ATTORNEY FOR APPELLANT:

STEVEN P. STOESZ
Stoesz & Stoesz
Westfield, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

J.T. WHITEHEAD
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

DOUGLAS A. HOLTKE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A02-0510-CR-1000
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel Pfleging, Judge
Cause No. 29D02-0210-FC-100

November 20, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Douglas Holtke was convicted of six counts of child solicitation, all Class C felonies, following a jury trial. During the trial Holtke raised the defense of entrapment, and contends on appeal that the State failed to meet its evidentiary burden of proving beyond a reasonable doubt that Holtke was predisposed to commit the offense. Concluding that the State provided sufficient evidence for a reasonable trier of fact to determine that Holke was predisposed to commit the offense, we affirm.

Facts and Procedural History

On August 1, 2002, Detective Charles Widner of the Noblesville Police Department entered into an adult online chatroom called "Girls with Big Boobs." To access the chatroom Widner had to register with Yahoo! When registering, Widner created the false identity of a thirteen-year-old girl named Sandy Adams, though to access adult content and receive and send web cam transmissions on Yahoo! he registered a January 1, 1970, birthday. General users of Yahoo! are not able to view the registration birth date. The publicly available profile Widner created for Sandy Adams stated that she was a thirteen-year-old girl who attended school in Carmel.

While in the adult chatroom Widner noticed that someone using the screen name "ABigd2001us," later identified as Holtke, had indicated that he was from Indiana. Widner, in the persona of Sandy, sent that person an instant message asking if he was from Indianapolis. Holtke responded and a conversation ensued. During this initial conversation Holtke asked Sandy how old she was and Widner answered that she was thirteen years old.

The conversation eventually led to a discussion of sexual preferences and desires initiated by Holtke.

Holtke chatted with Sandy on five more occasions between August 2 and August 27, 2002. All of these chats contained discussions of a sexual nature. Shortly after their last chat, Holtke sent Sandy an off-line message ending contact with Widner's persona. Widner then obtained an arrest warrant, and Holtke was arrested for child solicitation, among other charges.

On July 19 and 20, 2005, Holtke was tried by a jury and found guilty of six counts of child solicitation. Holtke now appeals his convictions.

Discussion and Decision

Holtke contends that the State failed to provide sufficient evidence to prove beyond a reasonable doubt that he was predisposed to commit the crime of child solicitation.

I. Standard of Review

We review a claim of entrapment using the same standard that applies to challenges based on the sufficiency of the evidence. Dockery v. State, 644 N.E.2d 573, 578 (Ind. 1994). The court will neither reweigh the evidence nor judge the credibility of the witnesses. Id. We will uphold the verdict where there is substantial evidence of probative value from which a reasonable trier of fact could infer that the defendant was guilty beyond a reasonable doubt. Id.

II. Sufficiency of the Evidence

Holtke is charged with child solicitation. Indiana Code section 35-42-4-6 defines

child solicitation as:

> (a) As used in this section, "solicit" means to command, authorize, urge, incite, request, or advise an individual:
> * * *
> (4) by using a computer network (as defined in IC 35-43-2-3(a))
> * * *
> to perform an act described in subsection (b) or (c).
> (b) A person eighteen (18) years of age or older who knowingly or intentionally solicits a child under fourteen (14) years of age, or an individual the person believes to be a child under fourteen (14) 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;
> commits child solicitation, a Class D felony. However, the offense is a Class C felony if it is committed by using a computer network (as defined in IC 35-43-2-3(a)).

Ind. Code § 35-42-4-6(a), (b).

The only issue raised for review is whether the State provided sufficient evidence to rebut Holtke's entrapment defense. The defense of entrapment is set out in Indiana Code section 35-41-3-9, and 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 entrapment defense is raised once the evidence includes a showing of police involvement in the criminal activity; no formal pleading of the defense is required. Shelton v. State, 679 N.E.2d 499, 501 (Ind. Ct. App. 1997). Once a defendant has indicated his intent to rely on the defense of entrapment and has established police inducement, the burden shifts to

the State to show the defendant's predisposition to commit the crime. Id. at 502. If the defendant shows police inducement and the State fails to show predisposition on the part of the defendant to commit the crime charged, entrapment is established as a matter of law. Dockery, 644 N.E.2d at 577. Whether a defendant is predisposed to commit a crime is a question for the trier of fact. Ferge v. State, 764 N.E.2d 268, 271 (Ind. Ct. App. 2002).

"The entrapment defense turns upon the defendant's state of mind, i.e., whether the 'criminal intent originated with the defendant[.]'" Kats v. State, 559 N.E.2d 348, 353 (Ind. Ct. App. 1990), trans. denied (quoting U.S. v. Toro, 840 F.2d 1221, 1230 (5th Cir. 1988)). "In other words, the question is whether 'criminal intent [was] deliberately implanted in the mind of an innocent person [.]'" Id. (quoting United States v. Killough, 607 F.Supp. 1009, 1011 (E.D. Ark. 1985)). In determining whether a defendant is predisposed to commit a crime the principal focus must be on the first transaction. U.S. v. Gunter, 741 F.2d 151, 154 (7th Cir. 1984). 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 a 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.

Kats, 559 N.E.2d at 353 (quoting U.S. v. Fusko, 869 F.2d 1048, 1052 (7th Cir. 1989)).

Because Holtke acted under police inducement, and indicated his intention to use the defense of entrapment, the State had the burden to show that Holtke was predisposed to commit the crime. Dockery, 644 N.E.2d at 577.

The first factor identified in Kats, the defendant's character or reputation, falls in favor of Holtke. The State provided no evidence that Holtke's reputation or character would lead him to solicit children. The second factor, whether the government originally suggested engaging in criminal activity, favors the State; Holtke made the first suggestion of criminal activity, soliciting Sandy to engage in sexual acts. The third factor, that of profit, does not apply in this case. The fourth factor, whether Holtke evidenced reluctance to commit the offense, also favors the State. Holtke did evidence some reluctance, but only after he had already solicited Sandy to engage in sexual intercourse. A reasonable finder of fact could conclude that his statements to Sandy indicated a fear of the consequences of his actions rather than any reluctance to commit the crimes themselves.

The final factor, the nature of the inducement or persuasion offered by the government, is the most difficult for both the State and Holtke. Though the State arguably merely afforded Holtke the opportunity to engage in the criminal solicitation of children, one cannot escape the fact that Detective Widner went looking for suspects in an adult's only section of Yahoo! Lastly, Widner, as Sandy, approached Holtke, flirted with him, and tried on numerous occasions to convince Holtke to meet with him. Although the State has moved very close to the line separating investigative work from entrapment, it was Holtke who first asked how old Sandy was, who first brought up sexual acts, and who seemed completely unperturbed that the person with whom he was chatting was apparently under the age of fourteen. Taking the four relevant factors together, a finder of fact could conclude beyond a reasonable doubt that Holtke was predisposed to solicit under-age internet users.

Because there is sufficient evidence from which a finder of fact could conclude beyond a reasonable doubt that Holtke was predisposed to commit the crime of child solicitation, we affirm Holtke's convictions.

Conclusion

The State provided sufficient evidence for a trier of fact to conclude, beyond a reasonable doubt, that Holtke was predisposed to commit the crime of child solicitation. Holtke's convictions are therefore affirmed.

Affirmed.

SULLIVAN, J., and BARNES, J., concur.