COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0810-CR **Cir. Ct. No. 00 CF 51**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK W. KENNEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Patrick W. Kenney appeals from a judgment entered after a jury found him guilty of one count of child enticement, sexual

contact, contrary to WIS. STAT. § 948.07(1) (1999-2000).[1] He also appeals from an order denying his postconviction motion. He claims: (1) WIS. STAT. § 948.07 is unconstitutional because it violates free speech; (2) the evidence was insufficient for conviction; (3) he was essentially convicted of "attempting to attempt" a crime, which does not exist under Wisconsin law; (4) the trial court erroneously admitted "other acts" evidence; and (5) the trial court erroneously exercised its sentencing discretion. Because ***State v. Robins***, 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287, resolves the first three issues in favor of upholding the judgment and order, and because the trial court did not erroneously exercise its discretion on the evidentiary issue or in sentencing, we affirm.

BACKGROUND

¶2 On September 23, 1999, Eric Szatkowski, a special agent with the Wisconsin Department of Justice, posed as a thirteen-year-old boy from Milwaukee named "Alex." Szatkowski logged into an America OnLine chat room on the internet and engaged in an online conversation with Kenney. The two discussed erotic wrestling, and Kenney explained that he paid men $100 per hour for such activity. At Kenney's suggestion, they agreed to meet at a Denny's restaurant near the Milwaukee airport before going to a hotel to engage in erotic wrestling. Kenney indicated that after they met, either one could "call it off." Kenney then packed his wrestling bag and drove from his home in Chicago to Milwaukee. When he arrived at Denny's, he was arrested.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted. This crime contemplates both an attempt to entice a child and the completed act of enticing a child. Kenney was convicted of an attempt to entice a child.

¶3 Kenney gave a statement to Agent Szatkowski admitting that he knew Alex's profile indicated he was thirteen years old, that he intended to meet Alex and go to a hotel room for erotic wrestling, which would include sexual contact. Kenney was thereafter charged with child enticement and pled not guilty. His case was tried to a jury, which found him guilty. He was sentenced to four years in jail based, in part, upon the trial court's intention to deter the general public from engaging in similar activity. Kenney filed a postconviction motion, which was denied. He now appeals.

DISCUSSION

A. Issues Controlled by Recent Supreme Court Case.

¶4 Kenney argues that: (1) WIS. STAT. § 948.07 is unconstitutional because it violates his right to free speech; (2) the evidence is insufficient to support his conviction because there was no child to be enticed and he never attempted to cause "Alex" to go into a room; and (3) his conviction is really for "attempting to attempt" child enticement, which is a non-existent crime. These three issues were all recently decided in favor of the state by our supreme court in ***Robins***.

1. Free Speech.

¶5 Kenney contends that the child enticement statute is unconstitutional as applied to his case because the alleged enticement consisted solely of communication over the internet. Robins made a similar argument, and our supreme court rejected this contention. The supreme court explained that the "internet conversations and e-mails … do not by themselves constitute the crime of child enticement." ***Robins***, 2002 WI 65 at ¶44. Rather, this contact is

circumstantial evidence of an individual's intent to entice a child, "which, combined with his actions in furtherance of that intent, constitute probable cause for the crime of attempted child enticement." ***Id.*** The supreme court held that "the First Amendment does not protect child enticements, whether initiated over the internet or otherwise." ***Id.***

¶6 This reasoning and holding applies to Kenney as well. Here, the internet communications are circumstantial evidence of his intent to entice a child. These, combined with his actions in furtherance of that intent, constitute probable cause for the crime of attempted child enticement. Kenney suggests that he did not "act in furtherance of that intent." We disagree. He packed his wrestling bag, obtained cash for payment, and drove his car from Chicago to Milwaukee. He arrived at the place the two agreed to meet before proceeding to a hotel room for the planned event. Therefore, we reject his claim that this statute is unconstitutional.

2. Insufficient Evidence.

¶7 Kenney next contends the evidence is insufficient because there never actually was a thirteen-year-old child involved and he never caused a child to go into a secluded place. The ***Robins*** court rejected this argument also. The court reasoned that the lack of an actual child victim does not render the charge non-existent. ***Robins***, 2002 WI 65 at ¶45. A fictitious victim is the extraneous factor that intervenes to prevent the completion of the crime, but it still allows conviction of an attempt to engage in child enticement. ***Id.*** at ¶27.

¶8 Similarly, the court in ***Robins*** rejected the claim that attempted child enticement is not an "'attempt to commit a strict liability crime,'" impermissible under the law of Wisconsin. ***Id.*** at ¶30. It further rejected the defendant's

argument that when the victim is fictitious, it is legally impossible to commit child enticement. *See* ***id.*** at ¶¶31-32.

¶9 Finally, Kenney's argument is that the evidence is insufficient to show that he attempted to get "Alex" to go into a secluded room. We are not persuaded. Again, Kenney's argument is based in part on the fact that "Alex" was fictitious and that he never actually escorted "Alex" into a secluded room. By making this argument, Kenney is again relying on two premises that we have rejected. As noted, the ***Robins*** case permits prosecution of child enticement when there is a fictitious victim, explaining that this factor merely intervenes to prevent the completion of the crime.

¶10 Furthermore, the second part of his argument fails as well for similar reasons. It is true that Kenney never was able to escort Alex into a secluded room, but that was only because the victim was fictitious and the law enforcement agent intervened before the meeting could take place. Like ***Robins***, this makes Kenney's conviction an attempt at child enticement, rather than a completed act. It does not render the evidence insufficient to support the conviction.

