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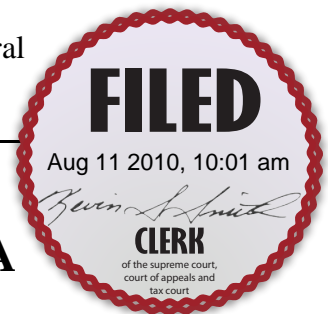
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**IN THE
COURT OF APPEALS OF INDIANA**

BRIAN N. STEARMAN,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 29A02-1002-CR-214

APPEAL FROM THE HAMILTON CIRCUIT COURT

Honorable Paul A. Felix, Judge

Cause No. 29C01-0806-FC-47

August 11, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Brian N. Stearman appeals his conviction for Child Solicitation,¹ a class C felony. Specifically, Stearman argues that the trial court erred in admitting an online conversation into evidence from Yahoo! Instant Messenger that was printed from a police computer. Stearman also maintains that the evidence was insufficient to support his conviction and the State failed to rebut his defense of entrapment. Concluding that the evidence was sufficient to support Stearman's conviction and finding no other error, we affirm the judgment of the trial court.

FACTS

On July 12, 2007, Noblesville Police Detective Charles Widner was working undercover in an online chat room posing as a fifteen-year-old girl in furtherance of the Child Exploitation Task Force. Detective Widner attached a photo of a young female to the profile and used the Yahoo! Instant Messenger feature with the user name of "sadams858." Tr. p. 82, 84.

At approximately 11:00 a.m., Stearman initiated a conversation with Detective Widner with an "instant message" that stated, "you are cute." Id. at 89. Detective Widner responded with "thanks . . . asl?"² Tr. p. 91, State's Ex. 2. In response, Stearman wrote, "I'm brian, in fishers. 36, single . . . with pic." Id. at 92. Detective Widner then identified himself as "Sandy," a fifteen-year-old girl from Fishers. Id. The chat continued, the substance of which is as follows:

¹ Ind. Code § 35-42-4-6(c)(1).

² According to Detective Widner, "asl" means "age, sex, location." Tr. p. 91.

Defendant: so . . . I'm kinda curious . . . but being younger, and on yahoo . . . don't you run into an awful lot of overly horny guys like me? lol.

Sandy: sometimes . . . but most of the time I just blow them off but a few that r cute I talk to a lot. . . . even met a few.

Defendant: did you guys just meet, or hook up?

Sandy: just met at first but then hooked up. . . .

Defendant: well, I can safely say that from your pic i find you very attractive.

Sandy: Same here ur a hottie!!!

Sandy: people just get so hung up on age . . it drives me crazy . . all my friends hook up with or date older guys. . . .

Defendant: well . . . I'm with you. I think its all about the person. But unfortunately we live in a pretty con[s]ervative part of the country. . . and the law gets a bit strict with us older guys and younger girls.

Sandy: I don't even worry about that stuff. . . what I do is my business. . . .

Defendant: so are you at home now? . . .

Sandy: yep. . . [and] bored. . . .

Defendant : well . . . I'm home, bored AND horny.

Defendant: so you are horny too? . . .

Sandy: a little bit. . . .

Defendant: who is home there?

Sandy: no one . . . just me.

Defendant: hmmm.

Sandy: hmmm what?

Defendant: definitely makes me think.

...
Defendant: believe me . . . there are a lot of things I'd suggest if I wasn't so paranoid.

Sandy: well its cool. . . we can chat as long as u want to. .

Sandy: no reason to be scared of me im to cute. lol

Defendant: lmao.³

Defendant: its kinda dangerous. I'm so horny I'd really wanna come and take advantage of you being home alone. . . .

Sandy: u can come over if u like or meet me somewhere but, I cant stay out long. . if rather do that in the morning when i have all day. . . .

Defendant: well . . . for all I know i'd be walking into a police sting operation.

Defendant: lol

Sandy: lol not at my house

...

Defendant: so who do you live with?

Sandy: just my mom. . .

Defendant: when does she get home?

Sandy: 3 pm

Defendant: k

Defendant: im so horny i feel like I'm about to explode

Sandy: awesome.

Defendant: you?

³ Detective Widner testified that "lmao" means "laughing my ass off." Tr. p. 110.

Sandy: I am but cant do anything today. . ;(

Defendant: whats wrong?

Sandy: my mom will be home in an hour.

State's Ex. 2.

Defendant Widner recorded the entire chat by using "copy and paste" from the "instant message box as it appear[ed]," saved it to a Word document, and placed that document in a folder. Tr. p. 93. The document includes the screen names, time of each message, and all instant messages.⁴

The next morning, Stearman initiated contact again with "Sandy:"

Defendant: you home alone again?

