Circuit Court for Montgomery County
Case No. 138040C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1613

September Term, 2021

MILTON ALEXANDER MAZARIEGO

v.

STATE OF MARYLAND

Wells, C.J.,
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: November 9, 2022

A jury in the Circuit Court for Montgomery County found Milton Alexander Mazariego, appellant, guilty of rape in the second degree and witness retaliation. The court sentenced him to terms of imprisonment totaling 40 years, with all but 25 years suspended, to be followed by 5 years' supervised probation, as well as lifetime sex offender registration. He thereafter noted this appeal, raising two issues for our review:

> I. Whether the circuit court erred in denying appellant's motion to suppress evidence recovered from his cell phone pursuant to a search warrant; and
>
> II. Whether the evidence was sufficient to sustain appellant's conviction of threatening to retaliate against a witness for reporting a crime.

For the reasons that follow, we shall affirm.

BACKGROUND

The Crimes and the Subsequent Investigation

At the time the offenses in this case were committed, Sandy Barrientos lived in an apartment complex in Silver Spring, Montgomery County, with her then-boyfriend, Cornelius Smith, and their three children. The victim, V.,[1] was a neighbor who lived in an apartment downstairs from the unit where Barrientos and Smith lived. V. struggled with drug and alcohol addiction. Occasionally, according to Barrientos, she would "help[] [V.] not fall in the street" when "a car was coming."

On September 5, 2020, the date of the sexual assault, Barrientos, Smith, and their daughter were outside on the porch, "enjoying the breeze[,]" when Barrientos observed V. approach. V. was slurring her words and appeared to be visibly drunk. V. told Barrientos

[1] To protect the victim's identity, we refer to her by an initial having no relationship to her name.

that she was "reunit[ing] . . . with an old . . . boyfriend[.]"[2] When V.'s friend arrived, Barrientos, Smith, and their daughter went inside their apartment.

V. returned shortly thereafter, knocked on the door of Barrientos's and Smith's apartment, and asked Smith if he knew "where some marijuana was." Smith "called somebody to see if they could come through but they were at work[,]" and Smith then called appellant, who replied that he had $20 worth and that he could "come over." Later, at "around 8:00 or 9:00" p.m., appellant arrived at Barrientos's and Smith's apartment with some marijuana, but "it wasn't the right amount[,]" and Smith and appellant "got into [an] altercation." Barrientos remained inside but could hear Smith, who was outside "in the stairway[,]" "going back-and-forth" with appellant.[3] Smith told V., "Don't give your money up" and that he would "call somebody else."

Later, around midnight or 1:00 a.m., appellant knocked on the door to Barrientos's and Smith's apartment, accompanied by V. At that time, V. appeared "very sluggish like she was about to fall down[.]" Appellant "gave [Smith] the weed and stepped out with" V., who could not walk unassisted because she was so intoxicated.

Then, "20 minutes later[,]" appellant returned and "banged really hard" on the door to Barrientos's and Smith's apartment, so hard, in fact, that Barrientos thought "it was the police[,]" and Smith "was hesitant to open the door." After Smith ascertained that it was

[2] The former boyfriend was not appellant, whom V. did not know before the events of that evening.

[3] Barrientos was acquainted with appellant because Smith previously had worked for him.

appellant, he opened the door and let him in. According to Barrientos, appellant was "sweaty" and "breathing heavily[,]" and she sensed that "something was not right." Appellant asked permission to use their restroom, which struck Barrientos as odd because, at that time, appellant "lived across the street."

After he finished using the restroom, appellant asked Smith to accompany him outside, and Smith and appellant "went out onto the porch[,]" where appellant told him that he "need[ed] some help getting this bitch out of [his] truck." Appellant and Smith then walked, with Barrientos following, toward appellant's truck, where V. was lying in the passenger seat, "unconscious" but "breathing" and partially nude, "with no shirt." Appellant told Smith that "he had fucked her" without using a condom.[4]

Appellant and Smith carried V. inside the building to the laundry room, which was adjacent to V.'s apartment. Smith asked Barrientos to help V. to dress, and Barrientos put a shirt on V. because she "did not like" seeing V. "without a shirt being exposed." Periodically throughout the rest of the night, Barrientos stopped by to check on V. to "make sure that she was conscious" and that "she was breathing." Sometime around 2:00 or 3:00 a.m., V. awoke and returned to her apartment.

V. had little memory of what happened that evening, acknowledging that she had been "pretty intoxicated" as a consequence of alcohol and heroin consumption. She recalled that her former boyfriend spent "[p]art of the evening" with her, and she did "remember him leaving." She had "flashes of memory with" Barrientos but did not

[4] It appears that appellant made this admission out of earshot of Barrientos.

remember talking with Smith, and she had no recollection of having been with appellant that night. When she came to the following morning, she noticed that she was wearing different clothes than she had been wearing the night before, and she specifically recalled that the shirt she had worn the previous evening ("one of [her] favorite shirts") had disappeared.

Later that day, while V. was near the steps to her apartment, appellant approached her and asked, "do you remember me?" When V. replied that she did not, appellant asked, "you don't remember me at all?" He then declared to V., "well you had sex with me, last night." Appellant then said, "you told me you were 50 years old, and there's no way you could be 50 years old because your pussy is way too tight for that." V. was horrified and "ashamed."

V. subsequently spoke with Barrientos and Smith. Barrientos explained to her what they had seen the previous night. V. also noticed vaginal soreness consistent with having experienced a sexual assault.

Several days later, V. spoke with Montgomery County Police officers, but she declined their suggestion to submit to a sexual assault forensic examination. Barrientos and Smith spoke with Montgomery County police officers around the same time. The lead detective, Detective Bryan Savage of the Montgomery County Police Special Victims Investigations Division, attempted to contact Barrientos to conduct an additional interview, but she repeatedly avoided his attempts to contact her.

Finally, on November 4, 2020, Detective Savage went to Barrientos's apartment and could "hear someone" inside. Detective Savage attempted to speak to her through the door,

but she refused to talk to the police. The following day, on November 5, 2020, appellant went to Barrientos's apartment and "threw a water bottle" at the window. When Barrientos went outside to speak with appellant, he forced his way inside her apartment and threatened her, stating that "he is capable of killing somebody and he has the tools to do it" and that, "if he can't do it, he has the money to get someone to do it for him." According to Barrientos, appellant demanded that she "write a letter" or "do a recording or something" on his behalf so "that [they] won't send him to jail." Appellant also forced Barrientos to pose with her driver's license in her outstretched hand and took a photograph depicting her in that pose.

Ultimately, Detective Savage obtained a subpoena, requiring that Barrientos submit to questioning, and, on November 19, 2020, she was interviewed by Montgomery County police. Meanwhile, Smith was by that time incarcerated on charges unrelated to this case. He was interviewed by Montgomery County police at the Montgomery County Correctional Facility, where he was then incarcerated.

Almost immediately after those witnesses were interviewed, Detective Savage filed an Application for Statement of Charges, in the District Court of Maryland for Montgomery County, charging appellant with rape in the second degree, assault in the second degree, and witness retaliation. At the same time, an arrest warrant for appellant was issued, and, four days later, he was arrested. One month later, in December 2020, a two-count indictment was returned, by the Grand Jury for Montgomery County, charging appellant with rape in the second degree and witness retaliation.

When appellant was arrested, police officers seized a cell phone that was in his possession. In January 2021, Detective Savage submitted an application for a search warrant, with supporting affidavit, requesting authorization to search "[a]ny and all information and/or data stored in the cell phone in the form of magnetic or electronic coding on any and all internal media or on media capable of being read by a computer or with the aid of computer related equipment." That same day, a Judge of the Circuit Court for Montgomery County approved the search warrant. When the search warrant was executed, Montgomery County police extracted, from appellant's cell phone, a copy of the photograph depicting Barrientos, holding her driver's license.

Motions Hearing

Prior to trial in this case, appellant filed an omnibus motion to suppress evidence as well as a supplemental motion. In the latter motion, appellant claimed that the search warrant affidavit failed to state what experience the affiant has, nor did it explain how his training and experience "leads to the conclusion that there would be evidence" of the charged crimes on appellant's cell phone; and because, he claimed, the warrant "was issued without probable cause[,]" it was unreasonable for police to rely upon it. The State thereafter filed its opposition to appellant's motions, asserting that the affidavit provided sufficient detail of the crimes charged so as to establish probable cause to search appellant's phone, especially given the nature of the crimes, the victim's inability to remember the events, and the allegation that appellant subsequently threatened a witness; and that, in any event, according to the State, the warrant was executed in good faith.

