

NONPRECEDENTIAL DISPOSITION
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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued January 25, 2023
Decided February 13, 2023

Before

DIANE S. SYKES, *Chief Judge*

DIANE P. WOOD, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-2549

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARK FITZPATRICK,
Defendant-Appellant.

Appeal from the United States District
Court for the Southern District of Illi-
nois.

No. 4:20-cr-40087-JPG

J. Phil Gilbert,
Judge.

ORDER

Following a trial, a jury convicted Mark Fitzpatrick of attempted enticement of a minor in violation of 18 U.S.C. § 2422(b). In the course of doing so, it rejected the entrapment defense on which it had been instructed. The district court sentenced Fitzpatrick to the statutory minimum of 120 months' imprisonment. Fitzpatrick now appeals and argues that the evidence was insufficient to sustain his conviction. Because a reasonable trier of fact could have found Fitzpatrick to have committed the essential elements of his crime and that he was predisposed to commit it without government intervention, we affirm the judgment.

I

This case arose, as many such prosecutions do, from an FBI investigation of various online communication platforms to identify people showing a sexual interest in children. In August 2020, Agent Raymond Hart was operating an undercover profile on "Adam4Adam," an online dating application. Hart portrayed a 15-year-old boy, "Codey," interested in having sex with men. He used the profile name "Funboy696969," and he stated on that profile that he was 18 years old, because that is the minimum age required by Adam4Adam.

Shortly after Hart created the profile, Fitzpatrick contacted Funboy696969 through a profile named "ass4sure." In response to Fitzpatrick's questions, Funboy said he had "never been with a guy but want[ed] to," and would like to "give and receive oral." He told Fitzpatrick he was looking for older men because he didn't "trust guys my age to keep a secret." Fitzpatrick responded that he was 55 years old and had "certainly had [his] share of 18 y/o newbie's before." At that point (just minutes into the chat), Funboy revealed that he was only 15 years old, and the conversation continued with Fitzpatrick expressing his worry of a "trap":

Funboy: what about 15yo newbies

ass4sure: You are 15?

Funboy: yeah. that's why I'm discreet. I'd be fucked at school if guys found out I sucked cock lol

ass4sure: Your profile said you were 18. I can't do anything since you are 15. I am not interested in going to jail. Sorry.

Funboy: ok. I understand. No worries. I can keep a secret tho.

ass4sure: I don't doubt you can but the law says you are a minor. This could be a trap for all I know.

Funboy: Im not looking to trap anybody just have some experiences. I understand tho. Nice to meet you anyway

One minute after Funboy ended the conversation at Fitzpatrick's request, Fitzpatrick restarted it. He bluntly asked Funboy: "Show me your dick." In response, Hart sent three pictures from a "cooperating human source"; two pictures showed a face, and the third partially revealed a bare chest. Fitzpatrick responded that he wished Funboy were older, but that they should stay in touch because he remained "interested" despite nervousness about Funboy's age:

ass4sure: I just wish you were older.

Funboy: sorry. I can't help that

ass4sure: Yeah. I know. Well hit me up later if you can't find anyone.

Funboy: if ur interested and serious I will

ass4sure: I am interested and I am serious. Just a little nervous about it.

Funboy: I wouldn't want u to be nervous cause I will be cause I'm not sure if I'm any good at it

ass4sure: I am only nervous due to your age.

Funboy said Fitzpatrick would have to "teach" him; Fitzpatrick replied that he would "do [Funboy] first so [he] could know what to do."

Fitzpatrick then asked if Funboy would "rather have a number to text." Funboy said sure and introduced himself as "Codey." The conversation on Adam4Adam then ended, after 59 minutes. Following Fitzpatrick's invitation, "Codey" sent a text message to the phone number that Fitzpatrick provided him, and the conversation moved to that platform.

