 2018 through March 6, 2018, in Howard County, did, knowingly solicit a law enforcement officer posing as a minor to engage in activities that would be unlawful under 3-307 of the Criminal Law Article of Maryland, to wit: intercourse, in violation of CR 3-324 of the Annotated Code of Maryland, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.
>
> (Sexual Solicitation of a Minor – CR 3-324, 11604).

Agranov filed a motion to dismiss the indictment on April 9, 2018 and filed a supplemental memorandum in support of the motion to dismiss the indictment on July 25, 2018, citing "defects in the charging documents." Specifically, Agranov averred that the indictment did not meet the constitutional requirements of both "Article 21 of the Maryland Declaration of Rights and the due process requirements under the United States Constitution[, which] require that a charging document apprise the accused of the specific crime he is accused of having committed." He claimed the indictment did not "allege essential information about the required element of intent, and it [did] not contain a definite statement of the essential facts of the offense charged."

On August 2, 2018, at the conclusion of a hearing, the circuit court granted the motion and dismissed the indictment without prejudice. In its written order, the court stated:

> Md. Code Crim. Law Art. § 3-324 requires that solicitation be made "with the intent to commit" the act. The failure to include the material element of intent renders the charging document defective. Further, the allegations in the indictment that the solicitation involved conduct unlawful for the person to engage in under Md. Code Crim. Law Art. § 3-307 are not sufficiently definite or factually specific. Since the indictment provides no definite statement of the essential facts of the offense that would allow the Defendant to ascertain which theory under § 3-307 is alleged, the indictment is also defective for this reason.

This timely appeal followed.

DISCUSSION

I. The State's arguments are properly preserved for review.

Agranov first argues in his brief that this Court should not consider two of the State's arguments because they were not raised in the circuit court, and thus, are not preserved for appellate review. Specifically, Agranov contends that the State's arguments that (1) intent was implicitly pled in the indictment, and (2) the indictment was not required to allege which modality of third-degree sexual offense the solicitation required, were not raised in the court below.

Maryland Rule 8-131(a) provides in relevant part, "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). During oral argument, Agranov conceded that he raised the issue below regarding whether intent was implicitly pled in the indictment in his supplemental memorandum in support of his motion to dismiss. He stated, "the indictment fails to sufficiently allege or *imply* intent, which is a material element of this crime." (emphasis added). Further, the issue of whether the indictment

was required to detail which modality of third-degree sexual offense the solicitation required, was raised by the State during the August 2, 2018 hearing. The Prosecutor argued:

> [W]ith regard to the second argument that the State didn't sufficiently put the defendant on notice with regard to what subsection of 3-307 of the Criminal Law Article it is referring to, the State did do exactly what it is supposed to do in putting the defendant on notice in count one, oral sex; in count two, intercourse.
>
> Your Honor, in the event that the Defense is attempting to gain the State's theory of the case that we all know is not what the defendant is entitled to in the indictment. Furthermore, Your Honor, if the Defense is looking for a little bit more particularity with regard to perhaps what the State is alleging under 3-307, the appropriate remedy would have been a request under [a] Bill of Particulars.

These arguments were thus raised below and are appropriate for appellate consideration.

II. The circuit court erred in dismissing the indictment for failure to adequately state the offense of sexual solicitation of a minor.

The State contends that the court erred in dismissing the indictment because it "allege[d] all of the elements of sexual solicitation of a minor, either expressly or implicitly," and it "adequately inform[ed] Agranov of the essential facts of the underlying charges." In response, Agranov asserts the court properly dismissed the indictment because "the indictment fail[ed] to sufficiently allege intent, which is a material element of the crime [of sexual solicitation of a minor]," and it failed to "allege facts necessary to allow [Agranov] to ascertain which theory under § 3-307 is alleged."

Generally, the dismissal of an indictment is at the sound discretion of the trial court and is reviewed under an abuse of discretion standard. *State v. Lee*, 179 Md. App. 478,

484 (2008). However, "where an order [of the trial court] involves an interpretation and application of Maryland constitutional, statutory, or case law, our Court must determine whether the trial court's conclusions are 'legally correct' under a *de novo* standard of review." *Schisler v. State*, 394 Md. 519, 535 (2006); *see also Beall v. Holloway-Johnson*, 446 Md. 48, 76 (2016).

A proper criminal charging document must "satisfy the constitutional requirement of Article 21 of the [Maryland] Declaration of Rights that each person charged with a crime be informed of the accusations against him." *Jones v. State*, 303 Md. 323, 336 (1985). To achieve this purpose a charging document must characterize the crime and furnish the defendant "such a description of the particular act alleged to have been committed as to inform [the defendant] of the specific conduct with which he [or she] is charged." *Ayre v. State*, 291 Md. 155, 163 (1981). Maryland Rule 4-202(a), requires that a charging document contain "a concise and definite statement of the essential facts of the offense with which the defendant is charged and, with reasonable particularity, the time and place the offense occurred." The common law rule in Maryland is that a charging document must allege the essential elements of the offense charged. *Jones v. State*, 303 Md. 323, 337 (1985).