Several weeks prior to trial, a hearing was held on the supplemental motion. Appellant contended, as he did in his supplemental motion, that the warrant was an invalid general warrant, lacking any limitations as to what may be seized, and that it was thoroughly lacking in probable cause, given both the absence of any detail regarding the affiant's experience as well as the failure to establish a nexus between the crimes alleged and the likelihood that any evidence would be found on his phone. In addition, appellant urged the circuit court not only to find stronger privacy protections under Article 26 of the Maryland Declaration of Rights than those established under the Fourth Amendment, but that it should find that, under Article 26, there is no good faith exception to the exclusionary rule.[5] The State countered that the warrant is presumptively valid and that there is no requirement that the affidavit "directly connect the property to be searched to a crime." And in any event, the State asserted, there was no *Franks* violation,[6] nor was this a bare-bones warrant, and therefore, the good faith exception should apply.

[5] Appellant does not claim in his brief that there should be no good faith exception under Article 26, and this claim is therefore abandoned. Md. Rule 8-504(a)(6) (stating that a brief "shall" include "[a]rgument in support of the party's position on each issue"); *Bordley v. State*, 205 Md. App. 692, 708 n.3 (2012) (observing that "[a]rguments not presented in a brief or not presented with particularity will not be considered on appeal") (quotation marks and citation omitted). We note that a number of states have declined to adopt the good faith exception to the exclusionary rule, either by statute or by judicial decisions interpretating state constitutional provisions. *See, e.g.*, Ga. Code Ann. § 17-5-30; *Commonwealth v. Upton*, 476 N.E.2d 548, 554 n.5 (Mass. 1985) (interpreting Mass. Gen. Laws ch. 276); *State v. Marsala*, 579 A.2d 58, 62-68 (Conn. 1990) (rejecting the good faith exception on state constitutional grounds); *State v. Guzman*, 842 P.2d 660, 671-77 (Idaho 1992) (same); *People v. Bigelow*, 488 N.E.2d 451, 457-58 (N.Y. 1985) (same).

[6] This was an allusion to *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), which held that, if a "defendant makes a substantial preliminary showing that a false statement (continued…)

The circuit court denied the motion to suppress, declaring as follows:

> It is a little bit hard to follow but it appears that we have a number of people that were together when the victim was drinking and then ultimately she blacked out. And it wasn't until several days later that she even knew anything happened when there is information about continuing activity with the defendant where he goes back and asks witnesses -- the people who turn out to be witnesses -- to help him. Sometime in that evening, witnesses apparently told the victim that [the defendant] had arrived in the apartment building where they reside looking for assistance. So there was passing of time throughout all of this from the drinking to the passing out to somehow the defendant appearing or, as I indicated, it does not read clearly but it says that the witnesses told the victim that [the defendant] had arrived at the apartment building where they resided asking for assistance.
>
> And that's when they observed the victim unconscious in the truck. And so I do think it is not unreasonable to think that this individual would use a phone to find other people I mean to help him. He clearly was looking for help of some kind because he ended up at these people's homes and said I need a hand with this totally unconscious person who is in my truck. I think the particular facts of this case lend itself to a reasonable inference that a Judge could have made that in this time period that was passing from at least a moment when the defendant was beginning to look for assistance he could have been using the phone.
>
> I'm not as clear about the paragraph concerning the threat that was made by witness A [i.e., Barrientos]. It doesn't seem clear to me that that was a phone a phone call or whether he appeared in person but I do think that in this case and, although it is not the strongest analysis by [*Moats v. State*, 455 Md. 682 (2017)] considering the use, it is not unusual at all in this day and age with sexting being common, with texting. On a lot of these cases now almost come to the point of being not uncommon at all for people to do that. It doesn't mean that it happens in every case but that is not the standard by which I review this warrant. And so I think, although there was not much analysis, the Court was making a leap I'm not going to make a leap to the

knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in [a] warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request"; and that, if subsequently it is established that the statement was false or in reckless disregard of the truth, and "the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."

> extent and say in cases involving anything you are entitled to a cell phone search because that is certainly not the law as I understand it to be.
>
> And [for the reasons] stated, I do find that there was, indeed, probable cause to think that there would be evidence of a crime on that phone and I do not find this to be a general warrant. I also find that, if the Court [errs] in its analysis of what a reasonable inference could be made given the presumption of validity, I also find that the officer acted in good faith. And there is not any -- any hint that there was a [*Franks*] violation in this case. And so reliance on this warrant would apply as well.
>
> So for those reasons, the defendant's motion to suppress is denied. . . .

Trial

The matter proceeded to a two-day jury trial. The State called Barrientos, Smith, V., and Detective Savage as witnesses, and their testimony was consistent with the facts as previously summarized. Appellant exercised his right not to testify.

After a brief deliberation,[7] the jury returned a verdict, finding appellant guilty of both rape in the second degree and witness retaliation. The court sentenced appellant to a term of 20 years' imprisonment for second degree rape and a consecutive term of 20 years' imprisonment, with all but 5 years suspended, for witness retaliation, to be followed by 5 years' supervised probation, as well as lifetime sex offender registration as a Tier 3 offender. This timely appeal ensued.

Additional facts will be noted as pertinent to discussion of the issues.

[7] The transcript does not indicate when deliberations began or when the verdict was received, but it appears that deliberations lasted approximately one or two hours.

DISCUSSION

I.

Parties' Contentions

Appellant contends that the motions court erred in denying his motion to suppress evidence extracted from his cell phone pursuant to a search warrant. Although recognizing the extremely deferential standard of review we apply to searches conducted pursuant to warrants, appellant nonetheless asserts that there was not even a substantial basis for the issuing judge to find probable cause that evidence of rape, assault, or witness intimidation (the offenses specified in the warrant) would be found on appellant's cell phone. According to appellant, the warrant was based upon little more than the affiant's ipse dixit that through his experience and training, he believed it likely that evidence of the crimes would be found on that phone.

In addition, appellant asserts that the search warrant, which authorized extraction of "[a]ny and all information and/or data stored in the cell phone[,]" violated the particularity requirement of the Fourth Amendment. Moreover, appellant maintains that the good faith exception "does not save the evidence from suppression" because the warrant was so lacking in particularity that the executing officers could not reasonably have presumed its validity. And finally, for good measure (and presumably, to preserve the question for further review), appellant advocates that we find an exclusionary rule in Article 26 of the Maryland Declaration of Rights and that this newly-found rule should be more protective of a defendant's right to privacy than its federal counterpart, at least with respect to cell

phone searches, an emerging category which implicates potentially far-reaching intrusions into otherwise private realms.

The State counters that appellant waived any objection to the admission of the contested evidence by stipulating to it at trial. On the merits, the State maintains that the warrant and attached affidavit established a sufficient nexus between the crimes alleged and appellant's suspected involvement so as to satisfy the constitutional requirements for a search warrant. In addition, the State asserts that merely because the warrant authorized the seizure of "a large amount of material" does not mean that it violated the particularity requirement; rather, the potential to seize "a large variety of potential information . . . owes more to our current technological age than any defect in the warrant." And, in any event, according to the State, even were we to conclude that the search warrant in this case was defective, the executing officers reasonably relied upon it, and therefore, the good faith exception applies.[8]

[8] Apparently recognizing that it is not our role as an intermediate appellate court to declare a novel, far-reaching rule of state constitutional interpretation, especially on an issue that has been considered many times by our highest Court, *see, e.g.*, *King v. State*, 434 Md. 472, 481-84 (2013) (declining to adopt an independent exclusionary rule based upon Article 26); *Jones v. State*, 407 Md. 33, 46 n.2 (2008) (declining to recognize greater protection against searches under Article 26 than that provided under the Fourth Amendment); *Fitzgerald v. State*, 384 Md. 484, 506-12 (2004) (declining to address whether Article 26 contains an independent exclusionary rule); *Padilla v. State*, 180 Md. App. 210, 226-27 (collecting cases), *cert. denied*, 405 Md. 507 (2008), the State does not address appellant's request that we declare an exclusionary rule in Article 26, nor shall we, except to note that such a declaration is beyond our power.

