IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Sergeant (E-5) **JOHN PENALOZA,** United States Army, Appellant	**BRIEF ON BEHALF OF APPELLEE** Docket No. ARMY 20230473 Tried at Wheeler Army Airfield, Hawaii, on 2 May, 28 July, and 28-29 August 2023, before a general court-martial appointed by the Commander, 25th Infantry Division, Colonel Rebecca Farrell and Lieutenant Colonel Michael Korte, military judges presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error[1]

I.

[WHETHER] BY NOT ARRIVING WITH CASH, APPELLANT DID NOT TAKE A SUBSTANTIAL STEP TOWARDS COMPLETING THE OFFENSE OF ATTEMPTED SEX TRAFFICKING OF A CHILD.

II.

[WHETHER] THE GOVERNMENT ENTRAPPED APPELLANT BY INTRODUCING THE CRIMINAL SCHEME WHEN HE WAS NOT PREDISPOSED TO ENGAGE IN ATTEMPTED SEX TRAFFICKING OF A CHILD.

[1] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits they lack merit. Should this Court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

III.

WHETHER THE MILITARY JUDGE IMPROPERLY TOOK JUDICIAL NOTICE OF AN ESSENTIAL ELEMENT WHEN SHE DID SO AFTER CLOSING THE COURT FOR DELIBERATIONS AND SHE ERRONEOUSLY INDICATED THE GOVERNMENT HAD REQUESTED HER TO DO SO DURING REBUTTAL ARGUMENT.

Statement of the Case

On 29 August 2023, a military judge sitting as a general court-martial convicted appellant, contrary to his plea, of attempted sex trafficking of a child in violation of Article 80, Uniform Code of Military Justice [UCMJ]. (R. 307; Statement of Trial Results [STR]). That day, the military judge sentenced appellant to sixty days confinement. (R. at 363; STR). On 14 September 2023, the convening authority took no action on the findings and sentence. (Convening Authority Action). The military judge entered judgement on 20 September 2023. (Judgment). This court docketed appellant's case on 23 April 2024. (Referral and Designation of Counsel).

Facts

1. Appellant's attempt to pay sixteen-year-old Kylie for sex.

Appellant matched and began communicating with Kylie on the dating application "Bumble." (R. at 106, 108–09, Pros. Ex. 3). Unbeknownst to appellant, Kylie was not a sixteen year old but rather Army Criminal Investigation

Division [CID] undercover chatter Special Agent [SA] [redacted] participating in a sting operation called "Operation Intercept."[2] (R. at 105). Kylie advertised her location as "Schofield Barracks" where appellant was stationed. (R. at 114, Pros. Ex. 3). Shortly after matching, Kylie suggested the two move the conversation to Snapchat, which appellant agreed to do. (Pros. Ex. 3, Pros Ex. 4). Quickly into the Snapchat conversation, Kylie informed appellant she "was not free" and asked "are you okay with $50 for a BJ?[3] Or like $200 for normal sex?" (R. at 123, Pros. Ex. 4).

Appellant then requested, and received, a photo and video from Kylie to prove she was real. (R. at 124; Pros. Ex. 4). In response to her proof appellant stated "okay, let's link then." (R. at 125; Pros. Ex. 4). When appellant asked if Kylie was married, she responded, "Not married. Way too young for that. My mom kicked me out, and I just got here to live with my aunt." (R. at 126: Pros. Ex. 4). Appellant then asked how old Kylie was and she told him "[a]lmost seventeen." (R. at 127; Pros. Ex. 4). After the discussion of age, appellant asked Kylie her address so he could pick her up. (R. at 128; Pros. Ex. 4.) Kylie then asked if he wanted "sex or a BJ?" (R. at 128; Pros. Ex. 4). Appellant responded, "Sex." and, "I'll pay you cash." (R. at 129; Pros. Ex. 4). Kylie confirmed the

[2] Special Agent [redacted]'s name changed between the operation and trial. (R. at 104). For consistency sake the government will refer to her by her name at trial.
[3] A "BJ" is a colloquial term for fellatio. (R. at 129).

price of $200. (R. at 129; Pros. Ex. 4). Appellant acknowledged that amount. (R. at 129; Pros. Ex. 4).

Over the course of the next two days, appellant made several efforts to meet with Kylie. (R. at 129–45; Pros. Ex. 4). Appellant attempted to persuade Kylie to sneak away from her "aunt's" house to meet him. (R. at 130, 134–135; Pros. Ex. 4). He repeatedly assured her he could and would pay for the sex. (R. at 129, 131, 139, 141). Ultimately, Kylie agreed to meet appellant. (R. at 144; Pros. Ex. 4). Law enforcement arrested appellant when he arrived at the location. (R. at 145). Law enforcement searched appellant's person and vehicle and found a cell phone, his walled, a condom, and "a few other personal items." (R. at 145).

