MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Dennis L. Mothersbaugh,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff.

October 7, 2022

Court of Appeals Case No. 21A-CR-2903

Appeal from the Jefferson Circuit Court

The Honorable Donald J. Mote, Judge

Trial Court Cause No. 39C01-2009-F4-1042

Pyle, Judge.

Statement of the Case

[1] Dennis L. Mothersbaugh ("Mothersbaugh") appeals, following a bench trial, his conviction for Level 4 felony child solicitation,[1] and his sentence imposed thereon. Mothersbaugh argues that: (1) there was insufficient evidence to overcome his entrapment defense and to support his conviction; and (2) his sentence is inappropriate. Concluding that there is sufficient evidence to overcome Mothersbaugh's entrapment defense and to support his conviction and that the sentence is not inappropriate, we affirm the trial court's judgment.

[2] We affirm.

Issues

1. Whether there is sufficient evidence to overcome Mothersbaugh's entrapment defense and to support his conviction.

2. Whether Mothersbaugh's sentence is inappropriate.

Facts

[3] In August 2020, the Madison Police Department created an online social media account for a fictitious fourteen-year-old girl named Jaden Reed ("Reed").

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[1] IND. CODE § 35-42-4-6.

Madison Police Department Detective Shawn Scudder ("Detective Scudder") operated the Reed profile. Forty-year-old Mothersbaugh, while operating a social media account under the name Dennis Lloyd, sent a friend request to the Reed profile on August 27, 2020. Mothersbaugh continuously messaged the Reed profile until September 6, 2020.

[4] Mothersbaugh's first message to Reed was "sure do look sexy from behind" followed by an emoji with heart eyes. (Tr. Vol. 2 at 12). The Reed profile clearly displayed her age as fourteen. Further, Reed told Mothersbaugh that she was only fourteen and Mothersbaugh responded that they were "just talking" and that it was "all good." (State's Ex. 3; Tr. Vol. 2 at 15). Mothersbaugh repeatedly referred to Reed as sexy butt or sexy ass and consistently sent kissing and heart emojis. Additionally, Mothersbaugh asked Reed "[w]hy do you only have a picture of that great ass of yours and no other pic[tures][?]" (State's Ex. 3). Mothersbaugh continued to ask Reed for pictures, including one where Reed was giving a thumbs up to the camera. In response, Detective Scudder sent a picture of a young girl taking a picture of herself through a mirror with the camera over her face. Mothersbaugh told Reed that her hair was "long and beautiful" and that he thought "long hair was sexy on a woman" followed by kissing face emojis. (State's Ex. 3).

[5] On September 1, 2020, Mothersbaugh mentioned to Reed that he might be in Madison and that it would "be a plus to meet [her]." (State's Ex. 3). Mothersbaugh mentioned that there was an ice cream place on the waterfront that he enjoyed. The next evening, Mothersbaugh messaged Reed and asked

her what she was doing. When Reed messaged that she was in bed, Mothersbaugh replied "sounds fun." (State's Ex. 3). Mothersbaugh continued by messaging "I can only imagine the possibilities" followed by a heart-face emoji and a kissing-face emoji. (State's Ex. 3). Mothersbaugh followed up this message with "and the pleasure I would have you experience." (State's Ex. 3). Mothersbaugh then asked Reed what she was wearing. When Reed replied with shorts and a t-shirt, Mothersbaugh responded with "I bet you would feel even better . . . meaning when or if I get the chan[c]e to try you on, you would feel amazing[.]" (State's Ex. 3).

[6] A few days later, Mothersbaugh messaged Reed, "[g]etting ready to ride back to Indiana[,] why don't I snatch you up and take you on a bike ride[?]" (State's Ex. 3). When Reed asked Mothersbaugh what they would do, Mothersbaugh replied "hang out with you" and "I'm sure we can figure something out" followed by an emoji holding a finger to the mouth in a shushing gesture. (State's Ex. 3). Later that day, when Reed had told Mothersbaugh a message that she was bored, Mothersbaugh replied, "sounds like you need some excitement in your life" followed by an eggplant emoji. (State's Ex. 3). When Reed responded that she always needed that kind of excitement, Mothersbaugh replied that Reed was a "naughty girl." (State's Ex. 3).