Sandy: yep.

Defendant: apt or house?

Sandy: apt.

. . .

Sandy: u working today???

Defendant: kinda

Defendant: but I can be free if I need to be.

Sandy: really cool.

Defendant: do you have nosey neighbors? lol.

Sandy: lol yes and I hate the bitch. . . . but there r ways around her!!! . . .
I just go out the back LOL . . . she cant see that.

⁴ Detective Widner used this method instead of the instant messenger archive because Yahoo! Instant Messenger does not record the initial contact. Tr. p. 92-93.

...

Sandy: I told u about me and Amy doing stuff.. Sooo..

Defendant: well . . . I'd like to watch you guys doing stuff . . . and I'd like to help . . . and I'd like to have you guys figure out some stuff to do to [m]e.

...

Defendant: well . . . you have to admit, there is an element of "too good to be true" about this situation. certainly its just about every guy's fantasy

Sandy: wow that's like deep.. lol. . . we just want to have some fun. . now all this deep stuff. lol.

Defendant: nah. Its cool . . . so what apts do you live in?

Sandy: sunblest.

...

Sandy: [Amy] was like hey whats he want to do and im like asking u and then like telling her .. he wont tell and shes like that's lame!! lol

Defendant: well . . . other than kissing and touching . . . I love oral (both giving and receiving) . . . and I like going all the way . . . but I think there's a lot more stuff one can do than just that

Sandy: awesome. . that's cool..

Defendant: i love to finger..

Sandy: is that what u want us to do for u??

Defendant: its definitely on my mind.

...

Sandy: Amy is talking to me. .

Defendant: I'm not some weirdo. . . I'd love to all touch each other...

Defendant: what is amy doin

Sandy: getting ready. . . which I need to do. .

Defendant: k

Sandy: lol

Defendant: well give me your address and phone.⁵

Defendant: what, you guys haven't done ANY playing? . . . while waiting

Sandy: nope been waiting on u

Defendant: ok. tell me what apt and building and street you are on. ill sneak over.

Sandy: u sure?? . . . I live in sunblest on Parkview ln . . . but its better to meet us at CVS than we can all go over and sneak in the back..

Defendant: wont it look kinda suspicious . . . two younger chic[k]s getting in my car?

Sandy: lol umm not really into us..

Defendant: lol. Its not YOU guys I'm worried about. lol

Sandy: what???

Defendant: I just have to be careful . . . that's all . . . im older . . . you aren't.

Sandy: ohh its all good. . . .

Defendant: I'd rather meet you guys somewhere else. Inside the complex

Sandy: maybe by the pool and park??

Defendant: ok. Like 10 min.

State's Ex. 4.

⁵ At this point, Stearman ended the conversation but returned and initiated additional conversation later that same day.

Detective Widner used the same procedure as the day before to record the chat. After obtaining some information about Stearman from the Bureau of Motor Vehicles, Detective Widner and several other police officers went to the apartment complex and observed Stearman driving his vehicle near the pool. The officers apprehended Stearman and recovered three condoms from his glove box during an inventory search of the vehicle.

Thereafter, Detective Widner obtained and executed a search warrant for Stearman's residence and seized nine computers. Detective Widner performed an "onsite preview" of the computers at the police station and found Yahoo! Instant Messenger on two of them. Tr. p. 121, 139, 149. Thereafter, Detective David Kimm examined the two computers and found the Yahoo! archive chat from July 13 between Stearman and Detective Widner.

Stearman was charged with child solicitation, a class C felony. Prior to trial, Stearman filed a motion in limine to bar the admission of the Word document memorializing the chat, claiming that "Detective Widner had the ability to save the chat, in a Yahoo archive, but apparently failed to do so." Appellant's App. p. 63. Thus, Stearman claimed that because "the State has failed to save the [electronically stored information] in [its] original form, it is impossible for the State to authenticate the documents as required by Rule 901 of the Indiana Rules of Evidence." Id. at 63. Stearman also claimed that because the chat was "pasted into a different format," its admission into evidence would violate the "best evidence" rule. Id. at 64-65. Following a hearing, the trial court denied Stearman's motion in limine.

During Stearman's jury trial that commenced on January 12, 2010, Detective Widner testified that State's Exhibit 2 is the "chat log from July 12, 2007." Tr. p. 94. He verified that the exhibit is "a true and accurate and full and complete copy of the exact chat that [he] had with" Defendant." Id. at 94. Detective Widner further testified that State's Exhibit 4 is "the chat log from July 13, 2007," and is "a complete and accurate copy of the full chat log." Id. at 209.