Standard of Review Pertaining to Suppression Motions

Our review of the denial of a motion to suppress evidence "is 'limited to the record developed at the suppression hearing.'" *Richardson v. State*, __ Md. __, No. 46, Sept. Term, 2021, slip op. at 13 (filed Aug. 29, 2022) (quoting *Pacheco v. State*, 465 Md. 311, 319 (2019)). In addition, in reviewing whether a search conducted pursuant to a warrant is justified, we ordinarily (with narrow exceptions not applicable here) "confine our consideration of probable cause solely to the information provided in the warrant and its accompanying application documents." *Greenstreet v. State*, 392 Md. 652, 669 (2006) (citing *Valdez v. State*, 300 Md. 160, 168 (1984)). "We assess the record 'in the light most favorable to the party who prevails on the issue that the defendant raises in the motion to suppress.'"[9] *Richardson*, slip op. at 13 (quoting *Norman v. State*, 452 Md. 373, 386 (2017)). "'We defer to the motions court's factual findings and uphold them unless they are shown to be clearly erroneous.'" *Whittington v. State*, 474 Md. 1, 20 (2021) (quoting *Lee v. State*, 418 Md. 136, 148 (2011)). We review a motions court's legal rulings, including its ultimate determination of whether there was a constitutional violation, without deference. *Richardson*, slip op. at 13; *Whittington*, 474 Md. at 20.

[9] This implies, among other things, that we draw all reasonable inferences, based upon the evidence adduced at the suppression hearing, in favor of the prevailing party. *Whittington v. State*, 474 Md. 1, 20 (2021); *Kelly v. State*, 436 Md. 406, 420 (2013).

Analysis

Preservation

The State maintains that appellant affirmatively waived his claim of an illegal search because, at trial, he entered into a stipulation asserting to the contrary. The State's argument would have had greater force at the time its brief was filed, given our holdings in *Jackson v. State*, 52 Md. App. 327 (1982), and *Erman v. State*, 49 Md. App. 605 (1981). In those cases, we held that, where a defendant moved, prior to trial, to suppress evidence but did not prevail, and then, at trial, affirmatively declared that he has no objection to the introduction of the same evidence, any claim that the motions court erred in denying the motion to suppress was waived. *Jackson*, 52 Md. App. at 332; *Erman*, 49 Md. App. at 630.

The day after the State filed its brief in this case, however, the Court of Appeals rendered its decision in *Huggins v. State*, 479 Md. 433 (2022), which expressly overruled *Jackson* and *Erman*, the principal authorities relied upon in the State's brief. The issue, as framed in *Huggins*, was a seeming inconsistency between Maryland Rules 4-252 and 4-323. Huggins had complied with Rule 4-252 through his timely filing of a pretrial motion to suppress evidence, *Huggins*, 479 Md. at 447, but when that same evidence was admitted into evidence at trial, he declared that he had "[n]o objection[,]" which we had held, in an unreported opinion, effected a waiver under Rule 4-323, the rule governing objections to rulings made at trial. *Id.* at 438-39.

The Court of Appeals harmonized the two rules by recognizing that they "address different and mutually exclusive grounds for objecting: Rule 4-252(a) applies to motions that must be filed and resolved pretrial, including claims of unlawful search and seizure,

and Rule 4-323(a) applies to any other grounds for objecting to the admission of such evidence." *Id*. at 447-48. The Court determined that Rule 4-252, rather than Rule 4-323, governed the issue before it. *Id.* at 448. Because Rule 4-252(h)(2)(C) expressly provides that the denial of a motion to suppress evidence "is binding at the trial unless the court, on the motion of a defendant and in the exercise of its discretion, grants a supplemental hearing or a hearing de novo and rules otherwise" and, furthermore, "is reviewable on a motion for a new trial or on appeal of a conviction[,]" the Court held that Huggins's claim was preserved. *Huggins*, 479 Md. at 455.

Here, appellant challenged the legality of the search of his cell phone through a motion to suppress evidence under Rule 4-252, which the circuit court denied. At trial, appellant entered into a stipulation with the prosecutor. The court explained to the jury the purpose of that stipulation:

> So, ladies and gentlemen, what the next part of this is called a stipulation. That means that in lieu of testimony, sometimes the parties agree on what the evidence would be, **quite frankly to save time because it's not contested. And so he's going to read you a stipulation into the record as to what the parties agree the testimony would show, rather than call a witness.** Okay? All right.

(Emphasis added.)

The prosecutor then read the following stipulation to the jury:

> The State and the Defense each jointly stipulate and agree that the defendant's phone was seized and searched pursuant to a lawful warrant. A detective in the Montgomery County Electronics Crime Unit found and extracted the photograph which is now State's Exhibit 1 in evidence from the defendant's phone.

Now, before us, the State contends that appellant, in entering into that stipulation, affirmatively stated that "he had no objection to the admission of the evidence recovered from his phone *pursuant to a lawful warrant*[,]" and we should construe his stipulation as an affirmative waiver of the legality of the search of his cell phone. We decline to do so.

We are mindful that the Court of Appeals, in *Huggins*, declared that it was "not foreclosing the possibility that, having fully preserved the issue under Rule 4-252, words or actions taken by defense counsel could potentially result in a waiver of the previously preserved search and seizure issue." *Huggins*, 479 Md. at 454. This, however, is not such a case. We do not believe that appellant, by entering into the stipulation, intentionally waived his claim of error by the motions court, nor did the trial court construe his stipulation as such.

A "stipulation is an agreement between counsel akin to a contract." *State v. Broberg*, 342 Md. 544, 558 (1996). "Like contracts, stipulations are based on mutual assent and interpreted to effectuate the intent of the parties." *Id.* "Although a stipulation by definition must be based on mutual assent, **parties frequently dispute** both **the scope of the stipulation** and the extent to which it precludes the parties from offering other evidence of the stipulated fact." *Id.* at 559 (emphasis added).

In *Smith v. State*, 225 Md. App. 516 (2015), we explained the effect of a stipulation during a criminal trial, which is generally that a defendant, "'by stipulating, [has] waived any right to contest the absence of proof on the stipulated elements.'" *Id.* at 526 (quoting *United States v. Harrison*, 204 F.3d 236, 240 (D.C. Cir.), *cert. denied*, 531 U.S. 911 (2000)). We further explained the scope of a waiver by stipulation:

> "The premise of the waiver theory is simple: Upon entering into a stipulation on an element, a defendant waives his right to put the government to its proof of that element. **A stipulation constitutes an express waiver made . . . preparatory to trial by the party or his attorney <u>conceding for the purposes of trial</u> the truth of some alleged fact** . . . thereafter to be taken for granted; so that the one party need offer no evidence to prove it and the other is not allowed to disprove it . . . ."

Id. (emphasis added) (quoting *Harrison*, 204 F.3d at 240).

Indeed, in the decades following the enactment of the statutory amendment limiting appeals from judgments entered upon guilty pleas to application for leave to appeal, 1983 Md. Laws, ch. 295, 1043-44 (amending Courts and Judicial Proceedings Article ("CJ"), § 12-302), it became common practice in the circuit courts for a defendant, having failed to prevail on a motion to suppress evidence, to proceed to trial on stipulated facts or an agreed statement of facts, in order to preserve for direct appeal a claim that the motions court erred. *See, e.g.*, *Bishop v. State*, 417 Md. 1, 4-5 (2010); *Bruno v. State*, 332 Md. 673, 675 (1993).

Although, following *Bishop*, the General Assembly amended CJ § 12-302 to permit a defendant to enter a conditional guilty plea and thereby preserve the right to a direct appeal on limited grounds,[10] 2012 Md. Laws, ch. 410, 2093-94, it has remained common practice in the circuit courts to proceed on a not guilty plea and an agreed statement of facts, without any indication that, in so doing, a defendant was affirmatively waiving his

[10] Following that statutory amendment, the Court of Appeals adopted an amendment to Maryland Rule 4-242(d), providing that a defendant, with consent of the circuit court and the prosecutor, could enter a conditional guilty plea, thereby permitting a direct appeal from an adverse ruling on a motion to suppress evidence. *See* Rules Order, dated Nov. 1, 2012 (adopting, with amendments, the 174th Report of the Standing Committee on Rules of Practice and Procedure, including amendments to Rule 4-242, effective Jan. 1, 2013).

right to appeal from an adverse motions ruling. *See, e.g.*, *Trott v. State*, 473 Md. 245, 251 (2021); *Lewis v. State*, 470 Md. 1, 10 (2020).