[7] On September 6, 2020, Mothersbaugh began messaging another fourteen-year-old profile named Emily Wyatt ("Wyatt") operated by another Madison Police Department detective. Mothersbaugh began asking Wyatt about taking Wyatt on a ride on his motorcycle. Later that afternoon, Mothersbaugh messaged

Reed and explained that he would be in Madison in a few hours and asked if she still wanted to meet up. When Reed asked if Mothersbaugh was "going to bring that excitement" that Mothersbaugh had talked about, Mothersbaugh replied, "oh yeah[.]" (State's Ex. 3). Reed asked Mothersbaugh if he was bringing condoms and Mothersbaugh responded with a thinking emoji. Reed clarified and reminded Mothersbaugh about the eggplant emoji, and Mothersbaugh responded, "if that's what you want I can." (State's Ex. 3). When Reed responded that she thought that that was the plan, Mothersbaugh replied with "we'll see what happens" followed by a kissing face emoji. (State's Ex. 3).

[8] Mothersbaugh and Reed agreed to meet up at Johnson Lake in Madison. A few hours later, Mothersbaugh told Reed that he was heading that way in a silver Lancer and asked Reed if she was going to be there. Reed explained that she would meet Mothersbaugh at the shelter next to Johnson Lake.

[9] Mothersbaugh arrived at the shelter around 9:30 p.m., and police officers arrested him. Mothersbaugh, after being handcuffed, screamed "I didn't solicit anything!" (State's Ex. 1). Mothersbaugh admitted to the officers that he was meeting a fourteen-year-old girl but stated that he "didn't solicit anything" and that he just wanted to "hang out[.]" (State's Ex. 1).

[10] In September 2020, the State charged Mothersbaugh with Level 4 felony child solicitation. In November 2021, Mothersbaugh filed a motion to dismiss, arguing that the State had violated his due process rights under the Fourteenth

Amendment of the United States Constitution due to the State's use of a fictitious Facebook profile. The trial court denied Mothersbaugh's motion to dismiss.

[11] The trial court held a bench trial in 2021. Mothersbaugh's theory of defense was entrapment. At the bench trial, the trial court heard the facts as set forth above. Additionally, Detective Scudder testified that Mothersbaugh initiated contact with the Reed profile by sending a friend request and a message. Detective Scudder further testified that he did not target Mothersbaugh while operating the Reed profile. Detective Scudder also testified that Mothersbaugh had sent sexual messages to Reed, including eggplant emojis, which signifies "an erect penis." (Tr. Vol. 2 at 14).

[12] Mothersbaugh testified in his defense. Mothersbaugh testified that he had believed from the beginning of the interaction that Reed was a fake profile and that there was "no harm in talking to a fake profile." (Tr. Vol. 2 at 51). Mothersbaugh also testified that his interactions with Reed were "like a game" and that he "was not serious at all[.]" (Tr. Vol. 2 at 54). Mothersbaugh further testified that when he made multiple sexual comments towards Reed, he was just being sarcastic. Mothersbaugh testified that Reed had led him on and was "trying to get [him] to say something" when Reed had asked what they would do when they met up. (Tr. Vol. 2 at 64). Mothersbaugh also testified that when Reed asked about condoms, Mothersbaugh "believed that to be inducement, coercion, and enticement." (Tr. Vol. 2 at 68).

[13] On cross-examination, Mothersbaugh admitted that Dennis Lloyd was his profile and that he made plans to meet up with Reed. Additionally, Mothersbaugh testified that he did admit that he was meeting a fourteen-year-old girl but that he never admitted that he "believed [her] to be real." (Tr. Vol. 2 at 78). Finally, Mothersbaugh testified that he felt induced and entrapped but also testified that "there was no crime committed." (Tr. Vol. 2 at 80).

[14] At the conclusion of the bench trial, the trial court found Mothersbaugh guilty of Level 4 felony child solicitation, Level 4 felony attempted sexual misconduct with a minor, Class A misdemeanor resisting law enforcement, and Class B misdemeanor possession of marijuana. The trial court found Mothersbaugh not guilty of Class C misdemeanor possession of paraphernalia.

