STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2017AP1536 CR

SHAYD C. MITCHELL,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POST CONVICTION MOTION ORDERED AND ENTERED IN MARATHON COUNTY CIRCUIT COURT, THE HONORABLE GREGORY E. GRAU AND GREGORY J. STRASSER PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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ISSUE PRESENTED

WAS THE EVIDENCE SUFFICIENT FOR THE JURY TO FIND BEYOND A REASONABLE DOUBT THAT MITCHELL COMMITTED THE OFFENSE OF CHILD ENTICEMENT?

The trial court answered this question in the affirmative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested as the defendant-appellant (Mitchell) believes that the briefs of the parties will sufficiently meet and discuss the issues

on appeal. Publication is unnecessary as this is a case based upon settled case law and unique facts.

STATEMENT OF THE CASE

This matter was commenced by the filing of a criminal complaint (1) on September 23, 2013 charging Mitchell with one count each of use of a computer to facilitate a child sex crime and misdemeanor bail jumping on September 21, 2013 contrary to Sec. 948.075(1r) and 946,49(1)(a) Wis. Stats., respectively. An initial appearance was held that day (77) at which bail was set. Mitchell was bound over for trial after waiving his right to a preliminary examination on October 2, 2013 (78) . The State also filed an Information (10) containing the same offenses as alleged in the complaint plus a count of child enticement contrary to Sec. 948.07(1), Wis. Stats. to which Mitchell plead not guilty (79). On January 22, 2014, Mitchell plead no contest to use of a computer to facilitate a child sex crime (27). He later filed motions to withdraw that plea (15, 16 and 22) which was granted (85). On February 9, 2015, Mitchell entered a conditional plea to misdemeanor bail jumping (Count 3) (90). On February 10 and 11, 2015, a jury trial was held (92 and 93) that resulted in a verdict of guilty on the computer crimes and child enticement offenses and the entry of judgment on the bail jumping offense (48). A presentence investigation that was filed (17) after the withdrawn no contest plea was entered and utilized by the court. Mitchell was

sentenced on February 18, 2015 (94) to concurrent sentences of 14 years initial confinement and 6 years extended supervision on the computer crimes and child enticement offenses (51 and 53) and a sentence of nine months in the county jail on the misdemeanor bail jumping offense (53; App. 101-104).

Mitchell subsequently filed a Notice of Intent to Pursue Post-Conviction Relief (56) and the undersigned attorney was appointed to represent him[1] (74). . Judge Gregory Strasser was assigned the case after Judge Grau retired and issued orders denying post conviction motions filed by Mitchell (70 and 72; App. 105-107). On August 2, 2017, Mitchell filed a notice of appeal (75) directed at the judgment of conviction and orders denying his post conviction motion.

STATEMENT OF FACTS

This case began as an undercover operation conducted by the police. At the jury trial which commenced on February 10, 2015, Sergeant Gregory Zager testified that on September 21, 2013, he responded as a member of a task force on internet crimes against children to an ad entitled "Twinks Only, M 4 M – 23 Wausau Wisconsin." (92: 70; Exhibit One). "Twinks" meant a young physically fit gay male (92: 71). "M 4 M meant male for male (92: 71). "23" meant the age of the poster (92: 71). The ad also indicated a preference by the poster to be the person administering sexual intercourse (92: 72). The ad also stated, "I want an experienced boy that knows what he is doing. I am not impressed by virgin. Do

[1] Mitchell initially represented himself on appeal and filed and litigated post conviction motions (95-101)

not reply if you're not serious." (92: 73). Further, "I want to touch you, jerk you, suck you and fuck you. Text your age to (608) 520-6739." (92: 74).

Zager replied to the ad in a text conversation (Exhibit 2) (92: 76). Zager responded that he was 15 years old and interested (92: 77). Zager sent a picture to the poster (later identified as Mitchell) of another police officer who appeared young (92: 80-81; Exhibit 3). Mitchell asked if Zager had a car to which he responded in the negative (92: 84). Zager and Mitchell agreed that Zager would get a friend to give him a ride to the mall to meet (92: 86). Later the place was changed to Family Video on 6th (92: 86-87). Mitchell identified the hat he would be wearing and they agreed to meet inside the store (92: 88). Mitchell indicated that they could hang out for a while after Zager asked if they if they were going to go to Mitchell's place (Exhibit 2 & 2A). Later Zager told Mitchell that he was on his way (92: 88). Mitchell replied that he was walking down 6th and just passed Kwik Trip (92: 89). Mitchell was then arrested (92; 89-90).

Benjamin Graham, a Wausau police officer, testified that on September 21, 2013 he found out that the phone number Zager told him about was identified with Mitchell and that Mitchell resided at 725 Gilbert Street #10 in Wausau (92: 95). When he was dispatched to Family Video, Graham observed Mitchell two blocks north of Family Video (92: 95). Mitchell identified himself and admitted messing around on Craig's List and that he was meeting up with somebody at Family Video (92: 97). Mitchell had his Sanyo cellular phone and keys to Mitchell's apartment with him (92: 98).

Cord Buckner, a Wausau police officer, testified that Mitchell's phone and Kindle met the legal definition of a computer (92: 123-129). Both devices had portions of the conversation between Zager and Mitchell (92: 130-134; Exhibits 84 and 85),

The State also offered into evidence a jail recording of Mitchell speaking to his grandmother (92: 145). During the conversation, Mitchell stated that he was being dumb and talking with an underage person who was the police (93: 21).