Under these circumstances, we hold that the scope of the stipulation at issue (i.e., the waiver) was limited to its ordinary and customary purpose, as stated by the trial court—to relieve the prosecution of calling the witness whose testimony otherwise would have been necessary to establish the facts set forth in the stipulation, or, in other words, to concede the truth of those facts "for the purposes of trial[.]" *Smith*, 225 Md. App. at 526 (quotation marks and citation omitted). To construe the scope of appellant's waiver as extending beyond that context and extinguishing his right to appellate review of the trial court's denial of his suppression motion, as the State urges, would countenance a type of "gotcha" litigation[11] that, under the circumstances, is unwarranted and unjustified. We conclude that, in entering into the stipulation, appellant did not affirmatively waive his challenge to the motions court's ruling on his motion to suppress evidence. The claim before us is preserved.

Substantial Basis

Appellant contends that the warrant-issuing judge erred because the warrant application and attached affidavit failed to establish a substantial basis to find probable cause that appellant's cell phone contained evidence of a crime. According to appellant,

[11] The prosecutor read the stipulation into the record, which is otherwise silent as to who drafted its language, but it appears more likely than not that the prosecutor drafted it. The State places weight upon the phrase "pursuant to a lawful warrant" beyond what it can bear. We think a fair inference of the intent of the parties to the stipulation was more likely a desire to foreclose the possibility that the jury might speculate about the legality of the search, a matter which, in the procedural posture of the case, was not a jury question.

the warrant application and affidavit in this case failed to "present a concrete connection between the crime charged and the cell phone police [sought] to search." We find no merit in this contention.

The Fourth Amendment to the United States Constitution, enforceable against the states through the Due Process Clause of the Fourteenth Amendment, *Terry v. Ohio*, 392 U.S. 1, 8 (1968) (citing *Mapp v. Ohio*, 367 U.S. 643 (1961)), provides, among other things, that "no Warrants shall issue, but upon probable cause[.]" The "probable cause standard is a 'practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)). "'Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in'" determining whether probable cause exists. *Id.* at 371 (quoting *Gates*, 462 U.S. at 235). "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232. The "'substance of all the definitions of probable cause is a reasonable ground for belief of guilt,'" *Pringle*, 540 U.S. at 371 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)), which "must be particularized with respect to the person to be searched or seized[.]" *Id.* (citing *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)).

Probable cause "depends on the totality of the circumstances[,]" *id.* (citing *Gates*, 462 U.S. at 232), which may include "'common-sense conclusions about human

behavior[.]'" *Gates*, 462 U.S. at 231 (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)). *See Moats*, 455 Md. at 699 (citing *Pringle*, 540 U.S. at 371, and *Gates*, 462 U.S. at 231); *Stevenson v. State*, 455 Md. 709, 723 (2017) (same), *cert. denied sub nom., Stevenson v. Maryland*, 583 U.S. __, 138 S. Ct. 705 (2018). In determining whether there was probable cause, we do not "'view each fact in isolation, but rather as a factor in the totality of the circumstances[.]'" *Freeman v. State*, 249 Md. App. 269, 301 (2021) (quoting *State v. Johnson*, 458 Md. 519, 534 (2018)). We must be "scrupulously wary of the defense tactic of 'divide and conquer' (looking at each facet in a vacuum) and . . . focus exclusively on the totality" of the circumstances. *Id.* at 300.

Moreover, reflecting the "strong preference" in the Fourth Amendment for warrants, *Gates*, 462 U.S. at 236, judicial review of a search performed pursuant to a warrant is considerably more deferential than of a warrantless search. *United States v. Leon*, 468 U.S. 897, 914 (1984). "Consequently, 'in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.'" *Moats*, 455 Md. at 699 (quoting *United States v. Ventresca*, 380 U.S. 102, 106 (1965)). Thus, "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review." *Gates*, 462 U.S. at 236. Unlike in the case of a warrantless search, where we would determine, on de novo review, whether the search was supported by probable cause, *Ornelas v. United States*, 517 U.S. 690, 697 (1996), the "standard for review of an issuing magistrate's probable cause determination" is that "so long as the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Gates*, 462 U.S. at 236 (cleaned up). "The evidence necessary to

demonstrate a 'substantial basis' is less than that which is required to prove 'probable cause.'" *Moats v. State*, 230 Md. App. 374, 391 (2016) (citing *State v. Johnson*, 208 Md. App. 573, 586-87 (2012)), *aff'd*, 455 Md. 682 (2017).

In this case, the affiant is a Montgomery County Police Detective assigned to the Special Victims Investigations Division, Sexual Assault Unit, and has been with the Department since 2013. The application at issue recited the following facts known to the affiant at the time he applied for the warrant:

> On September 11, 2020 Montgomery County Police responded to the 8700 block of Plymouth Street Silver Spring, Montgomery County, Maryland, 20901 reference a rape which occurred earlier. Upon arrival they made contact with Victim A, whose identity is known to the affiant, but shall remain anonymous due to fear of reprisal. Victim A advised the following:
>
> On the night of September 5, 2020 into the early morning hours of September 6, 2020 Victim A was drinking alcoholic beverages with friends in and around her apartment located in the 8700 block of Plymouth Street Silver Spring, Montgomery County, Maryland 20901 and became intoxicated. Victim A recalled leaving the apartment building with a subject identified as "Milton." Victim A advised she has seen "Milton" around the apartment complex since she moved in approximately 6 to 12 months ago but hadn't met him until she was introduced to him that night by her upstairs neighbors. Victim A blacked out from consuming the alcoholic beverages and cannot remember what happened the rest of the night. Approximately two (2) days later Victim A was approached by "Milton" who told her, "You would never guess you're 50 years old because how tight your pussy is." Victim A was shocked and asked "Milton" how he would know, "Milton" replied because "I had sex with you when you were unconscious on Sunday." Victim A advised a short time later witnesses contacted her because they were worried for her after the Sunday incident. Witnesses told Victim A "Milton" had arrived at their apartment building where they reside in asking for assistance. Witnesses observed Victim A wearing just a pair of shorts, with no shirt or bra on laying on the seat of the truck unconscious. Witnesses helped "Milton" carry Victim A to the laundry room of the building where she eventually regained consciousness.

Officers on scene checked the immediate area for "Milton's" white pickup truck. When they located a white pickup truck bearing Maryland registration 1EF7271, they noticed it was occupied by a hispanic male. When officers asked the hispanic male to exit the vehicle, he turned the vehicle on and fled the scene. When officers ran the truck's registration through the Maryland Motor Vehicle Administration database it showed a registered owner as Milton Alexander Mazariego with a date of birth of 12-31-1992. The affiant showed Victim A the Maryland Motor Vehicle Administration photograph for Milton Alexander Mazariego, to which she positively identified as "Milton."

On November 19, 2020 Detective Finamore conducted a recorded interview with Witness A. The identity of Witness A is known to the affiant but shall remain anonymous due to fear of reprisal. Witness A stated on September 5, 2020 at approximately 2100-2200 hours Witness A observed Victim A and "Milton" walk away from the apartments. At approximately 0100-0200 hours on September 6, 2020 Witness A heard a loud knock on her door. When asked who was at the door the person identified themself as "Milton." "Milton" asked to utilize their bathroom, which Witness A found odd since the defendant lived across the street. Witness A observed "Milton" to be sweaty and breathing heavy when he entered the apartment. "Milton" asked Witness A's boyfriend who will be referred to as Witness B to come outside with him. Witness A saw "Milton's" white pickup truck parked in front of the building. As "Milton" walked around the front of the truck and opened the door he stated, "I found her drunk on Bradford Road." Witness A saw Victim A laying in "Milton's" pick-up truck wearing only a pair of shorts, with no shirt or bra on. Witness B described Victim A as appearing "dead" and observed she was snoring. The "Milton" grabbed Victim A by the armpits as Witness B carried Victim A's legs and they put her on the couch in the laundry room. While Witness B was carrying Victim A, he asked the defendant multiple times where Victim A's clothes were. "Milton" admitted to having sex with Victim A. The "Milton" threw Victim A's clothing on top of her on the couch and left.

The affiant was contacted by Witness A who stated "Milton" had made threats to her at her apartment, located in Silver Spring, Maryland after the incident took place, which put her in fear. Witness A stated "Milton" told her "If he has to kill, he can." "Milton" further stated, if he was unable to kill, he could pay someone to do it. This put Witness A and Witness B in fear for their safety if they talked to police detectives about what they had witnessed.

