

STATEMENT OF THE CASE

Justin B. Troxell appeals the revocation of his probation after he was charged with attempted rape and conspiracy to commit rape.

We affirm.

ISSUES

1. Whether the State presented sufficient evidence to rebut Troxell's claim that revocation was improper because he was entrapped.
2. Whether the evidence should have been excluded because the Muncie Police Department engaged in outrageous conduct.

FACTS

On April 8, 2008, Troxell pled guilty in Madison Superior Court 1 to two counts of battery by means of a deadly weapon, class C felonies.¹ On June 9, 2008, the trial court sentenced Troxell to eight years on each count with the sentences to run concurrently. The sentencing order provided that “[t]hree and one-half years of the defendant’s eight (8) year sentence is ordered executed at the Indiana Department of Correction, balance suspended.” (App. 56). The sentencing order further provided that Troxell was to be placed on probation for four and one-half years.

On May 20, 2010, Susan Terry, a Muncie resident, contacted Troxell, who was out on probation, and asked him to lend her money so she could retrieve her impounded vehicle. Following the original contact, Troxell initiated a continuing conversation with Terry via text messaging. The texts began with Troxell’s suggestion that Terry earn the money by engaging in various sex acts, including urinating on him, supplying him with

¹ Ind. Code § 35-42-2-1.

underwear that had been urinated on by other “girls,” and finding a girl to “get [him] off now.” (State’s Ex. 2). Troxell also suggested that Terry engage in sex with other women and find females for sex who “have to be passed out when I get there.” *Id.*

Troxell asked Terry, “Check this out how down and crazy r u to make money,” and said, “It involves 2 females and drugs r u crazy.” *Id.* Terry did not immediately understand what Troxell was asking of her, so Troxell stated, “Think 2 ot[h]er females and lots of drugs taken what u think,” and then, “think what happens when a grl takes a lot of drugs . . . Sle[e]p.” *Id.* Terry responded, “So what are u tryin to say u want to do it when girls are asleep?” *Id.* Troxell confirmed that was what he wanted. He later stated, “U give them somethin to sleep and they can’t wake up,” and “OK tel me what al we doin to them and they have to be passed out when i get there.” *Id.*

Because these statements scared her, Terry contacted the Muncie Police Department on May 21, 2010.² Muncie Police Detective John Leach³ viewed and photographed the text messages. Terry was told not to initiate future conversations with Troxell but to participate in any conversations initiated by Troxell and to provide the Muncie Police Department with copies of all text messages between Troxell and Terry. Thereafter, Troxell initiated additional text-message conversations with Terry.

² On the evening of May 21, 2010, Troxell sent a text message that appeared to say that he was interested in having sex with Terry’s seven-year-old daughter. There is a dispute as to whether it was this text that precipitated Terry’s decision to contact the police or whether this text was sent after Terry went to the police

³ The parties refer to the detective as “Leech,” as does the court reporter. However, an affidavit signed by the detective refers to him as “Leach.” (Troxell’s App. 15). We will use the spelling acknowledged by the detective.

At some point, Terry had asked a police officer how young the victim would have to be for Troxell to be sentenced to prison. The officer had stated that the victim would have to be younger than sixteen, and Terry invented a fifteen-year-old named “Brandi” as a female that could be provided by Terry in response to Troxell’s request for unconscious sex partners. During one of their sessions, Terry texted Troxell and told him that she could provide the fictional Brandi and two adult women. Shortly after texting this information, Terry fell asleep and did not respond to Troxell.

Later that morning, Troxell texted Terry, stating, “If u don’t want this money let me know.” (State’s Ex. 2). After Terry apologized for falling asleep and not responding to Troxell’s earlier text, she asked which two of the three “women” Troxell wanted. Troxell suggested that Terry get “Brandi and whos pretty” *Id.* Troxell then asked, “Is Brandi a virgin Get brandi 4 sure.” *Id.* Later in the day, he asked Terry if she was going to help him “hurt” Brandi. *Id.*

The next day, Troxell texted Terry and asked, “Whats up on me fuckin brandi[?]” *Id.* Troxell later explained that Terry should render Brandi unconscious before he had sex with her.

Terry expressed concern about how Troxell wanted her to cause Brandi to lose consciousness. Troxell again questioned whether she wanted “al[l] this money” and texted, “u got any kind of chemical or fuck it get her knocked out I dk how.” *Id.* Troxell suggested that Terry choke Brandi, give her an abundance of aspirin, or put something in her drink to render her unconscious.

Terry arranged to meet Troxell at a Muncie motel on May 25, 2010, where Troxell expected an unconscious Brandi to be waiting. Troxell suggested that he would bring “a dte pil to make her not remember” and that “we goin to hurt her when she passes out.” *Id.* Shortly before Troxell arrived at the motel, he apparently sent a picture of the money to Terry, and when Terry texted that it did not look like the agreed-upon \$2500, Troxell texted, “It is some r stuck together look im tryin to help u I bought a daughter 4 500.” *Id.*

Prior to his arrival at the motel, Troxell spoke on the phone for approximately three minutes to a woman he believed to be Brandi but who was actually Muncie Police Detective Jami Brown. After further text messages were exchanged between Terry and Troxell, Troxell arrived at the motel, obtained the key to the motel room, and unlocked the door with the anticipation of seeing the unconscious Brandi. He was then arrested by officers waiting in the room.

In an interview with Detective Leach, Troxell admitted that he made arrangements with Terry to have Brandi rendered unconscious so he could rape her and that he came to Muncie with the intention of having sex with Brandi. Troxell also expressed the reservation that “he didn’t know if he could go through with it.” (Tr. 32).

