STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2017AP1536-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAYD C. MITCHELL,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MARATHON COUNTY, THE HONORABLE GREGORY E. GRAU AND THE HONORABLE GREGORY G. STRASSER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Defendant-Appellant Shayd C. Mitchell posted on Craigslist that he was seeking sex with a young man. A police officer posing as a 15-year-old boy responded. Mitchell and the "boy" agreed to meet at a video store and return to Mitchell's apartment for sex. Police arrested Mitchell when he was two blocks away from the video store. Was this evidence sufficient for the jury to convict Mitchell of child enticement?

By entering judgment on the jury's verdict, the circuit court answered yes.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The parties' briefs will fully address the issues presented, which can be resolved by applying well-established precedent.

INTRODUCTION

The State presented sufficient evidence to show that Mitchell committed child enticement. Mitchell arranged to meet someone he thought was a 15-year-old boy at a video store and then go to Mitchell's apartment for sex. Mitchell then began walking to the store. This was enough to show that Mitchell committed child enticement by attempting to cause a person that he believed was under 16 years old to go into a building with the intent to have sexual contact. And Mitchell's arguments why the evidence was insufficient are not persuasive.

STATEMENT OF THE CASE

On September 21, 2013, Sergeant Gregory Zager of the Sturgeon Bay Police Department was working on an Internet Crimes Against Children (ICAC) Task Force operation. (R. 93:69–70.) Zager saw a Craigslist posting titled, "Twinks Only, M 4 M – 23 Wausau, Wisconsin." (R. 34:1; 93:70.) The posting stated:

> DO NOT REPLY IF UR NOT INTERESTED. Sup, Imma top white daddy seeking a young boy. I want an experienced boy that knows what he is doing. I am not impressed by virgin. DO NOT REPLY IF UR NOT SERIOUS. I want to touch u, jerk u, suck u and fuck u. If it serious and interested, txt ur age to 6zero8 5twozero 6seven3nine. DO NOT REPLY IF UR NOT INTERESTED.
>
> ;) DaddyDoc

(R. 34:1; 93:70–75.)

At trial, Zager explained, based on his training and experience, that "Twinks basically means a young physically fit gay male," although it did not specifically mean underaged. (R. 93:71.) "M 4 M," Zager said, means "male for male." (R. 93:71.) Zager also said that "23" was the age of the poster. (R. 93:71–72.) Additionally, Zager explained "top" and "bottom" as "the bottom's usually the receptive person in the sexual intercourse. And the top is usually the person that administers the sexual intercourse." (R. 93:72.) And Zager said that the sentence, "I want to touch u, jerk u, suck u and fuck u" "[b]asically, it's a male who's seeking out a young boy, who — and he wants to have sexual contact and intercourse with that young boy." (R. 93:74.)

Zager responded to the posting, posing as a child. (R. 93:75–77.) He sent a text message to the number listed in the posting that read, "Hey, im responding to ur add im 15

and serious about this let me know if ur interested." (R. 35:1; 93:77.) Zager received a response asking if he was a virgin, and he replied no. (R. 35:1; 93:78.) In response to questions, Zager said that his name was Chris, he was a bottom, and he lived in Wausau. (R. 35:1; 93:78–79.) Zager, again responding to questions, said he was white, 5' 9", and fit. (R. 35:1; 93:79–80.) The person he was texting also requested that Zager email photos of him to daddydoc4you@yahoo.com. (R. 35:1, 93:79.) Zager sent the person a photo of another Sturgeon Bay police officer when the officer was younger. (R. 93:80–81.)

Zager next asked "what u got in mind." (R. 35:1; 93:83.) The other person replied, "Meet up, go to my place, and have sum fun." (R. 35:1; 93:83.) When asked whether he had a car, Zager replied that he did not drive because he was 15 years old. (R. 35:1; 93:84–85.) Eventually, Zager and the other person agreed to meet inside the Family Video on Sixth Street in Wausau. (R. 35:2; 93:86.) The person told Zager he would be wearing a red Chicago Bulls hat, a black jacket, and red shoes. (R. 35:2–3; 93:87.) He also told Zager to be "[d]iscreet as possible." (R. 35:2; 93:88.) In the last text messages Zager received, the person said he was walking down Sixth Street and asked Zager to walk towards him. (R. 93:89–90.)

