STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0225

State of Minnesota,
Respondent,

vs.

Billy Joe Huber,
Appellant.

Filed February 11, 2019
Affirmed
Bratvold, Judge

Clay County District Court
File No. 14-CR-16-2222

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Pamela L. Foss, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Deborah Ellis, Jennifer Macaulay, Ellis Law Office, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Bratvold, Judge; and Klaphake, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

BRATVOLD, Judge

Appellant challenges his judgment of conviction of attempted prostitution with a minor, arguing that the evidence was insufficient to support the jury's verdict and that the district court abused its discretion during sentencing. Because there is sufficient evidence to support the conviction and because the district court did not abuse its discretion in staying execution of appellant's sentence, we affirm.

FACTS

In June 2016, the Moorhead Police Department set up a sting operation—Operation Guardian Angel—in coordination with multiple law enforcement agencies with the intention of targeting "individuals who seek to hire underage girls to engage in sexual penetration or sexual contact." Law enforcement posted internet advertisements on Backpage.com, Craig's List, and Whisper with the lead-in, "Two girls special." The Backpage.com advertisement that is relevant to this appeal stated that the "poster" was 18 years old. Officer Krebsbach, the case agent, later testified that "[y]ou have to be at least 18 years of age to post an ad on Backpage."

On June 28, 2016, appellant Billy Joe Huber responded to the Backpage.com advertisement by text message, stating, "How much for two girls?" Officer Peterson responded by text that it would cost $150 for a half hour or $200 for an hour. Huber exchanged several more text messages with Peterson, and asked more than once if the women were cops. Peterson replied "no law here baby" and "we are not the police." In

other text messages, Huber asked whether he could "lick" "pussy" and said he did not have condoms, but had been "snipped" and was "clean."

In two messages, Peterson told Huber that the women were "young," and her friend was "only 16." In response, Huber asked about age and Peterson replied "im almost 17 . . . but look like im 19." Huber responded, "Oh shit your both jailbait." Huber then stated, "Can you call me?"

Huber called the number on the Backpage.com advertisement and Officer Hartnett spoke to him pretending to be a woman from the ad. Huber asked if the women were "under 18," and Hartnett responded that they were. Huber asked where the women were located and drove to the hotel at the address they provided. When Huber arrived he called Hartnett again and asked them to come to the window so that he could see them. A "younger-looking" female officer stood at the hotel window. Hartnett gave Huber a room number, Huber knocked on the room door, and officers arrested him.

A detective then interviewed Huber, who stated that he responded to the advertisement in Backpage.com. Huber also stated that he was going through a divorce, and "was not looking for a relationship and was aware of prostitution related to Backpage." When the detective asked Huber "if he knew how old the girls were," Huber responded that they were 16 and 17. Huber also said that he had $400 cash in his wallet, and did not bring a condom.

The state initially charged Huber with intentionally hiring or agreeing to hire an individual "under the age of 18 years but at least 16 years to engage in sexual penetration or sexual contact" under Minn. Stat. § 609.324, subd. 1(c)(2) (2014). The state amended

the complaint and added count 2, attempted prostitution of a minor under Minn. Stat. § 609.324, subd 1(c)(2) and Minn. Stat. § 609.17, subd. 1 (2014).

Before trial, the state dismissed count 1 and went to trial solely on count 2, attempted prostitution with a minor. During trial, three police officers and the detective testified to the facts summarized above. Huber testified in his defense that he had been "devastated" by his recent divorce, and responded to the Backpage.com advertisement to find someone that "looked similar" to his ex-wife. Huber also testified that the woman that he spoke to on the phone did not sound like a "17 year old girl . . . it sounded like an older—you know—olderly—30 minimum." Huber testified that he used binoculars to look at the hotel window and saw two women, "a blond and . . . a brunette and neither of them were minors." Huber also testified that the brunette looked "no younger than 30." Huber testified that he wanted to "see for [him]self" before going to the hotel room because he had conflicting information about the women's ages.

The jury convicted Huber. The district court ordered a presentence investigation (PSI) report, which probation prepared; the report stated that the guidelines recommended a stayed sentence of 12 months and one day, based on a criminal history score of zero and a severity level of three. The PSI report recommended the guidelines sentence.

At sentencing, Huber asked the district court to stay imposition of his sentence because he had no criminal history and "there [was] no reason to believe that [he] would ever reoffend." The state opposed Huber's request, arguing that the district court should stay execution of Huber's sentence because of the "nature of this offense." The district

court sentenced Huber to 12 months and one day and stayed the execution of the sentence for five years, provided that Huber followed several conditions. Huber appeals.

D E C I S I O N

I. Sufficient evidence supports Huber's conviction of attempted prostitution with a minor.

When the appellant challenges the sufficiency of the evidence, this court conducts "a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *Lapenotiere v. State*, 916 N.W.2d 351, 360-61 (Minn. 2018). We must assume that the trier of fact "believed the state's witnesses and disbelieved any contradictory evidence." *State v. Webster*, 894 N.W.2d 782, 785 (Minn. 2017).