2. Special Agent [redacted]'s Testimony.

As the only witness in the case, in addition to recounting appellant's actions, SA [redacted] testified extensively regarding the Operation Intercept's planning, execution, results, and framework. (R. at 104–262). Special Agent [redacted] outlined her undercover training at the "ICAC Undercover Concepts and Techniques Course,"[4] also known as the "Chatters Course." (R. at 105, 159). On cross examination defense counsel extensively challenged SA [redacted] on whether she followed the applicable regulations and laws, with particular focus on the ICAC guidelines. (R. at 152–247).

[4] ICAC stands for Internet Crimes Against Children. (R. at 173).

Special Agent [redacted] conceded that in ICAC cases, CID is not supposed to introduce the criminality. (R. at 205, 225). However, she was adamant that the "guidelines and principles of ICAC" did not apply to Operation Intercept as it was not an ICAC operation. (R. at 164, 173, 178, 205, 214). Special Agent [redacted] clarified that the operation used "some" of the concepts and guidance she learned at the ICAC course, as the operation has "some similarities" to ICAC cases. (R. at 163). She later confirmed that her ICAC training "was primarily about child pornography distribution online, as well as child solicitation" and ICAC has guidelines to avoid entrapment in child solicitation cases. (R. at 165, 261). Special Agent [redacted] explained while similar, human trafficking cases and child solicitation cases "are not the same." (R. at 161, 163–64). She also tried to explain that ICAC is an organization when defense counsel specifically challenged her on whether this was an internet crime against children.[5] (R. at 174).

Special Agent [redacted] admitted she was unaware of the CID Regulation 195-1 directive to read Chapter 18 prior to online undercover activity. (R. at 167). However, she was aware that the regulation does not allow agents to engage in

[5] Defense counsel cut off SA [redacted] and demanded a yes or no answer to the question. (R. at 174). Special Agent [redacted] then said, "It was not in ICAC operation." (R. at 174). She was not given the opportunity to expand upon her answer that ICAC is an organization. However, as defense counsel questioned, the lack of an "ICAC liaison" in the operation supports SA [redacted]'s assertion that ICAC is an organization that undertakes operations with law enforcement and not a classification of criminal activity. (R. at 174).

entrapment.[6] (R. at 167). Special Agent [redacted] explained the operation's design was to catch human traffickers, which is why she pretended to be a prostitute. (R. at 175–76). Special Agent [redacted] confirmed, "that's referring to child solicitation cases" in response to defense counsel reading from CID Pam 195-13, para 11-4 regarding "proactive ICAC chat operations." (R. at 175).

On cross-examination, SA [redacted] admitted that based on defense counsel's questioning, she was not following the CID Regulations "that govern proactive undercover online investigations." (R. at 178). Special Agent [redacted] admitted that CID Regulation 195-1 does state, "you shall not initiate any plan to commit criminal acts." (R. at 185, 225). However, she further explained the regulation also states, "the agent should make sure that the illegal nature of the activity is clear." (R. at 241). She followed that directive, "On a few different times and a few different ways. We talked about the exchange of sex for $200. I also mentioned my age being 16 more than once" because this was a human trafficking through prostitution operation. (R. at 249).

While SA [redacted] conceded there are entrapment instructions in CID Regulation 195-1, she also understood that there were differences between the types of operations. (R. at 171). When discussing the lack of a "human trafficking carve out" SA [redacted] noted: "Our reg [sic] isn't super direct. It doesn't go have a list

[6] As discussed *infra* there was no entrapment in this case.

of every single type of case or crime or offense or [operation] that we could have and then give a breakdown of each one." (R. at 172).

The CID team discussed entrapment during the operation brief prior to executing the mission. (R. at 166. 168). To SA [redacted]'s understanding, the appropriate level approved the operation. (R. at 170). Her superior, SA [redacted], informed her that the operation was not entrapment and therefore legal, and she "moved forward with the [operation]" (R. at 177).

I. [WHETHER] BY NOT ARRIVING WITH CASH, APPELLANT DID NOT TAKE A SUBSTANTIAL STEP TOWARDS COMPLETING THE OFFENSE OF ATTEMPTED SEX TRAFFICKING OF A CHILD.

Standard of Review

Questions of legal sufficiency are reviewed de novo. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). For factual sufficiency, "once an appellant makes a specific showing of a deficiency in proof, [this court] will conduct a de novo review of the controverted questions of fact." *United States v. Scott*, 84 M.J. 583, 585 (Army Ct. Crim. App. 2024).

