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IN THE
COURT OF APPEALS OF INDIANA

RAYMOND SCEBBI,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 77A01-1103-CR-96
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SULLIVAN SUPERIOR COURT
The Honorable Robert E. Springer, Judge
Cause No. 77D01-0907-FC-138

October 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Raymond Scebbi, through the use of text messaging, solicited a fourteen-year-old girl for fondling, touching, and sexual intercourse. He now appeals his conviction for class C felony child solicitation.[1] The sole issue presented for our review is whether there was sufficient evidence to support his child solicitation conviction. Finding the evidence sufficient, we affirm.[2]

Facts and Procedural History

The relevant facts most favorable to Scebbi's child solicitation conviction indicate that in June of 2009, fourteen-year-old E.B. was visiting friends in Ohio when she gave twenty-seven-year-old Scebbi, a resident of Ohio, her cell phone number. E.B. and her family had previously lived in Ohio where Scebbi was a pastor and family friend. In July of 2009, Scebbi, who was married, text messaged E.B. asking her if she liked him. She responded that she liked him "more than [she] should." Tr. at 91. Scebbi and E.B. began text messaging each other on a regular basis. At some point, Scebbi asked E.B. if he could call her. E.B. resisted at first but then allowed Scebbi to call. During subsequent phone conversations, Scebbi told E.B. that he had been diagnosed with a brain tumor and had only a fifty-percent chance of living. He also confided in E.B. that he believed his wife was having an affair.

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[1] Scebbi was also convicted of class D felony possession of child pornography due to his possession of nude photographs of his fourteen-year-old victim. He does not appeal that conviction.

[2] We note that Scebbi filed a motion for oral argument on August 30, 2011. We deny his motion by order issued contemporaneously with this opinion.

Thereafter, Scebbi began asking E.B. in text messages whether she would be willing to have sexual intercourse with him. E.B. responded that she wanted to be married first. Scebbi then sent a text message to E.B. stating: "I take [E.B] to be my lawful wedded wife, to love and to hold . . . ." *Id*. at 93. E.B. informed Scebbi that although this text made her feel a little better about their relationship, she was still apprehensive about engaging in any sexual behavior with Scebbi without being actually married. Scebbi then ceased texting E.B. for a brief period of time. Texting between the two commenced again, but each time E.B. would tell Scebbi that she "wouldn't do anything" sexual with him, he would get mad and stop communicating with her. *Id.* at 94. However, when E.B. agreed that she may be willing to "do it" with Scebbi, the two resumed their regular text messaging and phone calls. *Id*. At one point, Scebbi requested that E.B. send him pictures of her genitalia via text message, which E.B. in turn sent. Scebbi also sent E.B. pictures of his genitalia via text message.

E.B. eventually agreed that she would have sexual intercourse with Scebbi, so the two planned that Scebbi would make a trip from Ohio to E.B.'s home in Sullivan on July 22, 2009. Scebbi described to E.B. how he would perform oral sex on her and also how he wanted her to "straddle him like in a movie." *Id*. at 15, 54. Scebbi told E.B. to tell her parents that she needed to go with him on an errand to Walmart when he arrived at their house. Scebbi requested that E.B. first take a shower, and then come out of the house wearing only her pajama pants, a white shirt, and no bra. E.B. believed that she and Scebbi would share their first kiss during this encounter and perform some sexual act. *Id*. at 78; Appellant's App. at 16. Due to a random check of E.B.'s cell phone on July 20, 2009, E.B.'s

parents became aware of Scebbi's plan for a sexual liaison with their daughter and they alerted police. During a text conversation orchestrated by police that occurred on July 21, 2009, E.B. asked Scebbi if they were "gonna play doctor" when he came to see her. State's Exhibit 19. Scebbi responded "Sure." *Id*. E.B. then expressed her concern about pregnancy, and Scebbi tried to calm her fears but admitted that an accident could happen. *See id*. Police arrested Scebbi on July 22, 2009, when he arrived at E.B.'s home.

On July 30, 2009, the State charged Scebbi with class D felony possession of child pornography and class C felony child solicitation. Following a bench trial on January 19, 2011, the trial court found Scebbi guilty as charged. This appeal ensued.