Huber was convicted of attempting to hire or agreeing to hire a minor to engage in prostitution. *See* Minn. Stat. §§ 609.324, subd. 1(c)(2), .17, subd. 1. To convict someone of this offense, the state must prove beyond a reasonable doubt that the defendant "intentionally . . . hire[d] or offer[ed] or agree[d] to hire an individual under the age of 18 years but at least 16 years to engage in sexual penetration or sexual contact." *Id.*; *see also State v. Merrill*, 428 N.W.2d 361, 366 (Minn. 1998) (due process clauses of the United States Constitution requires the state to prove "each element of the crime charged beyond a reasonable doubt"). To convict someone of a crime of attempt, the state must prove beyond a reasonable doubt that the defendant, "with intent to commit a crime," performed an act "which is a substantial step toward, and more than preparation for, the commission of a crime." Minn. Stat. § 609.17, subd. 1. The term "'[w]ith intent to' . . . means that the

actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result." Minn. Stat. § 609.02, subd. 9(4) (2014).

Huber makes two arguments. First, he contends that sufficient evidence does not establish beyond a reasonable doubt that "he intended to engage in sexual contact with a minor." Second, he argues that the record evidence is insufficient to prove that he took "a substantial step toward attempting prostitution with minors." We address each argument in turn.

A. Intent

Huber argues that, while his "actions showed his interest in engaging in prostitution, his actions did not" show beyond a reasonable doubt that "he intended to engage in sexual contact with a minor." Huber contends that he received "conflicting information" about the women's ages and he drove to the hotel to find out more. Huber further contends that, after hearing the "raspy, smoky voice of the adult undercover agent" on the phone and the "actual sighting of adult women" in the window, he knocked on the hotel door, intending to have sexual contact with two adult women.

Huber urges this court to conclude that the state's evidence of intent was "entirely" circumstantial and, therefore, we should apply the two-step analysis for evaluating the sufficiency of circumstantial evidence. *See, e.g.*, *State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010) ("[W]hen reviewing the sufficiency of circumstantial evidence, our first task is to identify the circumstances proved. . . . Our second step is to examine independently the reasonableness of all inferences that might be drawn from the

circumstances proved; this includes inferences consistent with a hypothesis other than guilt." (quotations omitted)).

We are not persuaded that Huber's conviction is based solely on circumstantial evidence. Our analysis is guided by *State v. Horst*, where Horst argued that the evidence was insufficient to support her first-degree premeditated murder conviction. 880 N.W.2d 24, 39-40 (Minn. 2016). Like Huber, Horst argued that the court should apply the two-step analysis for circumstantial evidence to evaluate the sufficiency of the evidence received to prove her intent. *Id.* The supreme court rejected Horst's argument because the state's evidence included Horst's statements to several witnesses that she "want[ed] [the victim] dead." *Id.* at 40. The supreme court concluded this was "direct evidence of her mens rea." *Id.* The court held that where the state proved "the disputed elements through witness testimony, which is direct evidence when it reflects a witness's personal observations and allows the jury to find the defendant guilty without having to draw any inferences," an appellate court will consider the sufficiency challenge under the traditional standard. *Id.*

Here, the state presented direct evidence in the form of Huber's text messages, Huber's statements in telephone calls, and testimony by the detective who interviewed Huber. Thus, we consider the sufficiency of the state's evidence against Huber under the direct-evidence standard.

The evidence at trial demonstrated the following: Huber responded to an advertisement on Backpage.com for two women, whose ages were listed as 18. Huber agreed to pay $200 for one hour with both women. Huber discussed different types of sexual contact and implied he would not use a condom. In two messages, the officer told

Huber that the women were "young," and also told Huber that her friend was "only 16." Huber asked the about age, and the officer replied "im almost 17 . . . but look like im 19." Huber responded that the women were "jailbait," continued exchanging text messages with the officer, and arrived at the hotel. Huber then spoke to another officer on the phone, and asked again if the women were "under 18." The officer told him that they were. Huber asked the women to go to the hotel window, which another female officer did. Huber then knocked on the hotel room door, and was arrested. He had $400 cash with him. When a detective later asked "if he knew how old the girls were," Huber responded that they were 16 and 17.

Huber argues that, because he saw "two adult women" before he knocked on the hotel room door, and because he had received "conflicting information" on the women's ages, he, at most, intended to engage in prostitution with two adult women. But, based on our review of the record, the officers consistently told Huber that they were "under 18," "almost 17," and that one woman was "only 16." The only conflicting evidence about the prostitutes' ages is Huber's testimony that one of the women "at one point told me that she was 19 years old." Huber's testimony contradicts his statements by text, on the telephone, and to the detective. Immediately after his arrest, Huber told the detective that the women he was going to meet were "16 and 17." It is the jury's prerogative to assess the credibility and weight of conflicting evidence. *State v. Bakken*, 604 N.W.2d 106, 111 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). Here, the jury accepted the state's proof. Viewing the evidence in the light most favorable to the jury's verdict, we conclude that

there is sufficient evidence supporting the jury's determination that Huber intended to hire or agreed to hire minors to engage in prostitution.