[15] At the sentencing hearing, the trial court found as an aggravating circumstance Mothersbaugh's extensive criminal history. Specifically, Mothersbaugh had a string of misdemeanor convictions including resisting law enforcement in 2010 and 2011, operating with a blood alcohol content of .15 or more in 2018, and possession of marijuana in 2018 and 2020. Additionally, the trial court noted that Mothersbaugh had his probation revoked in his resisting law enforcement conviction from 2010. The trial court also found as an aggravating circumstance Mothersbaugh's lack of remorse. Additionally, the trial court also stated:

> As ubiquitous as the internet is and the struggles every parent has on a daily basis with their children being on the internet and the very real possibility that their . . . 14-year-old daughter is on the

> internet and receiving text messages from a grown man, telling them how sexy their butt looks, just leave it at that, that's an aggravating circumstance.

(Tr. Vol. 2 at 120).

[16] Ultimately, the trial court sentenced Mothersbaugh to nine (9) years to be served in the Indiana Department of Correction ("the DOC") for his Level 4 felony child solicitation conviction. In addition, the trial court sentenced Mothersbaugh to thirty (30) days for his possession of marijuana conviction and thirty (30) days for his resisting law enforcement conviction, all to run concurrently with his sentence for his child solicitation conviction. The trial court vacated the Level 4 felony attempted sexual misconduct with a minor conviction due to double jeopardy concerns.

[17] Mothersbaugh now appeals.

Decision

[18] Mothersbaugh argues that: (1) there was insufficient evidence to overcome his entrapment defense and to support his conviction; and (2) his sentence is inappropriate. We address each of Mothersbaugh's arguments in turn.

1. Sufficiency

[19] Mothersbaugh first argues that there is insufficient evidence to overcome his entrapment defense. "We review a claim of entrapment using the same standard that applies to other challenges to the sufficiency of evidence."

Dockery v. State, 644 N.E.2d 573, 578 (Ind. 1994). We neither reweigh the evidence nor reassess the credibility of witnesses. *Id.* Instead, we look to the probative evidence supporting the verdict and the reasonable inferences drawn from that evidence. *Id.* If we find a reasonable trier of fact could infer guilt beyond a reasonable doubt, we will affirm the conviction. *Id.*

[20] INDIANA CODE § 35-41-3-9 provides a definition of entrapment:

> (a) It is a defense that:
>
> > (1) the prohibited conduct of the person was a 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.

A defendant does not need to formally plead the entrapment defense; rather, it is raised, often on cross-examination of the State's witnesses, by affirmatively showing the police were involved in the criminal activity and expressing an intent to rely on the defense. *Wallace v. State*, 498 N.E.2d 961, 964 (Ind. 1986). The State then has the opportunity for rebuttal, its burden being to disprove one of the statutory elements beyond a reasonable doubt. *Riley v. State*, 711 N.E.2d 489, 494 (Ind. 1999). There is no entrapment if the State shows either: (1)

there was no police inducement; or (2) the defendant was predisposed to commit the crime. *Id.*

[21] Mothersbaugh contends that Detective Scudder induced him to commit child solicitation during the online conversations between Mothersbaugh and Reed. The State, on the other hand, argues that Detective Scudder did not induce Mothersbaugh. We agree with the State.

[22] "To rebut the inducement element, the State must prove police efforts did not produce the defendant's prohibited conduct[] because those efforts lacked a persuasive or other force." *Griesemer v. State*, 26 N.E.3d 606, 609 (Ind. 2015) (internal quotation marks and citations omitted). In *Griesemer*, the defendant Griesemer drove past an undercover police officer who was posing as a prostitute on a street corner in Indianapolis. *Id.* at 607. Griesemer stopped near the undercover officer and asked her if she needed a ride. *Id.* The undercover officer declined and explained that she was trying to make some money. *Id.* In response, Griesemer nodded to his passenger seat and the undercover officer asked him how much money he had. Griesemer nodded his head at his seat again and told the undercover officer he had twenty dollars. *Id.* The undercover officer explained that she could "do head" for that amount and Griesemer nodded his head at his passenger seat once more. *Id.* When Griesemer drove his car to meet the undercover officer for sex, police officers arrested him. *Id.*

[23] Griesemer argued that he had been induced by the undercover officer because she had been the first person to mention trading money for sex. Our supreme court held that the undercover officer did not induce Griesemer because her words did not "produce the criminal conduct" nor were the words an "explicit directive or order" and "did not exert a persuasive or other force over Griesemer." *Id.* at 610. Instead, the undercover officer had merely afforded him "an opportunity to commit the offense," which the statute explicitly notes is not entrapment. *Id.* *See also* I.C. § 35-41-3-9.