The affiant authored and was granted an arrest warrant for Mazariego for:

> CR 3-304 Second Degree Rape
> CR 3-203 Second Degree Assault
> CR 9-303 Retaliate Witness- Felony OFF
>
> On November 23, 2020 MCP detectives arrested Mazariego in the 8700 block of Plymouth Street Silver Spring, Montgomery County, Maryland, 20901 where he also resides. In Mazariego's possession was a black Apple iPhone which was on his person when he was arrested. Mazariego's phone was seized and entered into evidence per policy. Mazariego was transported to the Montgomery County Police Third District Station, located at 1002 Milestone Drive Silver Spring, Maryland 20904 for an interview. The writer read Mazariego the MCP-50 (Advise of Rights) to which Mazariego signed and acknowledged he understood. Mazariego stated he knew of Victim A living across the street from him but had never talked to or approached her. Mazariego denied ever having sex with Victim A. Mazariego admitted to being in Witness A's apartment on November 5, 2020 but denied threatening her. Mazariego did admit to fleeing from officers on September 11, 2020 when officers attempted to talk to him when the incident was initially reported.
>
> Your affiant knows through training and experience that evidence is likely to be stored within the black Apple iPhone MCPD barcode number 06256103, owned and operated by Milton Alexander Mazariego (Date of Birth: 12-31-1992), currently in possession of Montgomery County Police, which will aid in the prosecution of this incident. It is necessary to obtain any and all information and/or data stored in the cell phone in the form of magnetic or electronic coding on any and all internal media or on media capable of being read by a computer or with the aid of computer related equipment. This media includes but is not limited to SIM cards, removable magnetic storage, system RAM, and any other media which is capable of storing magnetic, optical, and/or binary coding.

The warrant affidavit recounted in detail the police investigation into the crimes, second degree rape, second degree assault, and witness intimidation. We think it especially noteworthy that the affidavit averred that appellant threatened "Witness A" that "if he was unable to kill [her], he could pay someone to do it." That averment leads to a strong inference that appellant's cell phone could have contained text messages or call data related

to an attempt to procure the assistance of another person in carrying out that threat, and in addition, it leads to an inference that appellant's cell phone could have contained threatening text messages directed to "Witness A." *See Moats*, 455 Md. at 700-01 (explaining that direct evidence linking the crime and the place to be searched is not required and that probable cause may be inferred from the circumstances); *id.* at 703-04 (explaining that it is reasonable to infer that evidence of crimes involving multiple perpetrators may be found on cell phones).

Furthermore, as the motions court observed, it has become "not uncommon at all for people to" engage in "sexting," that is, the use of cell phones to exchange suggestive text messages, which supports at least a weaker inference that evidence of the rape could have been found on appellant's cell phone. *See id.* at 703 (observing that the "nature of the criminal activity" of which appellant was suspected "supported a 'common-sense conclusion' that he might have incriminating evidence on his cell phone" (quoting *Gates*, 462 U.S. at 231)). Moreover, the affiant's declaration that he was an experienced police detective in the Sexual Assault Unit and that he "knows through training and experience that evidence is likely to be stored within" appellant's cell phone, although lacking details of his training, is nonetheless accorded "due weight." *Id.* at 701-02 (recognizing that the issuing judge may "defer, within reason, to the expertise and experience of the affiant police officer when deciding whether to draw a reasonable inference that evidence sought could be found in the place to be searched" and also may "consider the expertise and experience of the police officer in assessing what is to be made of facts that a layperson may consider insignificant or irrelevant" (citing *United States v. Arvizu*, 534 U.S. 266, 273

(2002))).[12] We hold that, under the totality of the circumstances, the warrant and attached affidavit provided the issuing judge a substantial basis to find probable cause to search appellant's cell phone for evidence of the crimes. To the extent appellant asserts to the contrary, we are "required to uphold the warrant." *Id.* at 700; *see Ventresca*, 380 U.S. at 106 (recognizing that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall").

Particularity

The Fourth Amendment to the United States Constitution requires, among other things, that a search warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." Appellant contends that the search warrant at issue violated the particularity requirement, as it "did not limit the search of the cell phone in any manner" and, therefore, was tantamount to a general warrant.

The State counters that the seeming overbreadth of the search warrant in this case is merely an artifact of the reality that modern-day cell phones have a large storage capacity. Observing that, at the time it filed its brief, there was no Maryland authority directly on point, the State directs our attention to *Moats*, *supra*, 455 Md. 682, which upheld a similarly broad search warrant of a cell phone, but where the challenge concerned whether the

[12] *Arvizu* involved the lesser reasonable suspicion standard required to justify an investigatory stop, but a similar totality-of-the-circumstances test is applied, and it was cited in *Moats*, 455 Md. at 702, and in *Stevenson*, 455 Md. at 727. In *Arvizu*, the Supreme Court observed that police officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." 534 U.S. at 273 (quotation marks and citation omitted).

warrant affidavit established a sufficient nexus between the crime alleged and the evidence sought. *Id.* at 691, 704-06. Accordingly, the State urges that, because it was reasonable to believe that evidence of a specific crime would be found on appellant's cell phone, the search warrant in this case satisfies the particularity requirement.

After the State filed its brief in this case, the Court of Appeals rendered its decision in *Richardson*, *supra*, which addressed whether a search warrant, very similar to the one issued in this case, was overbroad. The search warrant in that case, as here, purported to authorize police to search all data contained in a cell phone for evidence of a specific crime. The Court of Appeals summarized the relevant facts in that case as follows:

> After a school resource officer broke up a fight in which . . . Richardson was involved, Richardson's backpack dropped from his body to the ground. The officer and Richardson reached for the backpack simultaneously; the officer picked it up before Richardson could do so. Richardson then ran from the scene. Soon afterwards, the officer opened the backpack. Among its contents were a firearm, three cell phones, and Richardson's school ID card. Further investigation established that one of the phones in Richardson's backpack had been stolen in a robbery three days earlier. The police connected one of the other phones in the backpack to the perpetrators of that robbery, after which they obtained a warrant to search that cell phone. The warrant authorized the officers to search for "[a]ll information, text messages, emails, phone calls (incoming and outgoing), pictures, videos, cellular site locations for phone calls, data and/or applications, geo-tagging metadata, contacts, emails, voicemails, oral and/or written communication and any other data stored or maintained inside of [the phone]."

Richardson, slip op. at 2.

The Court began its analysis with the Supreme Court's observation, in *Riley v. California*, 573 U.S. 373 (2014), that modern cell phones, characterized by their "'immense storage capacity[,]'" differ "'in both a quantitative and a qualitative sense from other

objects that might be kept on an arrestee's person.'" *Richardson*, slip op. at 20 (quoting *Riley*, 573 U.S. at 393). *Riley*, however, addressed a different issue, which was whether a cell phone, seized from an arrestee, may be routinely searched incident to arrest; the Court held that a cell phone could not be searched routinely as an incident to an arrest and that, instead, police generally are required to obtain a warrant to search a cell phone. *Riley*, 573 U.S. at 401-02. *Riley* did not, however, address the scope of a search of a suspect's cell phone, pursuant to a warrant.

After examining decisional law addressing the scope of such a search, the Court of Appeals announced the following general rule (subject to exceptions not applicable here): "With respect to most cell phone search warrants, given the privacy interests at stake as explained in *Riley*, the particularity requirement is not satisfied by authorizing officers to search for any and all items that are evidence of a particular crime or crimes." *Richardson*, slip op. at 31. Because the search warrant in that case "simply authorize[d] police officers to search everything on" Richardson's cell phone, the Court concluded that "it violated the particularity requirement of the Fourth Amendment." *Id.* at 39.

The search warrant at issue here provided as follows:

> The search shall be for evidence pertaining to, but not limited to: Second Degree Rape (CR 3-304), and Second Degree Assault (CR 3-203), this evidence being: Any and all information and/or data stored in the cell phone in the form of magnetic or electronic coding on any and all internal media or on media capable of being read by a computer or with the aid of computer related equipment. This media includes but is not limited to SIM cards, removable magnetic storage, system RAM, and any other media which is capable of storing magnetic, optical, and/or binary coding, all electronic messages, call log, application data, contacts, all pictures or videos taken or received and any other digital information contained within.

We perceive no meaningful distinction between the warrant held invalid in *Richardson* and the warrant before us in this case. We conclude that the search warrant at issue violated the particularity requirement of the Fourth Amendment. We therefore must consider whether the exclusionary rule applies, or whether the "good faith" exception excuses the otherwise facially invalid search warrant.