While he was texting with the person, Zager was also on the phone with Wausau Police Officer Benjamin Graham. (R. 93:89, 94.) Zager told Graham that he had agreed to meet the person at Family Video and gave Graham the description of what the person would be wearing. (R. 93:89, 95.) Graham learned the phone number that Zager had been texting was listed to Shayd Mitchell, 725 Gilbert Street, Apartment 10, in Wausau. (R. 93:95.)

Graham went to the area of Family Video. (R. 93:96.) Two blocks south of the store, he saw a man matching the description Zager had given him. (R. 93:96.) This location was on a route of travel from Mitchell's address to Family Video. (R. 93:96.) Graham yelled "Shayd" at the man, who turned and looked, and whose head sunk to his chest. (R. 93:97.) Graham asked the man if he knew why Graham had stopped him, and he replied, "I was messing around on Craig's List and was meeting up with somebody at Family Video." (R. 93:97.) Graham called the phone number that Zager had been texting; a phone found on the man rang. (R. 93:98.) Police recovered the text messages that Zager testified about on the phone. (R. 93:111–13.) Graham identified Mitchell in the courtroom as the man he arrested. (R. 93:97.)

The jury convicted Mitchell of child enticement. (R. 47:2.) He appeals.[1]

STANDARD OF REVIEW

Whether the trial evidence was sufficient to support a conviction is a question of law that this court reviews de novo. *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410.

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[1] The jury also convicted Mitchell of using a computer to facilitate a child sex crime. (R. 47:1.) And before trial, Mitchell pleaded no contest to misdemeanor bail jumping. (R. 52; 91:7–12.) He does not challenge those convictions on appeal. (Mitchell's Br. 10.) Mitchell also filed a postconviction motion, which the circuit court denied. (R. 65; 69.) He does not raise any issues from the motion on appeal.

ARGUMENT

The evidence was sufficient to convict Mitchell of child enticement.

A. This Court must uphold the jury's verdict if there is any possibility that the jury could have found Mitchell guilty of child enticement.

When an appellate court reviews a challenge to the sufficiency of the evidence to support a conviction, the test is not whether the appellate court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the court can conclude the trier of fact, acting reasonably, could be so convinced by evidence it had a right to believe and accept as true. *State v. Poellinger*, 153 Wis. 2d 493, 503–04, 451 N.W.2d 752 (1990).

An appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *Id.* "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence [presented] at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." *Id.* at 507 (citation omitted).

Child enticement under Wis. Stat. § 948.07 includes both the attempted and completed crime. *State v. Koenck*, 2001 WI App 93, ¶¶ 14, 20, 242 Wis. 2d 693, 626 N.W.2d 359. The trial court instructed the jury that to find Mitchell guilty of child enticement, it had to conclude that he

attempted to cause a person he believed was a child under 16 years old to go into a building with the intent to have sexual contact with the child in violation of Wis. Stat. § 948.02. (R. 7:1; 95:41–42.) *See* Wis. Stat. § 948.07(1); Wis. JI–Criminal 2134B (2016).

The court explained that attempt meant that Mitchell had the intent to commit child enticement and performed acts that demonstrated "unequivocally under all of the circumstances that he had formed that intent and would commit the crime except for the intervention of another person or some extraneous factor." *Id.* Put another way, attempt has two elements, criminal intent and some acts in furtherance of the intent. *See State v. Kordas*, 191 Wis. 2d 124, 129, 528 N.W.2d 483 (Ct. App. 1995).

"Unequivocally means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts under the circumstances." (R. 95:42.) Wis. JI–Criminal 2134B. "Another person means anyone but the defendant and may include the intended victim." *Id.* "An extraneous factor is something outside the knowledge of the defendant or outside the defendant's control." *Id.* "That the victim was fictitious can constitute an extraneous factor." *Id*. *See State v. Robins*, 2002 WI 65, ¶¶ 27–28, 253 Wis. 2d 298, 646 N.W.2d 287.

