Not Designated for Publication

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR08-32

	Opinion Delivered September 17, 2008
VINCE DWAYNE GREER APPELLANT	APPEAL FROM THE GRANT COUNTY CIRCUIT COURT, [NO. CV-2007-80-2]
V.	HONORABLE PHILLIP SHIRRON, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

EUGENE HUNT, Judge

Appellant Vince Dwayne Greer was convicted by a Grant County jury of internet stalking of a child in violation of Ark. Code Ann. § 5-27-306 (Supp. 2007). He was sentenced to sixteen years in the Arkansas Department of Correction. On appeal, Greer argues (1) that the trial court erred in refusing to instruct the jury on the affirmative defense of entrapment and (2) that there was insufficient evidence to support his conviction for internet stalking of a child. We affirm.

On May 22 and 23, 2007, appellant engaged in chat sessions over the internet with a person whom he believed to be a fourteen-year-old girl, but was in fact David Holland, a detective with the Sheridan Police Department. Holland created a profile on Yahoo, posing as a female who was home schooled and listing various hobbies. Under the name

"Cheryl Kidd," he entered the Arkansas chatroom. Appellant contacted "Cheryl," and the two exchanged photographs, with Detective Holland sending appellant a picture of a member of the police department at the age of fifteen. The conversation almost immediately turned to sex. Appellant asked "Cheryl" whether she was a virgin, how old her oldest boyfriend had been, what sexual experiences she had already had, and what sexual experiences she would be willing to have. He also asked her several questions about her mother's work schedule to determine whether she could have guests over during the day while her mother was gone. On the second day they chatted, appellant asked "Cheryl" whether she would be willing to meet that day. She agreed and gave him an address.

Detective Holland testified that appellant, whom he recognized from the online picture, was able to see him before he got to the target house. Appellant drove past the house and was pulled over for a traffic stop. In his interview with police following his arrest, appellant maintained that he was curious and just trying to understand what would make a girl that age want to be with an older man.

Appellant's right against double jeopardy requires that his challenge to the sufficiency of the evidence be addressed first, even though it was not presented as the first argument on appeal. *See Woolbright v. State*, 357 Ark. 63, 160 S.W.3d 315 (2004).

Ark. Code Ann. § 5-27-306(a)(2) (Supp. 2007) provides:

> (a) A person commits the offense of internet stalking of a child if the person being twenty-one (21) years of age or older knowingly uses a computer online service, internet service, or local internet bulletin board service to:

(2) Seduce, solicit, lure, or entice an individual that the person believes to be fifteen (15) years of age or younger in an effort to arrange a meeting with the individual for the purpose of engaging in:

(A) Sexual intercourse;
(B) Sexually explicit conduct; or
(C) Deviate sexual activity.

Appellant argues that the State's evidence was insufficient to support his conviction for internet stalking of a child in three respects: (1) that no evidence was introduced as to his age; (2) that the State failed to present sufficient evidence that appellant acted "knowingly"; (3) although presented by appellant in an almost incomprehensible argument, that the prosecution failed to prove that the purpose for which he set up the meeting was to engage in sexual intercourse, sexually explicit conduct, or deviate sexual activity. A challenge to the sufficiency of the evidence is preserved for appellate review by making a specific motion for directed verdict at both the conclusion of the State's case and at the conclusion of all of the evidence. *Maxwell v. State*, __ Ark. __, __ S.W.3d __ (May 29, 2008) (citing Ark. R. Crim. P. 33.1; *Durham v. State*, 320 Ark. 689, 698, 899 S.W.2d 470, 473 (1995)). Because appellant's motion for directed verdict mentioned only the purpose for which the meeting was set up, his other two arguments regarding sufficiency are waived.

The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Smith v. State*, 346 Ark. 48, 55 S.W.3d 251 (2001). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* When a defendant

challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the State, and only evidence supporting the verdict will be considered. *Id*.

In this case, there was substantial evidence that appellant intended to arrange a meeting with a person he believed to be fourteen years old for the purpose of having sex with her. The questions that he asked her showed this intent. They were of a highly personal and sexually explicit nature and clearly contemplated a sexual encounter between the appellant and "Cheryl." Appellant asked her if she had thought about having sex with someone, how old would be too old for her "just to learn from," and responded with his own age, thirty, when she asked how old the teacher was. He was also very concerned with her mother's work schedule and whether she was able to meet him during the day while she was alone at her house. After telling her that her first time having sex would "hurt some," he said, "that is why *we* would have to take it easy and slow for your first time." (Emphasis added.) On their second day of chatting, appellant asked "Cheryl" if she would be "up to" meeting that day. He drove all the way from the Pine Bluff area to the address she gave him in Sheridan. In short, there was ample evidence from which the jury could have found, without resorting to speculation or conjecture, that appellant arranged the meeting for the purpose of engaging in sexual intercourse or sexually explicit conduct.

For his other point on appeal, appellant argues that the trial court erred in refusing to instruct the jury on entrapment. Entrapment is an affirmative defense that occurs "when a law enforcement officer or any person acting in cooperation with a law

enforcement officer induces the commission of an offense by using persuasion or other means likely to cause a normally law-abiding person to commit the offense." Ark. Code Ann. § 5-2-209 (Repl. 2006). Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment. *Id.* Entrapment is an affirmative defense for which the defendant bears the burden of proof by a preponderance of the evidence. *Wedgworth v. State*, 301 Ark. 91, 92, 782 S.W.2d 357, 358 (1990).

The trial court provided two reasons for denying appellant's proffered jury instruction regarding entrapment: (1) appellant denied a substantial element of the crime, which made the defense of entrapment unavailable to him; (2) an instruction was not warranted because there was essentially no evidence of entrapment in the record. First, Arkansas law is well established that, if a defendant denies committing an offense, he cannot assert that he was entrapped into committing the offense. *Montgomery v. State*, 367 Ark. 485, 497, 241 S.W.3d 753, 761 (2006). Appellant attempts to distinguish his case by arguing that he never denied the charges at trial because he did not testify. We find it unnecessary to decide whether the defense of entrapment was available to him on that basis because there was simply not sufficient evidence from which a reasonable jury could have found that appellant was entrapped. If there is no evidence to support an instruction, it is not error to refuse it. *Heritage v. State*, 326 Ark. 839, 847, 936 S.W.2d 499, 504 (1996).

Next, appellant argues that the State failed to show that he was predisposed to commit the offense. However, it was appellant's burden to prove the elements of the

affirmative defense of entrapment; the State did not have the burden of proving appellant's predisposition. While a defendant's conduct and predisposition to commit an offense are relevant when entrapment is at issue, the primary emphasis in cases involving entrapment is on the conduct of the law enforcement officer. *Walls v. State*, 8 Ark. App. 315, 322, 652 S.W.2d 37, 40 (1983). Here, there is no evidence that Officer Holland did anything other than afford appellant the opportunity to commit the offense. It was appellant who initiated the sexually-charged conversation, and it was appellant's idea to meet in person. Appellant presented no evidence, despite having the burden of doing so, that an alleged fourteen-year-old's willingness to chat, to engage in sexually suggestive dialogue, and to discuss the possibility of a sexual encounter would likely cause a normally law-abiding citizen to commit the offense, as required to entitle a defendant to an entrapment instruction. Therefore, it was not error for the trial court to refuse appellant's proposed instruction on entrapment.

We affirm.

HART and GRIFFEN, JJ., agree.