After a specific showing of a deficiency in proof is made, "the Court may weigh the evidence and determine controverted questions of fact subject to [] appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and [] appropriate deference to findings of fact entered into the

record by the military judge. [If] the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding." William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542 (1 Jan. 2021) [FY21 NDAA].

Law

This court reviews legal and factual sufficiency of court-martial convictions and only affirms findings of guilty that are correct in law and fact. Article 66(d)(1), UCMJ; 10 U.S.C. § 866(d). This court employs an extremely deferential test when evaluating legal sufficiency. Under the test, "evidence is legally sufficient if, viewed in the light most favorable to the "government, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011). This court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006); *Bright*, 66 M.J. at 365.

"The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of appellant's guilt beyond a reasonable doubt." *Craion*, 64 M.J. at 534 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A.

1987)). Under this analysis, "[r]easonable doubt . . . does not mean the evidence must be free from conflict." *United States v. Rankin*, 63 M.J. 552, 557 (N.M. Ct. Crim. App. 2006). While weighing the evidence, a reviewing court must be mindful that it did not personally observe and hear the witnesses. Article 66, UCMJ; *Turner*, 25 M.J. at 325.

Factfinders "are expected to use their common sense in assessing the credibility of testimony as well as other evidence presented at trial." *United States v. Frey*, 73 M.J. 245, 250 (C.A.A.F. 2014); *see also* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 7-7-1 (29 February 2020) [Benchbook]. This applies in a military judge alone case. *Frey*, 73 M.J. at 251. The factfinder should use their "knowledge of human nature and the ways of the world." Benchbook, para. 2-5-12. "In light of all the circumstances in the case, [the fact finder] should consider the inherent probability or improbability of the evidence." *Id.*

There are four elements of attempt: (1) that the accused did a certain overt act; (2) that the act was done with the specific intent to commit a certain offense under the code; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense. *United States v. Payne*, 73 M.J. 19, 24 (C.A.A.F. 2013)(citing MCM pt. IV, para. 4.b.) The CAAF has interpreted the third element of attempt as "requiring that the

accused take a 'substantial step' toward commission of the crime." *Id.* (citing *United States v. Jones*, 37 M.J. 459, 461 (C.M.A. 1993)). The CAAF has further distinguished a "substantial step" as going beyond "devising or arranging the means or measures necessary for the commission of the offense and, instead, engaging in a direct movement toward the commission after the preparations are made." *Id*. (quoting *United States v. Schoof*, 37 M.J. 96, 103 (C.M.A. 1993). While "the substantial step must unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances" it "could be comprised of something as benign as travel, arranging a meeting, or making hotel reservations." *United States v. Hale,* 78 M.J. 268, 272 (C.A.AF. 2019) (citing *United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011)). Importantly, the substantial step "need not be the last act essential to the consummations of the offense." *Id.* at 271 (quoting MCM pt. IV, para. 46.c.(2)). "Failure to complete the offense, whatever the cause, is not a defense." *United States v. Church*, 32 M.J. 70, 71 (C.A.A.F. 1991)(quoting MCM pt. IV, para. 4.c.(2)).

Sex trafficking of a child, as relevant to this case, occurs when an accused "knowingly . . . patronizes, or solicits by any means a person" and "that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act." 18 U.S.C. § 1591(a).

Argument

Appellant's conviction is legally and factually sufficient as he took a substantial step in furtherance of patronizing or soliciting a person under the age of eighteen to engage in a commercial sex act. When every reasonable inference from the evidence of record is viewed in favor of the prosecution, it is clear the conviction is legally sufficient. *Craion*, 64 M.J. at 534; *Bright*, 66 M.J. at 365. Further, this court's independent review of the evidence will show beyond a reasonable doubt that appellant's conviction is factually sufficient. *Turner*, 25 M.J. at 325.

1. Appellant was attempting to pay Kylie for sexual intercourse, not seduce her.

As a preliminary matter, appellant was not, as he argues here and at trial, attempting to seduce Kylie. (Appellant's Br. 12–13; R. at 290). This court should reject that theory like the military judge at trial. Appellant's actions are inconsistent with someone who rejected the notion of payment for sexual intercourse and was instead attempting to seduce the prostitute.

