COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2368-CR **Cir. Ct. No. 2012CF1250**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY J. NYBO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: MICHAEL J. APRAHAMIAN, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Bradley J. Nybo appeals from a judgment convicting him of one count of attempted second-degree sexual assault of a child

and four counts of possessing child pornography. Nybo challenges the warrantless seizure and search of his automobile as well as the sufficiency of the evidence supporting his conviction for attempted sexual assault of a child. We reject Nybo's arguments and affirm.

¶2 Under the username "daddyluvsynggrls," Nybo entered an Internet chatroom titled "Married but Looking for 13." As part of his job investigating Internet crimes against children, Detective Andrew Jicha was posing as a father with a fourteen-year-old daughter named "Kerri." Jicha's username was "Timolder4younger." Jicha received a private message from Nybo. Nybo lived in Minnesota but was staying at a Chicago-area hotel on business. Nybo asked what they would do if he traveled to meet Jicha in Milwaukee. Jicha responded that he liked to watch and record men having sex with Kerri. Nybo said, "I would love that." Jicha said Nybo should let him know when he would "be in town and maybe we can work something out." Nybo responded, "Well I am actually in Chicago now and heading through Wisconsin tonight." Nybo said he was "up for" a meeting that night and asked for a picture of Kerri.

¶3 Nybo described the sexual acts he wanted to perform with Kerri. Jicha told Nybo he would need to use condoms. Nybo responded that he had had a vasectomy but was fine using a condom. When Jicha said they could meet at a local hotel, Nybo suggested that they first meet at a bar or restaurant. They agreed to meet in a bar/restaurant near Waukesha. Jicha said he would have his daughter with him. Nybo provided Jicha with updates about his location and his anticipated arrival time.

¶4 Nybo arrived at the restaurant, parked in the lot, and headed toward the entrance. He was immediately detained. While other officers transported

Nybo to the police station, Jicha took custody of his car. Jicha believed that Nybo's car contained condoms because officers did not find any on his person. Because Nybo was returning from a business event in Chicago, Jicha believed he had a computer with him which would contain information about their chats. Jicha saw a laptop computer bag in the car and found condoms in the center console.

¶5 Detective Timothy Probst interviewed Nybo following his arrest. Nybo admitted initiating contact with a person known to him as "Tim" while he was in a Chicago-area hotel. Nybo stated: "We discussed the fantasy and I wanted to see the reality." He also stated he has a preference for girls ages thirteen to eighteen. With Nybo's consent, officers searched his laptop and recovered a number of images that appeared to be child pornography. Nybo was charged with attempted second-degree sexual assault of a child and four counts of possessing child pornography.

¶6 Nybo moved to suppress the evidence seized from his car. After a hearing, the circuit court denied the motion as well as Nybo's subsequent motion to reconsider. Following a bench trial, the circuit court entered guilty verdicts on all charges. Nybo appeals.

The warrantless search of Nybo's car was lawful under the automobile exception.

¶7 Warrantless searches are presumptively unreasonable subject to a few carefully delineated exceptions. ***State v. Johnston***, 184 Wis. 2d 794, 806, 518 N.W.2d 759 (1994). One such exception applies to automobiles. ***State v. Marquardt***, 2001 WI App 219, ¶26, 247 Wis. 2d 765, 635 N.W.2d 188. Law enforcement officers may conduct a warrantless search of a vehicle if they have probable cause to believe that the vehicle contains contraband or evidence of a

crime and the vehicle is readily mobile. ***Maryland v. Dyson***, 527 U.S. 465, 467 (1999) (per curiam); ***Marquardt***, 247 Wis. 2d 765, ¶¶30, 31, 33.

¶8 Whether a seizure passes constitutional muster presents a question of constitutional fact. ***State v. Malone***, 2004 WI 108, ¶14, 274 Wis. 2d 540, 683 N.W.2d 1. We defer to the trial court's findings of historical fact but determine independently whether those facts satisfy constitutional principles. ***Id.***

¶9 We conclude that the search of Nybo's car was lawful under the automobile exception to the warrant requirement. Nybo's car was clearly in working order. The parties do not dispute and we agree that the vehicle was readily mobile for purposes of the automobile exception. ***Marquardt***, 247 Wis. 2d 765, ¶42 (the automobile exception permits a warrantless search even after officers have arrested the driver; an arrest makes the vehicle less accessible, not less mobile).