Good Faith Exception

"[C]ourts will not suppress evidence where law enforcement officers act with a reasonable good-faith belief that their conduct is lawful." *Kelly v. State*, 436 Md. 406, 421 (2013) (citing *Leon*, 468 U.S. at 909). Although this rule had its origins in the context of searches conducted pursuant to search warrants, its application has since been extended "to a variety of situations."[13] *Id.* at 421-22 (citing cases). Here, we are faced with a paradigmatic application of the good faith exception: a search conducted pursuant to a warrant which, on appeal, has been held to be invalid.

Leon and its progeny set forth four circumstances where the good faith exception would not excuse a search conducted pursuant to a warrant which subsequently was determined to be invalid:

> "(1) the magistrate was [misled] by information in an affidavit that the officer knew was false or would have known was false except for the officer's reckless regard for the truth;

[13] For example, in *Illinois v. Krull*, 480 U.S. 340, 343 (1987), the Supreme Court held that the good faith exception applied where police officers seized evidence, in reliance on a statute authorizing warrantless administrative searches, which later was found to be unconstitutional. And in *Davis v. United States*, 564 U.S. 229, 241 (2011), the Supreme Court held that "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule."

> (2) the magistrate wholly abandoned his detached and neutral judicial role;
>
> (3) the warrant was based on an affidavit that was so lacking in probable cause as to render official belief in its existence entirely unreasonable; and
>
> (4) the warrant was so facially deficient, by failing to particularize the place to be searched or the things to be seized, that the executing officers cannot reasonabl[y] presume it to be valid."

Agurs v. State, 415 Md. 62, 78 (2010) (quoting *Patterson v. State*, 401 Md. 76, 104 (2007)). *Accord Richardson*, slip op. at 41. As in *Richardson*, "only the fourth one is at issue in this case."[14] *Id.*

In *Richardson*, the Court held that the good faith exception applied. The Court declared:

> If [the detective's] affidavit had not been incorporated into the warrant, the good faith exception would not be applicable. But the information in the affidavit, which was incorporated in the warrant, provided the executing officers with detailed information about the robbery under investigation[.] . . . **Although we read the affidavit as seeking authorization to search for everything on the phone, an officer reading the affidavit reasonably could have interpreted it as limiting the search for evidence of the crime under investigation**[.] . . . **Until today, this Court has not analyzed whether a cell phone search warrant that allows officers to search an entire phone for evidence of a particular crime satisfies the particularity requirement.** Courts around the country have answered this question differently. *Compare*, *e.g.*, [*Burns v. United States*, 235 A.3d 758, 774-75 (D.C. 2020)] (search warrant invalid for lack of particularity where it authorized officers to search for "all records" and "any evidence" on the phones related to violations of the first-degree murder statute), *with State v. Johnson*, 576 S.W.3d 205, 222 (Mo. Ct. App. 2019) (citing cases for the proposition that "the particularity requirement in a warrant authorizing the search of all data or all files in a cell phone is met so long as the warrant constrains the search to evidence of a specific crime"). In this opinion, we have stated that, in this case and with respect to the vast

[14] Appellant contends that there was not a substantial basis for the issuing judge to find probable cause (the third *Leon* exception), but, as we previously explained, we hold to the contrary.

> majority of Maryland cell phone search warrants, the answer to that question is "no." But we cannot fault the officers who executed this search warrant for thinking that the answer was "yes."
>
> In sum, the warrant – as supplemented by the incorporated affidavit – was not so facially deficient that the executing officers acted unreasonably in relying on it. Thus, the good faith exception to the exclusionary rule applies here. For this reason, we conclude that the circuit court properly denied Richardson's motion to suppress the fruits of the warrant to search the T-Mobile iPhone SE.

Richardson, slip op. at 42-43 (footnotes omitted) (emphasis added).

Because the affidavit in this case similarly could be read as limiting the search of appellant's cell phone to evidence of the specific crimes alleged, we hold that the executing police officers acted in reasonable reliance upon that warrant. Moreover, because a similarly overbroad warrant was upheld in *Moats*, 455 Md. at 705-06, we conclude that the executing officers reasonably relied upon binding appellate precedent, and for that additional reason, the good faith exception applies in this case. *See Kelly*, 436 Md. at 426 (concluding that "'binding precedent does not require that there be a prior appellate case directly on point, *i.e.*, factually the same as the police conduct in question'" (quoting *Kelly v. State*, 208 Md. App. 218, 248 (2012))).

II.

Parties' Contentions

Appellant contends that the evidence was insufficient to sustain his conviction for retaliating against a witness for reporting a crime under Criminal Law Article ("CL") § 9-303. He asserts that there was insufficient evidence to conclude that Barrientos

"actually *reported* a crime" and that, furthermore, even assuming she made a report, that the behavior alleged "constituted a crime."

As for *reporting* a crime, appellant asserts that, although CL § 9-303 does not, itself, define the term "reporting," that term is defined by inference in a closely related section, CL § 9-301(d)(3), which defines the term "witness" as "a person who . . . has reported a crime or delinquent act to a law enforcement officer, prosecutor, intake officer, correctional officer, or judicial officer[.]" Thus, according to appellant, reporting a crime requires that the witness report to a law enforcement official, not merely to a lay person such as V. Appellant claims further support for this interpretation in *Wholey v. Sears Roebuck*, 370 Md. 38 (2002), a (civil) wrongful discharge case in which the Court of Appeals interpreted the statutory predecessor to CL § 9-303 as applying only where the witness reports a crime to law enforcement.

As for whether Barrientos actually reported a *crime*, appellant contends that, whereas "her observations perhaps raised a suspicion that a crime *may have* occurred," they "were equally susceptible to an inference that a crime did not occur." Therefore, he contends, "the State presented insufficient evidence that any report by Barrientos—if there even was one under § 9-303—was a report of a crime."

The State counters that "Barrientos was clearly a witness in every sense of the word" and that "[s]he need not have been an eyewitness to the crime to be considered" as such. Furthermore, according to the State, it was unnecessary to show that Barrientos reported evidence of a crime to law enforcement; rather, according to the State, Barrientos's statements to the victim sufficed under CL § 9-303 to constitute "reporting a crime."

Facts Pertaining to this Claim

The only evidence that Barrientos spoke with law enforcement officers, prior to the date appellant threatened her, was the following testimony of Detective Savage during direct examination:

> [PROSECUTOR:] Did you speak with Sandy Barrientos about what happened in this case?
>
> [DET. SAVAGE:] Briefly. I -- once I obtained notes from officers on scene from that day that spoke with Ms. Barrientos and Mr. Smith, I was --

This testimony was admitted for a non-hearsay purpose, its effect on the hearer.

In his motion for judgment of acquittal, appellant's counsel argued, regarding witness retaliation:

> As to Count 2, the witness retaliation, I think that there is insufficient evidence at this stage for that case for the following reasons. One, there has been no evidence that Ms. Barrientos ever reported this case to the police or law enforcement authorities, which under the definitions in 9-301 of the Criminal Law Article, I believe it's definition C where it talks about a witness -- there is no definition of reporting or time in that part of the statute.
>
> But one of the definitions of witnesses talks about the person who reports a crime, and then lists, basically like a judge, sheriff's department, investigator or some sort of authority. And there's no evidence that Ms. Barrientos did that before Mr. Mazariego allegedly threatened her on November 5th. I believe the testimony was that she didn't talk to the police until November 19th. And that is -- the language of the statute makes clear it has to be in retaliation. It can't be preemptive. I believe that's a different statute.
>
> Second, I believe Ms. Barrientos' testimony is insufficient to show any retaliation. Her testimony was somewhat unclear, but according to her, Mr. Mazariego wanted her to get, to write a letter exonerating him, and was not -- and to the extent that there were threats, that that was the purpose of those threats, not to punish her for any previous retaliation. There's no information, evidence that he knew that she had already reported, that she had reported this as a crime.

Additionally, additionally I believe the evidence is insufficient to show -- and I guess the other point I would make is that her testimony, based on what she observed, is basically that Mr. Mazariego came in, was sweaty and possibly disheveled, and said that he found her on the side of the road. There is no other evidence that he thought that she observed any sort of criminal activity.

The State countered:

For the witness retaliation, you know, the definition of witness in 301 includes, is a witness means a person who, and then the first prong is, has knowledge of the existence of facts relating to a crime or delinquent act. So, is Sandy Barrientos truly a witness? The statute that [he's] charged under is 9-303, which prohibits retaliation, including threatening or threatening to harm a witness through reporting a prior delinquent act.

Now as [defense counsel] said, there is no definition of what reporting is. I would ask Your Honor to construe the statute in the way that it's written. If the legislature had intended for it to be solely for law enforcement, it would have been written solely reported to law enforcement. It does not say that. None of the case law says that.