During closing argument, the State's theory was that Mitchell's intent was to have sexual contact when he requested to meet at Family Video (93: 22, 33). Judge Grau's instruction to the jury indicated that " the defendant attempted to cause a person to go into a building with intent to have sexual contact." (93; 42). The jury asked for a copy of the highlighted text messages (Exhibit 2A) during deliberations (93: 55). The jury returned a verdict of guilty on both the computer crimes against children and the child enticement counts (93: 57). Judge Grau entered judgment on those counts and the bail jumping count on which a conditional plea had been entered at an earlier proceeding (93: 61).

Further facts will be stated in the argument below.

ARGUMENT

THE EVIDENCE WAS INSUFFICIENT FOR THE JURY TO FIND BEYOND A REASONABLE DOUBT THAT MITCHELL WAS GUILTY OF CHILD ENTICEMENT CONTRARY TO SEC. 948.07(1), WIS. STATS.

When an appellate court reviews a challenge to the sufficiency of the evidence, it views the evidence most favorably to the State and to the conviction. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If more than one reasonable inference can be drawn from the evidence presented at trial, the appellate court accepts the inference most favorable to the verdict, even if other inferences could be drawn. *State v. Routon*, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530. The test is whether "`the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true.'" *State v. Schutte*, 2006 WI App 135, ¶14, 295 Wis. 2d 256, 720 N.W.2d 469 (quoting *Poellinger*, 153 Wis. 2d at 503-04; one set of internal quotations marks omitted). This highly deferential standard of appellate review of a challenge to the sufficiency of the evidence is the same whether the fact finder is a jury or the trial court. *Routon*, 304 Wis. 2d 480, ¶17. Whether the evidence viewed most favorably to the verdict satisfies the legal elements of the crime presents a question of law, which appellate courts review *de novo*. *Id*. It is the jury's function to decide the credibility of witnesses. See *Poellinger*, 153 Wis. 2d at 506.

In this case, the State was required to prove the following beyond a reasonable doubt as to the child enticement offense:

1. That Mitchell attempted to cause a person to go into a building

2. That Mitchell attempted to cause a person to go into a building with intent to have sexual contact. The phrase “with intent to” means that the defendant must have had the mental purpose to engage in sexual contact.

3. Mitchell believed the person was under the age of 16 years.

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In this case, the text messages indicated clearly that Family Video was not intended to be the location where sexual contact was supposed to take place:

ıbox	6085206739		Meet up. Go to my place. And have sum fun

Exhibit 2: Page 1.

In this case, Mitchell was arrested while walking approximately two blocks from Family Video (92: 89-90). The court can take judicial notice that Family Video is a store that rents videos. It is open to the public. The State presented no evidence that Family Video was a secluded place (although it is a building). It is clear that although Mitchell may have wanted to meet up with the child there, it was not the place where Mitchell intended to have sexual contact or intercourse.

A number of Wisconsin cases have explored the issue of what specific intent is required for a violation of Sec.948.07(1), Wis. Stats. In *State v. Grimm*, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284 the issue was whether Grimm could be convicted with child enticement with a police decoy such as occurred in this case. The court held that Grimm could be convicted on a theory of attempt and quoted Sec. 939.32, Wis. Stats. which provides in part:

> Attempt. (3) An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

Grimm, ¶9. It did not address whether the intent to go into a building must be a place where the illicit sexual behavior would take place. The *Grimm* court cited *State v. Robins*, 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287 in which held that that going to meet at the planned time and place is a sufficient unequivocal act in furtherance of the criminal objective of child enticement, when earlier conversations provide reasonable inferences of that criminal objective. *Grimm*, ¶19. In this case, however, Mitchell never made it to Family Video. He was walking two blocks away when arrested (92: 89-90). Further, Family Video was not the location at which the illicit sexual activity was to occur. It was a public location inside a building where Mitchell and the decoy were to meet and decide whether to go to Mitchell's apartment[2]. A discussion with Mitchell and the decoy was needed before a decision was made to go to Mitchell's apartment for illicit sexual activity. This case is clearly distinguishable from

[2] Mitchell agrees that his apartment would be a building within the meaning of Sec. 948.07(1). However, the State's theory was that the building was Family Video.

While courts rarely reverse a jury's verdict, the facts of this case justify it. The State did not present facts sufficient for a rational jury to find beyond a reasonable doubt that Mitchell committed the offense the State charged him with in this case.

In *Burks v. United States*, 437 U.S. 1, 12-14, 57 L.Ed.2d 1, 98 S.Ct. 2141 (1978), the United States Supreme Court held that the double jeopardy clause precludes a second trial once a reviewing court has found the evidence legally insufficient, and the only available remedy is the direction of a judgment of acquittal. Because the evidence was insufficient for a conviction as a matter of law, the only remedy is dismissal with prejudice.

CONCLUSION

For the reasons stated above, the undersigned attorney requests that this court reverse the trial court's Judgment of Conviction and Order Denying Post-Conviction Motion and remand this matter to the trial court with instructions to vacate the conviction and discharge Mitchell from custody.

Dated this ____ day of September 2017

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CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with a serif proportional font. This brief has *** words, including certifications.

Dated this ____ day of September 2017

LEN KACHINSKY

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies the requirements of Rule 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ____ day of September 2017

_____

LEN KACHINSKY