¶10 Further, officers had probable cause to believe Nybo's car contained evidence of a crime. Probable cause is a "practical, common-sense determination" based on the totality of the circumstances. ***State v. Robinson***, 2010 WI 80, ¶27, 327 Wis. 2d 302, 786 N.W.2d 463. The totality of the circumstances known to the officers included that Nybo actively participated in an Internet conversation with Jicha about engaging in sexual activity with "Kerri," his fictitious fourteen-year-old daughter, that Nybo expressed a specific desire to engage in illegal sexual activity with Kerri, and that Nybo traveled from Illinois to a prearranged location in Wisconsin for the stated purpose of having sex with Kerri. Nybo agreed to bring condoms and continued his electronic communications with Jicha while traveling to Wisconsin. Officers could reasonably believe that evidence such as

condoms, computers or other electronic devices were probably located in Nybo's car.

¶11 Nybo contends there was no probable cause to search his car because he believed he was chatting with an adult and therefore, as a matter of law, did not commit the stated crime of arrest—use of a computer to facilitate a child sex crime.[1] The State agrees that Nybo did not commit the crime of arrest but argues that Jicha's subjective motivation does not determine the legality of the search. ***State v. Mata***, 230 Wis. 2d 567, 574, 602 N.W.2d 158 (Ct. App. 1999) (a court is "not bound by an officer's subjective reasons for a search or arrest").

¶12 The State is correct; we determine the propriety of a legal intrusion using an objective test. *See*, *e.g.*, ***State v. Baudhuin***, 141 Wis. 2d 642, 651, 416 N.W.2d 60 (1987) (officer's subjective belief did not render search of car illegal where "there were objective facts that would have supported a correct legal theory to be applied"); ***State v. Repenshek***, 2004 WI App 229, ¶11, 277 Wis. 2d 780, 691 N.W.2d 369 ("[E]ven when an officer acts under a mistaken understanding of the crime committed, an objective test is used to determine the legality of the arrest."). From an objective standpoint, there was ample probable cause to believe that evidence of a child sex crime, such as attempted sexual assault or child enticement, would be located in Nybo's car. *See* ***State v. Grimm***, 2002 WI App 242, 258 Wis. 2d 166, 653 N.W.2d 284 (finding probable cause for the crimes of attempted child enticement and attempted second-degree sexual assault of a child

[1] Pursuant to WIS. STAT. § 948.075 (2015-16), a person commits the crime of using a computer to facilitate a child sex crime only if that person believes he or she is communicating with a child. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

where defendant showed up for a sexual encounter arranged over the Internet with a law enforcement officer pretending to be a child).

¶13 According to Nybo, cases like ***Mata***, ***Baudhuin*** and ***Repenshek*** are inapposite because they do not present the precise question of whether an officer's subjective belief should be used to determine the existence of probable cause to search under the automobile exception. Any distinction is without a difference. Nothing in Nybo's argument persuades us that a deviation from the well-established objective test is warranted.

The evidence sufficiently supports Nybo's conviction for attempted second-degree sexual assault of a child.

¶14 Nybo argues that the evidence at trial was insufficient to demonstrate that he attempted to have sexual contact or sexual intercourse with the fictitious "Kerri." We must uphold Nybo's conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If there is a possibility that the fact finder "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we must uphold the verdict even if we believe that the fact finder "should not have found guilt based on the evidence before it." ***Id.*** at 507. The standard for assessing the sufficiency of the evidence under ***Poellinger*** extends to court trials. ***State v. Schulpius***, 2006 WI App 263, ¶11, 298 Wis. 2d 155, 726 N.W.2d 706.

¶15 The State needed to prove: (1) Nybo intended to have sexual intercourse or sexual contact with another person; (2) Nybo believed the other

person was under the age of sixteen; and (3) Nybo did acts which demonstrated unequivocally, under all the circumstances, that he intended to and would have had sexual contact or intercourse with that person except for the intervention of another person or some other extraneous factor.[2] *See* WIS JI—CRIMINAL 2105B. To constitute an attempt, the acts of the accused "must not be so few or of such an equivocal nature as to render doubtful the existence of the requisite criminal intent." ***State v. Webster***, 196 Wis. 2d 308, 321, 538 N.W.2d 810 (Ct. App. 1995) (citation omitted).