I also looked through the text of the bill. I looked through the notes, the legislative history, the case law, and there's not one suggestion in dicta for a holding, nothing in the notes that said a report must be made to a law enforcement agency or a to a federal agency.

The purpose of this law is to prevent a defendant from going back on behalf of defendants from impeding an investigation or the administration of justice. Now part of that is that a victim is often the person who reports to the police. And we have testimony that Sandy reported what she saw and what she heard to the victim, who then reported that to the police.

That's corroborated by the fact that Detective Savage then started going trying to talk to Sandy based on what had been reported to [V.] and what [V.] then reported to the police. So the State has met these elements, based on the State's reading. There is case law I can refer Your Honor to but it doesn't address the issue of what reporting, there's no definition. So I would ask Your Honor to give it it's common meaning, and to give it the meaning that the State believes makes sense in this context.

The trial court denied the motion, declaring:

> Okay. All right. As to 9-303, there is a definitions report. I was looking at it. There is some case law that has to do when someone threatens someone to testify. But in this case, I think the description of what occurred shortly thereafter, I think it was prior to the report in this case. And that's for the jury to decide.
>
> So, the -- I guess the timing is a little vague. And so, the jury could find that he was threatening her not to tell Sandy that -- or not to give a spoken or written account of something that one had occurred or done or investigated. And so, we have to assume that unless there is a specific meaning, that it's the normal meaning with regards to a word when they enact the legislature, unless there's another statute, and no one's directed me to another statute.
>
> So, I will say that it's not overwhelming evidence, but I do believe that it's evidence enough now to, at this point in time, the judgment focused on acquittal. . . .

The circuit court thereafter instructed the jury on witness retaliation as follows, without objection:

> The defendant is charged with the crime of retaliation, retaliating against a witness for reporting a crime. A person commits this crime when he intentionally threatens to harm another with the intent of retaliating against a witness for reporting a crime.
>
> In order to convict the defendant of this offense, the State must prove that the defendant intentionally threatened to harm Sandy Barrientos, that Sandy Barrientos was a witness to a crime, that the threats were intended to retaliate against Ms. Barrientos for reporting a crime, and that the crime Ms. Barrientos witnessed was a felony.
>
> Witness means a person who has knowledge of the existence of the facts relating to a crime or delinquent act. And rape is a felony.

In closing argument, the State relied upon the notion that it was sufficient that Barrientos "report" the crime to V., who, in turn, notified the police:

> So let's talk about the witness retaliation. So the timeline is important here. Sandy and Cornelius see [V.] passed out in the truck. They then, you know, assist the defendant in getting her inside, I mean, she's shirtless. They

then in the days following, both [V.] and Cornelius, I'm sorry, Sandy and Cornelius tell [V.] what they saw that night, the facts that they witnessed, and they also reported to her what they heard, what the defendant told them.

So based on what they reported to [V.], [V.] called the police. Based on what [V.] tells Detective [Savage], Detective [Savage] starts attempting to contact Sandy Barrientos. On November 4th, this is an important date, on November 4th, Detective [Savage] says that he bangs on her door. That Sandy comes to the door, but doesn't answer. She talks to him through the door, that he leaves a card, and he tells her that he wants to talk to her about this case. But he says that she declines to talk about it at that time.

The next day, the defendant shows up at Sandy Barrientos' apartment. Now, why did he do that? They're not friends, certainly he, there has been no testimony that he and Sandy had any kind of independent friendship. At this point Sandy had spoken to [V.], but Sandy hadn't spoken to the police,[15] but when the defendant went there, he went there to get her to write him a letter that would get him out of trouble, or as she testified, get him so that he wouldn't have to go to jail. Why would the defendant think that Sandy Barrientos could write that letter? Why of all the people that live in that complex, would he think that some woman who he is not friends with could write a letter that would get him out of trouble? He knew that because she was a witness to what happened. He knew that because she was there. He knew that because Sandy saw some of what happened, and he knew that because Sandy told [V.], and then the police, after Sandy told [V.], [V.] told the police, and then the police started looking for Sandy. So the inference that you can draw is that when the police were looking for Sandy, it was because they had learned that Sandy had been a witness.

Sandy was a witness because a witness is a person who has knowledge about the details of a crime. So when the defendant went there, he knew, when he went to her house on November 5th, he knew that she had talked about what happened, and that the police were looking to talk to her because she had reported it to someone. In this case, all the testimony establishes that she had reported it to the victim, [V.], who then reported it to the police.

Now, when he went to Sandy's house, he went there w[hile] she was alone. She didn't have anyone there with her. She had her one year old. He told her that he wanted her to write a letter to get him out of trouble, and then he told her that he could kill her, or -- he said, I believe his exact words were he could kill someone, or he could pay someone to kill someone, and her that

[15] As we explained, that is not consistent with Detective Savage's testimony.

> the day after the police banged on her door about this case. So you can draw your own inference of the intent. The intent is clearly to retaliate against her for having reported what he did. The intent is to intim[id]ate her, and prevent her from telling the police what she saw as a witness. That goes both to her credibility, and it also goes to this other crime of retaliating against a witness.
>
> So what detail do we have? We have one piece of physical evidence in this case, and that is this picture, which you will have back with you in the jury room, this is a picture that was taken off the defendant's phone. This is Sandy Barrientos' driver's license. Now, why is this important? Well, first of all, why on earth is that picture on that defendant's phone? He's not her friend. Even if he were her friend, why would he be taking pictures of driver's license. That is the piece of evidence that proves that what she's saying is true. She said that the defendant threatened her, and that he then made her pull out her license, and he took a picture of it, and that picture was on his phone. We have heard nothing. She was on the stand. She was subject to cross-examination. To questions about why a picture of her driver's license would end up on the defendant's phone. There was no explanation for that. We have heard absolutely nothing except the only story that makes sense, which is what, which is what Sandy told us, that the defendant came into her home uninvited, tried to get himself out of trouble, made threatening comments, and then took a picture of her as part of that threat, took a picture of her license so that he knew who she was, knew where she lived, and he kept that on his phone, and the police found that on his phone.

Analysis

The test we apply, in determining whether the evidence was sufficient to sustain a conviction, is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *See, e.g.*, *Howling v. State*, 478 Md. 472, 507 (2022) (recognizing that Maryland has long applied the *Jackson* standard); *see Rivera v. State*, 248 Md. App. 170, 177-83 (2020) (setting forth the history of appellate review of evidentiary sufficiency claims from 1950 to the

present).[16] In applying this test, we consider both direct and circumstantial evidence, and we do not assess the credibility of the witnesses or otherwise engage in weighing the evidence adduced. *Howling*, 478 Md. at 507.

To Whom Must a Witness Report a Crime

A principal point of disagreement between the parties is the meaning of "report" in the witness retaliation statute, and specifically, *to whom* must a witness report to fall within the scope of the statute. The witness retaliation statute provides in relevant part:

> (a) A person may not intentionally harm another, threaten to harm another, or damage or destroy property with the intent of retaliating against:
>
> (1) a victim or witness for:
>
> (i) giving testimony in an official proceeding; or
>
> (ii) reporting a crime or delinquent act.

Md. Code (2002, 2012 Repl. Vol., 2020 Supp.), CL § 9-303(a).[17]

Witness is defined in CL § 9-301(d):

> (d) "Witness" means a person who:
>
> (1) has knowledge of the existence of facts relating to a crime or delinquent act;
>
> (2) makes a declaration under oath that is received as evidence for any purpose;

[16] In Maryland, prior to 1950, such a claim was not cognizable on appeal. *Rivera*, 248 Md. App. at 177.

[17] The identical statute is now codified at the 2021 Replacement Volume. Throughout this opinion, all statutory references, unless otherwise noted, are to those versions of the statutes in effect at the time of the offenses.

> (3) has reported a crime or delinquent act to a law enforcement officer, prosecutor, intake officer, correctional officer, or judicial officer; or
>
> (4) has been served with a subpoena issued under the authority of a court of this State, any other state, or the United States.

Although "witness" is a statutorily defined term, and it is undisputed that Barrientos qualified under the definition as a "witness," the statute does not define the term "report." The only decisional law addressing the question is *Wholey v. Sears Roebuck*, *supra*, 370 Md. 38, a civil case. Wholey had been the Security Manager at the Sears store in Glen Burnie, Maryland. *Id.* at 43-44. He suspected the Store Manager of theft and notified his superior, Eiseman, the District Manager for Security, who approved his suggestion to install a video camera to record surreptitiously the Store Manager's activity. *Id.* at 44.