Detective Widner explained that he attempted to retrieve the chats from the archive in the computer, but the instant messenger program was removed, and "it took off the archive chats with it as well." Id. at 95-96. Stearman objected to the admission of the chats on the same grounds that he set forth in the motion in limine. The trial court overruled Stearman's objection and following the State's case-in-chief, Stearman rested without presenting any evidence. The jury found Stearman guilty as charged and he was subsequently sentenced to three years of incarceration with 180 days executed and two-and-one-half years suspended with two years on probation. Stearman now appeals.

DISCUSSION AND DECISION

I. Admission of Online Chat Documents

Stearman first argues that his conviction must be reversed because the trial court erred in admitting documents of the online conversation that he had with "Sandy." Appellant's Br. p. 1. Specifically, Stearman claims that the State failed to adequately authenticate the "chat logs" and the admission of the documents that were printed from a police computer violated the best evidence rule because they were "untrustworthy duplicates." Id.

We initially observe that the decision to admit or exclude evidence is within the trial court's sound discretion and is "afforded a great deal of deference on appeal." Hauk v. State, 729 N.E.2d 994, 1001 (Ind. 2000). We will not reverse that decision absent a manifest abuse of discretion resulting in the denial of a fair trial. Edwards v. State, 724 N.E.2d 616, 620 (Ind. Ct. App. 2000).

A. Authentication

Notwithstanding Stearman's contention that Detective Widner's testimony failed to provide sufficient authentication for the admission of the printed documents, we note that authentication is established by evidence that is sufficient to support a finding that the matter in question is what the proponent claims it is. Ind. Evidence Rule 901(a). This requirement is satisfied by "[t]estimony of a witness with knowledge that a matter is what it is claimed to be." Evid. R. 901(b). Absolute proof of authenticity is not required. Fry v. State, 885 N.E.2d 742, 748 (Ind. Ct. App. 2008), trans. denied. Thus, when the evidence establishes a reasonable probability that an item is what it is claimed to be, the item is admissible. Thomas v. State, 734 N.E.2d 572, 573 (Ind. 2000).

At trial, Detective Widner testified that the entire online conversation that he participated in was copied onto a Word document and saved in a folder. Tr. p. 93-93, 109. And, as noted above, the exhibits admitted at trial were the printouts of the chat that were saved to the file folder. Detective Widner knew that the printed conversation is what it was claimed to be. Id. at 89, 92. Thus, we conclude that Detective Widner validly authenticated the exhibits pursuant to the requirements of Evidence Rule 901(b)(1).

B. Best Evidence

In a related issue, Stearman maintains that the printouts of the online chat failed to satisfy the requirements of the best evidence rule. More particularly, Stearman claims that because the chat log was “not the original, but instead is merely a copy pasted into a different format,” the evidence should have been excluded. Appellant’s Br. p. 7.

In addressing this contention, we note that the best evidence rule requires an original writing or recording “[t]o prove the content” of a writing or recording. Ind. Evidence Rule 1002. However, in the context of information stored in a computer, “any printout or other output readable by sight, shown to reflect the data accurately is an ‘original.’” Ind. Evidence Rule 1001(3).

In this case, the recorded online conversation was saved in a Word document and stored in a folder. Tr. p. 93. The document identifies the screen names, the time of each message, and the content of all instant messages. Id. at 94. And Detective Widner testified that the printouts accurately reflected those conversations. Id. Thus, because the computer printouts constitute “originals” in accordance with Evidence Rule 1001, we conclude that the requirements of the best evidence rule were satisfied. See Laughner v. State, 769 N.E.2d 1147, 1159 (Ind. Ct. App. 2002) (holding that printouts of an online conversation between the defendant and an undercover detective could be found to be the best evidence where the detective testified that he saved the conversations with the defendant, and the printout document accurately reflected the content of those conversations), overruled on other grounds, Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007).

In addition to the above, we also note that an original is not required if the original has been lost or destroyed “unless the proponent lost or destroyed [the original] in bad faith.” Ind. Evidence Rule 1004(1). Here, the evidence showed that although Detective Widner attempted to retrieve the chats from the archive in his computer, the instant messenger program was removed, and “it took off the archive charts with it as well.” Tr. p. 95-96. Hence, the instant message conversations no longer existed, and the only recording of that information is the copy that Detective Widner saved. Stearman has made no showing that Detective Widner acted in bad faith when he saved the conversations by copying them into a Word document file rather than by saving the Yahoo! Instant Messenger archive. Thus, even if we concluded solely for the sake of argument that the computer printouts were not “originals,” they were nonetheless admissible.

Finally, we reject Stearman’s reliance on United States v. Jackson, 488 F. Supp. 2d 866 (D. Neb. 2007), for the proposition that the online conversation saved in the Word document was inadmissible. As noted above, Detective Widner testified that State’s Exhibits two and four constituted the entire “chat” with Stearman. Tr. p. 93-94, 109. On the other hand, it was observed in Jackson that there were “numerous examples of missing data, timing sequences that do not make sense, and editorial information.” Id. at 871. Such was not the case here and, as a result, we conclude that the trial court did not abuse its discretion in admitting the printouts into evidence.