¶16 The circuit court, acting reasonably, could have found guilt beyond a reasonable doubt. Using the name "daddyluvsynggrls," Nybo entered the Internet chat room "Married but Looking for 13" and sent a private message to Jicha, who was holding himself out as the father of "Kerri," a fourteen-year-old girl. Nybo graphically described the sex acts he wanted to perform on Kerri.

¶17 Jicha testified that Nybo encountered problems messaging under his screen name and switched to the screen name "Racedvr50." Nybo called himself Brad during this conversation. When Jicha told Nybo that condoms "were a must," Nybo responded, "I'm cool with that but I have had a vasectomy." When asked about diseases, Nybo replied that his last doctor's appointment was in July. At Nybo's request, Jicha sent him a picture of a fourteen-year-old girl and said it was Kerri. Nybo said that she was cute and "has a nice body too!" At Jicha's request, Nybo sent a picture of himself. Jicha asked Nybo if he could videotape

[2] The "other extraneous factor" may be the fact that the underage person is fictitious. *See* ***State v. Grimm***, 2002 WI App 242, ¶20, 258 Wis. 2d 166, 653 N.W.2d 284.

Nybo having intercourse with Kerri and Nybo replied, "[T]hat would be cool if you block my face."

¶18 Nybo asked questions about Kerri, including whether she liked having sex with men while Jicha watched and if she was excited to meet him. When Jicha said he wanted to meet Nybo before introducing him to Kerri to make sure he was not a "psycho," Nybo said he understood but defended himself by reminding Jicha he had not posted his own ad and "wasn't out fishing."

¶19 On the same day he first made contact with Jicha, Nybo traveled from Illinois to Waukesha. Along the way, he updated Jicha on his location. Nybo exited the interstate, drove to the agreed-upon location and parked his car while remaining in contact with Jicha. As the circuit court noted, despite having said he had a vasectomy and did not need condoms, Nybo brought the condoms "which was specifically identified as a prerequisite by the fictitious Tim."

¶20 Nybo argues that the evidence was insufficient to prove his intent to have sex with Kerri. He points out that Jicha proposed the in-person meeting, suggested that Nybo get a hotel, and directed Nybo to the restaurant. Nybo suggests that his request to meet in public and the fact that he never agreed to get a hotel room demonstrate his "unwillingness to go along with Jicha's plan." We are not persuaded. The details of Nybo's chatroom conversation with Jicha coupled with the facts surrounding Nybo's travel to Wisconsin for an in-person meeting sufficiently support the verdict. *See* ***Poellinger***, 153 Wis. 2d at 506-07 (even if more than one inference can be drawn from the evidence, this court will follow the inference that supports the verdict "unless the evidence on which that inference is based is incredible as a matter of law").

¶21 Nybo also asks us to conclude that the evidence was insufficient under the "stop-the-film" test set forth in ***Hamiel v. State***, 92 Wis. 2d 656, 665 n.4, 285 N.W.2d 639 (1979); *see also* ***State v. Stewart***, 143 Wis. 2d 28, 42-43, 420 N.W.2d 44 (1988). The premise of the test is "that the accused's acts be viewed as a film in which the action is suddenly stopped, so that the audience may be asked to what end the acts are directed." ***Stewart***, 143 Wis. 2d at 42. Emphasizing that the film stopped before he even walked into the restaurant, Nybo argues that a reasonable trier of fact could not find beyond a reasonable doubt "that it was improbable [Nybo] would desist of his … own free will." ***Id.*** at 31.

¶22 We disagree. Throughout the day, Nybo and Jicha exchanged messages. Their discussion focused largely on Nybo's travel, arrival time, and where they would meet. As the circuit court stated, if Nybo had been engaged in "role play and fantasy, the discussion would have related more specifically to that sort of conduct and those sort of actions as opposed to planning a meet, which is what the great majority of the discussions … related to."

¶23 Nybo further contends that the evidence was insufficient because the film stopped "long before it had become too late for Nybo to repent and withdraw from the purported sexual assault." A defendant's voluntary abandonment or withdrawal is not a defense to the inchoate crime of attempt. ***Id.*** at 45. Despite Nybo's protestations to the contrary, we agree with the State that to find insufficient evidence on this proffered rationale would be to implicitly recognize voluntary abandonment or withdrawal as a defense to the crime of attempted second-degree sexual assault.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.