The test of sufficiency of an indictment is not whether it could have charged the offense with greater particularity, but whether the indictment is constitutionally deficient because it does not inform the accused of the accusation against him. *Id.* at 338. "All essential elements of the crime need not [] be expressly averred in the charging document;

elements may be implied from language used in the indictment or information." *Id.* (internal citations omitted); *see Bosco v. State*, 157 Md. 407, 239 (1929) (a case involving attempted bribery, where the Court held that an express allegation of scienter in the indictment is unnecessary if it is implied therein from the statement of the acts which constitute the offense); *see also Williams v. State*, 302 Md. 787, 793 (1985) (a case concerning an armed robbery indictment, in which the Court noted that the allegation that the defendant "did rob" the victim implied that the crime was committed with the requisite intent to permanently deprive the owner of her property); *State v. Coblentz*, 167 Md. 523, 175 A. 340, 343 (1934) (a fraud case where it was held that the essential element of knowledge was implied from a fair reading of the language of the indictment, reasoning that "the fact that the words [of the indictment] may leave unspecified one or more essential elements of the crime" does not necessarily render the document defective).

An indictment is also sufficient where unspecified elements of a crime may be incorporated by referencing the statute in the indictment. For instance, in *Whitehead v. State*, the defendant was charged with unlawfully stealing a specific car in violation of Article 27, § 342. 54 Md. App. 428, 441 (1983). The indictment was challenged on constitutional grounds that, *inter alia*, it failed to allege the essential elements of the offense charged because the indictment did not include that the crime had been committed "knowingly." *Id.* This Court reasoned that citing the statute number in the indictment incorporated by reference the elements of the statutory offense as enumerated in the cited section of the statute, as though the section had been set forth in full in the indictment; and

that such "incorporation by reference would of necessity include elements of wil[l]fulness or knowledge." *Id.* at 445. We also found that the facts alleged in the indictment "implied the essential element of scienter," and thus alleged the necessary specific intent. *Id.*

This Court reaffirmed its holding in *Whitehead* in a subsequent opinion, *Russell v. State*, 69 Md. App. 554, 559 (1987). The appellant in that case argued that the indictment was fatally defective because it "failed to allege that he possessed certain paraphernalia with the specific intent to use the items in connection with the illegal manufacture, distribution, or dispensing of a controlled dangerous substance." *Id.* at 558–59. This Court relying on *Whitehead*, stated:

> As this [C]ourt stated in *Whitehead v. State*, "reference to the statute here was not a mere citation for the purposes of convenience." Here, as in *Whitehead*, the specific charge was that the appellant had committed a proscribed act in violation of a particular statute, i.e., had possessed controlled paraphernalia in violation of [A]rticle 27, § 287(d). We reaffirm our holding that "[t]he effect of charging in that manner was to incorporate by reference the elements of the statutory offense . . . as though the section had been set forth in full . . . in the indictment."

Id. at 559 (internal citations omitted).

In the present case, we hold that the indictment was sufficient under both the implied or incorporation by reference analysis. The statute under which Agranov was charged provides in pertinent part:

> A person may not, with the intent to commit a violation of . . . § 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 . . . § 3-307 of this subtitle.

Md. Code Crim. Law Art. § 3-324. "Solicit" under this section means to command, authorize, urge, entice, request, or advise a person by any means. *Id.*

The indictment in this case charged that Agranov "***did, knowingly solicit*** a law enforcement officer posing as a minor ***to engage in*** activities that would be unlawful under 3-307 of the Criminal Law Article of Maryland, to wit: [oral sex and intercourse] ***in violation of CR 3-324*** of the Annotated Code of Maryland." By using the term solicit in the indictment, it is implicit that Agranov intended that the desired unlawful sexual activity of intercourse and oral sex would occur by his action of enticing a law enforcement officer posing as a minor. The allegation that Agranov "did knowingly solicit" followed by the clause "to engage in activities that would be unlawful under 3-307" implied that the crime was committed with the intent to take part in unlawful sexual acts. The facts alleged in the indictment charged that Agranov knew he was soliciting for the purpose of engaging in illicit sexual acts, which implied that he necessarily had the intent to violate § 3-307. In our view, these averments sufficiently charged and characterized the crime of solicitation of a minor with the requisite intent.

Further, the indictment tracked the language of the statute and alleged Agranov committed a prohibited act in violation of that specific statute. Reference to the statute here was not a mere citation for the purposes of convenience, its purpose was to put Agranov on notice as to the criminal conduct he had been charged with and thereby incorporated by reference the unspecified statutory element of intent. *See Whitehead*, 54 Md. App. at 445 (holding that the effect of citing the statute number was to incorporate by

reference the statutory elements into the indictment as though the text of the statute had been set forth in full).

We also hold the circuit court erred in finding the indictment defective because it did not provide a definite statement of essential facts of the offense to sufficiently inform Agranov which theory under section 3-307 was alleged. The indictment alleged specific sexual acts, "to wit: oral sex" and "to wit: intercourse," in violation of section 3-324. This language adequately apprised Agranov of the specific criminal conduct he was charged with. Further, the State is not required to set out in the indictment the details concerning the manner in which the accused committed the alleged crime. A bill of particulars may be requested to fulfill that purpose. *See Dzikowski v. State*, 436 Md. 430, 446 (2013) ("[t]he manner or means of committing the offense, if not otherwise provided by the prosecutor, is obtainable through a bill of particulars."); *Jones v. State*, 303 Md. 323, 337 (1985) (Moreover, the particular conduct necessary to establish an offense, *i.e.*, the manner or means of its commission, need not be alleged as elements in the charging document."). We conclude the circuit court erred in dismissing the indictment, as it satisfied the constitutional requirement that each person charged with a crime be informed of the accusations against him.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY REVERSED; COSTS TO BE PAID BY APPELLEE.