[24] Here, our review of the record reveals that Mothersbaugh had initiated the friend request with Reed, sent the first message, steered the conversation towards sex, and requested to meet with Reed in person. Although Reed participated in the conversation, we find this conduct similar to that of the undercover officer in *Griesemer*. Thus, we conclude that Detective Scudder, did not induce Mothersbaugh, but instead, merely afforded Mothersbaugh the opportunity to commit the offense, which does not constitute entrapment. *Id.*

[25] Because we determined that Detective Scudder, while operating the Reed profile, did not induce Mothersbaugh's conduct, we need not address his arguments regarding his predisposition. *McGowan v. State*, 674 N.E.2d 174, 175 (Ind. 1994) (holding that because entrapment is established by the existence of two elements, it is defeated by the nonexistence of one). We conclude that the State produced sufficient evidence to rebut Mothersbaugh's entrapment defense.

[26] Mothersbaugh next argues that the evidence is insufficient to support his conviction. Our standard of review for sufficiency of the evidence claims is well settled. We consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not reweigh the evidence or judge witness credibility. *Id.* We will affirm the conviction unless no reasonable fact finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* at 146-47. The evidence is sufficient if an inference may be reasonably drawn from it to support the verdict. *Id.* at 147.

[27] INDIANA CODE § 35-42-4-6(c) provides:

> [a] person at least twenty-one (21) years of age who knowingly or intentionally solicits a child at least fourteen (14) years of age but less than sixteen (16) years of age, or an individual the person believes to be a child at least fourteen (14) years of age but less than sixteen (16) years of age, to engage in sexual intercourse, other sexual conduct[], or any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person, commits child solicitation, a Level 5 felony.

However, the statute provides that a person commits a Level 4 felony if "the person solicits the child or individual the person believes to be a child . . . to engage in sexual intercourse or other sexual conduct . . . and . . . commits the offense by using a computer network . . . and travels to meet the child or individual the person believes to be a child[.]" I.C. § 35-42-4-6(c). The statute defines "solicit" as "to command, authorize, urge, incite, request, or advise[.]" I.C. § 35-42-4-6(a).

[28] Mothersbaugh argues that the State's evidence "failed to establish that Mothersbaugh solicited sexual intercourse or other sexual conduct" from Reed. (Mothersbaugh's Br. 21). We disagree.

[29] Our review of the record reveals that Mothersbaugh sent a friend request and initiated conversation with Reed. Mothersbaugh's first message to Reed was "sure do look sexy from behind" followed by an emoji with heart eyes. (Tr. Vol. 2 at 12). Further, Mothersbaugh told Reed that her hair was "long and beautiful" and that he thought "long hair was sexy on a woman" followed by kissing face emojis. (State's Ex. 3). Mothersbaugh also consistently referred to Reed as sexy butt or sexy ass.

[30] One evening, Mothersbaugh messaged Reed and asked her what she was doing. When Reed messaged that she was in bed, Mothersbaugh replied "sounds fun." (State's Ex. 3). Mothersbaugh continued by messaging, "I can only imagine the possibilities" followed by a heart-face emoji and a kissing-face emoji. (State's Ex. 3). Mothersbaugh followed up this message with "and the pleasure I would have you experience." (State's Ex. 3). Mothersbaugh then asked Reed what she was wearing. When Reed replied that she was wearing shorts and a t-shirt, Mothersbaugh responded with "I bet you would feel even better . . . meaning when or if I get the chan[c]e to try you on, you would feel amazing[.]" (State's Ex. 3). On another day when Reed had sent Mothersbaugh that she was bored, Mothersbaugh replied, "sounds like you need some excitement in your life" followed by an eggplant emoji. (State's Ex. 3). When Reed responded that she

always needed that kind of excitement, Mothersbaugh replied that Reed was a "naughty girl." (State's Ex. 3).