Discussion and Decision

Scebbi contends that the evidence is insufficient to support his conviction for child solicitation. Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, we neither reweigh the evidence nor judge the credibility of witnesses. *Bond v. State*, 925 N.E.2d 773, 781 (Ind. Ct. App. 2010), *trans. denied*. We consider only the evidence most favorable to the judgment and the reasonable inferences drawn therefrom. *Id*. We will affirm if the evidence and inferences constitute substantial evidence of probative value to support the judgment. *Id*. Reversal is appropriate only when reasonable people would not be able to form inferences as to each material element of the offense. *Id.*

To prove that Scebbi committed the crime of child solicitation, the State was required to prove that Scebbi, a person at least twenty-one years of age, knowingly or intentionally

solicited[3] E.B., a child at least fourteen years of age but less than sixteen years of age, to engage in: (1) sexual intercourse; (2) deviate sexual conduct; or (3) any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person. Ind. Code § 35-42-4-6(c). The offense is a class C felony if it is committed by using a computer network as defined in Indiana Code Section 35-43-2-3(a). *Id.*

Scebbi's first assertion of insufficient evidence involves the dates of the solicitation. Because the charging information alleges that Scebbi's crimes took place between July 20 and 21, 2009, Scebbi asserts that the State was required, but failed, to prove that Scebbi engaged in his acts of solicitation on those specific dates. Contrary to Scebbi's argument, time is not an essential element of the offense of child solicitation. *See* Ind. Code § 35-42-4-6-(c). We note that when time is not an element of the offense, the State is only required to prove that the offense occurred at any time within the statutory period of limitations; therefore, the State is not required to prove that the offense occurred on the precise date alleged in the information. *Neff v. State*, 915 N.E.2d 1026, 1032 (Ind. Ct. App. 2009), *trans. denied* (2010).

Scebbi acknowledges that significant testimony was presented regarding text messages sent prior to July 20, 2009, in which Scebbi specifically solicited E.B. to engage in sexual intercourse, oral sex, and kissing, but argues such testimony is irrelevant due to the narrow dates provided in the charging information. First, as we stated, the State was not

[3] "Solicit" means to command, authorize, urge, incite, request, or advise an individual . . . to perform an act. *See* Ind. Code § 35-42-4-6(a).

required to prove that Scebbi's offense occurred on the precise dates alleged in the information. Thus, Scebbi's argument fails. Moreover, the testimony and the evidence presented support a reasonable inference that Scebbi solicited E.B. on the dates alleged in the information as well. In text messages sent on the specific dates alleged, Scebbi and E.B. discussed their arrangement to meet and their hopes that they could be alone where E.B's parents would not discover them. They discussed how they were going to "play doctor" and also discussed the possibility that E.B. could get pregnant. State's Exhibit. 19. E.B.'s testimony regarding those text messages as well as the text messages themselves constitute substantial evidence of probative value to support the trial court's judgment.

Scebbi next argues that the State presented insufficient evidence that he solicited E.B. to engage in fondling or touching intended to arouse or satisfy the sexual desires of either Scebbi or E.B. Scebbi makes much of the fact that the State specifically charged him with soliciting fondling or touching pursuant to Indiana Code Section 35-42-4-6(c)(3) rather than charging him with soliciting sexual intercourse pursuant to subsection (c)(1) of the same statute. Scebbi concedes that reasonable inferences may be drawn from the evidence that he solicited E.B. to engage in sexual intercourse, *see* Appellant's Reply Br. at 5, but maintains that those same reasonable inferences do not support a finding that he solicited E.B. to engage in touching or fondling. This argument is, in simple terms, just silly.

Although Scebbi frames his argument as one of sufficiency of the evidence, he essentially alleges a fatal variance between the charging information and the proof at trial.

A variance exists when the proof at trial does not conform to the pleadings. *Reinhardt v. State*, 881 N.E.2d 15, 17 (Ind. Ct. App. 2008). A failure to prove a material allegation descriptive of the offense is fatal. *Mitchem v. State*, 685 N.E.2d 671, 676 (Ind. 1997). However, "a variance will require reversal only . . . if it misleads the defendant in the preparation of his defense or subjects him to the likelihood of another prosecution for the same offense." *Robinson v. State*, 634 N.E.2d 1367, 1372 (Ind. Ct. App. 1994).

We find no fatal variance here. Scebbi essentially asks that we disregard the ample evidence from which the trier of fact could infer that Scebbi not only knowingly solicited fourteen-year-old E.B. for sexual intercourse, but that he knowingly solicited her for fondling or touching intended to arouse. For lack of a better description, touching and fondling is an inherently lesser included act of sexual intercourse. The fact that the State chose to charge him with soliciting the lesser act does not mean that ample proof of even more heinous behavior is somehow insufficient or misled Scebbi in the preparation of his defense. It is impossible for this Court to imagine a scenario where one could solicit another for sexual intercourse that did not necessarily include fondling or touching intended to arouse. Under the circumstances, there was no failure to prove a material allegation descriptive of the offense and Scebbi does not assert that he was misled in the preparation of his defense. The evidence is more than sufficient to sustain Scebbi's conviction for child solicitation.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.