II. Sufficiency of the Evidence

Stearman argues that the evidence was insufficient to support his conviction. Specifically, Stearman claims that even assuming that the trial court did not err in admitting the chat log, the evidence failed to demonstrate that a solicitation occurred. In addressing Stearman's challenge to the sufficiency of the evidence, we respect the fact-finder's exclusive province to weigh the evidence and therefore neither reweigh the evidence nor judge witness credibility. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict. Id. We will affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id. To convict Stearman of child solicitation as a class C felony, the State had to prove beyond a reasonable doubt that he knowingly or intentionally solicited an individual who he believed to be a child at least fourteen years of age, but less than sixteen years of age, to engage in: "(1) sexual intercourse; (2) deviate sexual conduct; or (3) any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person." Ind. Code § 35-42-4-6(c). "Solicit" is defined as "to command, authorize, urge, incite, request, or advise an individual . . . by using a computer network." I.C. § 35-42-4-6(a)(4).

Stearman acknowledges that although the online conversation is replete with discussions regarding sex and the possibility of the encounter being a sting operation, "there are just a few times during the conversation that Stearman uses words that approach solicitation." Appellant's Br. p. 11. In other words, Stearman contends that there is no "urging, inciting or requesting." Id.

Contrary to Stearman's claims, the evidence established that he initiated an online conversation with a person that he believed was a child, expressed his desire to engage in sexual activity with her, and asked if she was home alone. Tr. p. 44, State's Ex. 2, 4. Stearman also asked "Sandy" where she lived, arranged a meeting with her, and drove to that location. Id. Indeed, Stearman went to that location with condoms in his possession. Tr. p. 204. In our view, the evidence established beyond a reasonable doubt that Stearman believed "Sandy" to be a fifteen-year-old child and knowingly solicited her to engage in sexual intercourse or deviate sexual conduct. Thus, Stearman's challenge to the sufficiency of the evidence fails.

III. Entrapment

Finally, Stearman argues that even assuming that his statements in the online conversation amounted to solicitation, the State failed to produce sufficient evidence to disprove the defense of entrapment. Specifically, Stearman asserts that what transpired on July 12 and 13 "was blatant persuasion, and begging by an undercover police detective designed to extract a solicitation for sex from a man who came into the conversation with no predisposition to engage in such talk, and demonstrated that lack of predisposition with continued reluctance." Appellant's Br. p. 14.

When we review a claim of entrapment, we use the same standard that applies to other challenges to the sufficiency of evidence. Ferge v. State, 764 N.E.2d 268, 270 (Ind. Ct. App. 2002). The defense of entrapment is set forth in Indiana Code section 35-41-3-9 (2007), which provides:

(a) It is a defense that:

- (1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and
 - (2) the person was not predisposed to commit the offense.
- (b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

The defense of entrapment turns on the defendant's state of mind, or whether the criminal intent originated with the defendant. Ferge, 764 N.E.2d at 271. Once the entrapment defense is raised, the State bears the burden of showing that the defendant was predisposed to commit the crime beyond a reasonable doubt. Dockery v. State, 644 N.E.2d 573, 578 (Ind. 1994)). The following factors are important in determining whether a defendant was predisposed to commit the charged crime: 1) the character or reputation of the defendant; 2) whether the suggestion of criminal activity was originally made by the government; 3) whether the defendant was engaged in criminal activity for profit; 4) whether the defendant evidenced reluctance to commit the offense, overcome by government persuasion; and 5) the nature of the inducement or persuasion offered by the government. Id.

In this case, the evidence established that Stearman initiated the chat with "Sandy" along with the sexual content of the conversation. State's Ex. 2, 4. Moreover, Stearman showed no reluctance to commit the offense and only expressed a concern about being caught. Id. While Detective Widner provided Stearman with the opportunity to commit the offense of child solicitation, he did not importune him to commit that crime.

Unlike the circumstances in Ferge, where the defendant's entrapment defense prevailed because he declined an opportunity provided by an undercover police officer to pay for sex, Stearman never declined that opportunity. Indeed, as discussed above, Stearman actively participated in arranging the sexual encounter by asking "Sandy" where she lived and then driving to that location. Tr. p. 144. In sum, it is apparent that Stearman demonstrated a predisposition to commit the offense. As a result, we conclude that the State presented sufficient evidence to rebut Stearman's claim of entrapment.

The judgment of the trial court is affirmed.

RILEY, J., and BAILEY, J., concur.