Eiseman's superiors, however, disapproved of Wholey's video surveillance of the Glen Burnie Store Manager. *Id.* at 44-45. Wholey was fired from his at-will position and brought a civil action against Sears, alleging wrongful termination.[18] *Id.* at 45-46. Although Wholey prevailed at trial, on appeal we reversed, holding that "no clear mandate of public policy was implicated in Sears's termination of Wholey's employment, as a matter of law." *Sears, Roebuck & Co. v. Wholey*, 139 Md. App. 642, 660 (2001), *aff'd*, 370 Md. 38 (2002). Wholey filed a petition for writ of certiorari, which the Court of Appeals granted, "to consider whether there exists a clear public policy mandate in Maryland with respect to the investigation and reporting of criminal activity such that

[18] Wholey raised additional claims that are not relevant for our purposes. *Wholey*, 370 Md. at 46.

terminating an at-will employee for his/her involvement in investigating the possible criminal activity of another employee constitutes a wrongful discharge." *Wholey*, 370 Md. at 47-48; *Wholey v. Sears*, 367 Md. 88 (2001) (granting certiorari).

In that context, the Court of Appeals interpreted the statutory predecessor to CL § 9-301 to 9-303, Maryland Code (1957, 1996 Repl. Vol., 2001 Supp.), Art. 27, § 760 to 762. The Court declared that a witness "who '[h]as reported a crime or delinquent act to a law enforcement officer, prosecutor, intake officer, correctional officer, or judicial officer' pursuant to Section 760(d)(3) [now CL § 9-301(d)(3)] is a witness against whom retaliation is prohibited for 'reporting a crime or delinquent act'" under Section 762(a) (now CL § 9-303(a)(1)(ii)). *Wholey*, 370 Md. at 58-59. The Court thus derived, from the statute, "a clearly definable public policy goal[,]" that "the Legislature sought to protect those witnesses *who report suspected criminal activity to the appropriate law enforcement or judicial authority* from being harmed for performing this important public task." *Id.* at 59.[19] Because Wholey had only internally notified store security supervisors, and had not externally notified law enforcement agencies, of his suspicions concerning the store manager, the Court concluded that Wholey was not protected under the public policy exception necessary to prove his wrongful discharge claim,[20] and it therefore affirmed our

[19] We note that *Wholey* was a plurality decision. However, it appears that subsequently, a majority of the Court of Appeals ratified that decision, making it binding on us. *Porterfield v. Mascari II, Inc.*, 374 Md. 402, 425 (2003) (characterizing the decision in *Wholey* as a holding).

[20] In the absence of a "clear mandate of public policy," an at-will employee generally may be discharged for any reason. *Wholey*, 370 Md. at 48, 50-51.

decision, reversing the judgment that had been rendered in favor of Wholey. *Wholey*, 370 Md. at 56-67.

When we consult dictionary definitions of the verb "report," we find two definitions that are most relevant here. "Report" means "to give an account of: NARRATE, RELATE, TELL[.]" *Webster's Third Int'l Dictionary* ("*Webster's*") 1925 (1976). Another well-known dictionary similarly defines it as "[t]o relate, narrate, tell, give an account of (a fact, event, etc.)." *XIII The Oxford English Dictionary* ("*OED*") 651 (2d ed. 1989). But the second definition of "report" is "to make known to the proper authorities: give notification of[.]" *Webster's* at 1925. Similarly, the OED defines it as "[t]o name (a person) to a superior authority as having offended in some way." *OED* at 651. The State, in effect, urges us to adopt the first definition, akin to the actions of a journalist, according to which a witness may report to anyone, and appellant urges us to adopt the second definition, according to which a witness must report to a law enforcement official.

Consistent with *Wholey*, we hold that the second of these definitions, which directly relates to reporting a crime to law enforcement authorities, is far more in accord with the legislative purpose of the witness retaliation statute. Were we to adopt the State's interpretation (as the circuit court did in this case), gossip between a witness and her neighbors, or even between two co-conspirators, would fall within the sweep of "reporting a crime or delinquent act." That is not a sensible reading of the statute.

Moreover, the Court of Appeals has admonished us in the past for reading snippets of a statute in isolation, without reference to related provisions. *See, e.g.*, *Kranz v. State*, 459 Md. 456, 475 (2018) (declaring that our interpretation of a statute, although "perhaps

conforming, at least superficially, to its plain language, ignores the requirement that statutory construction must be reasonable and consistent with the overall legislative scheme and must not render any other provision of the scheme meaningless or nugatory"). Here, in adopting the definition of "report" to require reporting "to the proper authorities" or "to a superior authority," we harmonize CL § 9-303(a)(1)(ii) with CL § 9-301(d)(3), which expressly refers to "a person who . . . has reported a crime or delinquent act to a law enforcement officer, prosecutor, intake officer, correctional officer, or judicial officer[.]" Thus, we reject the State's assertion that Barrientos, in describing appellant's actions on the night of September 5 to the victim, was "reporting a crime or delinquent act," within the meaning of CL § 9-303(a)(1)(ii).

Given our definition of "reporting a crime or delinquent act," the timing of the reporting at issue is critical because, as the Court of Appeals observed in *Tracy v. State*, 423 Md. 1, 15-16 (2011), CL § 9-303 proscribes "conduct undertaken with the intent to retaliate against a person who *has* reported a crime, or *has given* testimony in a criminal case," whereas CL § 9-302 (the witness intimidation statute) proscribes "conduct undertaken with the intent to prevent a victim or witness from reporting a crime that he or she has not yet reported and/or to prevent a victim or witness for testifying in a proceeding that has not yet taken place." *Tracy*, 423 Md. at 16. Thus, to prove that appellant retaliated against Barrientos, it was necessary that there be some evidence that she reported the crime prior to November 5, 2020, the date when appellant threatened her.

Here, according to appellant, Barrientos did not report a crime or otherwise act as a witness until after he threatened her, and therefore, the evidence was insufficient to sustain

his conviction of witness retaliation. Although the evidence to sustain this conviction is thin, we hold that it was legally sufficient.

Detective Savage testified that Barrientos had spoken with police officers in September 2020, around the time when V. first called police to report the rape. Although no evidence was introduced as to the subject of the conversation between Barrientos and the first-responding police officers, it is reasonable to infer that Barrientos was asked, and told the officers, what she had observed. In other words, the fact finder was permitted to infer that Barrientos reported her knowledge of the events of September 5, 2020, that is, that she reported a crime. That leads us to the other principal point of contention between the parties, that is, what must a witness report so as to establish "reporting a crime"?

What Must a Witness Report

Appellant seemingly would have us impose an unrealistic requirement that a witness, to be eligible under the witness retaliation statute, must possess and report knowledge of all elements constituting a crime. Thus, according to appellant, because Barrientos did not observe him in the act of raping V., whatever Barrientos reported merely "generated suspicion of a possible crime" but was not "evidence of a crime." Such a cramped interpretation of what a "witness" must report does not comport with reality.

A simple example illustrates the point. Suppose the critical issue in a murder trial is the defendant's criminal agency as the trigger puller, and the State produces a witness who places the defendant at the scene of the shooting. Simply because that witness may not have first-hand knowledge touching on other elements of the crime charged (for

example, self-defense, which, if not disproven, would negate malice) does not, in our view, render him or her any less of a witness.

A "witness" is "'one who gives evidence in a cause before a court; and in its general sense includes all persons from whose lips testimony is extracted to be used in any judicial proceeding[.]'" *Witness*, BLACK'S LAW DICTIONARY (11th ed. 2019) (quoting 97 C.J.S. *Witnesses* § 1, at 350 (1957)). Furthermore, to be relevant and therefore presumptively admissible, Md. Rule 5-402, such evidence need only "hav[e] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. In the absence of anything more specific in the statute, and in accordance with the definition of evidence, we hold that, to report a crime within the meaning of the witness retaliation statute, it is only necessary that the witness's account be inculpatory of the defendant, not that it establish every element of a crime. Here, given Barrientos's testimony at appellant's trial, we hold that the fact finder was permitted to infer that she reported to the first-responding police officers in September 2020 facts consistent with her subsequent testimony, and therefore, she was "reporting a crime" within the meaning of CL § 9-303(a)(1)(ii).

For these reasons, we conclude that the evidence was sufficient to sustain appellant's conviction under the witness retaliation statute, CL § 9-303(a)(1)(ii).

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.