At appellant's first request to "link up," Kylie informed him he would need to pay for sex.[7] (Pros. Ex. 4; p 1). Appellant continued to negotiate and arrange a meeting over the course of two days despite knowing that Kylie intended to engage in illegal commercial sexual intercourse. (R. at 126–42; Pros. Ex. 4). Appellant

[7] This was the seventh message Kylie sent to appellant. (Pros. Ex. 3; Pros. Ex. 4).

demanded Kylie send a video to prove she was real stating, "you're the one charging to fuck." (R. at 124; Pros. Ex. 4). His immediate response to the proof was "let's link then" indicating he desired to pay her to have sex with him. (R. at 125; Pros. Ex. 4). He never refused to pay for sexual intercourse, even if he harbored doubts that Kylie was real.[8] (Pros. Ex. 4). In fact, appellant told Kylie he would pay or had the money for sexual intercourse seven times. (Pros. Ex. 4). Likewise, he repeatedly attempted to persuade her to lie to or sneak away from her "aunt" to prostitute herself to him. (Pros. Ex. 4). Disturbingly, appellant was not dissuaded from paying for intercourse when Kylie revealed her age. Nor did appellant try to convince her to have non-commercial intercourse when Kylie informed him of her age.[9] (Pros. Ex. 4). Appellant never expressed a desire to not pay for sex, attempted to convince Kylie to not charge him, or made overtures to a non-transactional event. Even if appellant flirted with Kylie in some manner, that does not negate his expressed willingness and desire to pay $200 for sexual intercourse.[10] Appellant's argument otherwise is simply unpersuasive.

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[8] On cross, defense counsel questioned SA [redacted] about the existence of fake accounts, internet trolls, scammers, internet bots, and people pretending to be something they are not. (R. at 194–96).

[9] Twice after being told Kylies age appellant immediately asked for a picture of her. (Pros. Ex. 4).

[10] Appellant claims his invitation to "come take a seat" and to "go on a little drive" are attempts to "entice" or "arouse" and "seduce" her. (Appellant's Br. 12–13). Putting aside the weakness of that claim, those actions do not negate his willingness to engage in commercial sex.

2. Appellant's actions were sufficient to establish he took a substantial step to completing the offense.

Appellant's conviction is legally and factually sufficient, as his attempt was complete when he concluded negotiations with Kylie and traveled to the meeting site. *Jones*, 37 M.J. at 461; *Hale,* 78 M.J. at 272. Appellant's failure to bring paper money does not negate the crime. *Id.* (the substantial step "need not be the last act essential to the consummations of the offense.") Failure to complete the trafficking, due to the lack of paper money, is not a defense in this case. *Church*, 32 M.J. at 71.

This court should look to the Eight Circuit Court of Appeals' analysis of this exact charge in *United States v. Larive*, 794 F.3d 1016 (8th Cir. 2015). There, the circuit court noted the similarities between a violation of 18 U.S.C. §1591 and enticing a minor to engage in illegal sexual activity in violation of 18 U.S.C. §2422. *Id*. at 1019. The court noted:

> If a defendant's online conversations with an adult to arrange sex with a minor and a defendant's travel to an arranged meeting place to meet a minor constitute substantial steps toward enticing a minor to engage in illegal sexual activity under §2422(b), then it follows that these acts also constitute substantial steps toward enticing a minor whom the defendant knows will be caused to engage in a commercial sex act in violation of §1591(a).

Id. Ultimately, the Eight Circuit determined that "a reasonable jury could find that Larive committed an attempt by finishing negotiations for the commercial sex act

with a minor and traveling to the meeting site."[11] *Id.* at 120. That same logic should be applied here. Appellant completed his negotiation to exchange $200 for sexual intercourse with Kylie. (Pros. Ex. 4). Upon completion of the negotiation, he traveled to the meeting site. (Pros. Ex. 4). This is sufficient to create an attempt and overcome appellant's "seduction" defense. *Id. see also United States v. Lopez*, 74 F.4th 915 (8th Cir. 2023) (applying the same logic to several pieces of evidence and determining the evidence was sufficient to overcome Lopez's defense, that he did not know which sex worker he was meeting and therefore did not have the intent to commit the specific crime). [12]

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[11] Appellant appears to suggest that the court held that Larive's possession of the "form of payment" at the time of the arrest was dispositive for the Eighth Circuit and argues the court "requires the defendant to appear at a predetermined site with the previously discussed form of payment on their persons." (Appellant's Br. 11). That is an inappropriate reading of the case, as evidenced by the lack of mention of the form of payment or its location in the courts holding. While Larive was in possession of the phone he intended to trade for sex, it is clear that the Eighth Circuit held the "finishing of negotiations" and "traveling to the meeting site" and not the ability to complete the transaction formed the substantial step. *Larive*, 794 F.3d at 1020.