3. Attempting to Attempt.

¶11 Finally, Kenney argues that his conviction is really for an "attempt to attempt" child enticement. He contends that he was going to Denny's simply to call off the erotic wrestling date and, therefore, his actions constituted a non-existent crime. We do not agree.

¶12 The court in ***Robins*** rejected a similar argument. The court explained that attempt has two elements: "'(1) an intent to commit the crime charged; and (2) sufficient acts in furtherance of the criminal intent to demonstrate

unequivocally that it was improbable the accused would desist from the crime of his or her own free will.'" ***Id.*** at ¶36 (citation omitted). The court reasoned that although the law does not punish a person for his guilty intentions alone, the law of attempt punishes for "'acts that further the criminal objective.'" ***Id.*** (citation omitted). In the instant case, the evidence proffered demonstrated an intent to commit the crime and sufficient acts in furtherance. The intent was evidenced by the communications over the internet and the acts in furtherance included: packing a wrestling bag; bringing $440 in cash and a digital camera; and driving from Chicago to Milwaukee.

¶13 Although Kenney claims his intentions had changed and told the jury so during his testimony, the jury did not find his self-serving claim credible. Rather, they inferred from his actions that it was improbable he would desist from committing child enticement. Based on the foregoing, we cannot accept Kenney's contention that his conviction is for an "attempt to attempt" child enticement. The evidence demonstrates otherwise. The only reason the crime was not completed was because of the intervention of the fortuitous circumstance that "Alex" was an undercover law enforcement agent.

B. Other Acts Evidence.

¶14 Kenney argues that the trial court erroneously admitted other acts evidence, which included three photographs found in his apartment that depicted men engaged in "erotic wrestling" and the admission of his statement to police that he had met more than a dozen men through the internet with whom he had engaged in wrestling and sexual contact. We reject his argument.

¶15 WISCONSIN STAT. § 904.04(2) prohibits the introduction of evidence of "other acts" to prove a person's character in order to show conduct in

conformity therewith. The statute, however, permits the admission of other acts evidence for other purposes. ***Id.*** Other acts evidence may be admitted if: (1) it is offered for an acceptable purpose under § 904.04(2); (2) it is relevant; and (3) its probative value substantially outweighs the danger of unfair prejudice, confusion of the issues, misleading of the jury, undue delay, waste of time or needless presentation of cumulative evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). We review the trial court's decision to admit or exclude other acts evidence under the erroneous exercise of discretion standard of review. ***Id.*** at 780. Here, we cannot state that the trial court erroneously admitted the challenged evidence.

¶16 The photographic evidence was offered for the acceptable purpose of absence of mistake—to explain away an innocent explanation for Kenney's behavior. ***Id.*** at 784. Further, they were also offered for the acceptable purpose of demonstrating Kenney's intent to engage in sexual contact when he was discussing "erotic wrestling." Similarly, Kenney's statement of other encounters was offered for the acceptable purpose of demonstrating plan, absence of mistake, and intent. Thus, the first step of ***Sullivan*** is satisfied.

¶17 The second step of the ***Sullivan*** test is also met—the evidence was relevant to issues of intent, plan or scheme and absence of mistake, and to negate Kenney's potential innocent explanation for his conduct. Kenney tries to argue that the other acts evidence was not relevant because it involved adults and the instant case involved a child. Although this distinction is a proper consideration, we cannot say that the distinction here renders the evidence irrelevant because it is the only notable difference between this act and the other acts. All of the remaining factors demonstrate a common plan and scheme to meet someone over

the internet, and arrange for erotic wrestling/sexual contact. Accordingly, the trial court did not err when it found the second step of the ***Sullivan*** test was satisfied.

¶18 Likewise, we conclude that the third step of the test is satisfied. Kenney contends the evidence was highly prejudicial and should have been excluded under the third step. We disagree. The record reflects that the trial court carefully considered this factor and, as a result, excluded much of the total evidence proffered by the State, allowing only a select portion of the photographs and Kenney's statement to be introduced. By doing so, the trial court minimized any potential prejudice. In addition, the trial court gave a cautionary instruction to the jury to minimize any risk of unfair prejudice. *See* ***State v. Mink***, 146 Wis. 2d 1, 17, 429 N.W.2d 99 (Ct. App. 1988).

¶19 Based on the foregoing, we conclude that the trial court properly exercised its discretion in addressing and deciding this issue.

C. Sentencing.

¶20 Kenney's last argument is that the trial court erroneously exercised its sentencing discretion by imposing a long sentence because of the publicity given to his case. He contends that the trial court improperly enhanced his sentence based on a factor beyond his control—media attention. We reject his claim.

¶21 The trial court has broad discretion in sentencing and we will not disturb a sentence unless the trial court erroneously exercised its discretion. To properly exercise its sentencing discretion, the court must consider three primary factors: the gravity and nature of the offense, the character and needs of the offender, and the need to protect the public. ***State v. Spears***, 227 Wis. 2d 495,

507, 596 N.W.2d 375 (1999). The record reflects that the trial court considered these factors when it imposed the sentence.

¶22 Kenney's complaint is that the trial court imposed a longer sentence because his case generated much media attention. The record reflects that the trial court did, in fact, base the sentence in part on the fact that the media was covering Kenney's case. However, this was not improper. The trial court imposed a lengthy sentence in the hopes of deterring this type of activity, noting that the media attention would facilitate that purpose. This was not an erroneous exercise of discretion. Kenney briefly asserts that the trial court's sentence violated his constitutional rights to due process and equal protection because of the reference to media attention. We decline to consider this argument because it is undeveloped. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

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