B. Substantial step

Conduct that constitutes a "substantial step toward" the crime is not defined in the attempt statute. *See* Minn. Stat. § 609.17, subd. 1. In *State v. Dumas*, the supreme court stated that "no definite rule, applicable to all cases, can be laid down as to what constitutes an overt act or acts tending to accomplish a particular crime, within the meaning of our statute. Each case must depend largely upon its particular facts and the inferences which the jury may reasonably draw therefrom." 136 N.W.311, 314 (Minn. 1912). *Dumas* went on to say that, "as a general proposition," an attempt to commit a crime requires "an intent to commit [a crime], followed by an overt act or acts tending, but failing, to accomplish it." *Id*. The overt act must "directly tend in some substantial degree to accomplish" the intended crime. *Id*.

We conclude that sufficient record evidence establishes that Huber took substantial steps toward committing prostitution with a minor. The state presented evidence that Huber responded by text to a suggestive advertisement, exchanged numerous text messages, spoke to the prostitute by telephone, asked for the location of the hotel, and drove to the hotel. After seeing a "younger-looking" woman in the hotel window, Huber exited his car and knocked on the hotel room door, where he was arrested with $400 cash in his pocket.

Huber argues that these actions constitute, at most, "substantial steps toward hiring a prostitute," but not substantial steps "toward hiring a minor." But record evidence establishes that Huber took several of these steps *after* the undercover officers told him

several times that the women were "young," that one of them was "only 16," and that the other was "almost 17." After receiving these text messages, Huber responded, "Oh shit your both jailbait." Huber then drove to the hotel and knocked on the door. Thus, the state presented sufficient evidence to prove that Huber took substantial steps toward hiring or agreeing to hire minors to engage in sexual conduct. *See State v. Wilkie*, ___ N.W.2d ___, ___, 2019 WL 333483, at *1-4 (Minn. App. Jan. 28, 2019) (determining that appellant took substantial steps "toward achieving his intended goal—sexual penetration of a juvenile" when he exchanged text messages with the decoy, planned a meet up, went to the location, and knocked on the door).

II. The district court did not abuse its discretion by staying execution of Huber's sentence.

Huber argues that the district court abused its discretion by staying execution of his sentence rather than staying imposition of his sentence. A stay of *execution* occurs when a sentence is imposed, but is stayed subject to conditions and for a particular period. *See State v. Martin*, 849 N.W.2d 99, 102 (Minn. App. 2014), *review denied* (Minn. Sept. 24, 2014). When a district court stays *imposition* of the sentence, the defendant "stands convicted, but the [court] does not actually pronounce a sentence." *Id.* A reviewing court will not interfere with the district court's decision regarding sentencing unless there has been a clear abuse of discretion. *State v. Lundberg*, 575 N.W.2d 589, 591 (Minn. App. 1998), *review denied* (Minn. May 20, 1998).

In his brief to this court, Huber asserts that six other individuals were arrested as a result of the sting operation in Clay County and cites to the district court file number for

each case. He argues that one of these individuals responded to the same advertisement as Huber, and was convicted of two counts "of agreeing to hire an underage prostitute," yet, received a stay of imposition. Huber also asserts that of "the three individuals who [also] received stays of execution of their sentences, one had a prior conviction . . . and the other two were convicted of solicitation of persons younger than 15." Huber contends, therefore, that imposing a stay of execution of his sentence was a "disparity in sentencing for similarly situated individuals and an abuse of discretion." The state argues that Huber's "entire argument on this issue should be struck as it relies completely on facts not part of this record."

We begin by addressing the state's motion to strike. Generally, "[t]he documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Crim. App. P. 110.01. "An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." *Thiele v. Stich*, 425 N. W.2d 580, 582-83 (Minn. 1988). But a well-established exception to this rule exists for matters of public record that the reviewing court could have discovered and relied upon in the course of its own research. *See State v. Rewitzer*, 617 N.W.2d. 407, 411 (Minn. 2000) (citing *In Re Estate of Turner*, 391 N.W.2d 767, 771 (Minn. 1986)).

Assuming without deciding that the criminal sentencing decisions that Huber refers to are matters of public record, we nonetheless conclude that the district court did not abuse its discretion in sentencing Huber. *See State v. Webber*, 382 N.W.2d 567, 568 (Minn. App. 1986) (holding trial court did not abuse its discretion by ordering a stay of execution rather

than a stay of imposition when there was no "compelling reason" to interfere with the sentence). The sentencing guidelines recommend that "stays of imposition be used for offenders who are convicted of lower severity offenses and who have low criminal history scores." Minn. Sent. Guidelines 3.A.1 (2015). But the guidelines comments also state that "[t]he use of either a stay of imposition or stay of execution is at the discretion of the court." Minn. Sent. Guidelines cmt. 3.A.101. It is true that Huber has a low criminal history score. But the state argued at sentencing that the district court should stay execution of the sentence because of the "nature of the offense." The district court did not abuse its discretion when it stayed execution of Huber's sentence. *See Webber*, 382 N.W.2d at 568.

In sum, the record contains sufficient evidence to support Huber's conviction and the district court did not abuse its discretion in sentencing Huber. Accordingly, we affirm.

Affirmed.