Troxell was subsequently charged in Delaware County with attempted rape⁴ and conspiracy to commit rape.⁵ A probation violation notice was filed in Madison County, and after hearing the evidence, including Troxell’s entrapment defense, the Madison County probation court found that Troxell had violated a condition of probation by

⁴ I.C. § 35-41-5-1 defines the offense of “attempt.”

⁵ I.C. § 35-41-5-2 defines the offense of “conspiracy.”

committing illegal acts. The probation court revoked Troxell's probation and ordered him to serve his previously suspended sentence of four and one-half years.

DECISION

1. Entrapment

Troxell contends that the State failed to present sufficient evidence to warrant revocation of his probation. Specifically, he contends that the State failed to rebut his asserted entrapment defense.

A probation revocation hearing is in the nature of a civil proceeding, and a violation need only be proven by a preponderance of the evidence. *Whatley v. State*, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006). In reviewing probation violation determinations, we neither reweigh the evidence nor reassess the credibility of witnesses. *Id.* We look to the evidence most favorable to the probation court's judgment. *Id.* Decisions to revoke probation are reviewed for abuse of discretion. *Cooper v. State*, 917 N.E.2d 667, 671 (Ind. 2009).

The entrapment defense is stated in Indiana Code section 35-41-3-9, which provides as follows:

(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.

In Indiana, the defense of entrapment turns upon the defendant's state of mind, or whether the criminal intent originated with the defendant. *Espinoza v. State*, 859 N.E.2d 375, 385 (Ind. Ct. App. 2006). In other words, the question is whether criminal intent was deliberately implanted in the mind of an innocent person. *Id.* "It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." *Id.* (quoting *Scott v. State*, 772 N.E.2d 473, 475 (Ind. Ct. App. 2002), *trans. denied*).

The State may rebut this defense either by disproving police inducement or by proving the defendant's predisposition to commit the crime. *Id.* at 386. If a defendant indicates 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.* Whether a defendant was predisposed to commit the crime charged is a question for the trier of fact. *Id.* "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." *Id.*

Several factors are relevant in determining whether predisposition of a defendant exists. *Kats v. State*, 559 N.E.2d 348, 353 (Ind. Ct. App. 1990), *trans. denied*. The factors relevant to this case include: (1) whether the suggestion of criminal activity was originally made by the government; (2) whether the defendant evidenced reluctance to commit the offense, overcome by government persuasion; and (3) the nature of the inducement or persuasion offered by the government. *See id.*

Troxell contends that the evidence establishes that he was reluctant to culminate his fantasy to rape unconscious women but that he was led to attempt the act by Terry's insistence. He cites the following text conversation about a woman named "Lindsey" in support of his contention:

Terry: I'm don't think I can take advantage of [Lindsey]
Troxell: Y
Terry: Cause I cant do that that has happened to me and I know what it did to me and I aint bout to put sum1 else through it no matter how much I hate her
Troxell: But you aint doin much so u don't want to do it at all to anyone
Terry: No So u mad now
Troxell: No u just said u was crazy
Terry: O
Troxell: And u not realy crazy r u
Terry: No
Troxell: Then y u say u was
Terry: Cause I didn't think u would want to do shit like that have u done that be4
Troxell: I was just tryin to make u lots of money
Terry: You've done it already haven't you
Troxell: Im sorry I asked u
Terry: K ill think bout it k
Troxell: Forget it
Terry: K
Troxell: I'll find someone to do somethin 4 2500
Terry: K I will do it but I get 2500

(State's Ex. 2, Section B, Pictures 46-58).

The probation court could have reasonably concluded from this exchange that Troxell was not showing reluctance by saying "forget it." He was expressing anger to encourage Terry's actions on his behalf. We will not reassess the evidence.

Troxell also contends that his reluctance was shown by his post-arrest statement to Detective Leach that when he arrived at the motel, "he didn't know if he could go

through with it.” (Tr. 32). The probation court could have reasonably concluded that the statement was merely self-serving. Again, we will not reassess the evidence.

Here, Terry first contacted Troxell about the loan. Troxell then began a multiple-day text discussion with Terry, asking her to find females for sex who “have to be passed out when I get there.” (State’s Ex. 2). Terry responded to Troxell’s messages by suggesting that she could provide the fictional fifteen-year-old Brandi and two adult women to Troxell. Although Terry provided the name of the minor, and the State provided an “opportunity” to commit the crimes, it was Troxell who first requested that Terry provide unconscious females for sex and who pressed Terry to set up a rendezvous with the unconscious Brandi. It was also Troxell who, without any force or coercion from the Muncie Police Department, drove from Madison County to a Muncie motel with the expectation of having sex with an unconscious girl. Under the circumstances, we cannot say that the probation court abused its discretion in concluding that there was sufficient evidence to show by a preponderance of the evidence that Troxell was predisposed to commit the offenses. The probation court therefore did not abuse its discretion in revoking Troxell’s probation.

2. Outrageous Behavior

Troxell contends that the Muncie Police Department engaged in outrageous conduct that deprived him of his due process rights under Article 1, Section 11 of the Indiana Constitution. He cites *Osborne v. State*, 805 N.E.2d 435 (Ind. Ct. App. 2004) for the proposition that the evidence against him should have been excluded.

We note that Troxell did not raise this issue at the probation revocation hearing. Failure to raise an issue before the court below waives the issue for appellate review. *See Wilson v. State*, 931 N.E.2d 914, 919 (Ind. Ct. App. 2010), *trans. denied*.

CONCLUSION

The State presented sufficient evidence to show that Troxell was predisposed to commit the offenses for which he was arrested in Delaware County. Troxell has waived the issue of the effect of the Muncie Police Department's alleged outrageous conduct. The probation court did not abuse its discretion in revoking Troxell's probation.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.