Fitzpatrick and "Codey" continued texting for five days. During that time, Fitzpatrick repeatedly expressed interest in making plans to meet "Codey." Early in the conversation, "Codey" suggested that he would be alone during the upcoming weekend because his mother was going out of state. The two exchanged photographs, and Fitzpatrick again unsuccessfully requested nude photographs.

Communications continued, alternating between Fitzpatrick worrying about a trap and disregarding that fear to keep engaging with "Codey." For example, over text Fitzpatrick asked "your age still makes me nervous. How do I know that you aren't the police trying to entrap me?" Yet Fitzpatrick asked "Codey" about masturbation, orgasms, and the acts that he and "Codey" could perform when they met. After asking "Codey" what sexual position he wanted to use, he graphically described different sex positions and said they could try them "just to see which position you like." Fitzpatrick said that he wanted sex on a "regular basis" with "Codey" if that was what "Codey" wanted.

Eventually, Fitzpatrick set out to visit "Codey's" home. Agents conducting surveillance observed Fitzpatrick drive past the home four times in a short period and then pull into the driveway. When Fitzpatrick knocked on the door, officers arrested him.

After the government presented this evidence, it rested its case, and Fitzpatrick moved for judgment of acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure. The district judge denied that motion without elaboration. The following day, Fitzpatrick rested without presenting any evidence. The judge submitted the case to the jury and gave the defense-tendered instruction on an entrapment defense. The jury returned a guilty verdict, and the judge sentenced Fitzpatrick to a term of 120 months in prison.

II

On appeal, Fitzpatrick challenges the sufficiency of the evidence. In doing so, he faces what this court has called a “nearly insurmountable” hurdle. See, e.g., *United States v. Farmer*, 38 F.4th 591, 602 (7th Cir. 2022). We assess the sufficiency of the evidence by considering it “in the light most favorable to the government and draw[ing] all reasonable inferences in its favor.” We vacate the conviction only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. York*, 48 F.4th 494, 499 (7th Cir. 2022). Where there are competing interpretations of the events that transpired, the choice of which version to believe is up to the jury, not us. *Farmer*, 38 F.4th at 602 (“We can neither reweigh the evidence nor reassess witness credibility.”).

Fitzpatrick raises two sufficiency arguments. First, he contends that the evidence of an intent to entice a minor was insufficient, and second, he argues that the evidence mandated a finding that the government entrapped him. We address them in that order.

A

The evidence we have described is more than sufficient to show that Fitzpatrick attempted to entice a minor. A person who “knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so” using the mail or a means of interstate or foreign commerce is guilty of enticing a minor. 18 U.S.C. § 2422(b). Section 2422(b) criminalizes encouraging and obtaining a minor’s agreement to engage in sex; it does not require proof of an intent to engage in such activity. See *United States v. Berg*, 640 F.3d 239, 252 (7th Cir. 2011). To prove an attempt to entice a minor, the government needed to prove that Fitzpatrick (1) had the specific intent to commit the underlying crime of enticing a minor and (2) took a substantial step towards completion of the offense. *Id.* at 246.

Fitzpatrick's main argument is that the evidence was insufficient to prove that he intended to persuade, induce, or entice "Codey" to engage in illicit sex. (He does not contest other elements of the offense.) He insists that *he* was enticed by "Codey," who sent him alluring pictures, and he just wanted to fantasize about "Codey" until he succumbed to Hart's unrelenting pressure to meet.

But that is not the way the standard of review works, and it also mischaracterizes much of the evidence. It is not enough for Fitzpatrick to offer one favorable, rational view of the evidence; he must demonstrate that the evidence, when considered in the government's favor, would not be enough to convict. See *York*, 48 F.4th at 499; *Berg*, 640 F.3d at 246. The evidence here permitted the jury to find that Fitzpatrick attempted to entice a person he believed to be a minor. First, Fitzpatrick contacted "Codey." Second, when Fitzpatrick hesitated upon learning that "Codey" was 15, "Codey" ended contact with "nice to meet you anyway," but a minute later, Fitzpatrick restarted the exchange with the sexually explicit request to "show me your dick." Third, it was Fitzpatrick who offered "Codey" his phone number, arranged to take the conversation off the platform that barred minors, and discussed the various sexual positions and acts they could perform on a "regular basis." A rational jury could see these facts as ample evidence of substantial steps toward enticing a minor. See *Berg*, 640 F.3d at 252.