The court instructed the jury that "sexual contact" means "an intentional touching of an intimate part of the victim by the defendant." (R. 95:43.) Wis. Stat. § 948.01(5)(a); Wis. JI–Criminal 2134B. "Intimate part means the breast, buttocks, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." *Id.* "The touching may be of the intimate part directly or it may be through the clothing, the touching may be done by any body part, or by any object, but it must be an intentional touching." *Id.*

"Sexual contact also requires that the defendant acted with intent to become sexually aroused or gratified." *Id.*

B. The evidence allowed the jury to conclude that Mitchell attempted to cause a person he believed was under 16 to go into a building to have sexual contact.

This Court should conclude that the evidence was sufficient to let the jury convict Mitchell of child enticement. The jury had to find that Mitchell attempted to cause a person he believed was a child under 16 years old to go into a building with the intent to have sexual contact. There was sufficient evidence to meet these elements.

The jury heard testimony about Zager's text conversations with Mitchell. This testimony allowed the jury to conclude that Mitchell had formed the intent to commit child enticement. Zager repeatedly told Mitchell in the text messages that he was a 15-year-old named Chris. The jury could conclude from this that Mitchell was interacting with a person he believed was under 16 years old. Zager was responding to a sexually explicit Craigslist post from Mitchell that showed he was looking for a sexual partner to "touch . . . jerk . . . suck . . . and fuck." And the text conversations between Zager and Mitchell discussed sex, specifically whether "Chris" was a virgin and a bottom. Zager and Mitchell then agreed to meet at Family Video to go back to Mitchell's apartment and "have sum fun." From this, the jury could have concluded that Mitchell's intent was to cause "Chris" to go into a building—Mitchell's apartment—to have sexual contact with him.

In addition, the jury could have found that Mitchell's actions after the conversation were acts in furtherance of the intent he had formed. After agreeing to meet "Chris" at

Family Video, Mitchell walked toward the store. After police stopped him two blocks from the store, Mitchell said he had been "messing around on Craig's List and was meeting up with somebody at Family Video." This evidence allowed the jury to conclude that Mitchell was going to Family Video to meet with "Chris" with the intent to take him back to his apartment for sex. Thus, Mitchell's travelling to the video store was an act in furtherance of his already-formed intent.

And finally, that the police stopped Mitchell before he got to Family Video or that there actually was no "Chris" did not preclude a finding of guilt. Rather, Graham's arresting Mitchell was the action of another person and Chris's fictitiousness was an extraneous factor. Both of these things merely prevented Mitchell from completing his crime. But because the child enticement statute includes both the attempted and completed crime, Mitchell's failure to complete his crime is irrelevant. The jury had sufficient evidence to find Mitchell guilty of child enticement.

C. None of Mitchell's arguments establish that the evidence was insufficient to find him guilty.

This Court should also reject Mitchell's arguments that the evidence was insufficient. He argues that there was insufficient evidence to show that he intended to cause "Chris" to go into a building. (Mitchell's Br. 7–10.) Specifically, pointing to the State's closing argument, he contends that the State's theory was that Family Video was the building Mitchell intended to cause Chris to go in. (Mitchell's Br. 5, 7–10.) Mitchell maintains that Family Video was not a secluded place where a child sex offense could be committed because it was open to the public. (Mitchell's Br. 7–10.) Instead, Mitchell insists that he and

"Chris" needed to meet inside Family Video to decide whether to return to Mitchell's apartment, which he admits is a "building" under the statute. (Mitchell's Br. 8.) But because police arrested him two blocks from Family Video, Mitchell contends that the evidence was not sufficient to show he had taken sufficient acts in furtherance of his intent. (Mitchell's Br. 8–9.)

This argument fails at every step. The State's theory was not that Family Video was the building. In its closing, the State asserted that the building was Mitchell's apartment, specifically referencing the text message in which Mitchell mentioned going back to his place to have some fun. (R. 95:21–22.) Moreover, even if the State's references to Family Video in its closing suggest that the State's theory of the case was that Family Video was the building, this does not matter. Closing arguments are not evidence. (R. 95:51.) Wis. JI-Criminal 160 (2000). What matters is the evidence the State presented at trial. As argued, that showed that Mitchell acted with the intent to take "Chris" back to his apartment for sex.