[12] The evidence included Lopez's repeated expressed desire to have sexual intercourse with a 15-year-old, his negotiation of price, his travel (through a snowstorm) to the prearranged location, and the money and alcohol he brought with him. *Id.* at 918. Appellant again frames this holding as requiring the presence of paper money in order to find a substantial step was completed. (Appellant's Br. 11). As was his reading with *Larive*, that is not a reasonable interpretation of the case. The Eighth Circuit mentioned the money in conjunction with several other pieces of evidence to show that Lopez knew which particular sex worker, namely the child one, that he was attempting to meet. (*Lopez*, 74 F.4th at 918).

The Seventh Circuit Court of Appeals similarly discussed the issue of substantial steps in *United States v. Gladish*, albeit dealing with a violation of 18 U.S.C. §2422(b). 536 F.3d 646 (7th Cir. 2008). There the court discussed a non-exhaustive list of "substantial steps." *Id.* at 649. The Seventh Circuit noted travel was not an essential condition of finding a substantial step. Rather, like the CAAF in *Hale*, the Seventh Circuit highlighted that "making arrangements for meeting the [child], as by agreeing on a time and place for the meeting...making a hotel reservation, purchasing a gift, or buying a bus or train ticket" as possible substantial steps. *Id*.; 78 M.J. at 272. Although *Gladish* dealt with a non-commercial sex crime, the Seventh Circuit then applied the case's logic to *United States v. Wright*, 2022 U.S. App. LEXIS 16157 (7th Cir. 2022).

In *Wright* the court relied on *Gladish* to inform its decision dealing with a violation of 18 U.S.C. §1591. The court noted that "[Wright] *not only* made arrangements like agreeing on a time and place for the meeting," as discussed in *Gladish*, but he *also* "came within feet of the meeting place with the agreed-upon payment in his pocket." *Id.* at *7 (emphasis added). That holding indicates that either the arrangement *or* the travel with payment was sufficient to show a substantial step was taken.[13] Like in *Wright*, here

[13] Appellant again appears to claim that the payment in Wright's pocket was the dispositive factor for the court. (Appellant's Br. 11). However, the court's reliance

we have several independent actions that amount to a substantial step such as negotiation, repeated attempts to persuade the victim to sneak out to meet, arranging the actual meeting, and traveling to the meeting. (Pros. Ex. 4).

Applying the well-reasoned logic of *Hale, Larive, Gladish,* and *Wright*, the court should determine that appellant took a substantial step towards committing the crime, regardless of the lack of paper money on his person.

II. [WHETHER] THE GOVERNMENT ENTRAPPED APPELLANT BY INTRODUCING THE CRIMINAL SCHEME WHEN HE WAS NOT PREDISPOSED TO ENGAGE IN ATTEMPTED SEX TRAFFICKING OF A CHILD.

Standard of Review

The government incorporates the standard of review outlined *supra* p. 7–8 for appellant's first assignment of error here for his second assignment of error.

Law

The government incorporates the law discussed for legal and factual sufficiency as outlined *supra* 8–9.

Entrapment has two prongs, both are required for a successful defense; (1) "government inducement of the crime *and* [(2)] a lack of predisposition on the part

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on *Gladish* and the noting of the *facts* adduced at trial show that appellant is mistaken in his interpretation. *Wright*, 2022 U.S. App. LEXIS at *7.

of the [accused] to engage in criminal conduct." *Mathews v. United States*, 485 U.S. 58, 63 (1988) (emphasis added); RCM 916(g); *United States v. Whittle*, 34 M.J. 206, 208 (C.M.A. 1992). "Inducement is government conduct that 'creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense.'" *United States v. Howell*, 36 M.J. 354, 359 (C.A.A.F 1993) (citations omitted).

"The defense has the initial burden of going forward to show that a government agent originated the suggestion to commit the crime." *Whittle*, 34 M.J. at 208. "The burden then shifts to the Government to prove beyond a reasonable doubt that the criminal design did not originate with the Government *or* that the accused had a predisposition to commit the offense 'prior to first being approached by Government agents.'" *Id.* (*citing Jacobson v. United States*, 503 U.S. 540 (1992) and *United States v. Vanzandt*, 14 M.J. 332, 342–43 (C.M.A. 1982)) (emphasis added).

"In military law, the entrapment defense is concerned with the subjective intent of the accused, rather than the tactics employed by government agents." *United States v. Clark*, 28 M.J. 401, 406-407 (CMA 1989) (*citing Vanzandt*, 14 M.J. at 343). "The question of predisposition relates to a law-abiding citizen. '[a] law-abiding person is one who resists the temptations, which abound in our society today, to commit crimes.'" *Whittle,* 34 M.J. at 208 (*citing United States v. Evans*,

924 F.2d 714, 717 (7th Cir.1991). "When a person accepts a criminal offer without being offered extraordinary inducements, he demonstrates his predisposition to commit the type of crime involved." *Id.* "A person who takes advantage of an ordinary opportunity to commit criminal acts — not an extraordinary opportunity, the sort of thing that might entice an otherwise law-abiding person — is not entrapped." *Evans*, 924 F.2d at 717. "The latitude given the Government in 'inducing' the criminal act is considerably greater in…'victim-less' crimes…than would be permissible as to other crimes, where commission of the acts would bring injury to members of the public." *Vanzandt*, 14 M.J. at 344.