Fitzpatrick responds that "Codey" promised to keep contacting Fitzpatrick (and thereby pressuring Fitzpatrick to meet) despite "Codey's" age, as reflected in this exchange:

ass4sure: I just wish you were older.

Funboy: sorry. I can't help that

ass4sure: Yeah. I know. Well hit me up later if you can't find anyone.

Funboy: if ur interested and serious I will

But a rational jury did not have to find from this dialogue that "Codey" would keep contacting Fitzpatrick, no matter what Fitzpatrick said. Rather, it could focus on the fact that Fitzpatrick solicited "Codey" by asking him to "hit me up later" and that "Codey" said he would do so only if Fitzpatrick was "interested and serious" (which Fitzpatrick confirmed he was). Moreover, a debate about "Codey's" interest in illicit sex is beside the point. The government had to prove only that Fitzpatrick intended to induce a person he believed to be a minor to assent to illicit sex. "[A] minor's willingness or unwillingness to engage in sexual activity is irrelevant." *York*, 48 F.4th at 500. Here, Fitzpatrick's persistent sexual talk with a minor, request for nude photos, exploration of the

minor's sexual history and preferences, and description of sexual acts to be performed were enough for a jury to find that Fitzpatrick attempted to entice a minor. *Id.* at 500–01.

B

Entrapment, if proven, is a complete defense to the crime of enticement. See *id.* at 502. Once the instruction was given to the jury, the government had to prove that Fitzpatrick was *not* entrapped. See *United States v. Mayfield*, 771 F.3d 417, 439 (7th Cir. 2014) (en banc). This required it to prove, in addition to the other elements of the crime, that Fitzpatrick was predisposed to commit the charged crime or that the government did not induce him. *Id.* at 440, 443.

Fitzpatrick argues that a rational jury would have been compelled to find that he was entrapped. He cites his refusal to commit to sex “until Funboy’s efforts at persuasion,” flattery, reassurances (that “Codey” was not the police), and manipulations finally overcame his resolve against enticing “Codey.” He contends that this evidence demonstrates a level of persistence from the government similar to that found in *United States v. Barta*, 776 F.3d 931, 937, 939 (7th Cir. 2015), where we held that the evidence compelled a finding of entrapment.

Once again Fitzpatrick’s argument fails because it assumes, incorrectly, that Fitzpatrick’s view of the evidence is the only rational one. The jury was not required to interpret the evidence as Fitzpatrick frames it. Unlike the situation in *Barta*, where the FBI repeatedly called and emailed the defendant despite receiving no response from him, Fitzpatrick took the initiative over and over again. He began the conversation with “Codey” and reinitiated it when “Codey” attempted to end it. Then, after he initially said that he was “nervous” about “Codey’s” age of 15, he pursued “Codey” by insisting that he was “interested” and “serious,” asking for nude photographs, and offering to teach “Codey” sex acts. Fitzpatrick also proposed that they leave the online platform and stay in touch over text, where over five days he discussed his hope for “regular” sex. Finally, it was Fitzpatrick who drove to “Codey’s” home, walked up his driveway, and knocked on his door. A reasonable jury thus could, and did, interpret this evidence as demonstrating that Fitzpatrick was predisposed to obtain “Codey’s” consent to engage in sex, without additional prodding from the government.

III

Because the evidence was sufficient to support Fitzpatrick’s conviction for attempted enticement of a minor and for the jury to find that the government did not entrap him, we AFFIRM the judgment of the district court.