In addition, Family Video's being open to the public does not preclude it from being a building under Wis. Stat. § 948.07. The statute prohibits defendants from causing children "to go into any vehicle, building, room or secluded place." Wis. Stat. § 948.07. These are alternative modes of commission. *See Koenck*, 242 Wis. 2d 693, ¶ 15. "The statute does not require that the defendant's action separate the child from the public." *State v. Gomez*, 179 Wis. 2d 400, 405, 507 N.W.2d 378 (Ct. App. 1993). There is no requirement in section 948.07 that the building be private.

For those reasons, Mitchell's reliance on *State v. Pask*, 2010 WI App 53, 324 Wis. 2d 555, 781 N.W.2d 751, is misplaced. (Mitchell's Br. 9–10.) Mitchell says *Pask*

establishes that "the location where the child enticement occurs must be a location where the intended sexual conduct is less likely to be detected by the public." (Mitchell's Br. 10 (internal quotation marks omitted).) *Pask*, though, was interpreting "secluded place," not "building." *Pask*, 324 Wis. 2d 555, ¶ 11–16. And again, the statute does not require that the building be secluded or closed to the public.

Nor has Mitchell shown that he did not engage in sufficient acts in furtherance of his intent. As argued, Mitchell made plans to meet "Chris" at Family Video so they could return to Mitchell's apartment and have sex. This shows Mitchell's intent. Mitchell then began walking to Family Video, which was an act in furtherance of that intent.

Mitchell argues that his arrest two blocks from Family Video precludes his walking there from being a sufficient act. (Mitchell's Br. 7–9.) He relies on *State v. Grimm*, 2002 WI App 242, 258 Wis. 2d 166, 653 N.W.2d 284, to argue that he needed to enter Family Video and agree with "Chris" to return to the apartment for sex before he could be guilty of child enticement. (Mitchell's Br. 7–8.)

Grimm does not support Mitchell's argument. There, the State alleged that Grimm engaged in instant messaging with an undercover police officer posing as a fourteen-year-old. *Grimm*, 258 Wis. 2d 166, ¶¶ 2–4. They agreed to meet at a McDonald's and then go to a hotel for sex. *Id.* ¶ 4. Police arrested Grimm when he got out of his car in the McDonald's parking lot. *Id.* ¶ 5.

Grimm challenged the complaint as lacking probable cause. *Id* ¶ 6. This Court disagreed, holding that reasonable inferences from the State's allegations showed that Grimm intended to commit child enticement and took acts in

furtherance of that intent. *Id*. ¶¶ 17–20. This Court rejected the argument that more acts, such as trying to get the child into a car or a hotel room, were necessary. *Id*. ¶ 19. The Court held that "[*State v.*] *Robins* makes it clear 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." *Id*.

Far from helping Mitchell, *Grimm* shows that the evidence here was sufficient to convict him. Grimm, like Mitchell, never got inside the building where he intended to meet his victim. And this Court specifically rejected an argument that acts beyond travelling to the location of the planned meeting were necessary to show child enticement.

Further, the other two cases Mitchell cites in support of his argument are also unhelpful to him. In *Robins*, the police arrested Robins right after he got out of his car in the parking lot of the agreed-on meeting spot, a Burger King. *Robins*, 253 Wis. 2d 298, ¶ 14. Thus, Robins never entered the building. Nonetheless, the supreme court concluded travelling to the meeting spot was a sufficient act in furtherance of Robins's intent to establish probable cause in the complaint. *Id*. ¶ 38. And in *State v. Brienzo*, 2003 WI App 203, 267 Wis. 2d 349, 671 N.W.2d 700, while the police arrested the defendant inside the meeting spot, a McDonald's, this Court never held that entry was required to show a sufficient act. *Id*. ¶¶ 7, 25. All that is required is some act in furtherance of the defendant's intent. And here, Mitchell's walking to the agreed-upon meeting spot was enough. The case law rejects Mitchell's argument that the defendant must enter the meeting spot or take any further acts to be guilty of child enticement.

CONCLUSION

The State respectfully requests that this Court affirm the circuit court's judgment of conviction and order denying Mitchell's motion for postconviction relief.

Dated November 20, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,068 words.

Dated this 20th day of November, 2017.

_____
AARON R. O'NEIL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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 20th day of November, 2017.

_____
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