Argument

It is uncontroverted that the criminal design originated with the government and therefore appellant's entrapment defense rests on his predisposition to commit the offense. *Mathews*, 485 U.S. at 63; *Whittle,* 34 M.J. at 208. A review of the facts clearly shows the government proved that appellant was predisposed, and therefore the conviction is sufficient. *Craion*, 64 M.J. at 534; *Bright*, 66 M.J. at 365; *Turner*, 25 M.J. at 325. Contrary to appellant's assertion, the government is not required to offer "independent evidence of any previous predisposition" or affirmative disclosure of a desire prior to the "grand reveal." (Appellant's Br. 16–17). Rather, the showing of appellant's acceptance of the criminal offer, with no extraordinary inducement, is enough to demonstrate "predisposition to commit the

type of crime involved." *Evans*, 924 F.2d at 717. It is abundantly clear in this case that appellant failed to resist the temptation to commit a crime when offered the opportunity. *Whittle,* 34 M.J. at 208. As discussed *supra* p. 11-16, appellant's actions prove his predisposition to commit this act.

Appellant seized the opportunity to sexually traffic a child. Not once did appellant balk at the request for money in exchange for sex. In fact, the appellant first requested to "link up" with Kylie immediately after she offered the commercial sex act. (Pros. Ex. 4). Appellant then continued to negotiate and arrange a meeting over the course of two days. (Pros. Ex. 4). Appellant continued to assure her he would pay for the sexual intercourse even after learning Kylie was a minor. (Pros. Ex. 4). Nowhere in the conversation is appellant threatened or coerced into engaging in the crime. He actively, and willingly, accepted Kylie's criminal offer – thus proving his predisposition. *Whittle,* 34 M.J. at 208.

Jacobson is informative to this issue, not for the thin similarities appellant presented, but for the glaring differences between the cases.[14] (Appellant's Br. at 17). *Jacobson* informs this court just how extreme government action must be for the entrapment defense to prevail. In *Jacobson*, the appellant ordered then legal

[14] Using *Jacobson* appellant unpersuasively argues "the fact that appellant was looking for casual, nonpaid, sex "may indicate a predisposition to [engage in consensual sex with those of a legal age]; but evidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of little probative value in establishing predisposition." (Appellant's Br. at 17).

magazines from California to his home in Nebraska. 503 U.S. at 543. Subsequent to Jacobson's order, a new law made the receipt of such magazines illegal. *Id.* Government agents identified Jacobson "that very month" and "there followed over the next [two and a half] years repeated efforts by two Government agencies, through five fictitious organizations and a bogus pen pal, to explore petitioner's willingness to break the new law by ordering sexually explicit photographs of children through the mail." *Id.* It was that extensive government effort that the Supreme Court determined created the predisposition within Jacobson.[15] *See also United States v. Dorsey*, 42 C.M.R. 60 (1970) (finding that law enforcement "hounding" the appellant for "an entire week" to locate drugs for the officer rose to the level of extraordinary inducement).

The present case falls well short of the *Jacobson* standard. This is not a years' long effort, including "waving the banner of individual rights," to finally convince the appellant to commit the crime. *Jacobson,* 503 U.S. at 552. Rather it is a typical "sting operation" the CAAF discussed in *Whittle.* In that case, a confidential informant [CI] agreed to aid law enforcement in arranging a "controlled buy" involving the appellant. *Whittle*, 34 M.J. at 207. After initially claiming lack of ability, appellant called a contact and "made arrangements to meet

[15] However, the court noted that in "sting operations," both typical and elaborate, "the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition." *Id.* at 550.

at a rendezvous point to buy some cocaine at a predetermined cost." *Id.* He then delivered the drugs to an undercover law enforcement agent with the CI. *Id*. The *Whittle* court explained "a person who had no predisposition to commit the offense could have done many things, including just telling the [CI] no." *Id*. at 208. That is nearly identical to the choice appellant had twice when Kylie offered the commercial sex act and disclosed her age. Both times appellant could have said "no," he could have disengaged with her, he could have moved on to another non-child prostitute on the application. Similar to Whittle before him, appellant chose not to do any of that and in doing so demonstrated his predisposition. *Id.*

Like *Whittle*, and unlike *Jacobson,* in a normal course of events for a "sting operation" of this sort, law enforcement presented a criminal opportunity to appellant and he took it willingly and immediately.[16] He was not coerced, tricked, pressured, hounded, or in any way extraordinarily induced to commit this crime. Rather, he willingly and eagerly negotiated and traveled to engage in a commercial sex act with a child. There is no question of appellant's predisposition, and thus his entrapment defense fails and his conviction is legally and factually sufficient. *Mathews,* 485 U.S. at 63; W*hittle,* 34 M.J. at 208.