[31] Mothersbaugh mentioned to Reed multiple times that he wanted to meet. When Reed asked if Mothersbaugh was "going to bring that excitement" that Mothersbaugh had talked about, Mothersbaugh replied, "oh yeah[.]" (State's Ex. 3). We conclude that there is sufficient evidence of Mothersbaugh's solicitation. *See Kuypers v. State*, 878 N.E.2d 896, 899 (Ind. Ct. App. 2008) (holding that there is sufficient evidence of child solicitation where a person must merely "command, authorize, urge, incite, request, or advise a child to commit the act"), *trans. denied*.

2. Inappropriate Sentence

[32] Finally, Mothersbaugh contends that his aggregate nine-year sentence for his Level 4 felony child solicitation, Class A misdemeanor resisting law enforcement, and Class B misdemeanor possession of marijuana convictions is inappropriate in light of the nature of his offense and his character. We disagree.

[33] We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). The defendant has the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). The principal role of a Rule 7(B) review "should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the

sentencing statutes, but not to achieve a perceived correct result in each case." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008) (internal quotation marks omitted). Whether a sentence is inappropriate ultimately turns on "the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case." *Id.* at 1224. "Appellate Rule 7(B) analysis is not to determine whether another sentence is more appropriate but rather whether the sentence imposed is inappropriate." *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012) (internal quotation marks and citation omitted), *reh'g denied*.

[34] When determining whether a sentence is inappropriate, we acknowledge that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1081. Mothersbaugh was convicted of Level 4 felony child solicitation, Class A misdemeanor resisting law enforcement, and Class B misdemeanor possession of marijuana. A person who commits a Level 4 felony "shall be imprisoned for a fixed term of between two (2) and twelve (12) years, with the advisory sentence being six (6) years." I.C. § 35-50-2-5.5. A person who commits a Class A misdemeanor "shall be imprisoned for a fixed term of not more than one (1) year[.]" I.C. § 35-50-3-2. A person who commits a Class B misdemeanor "shall be imprisoned for a fixed term of not more than one hundred eighty (180) days[.]" I.C. § 35-50-3-3. Here, the trial court imposed a sentence of nine years at the DOC for Mothersbaugh's Level 4 felony child solicitation conviction, thirty days for his Class A misdemeanor resisting law

enforcement conviction, and thirty days for his Class B misdemeanor possession of marijuana conviction. The trial court ordered these sentences to be served concurrently. Thus, the trial court sentenced Mothersbaugh to an aggregate term of nine years, which is below the maximum sentence.

[35] Turning first to the nature of the offense, we note that the nature of this crime is disturbing. Forty-year-old Mothersbaugh, despite being aware that Reed was only fourteen years old, continuously sent messages calling her sexy butt and sexy ass. Mothersbaugh sent Reed kissing face emojis and heart eye emojis. Mothersbaugh also sent eggplant emojis and told her she needed excitement in her life, called her naughty, and told her about the pleasure she would experience if he had the chance to try her on. Mothersbaugh arranged to meet up with Reed and drove to a shelter near a lake at 9:30 p.m. in order to meet with her. We conclude that the nature of Mothersbaugh's offense in no way merits a reduction of his sentence.

[36] Turning to Mothersbaugh's character, we note the presence of a criminal history spanning decades. Mothersbaugh has a string of misdemeanor convictions including resisting law enforcement in 2010 and 2011, operating with a blood alcohol content of .15 or more in 2018, and possession of marijuana in 2018 and 2020. Additionally, the trial court noted that Mothersbaugh had his probation revoked in his resisting law enforcement case from 2010. Given the list of previous criminal offenses and his probation revocation, Mothersbaugh has shown a failure to respond to previous attempts at rehabilitation.

[37] Mothersbaugh has not convinced us that his aggregate nine-year sentence for his Level 4 felony child solicitation, Class A misdemeanor resisting law enforcement, and Class B misdemeanor possession of marijuana convictions is inappropriate. Therefore, we affirm the sentence imposed by the trial court.

[38] Affirmed.[2]

Robb, J., and Weissmann, J., concur.

[2] Mothersbaugh also argues that law enforcement's use of a fake Facebook profile was "fundamentally unfair" and resulted in "a due process violation for Mothersbaugh." (Mothersbaugh's Br. 15). However, Mothersbaugh fails to cite to a single case or authority that supports the position that using a fake Facebook account violates his due process rights. Thus, he has waived his argument on appeal. *See* Ind. Appellate Rule 46(A)(8).