[16] Appellant's meritless claims regarding the CID Regulation and due process will be discussed at length appellee's supplemental brief to be filed under seal.

III. WHETHER THE MILITARY JUDGE IMPROPERLY TOOK JUDICIAL NOTICE OF AN ESSENTIAL ELEMENT WHEN SHE DID SO AFTER CLOSING THE COURT FOR DELIBERATIONS AND SHE ERRONEOUSLY INDICATED THE GOVERNMENT HAD REQUESTED HER TO DO SO DURING REBUTTAL ARGUMENT.

The government agrees with appellant that his third assignment of error does not merit discussion of applicable law or argument. (Appellant Br. 18). Given appellant's failure to abide by Appendix A of this court's rules, the government will not respond to this assignment of error.[17]

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence as approved by the convening authority.

[redacted]

PATRICK S. BARR
MAJ, JA
Appellate Attorney, Government
Appellate Division

[redacted]

MARC B. SAWYER
MAJ, JA
Branch Chief, Government
Appellate Division

[redacted]

RICHARD E. GORINI
COL, JA
Chief, Government
Appellate Division

[17] Should this Court consider this assignment of error meritorious, or if appellant provides law and argument in accordance with this court's rules, the government requests an opportunity to file a supplemental brief addressing the claimed error.

APPENDIX

United States v. Wright

United States Court of Appeals for the Seventh Circuit

June 10, 2022[*], Submitted; June 13, 2022, Decided

No. 21-2676

Reporter
2022 U.S. App. LEXIS 16157 *; 2022 WL 2114559

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES WRIGHT, Defendant-Appellant.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [*1] Appeal from the United States District Court for the Central District of Illinois. No. 20-CR-10030-001. James E. Shadid, Judge.

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Jeffrey Kienstra, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Peoria, IL.

For JAMES WRIGHT, Defendant - Appellant: Kent R. Carlson, Attorney, CARLSON & ASSOCIATES, Chicago, IL.

Judges: Before DIANE S. SYKES, Chief Judge, DIANE P. WOOD, Circuit Judge, MICHAEL Y. SCUDDER, Circuit Judge.

Opinion

ORDER

After a bench trial, a district judge convicted James Wright of sex offenses involving a minor. Wright appeals, challenging the sufficiency of the evidence of attempted trafficking. Because ample evidence showed that Wright intended to pay for sex with a minor and took a substantial step towards doing so, we affirm.

In June 2020, Wright responded to a posting on Craigslist.org by a grandmother purportedly caring for granddaughters, who invited anyone "a little bit $ick" to contact her. Unbeknownst to Wright, the poster, who called herself "Baily," was an FBI agent. Baily

[*] We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

told Wright via email that she was "selling experiences" with her 15-and 10-year-old granddaughters and, at Wright's request, sent him a picture of the 15-year-old [*2] (actually a 28-year-old confidential human source). (Wright also solicited sex from Baily, who declined.) After a three-week break in communication, Wright emailed to ask if others had purchased sex with the girls and if he could speak to her "not over the internet."

After a few days of phone calls and text messages, Wright and Baily agreed that Wright would pay $100 to receive oral sex from the 15-year-old. Wright, an auto mechanic, suggested meeting at his shop, and they set a date and time. On that day, Wright told Baily that he felt "reluctant" and asked for proof that she was "NOT the police." Baily sent a series of more revealing photos to reassure him. Wright agreed to continue and sent Baily a photograph of a $100 bill to show he had the agreed amount.

At the agreed meeting time, Baily sent Wright a text message informing him that the girl was in a minivan parked near Wright's shop. As Wright approached the minivan, federal agents stopped him and arrested him on a criminal complaint. He had a $100 bill in his pocket, and its serial number matched the one on the bill Wright had displayed earlier. Wright agreed to answer questions in a recorded post-arrest interview. Two weeks [*3] later, a grand jury filed a two-count indictment. Count One charged attempted trafficking of a minor, 18 U.S.C. §§ 1591(a)(1), 1591(b)(2), 1594, and Count Two charged committing a felony offense involving a minor while required to register as a sex offender, *id.* § 2260A.

The prosecution proceeded to a one-day bench trial. The parties stipulated that Wright was required to register as a sex offender at the time he set the meeting with the girl. The government introduced into evidence records of all communications between Wright and Baily. This included a recording and transcript of a phone call in which Wright asked about the price of oral sex from the 15-year-old ("All right, um, how much for a blowjob?"), discussed what time he would meet the girl for the encounter ("Say about 3? Will that work?"), how much time he expected it to take ("[I'd] hate to get a [hotel] room for 15 minutes"), and provided an address for the meeting.

The government also introduced the text messages in which Wright expressed fear that Baily was with law enforcement and asked for something to "ease [his] mind." When Baily offered to send a picture of the girl in her bra, Wright responded, "you can do better than that." When he then received a picture [*4] of the girl covering her bare breasts, he responded that Baily was "getting closer." After receiving these photos and sending one of the $100 bill, Wright confirmed the price for oral sex and again asked Baily to confirm she was "NOT affiliated with ANY law enforcement agencies."

The government also introduced a recording and transcript of Wright's post-arrest statements. Here, Wright admitted that he knew he was meeting a 15-year-old. But he

denied that he intended to pay for oral sex with her, explaining that he just wanted to talk and had asked for explicit photographs to decide whether to report Baily to law enforcement. He said that he had been discussing automotive repairs with Baily and that a "bj" referred to a "brake job." But when confronted with a recording of the phone call in which he expressly agreed to pay $100 for "a blow job," Wright proclaimed: "Oh shit, I'm going back to prison."

At the close of the government's case-in-chief, Wright moved for a judgment of acquittal based on insufficient evidence. Defense counsel emphasized Wright's post-arrest statements, in which he denied intending to receive oral sex and explained that he approached the van out of curiosity. Although [*5] counsel acknowledged that Wright's statements about a "brake job" were a "bad lie," he referred to Wright's fear that the agents would not believe that he was not looking for sex. Counsel also emphasized that, because no girl was waiting for Wright, it was impossible to know if Wright truly intended to follow through with the planned transaction. The judge denied the motion. Wright did not testify or present evidence.

The judge then found Wright guilty of both counts and entered written findings of fact and conclusions of law. Later, Wright was sentenced to 324 months on Count One and a consecutive 120 months on Count Two, for a total of 444 months' imprisonment, plus supervised release for life.

On appeal, Wright challenges his conviction on Count One, arguing that the evidence was insufficient to find beyond a reasonable doubt that he intended to have sex with the fictitious granddaughter or that he took a substantial step towards doing so. Wright faces a difficult standard because we view the evidence in the light most favorable to the prosecution and overturn a conviction only if the record contains "no evidence, regardless of how it is weighed, from which the jury could find guilt [*6] beyond a reasonable doubt." *United States v. Norwood*, 982 F.3d 1032, 1039 (7th Cir. 2020); *United States v. Medina*, 969 F.3d 819, 821 (7th Cir. 2020) (same standard for bench trials).

Wright first reprises his argument that, because he told agents that he did not intend to have sex with the 15-year-old for $100, the other evidence was insufficient to establish guilt. Not so. The district court did not have to credit the statement Wright made to the agent, and his actions that contradict those words are sufficient evidence of his intent. Negotiating the price and delivery of an illegal good (or service) supports an inference of intent to complete the illegal activity. *See United States v. Johnson*, 592 F.3d 749, 758 (7th Cir. 2010) (phone calls negotiating the price and arranging for the delivery of crack cocaine). Wright discussed the price, time, and location for a sexual encounter with Baily's elder granddaughter. Further, Wright asked Baily multiple times to confirm that she was not a law enforcement officer and asked for proof in the form of revealing photographs; these "precautions strongly suggest[] a desire for sex" with the victim. *United States v.*

Hensley, 574 F.3d 384, 391 (7th Cir. 2009); *see also United States v. Chambers*, 642 F.3d 588, 593-94 (7th Cir. 2011). Finally, Wright lied to federal agents in saying that "bj" meant "brake job," and a cover story can be probative of guilt. *See United States v. Mbaye*, 827 F.3d 617, 620 (7th Cir. 2016).

For similar reasons, the record belies Wright's contention that there is insufficient [*7] evidence that he took a substantial step towards paying for sex with the teen. He not only made arrangements like "agreeing on a time and place for the meeting," *United States v. Gladish*, 536 F.3d 646, 649 (7th Cir. 2008), but came within feet of the meeting place with the agreed-upon payment in his pocket. Although Wright urges us not to rely on *Gladish* because intent is a "fact specific" inquiry, the facts adduced at trial were enough to prove a substantial step towards consummating the offense. *See id.*

The judgment is AFFIRMED.
