

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

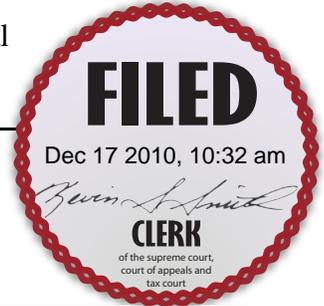
ATTORNEY FOR APPELLANT:

TIMOTHY J. O'CONNOR
O'Connor & Auersch
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANN L. GOODWIN
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

JUDD PONSLER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 49A05-1003-CR-179

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol J. Orbison, Judge
Cause No. 49G22-0904-FC-037226

December 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Judd Ponsler appeals his two Class C felony child solicitation convictions. He contends that the evidence is insufficient to support his convictions. Finding the evidence sufficient, we affirm.

Facts and Procedural History

In March 2009, Indianapolis Metropolitan Police Department Detective Darren Odier and Officer Shani Anderson conducted an online investigation in which they attempted to identify people soliciting children for sexual activity.

On March 9, Detective Odier, posing as fifteen-year-old Ashley, signed into a Yahoo Romance Indiana chatroom using the screen name “IndyDiamondGirl08.” Tr. p. 34. The profile contained a picture and said that Ashley liked American Idol and playing softball. Odier did not initiate contact but instead waited to be contacted. Odier was eventually contacted that day by someone using the screen name “juddlp1974.” *Id.* at 40. This person was later identified as Ponsler. Odier, posing as Ashley, told Ponsler that she was a fifteen-year-old female from Indianapolis. State’s Ex. 1, p. 2. Ponsler responded “kool.” *Id.* Ponsler told Ashley that he was a thirty-four-year-old male from Greensburg, which was accurate. Ashley sent Ponsler additional photographs of herself.

The next day, Odier, again posing as Ashley, received a message from “bubba_race,” later identified as Ponsler. Tr. p. 59. Ponsler again correctly identified himself as a thirty-four-year-old male from Greensburg. Ashley told Ponsler that she was fifteen years old, to which Ponsler said, “kool u don’t mind talking to older guys then” and “i have a niece that only 3 yrs older than you.” State’s Ex. 7, p. 15.

On March 12, Odier was again online as Ashley and communicated with Ponsler as bubba_race. Ashley again referenced that she was fifteen years old. Ponsler asked Ashley if she would like to role play with him, but she responded “i dont think I like roleplaying,” State’s Ex. 8, p. 18, and Ponsler dropped the subject. Ponsler then asked Ashley if she had engaged in phone sex and if she was a virgin. Ponsler gave Ashley his telephone number so that she could call him. Ponsler told Ashley he would come see her “as long as i wouldnt get into trouble.” *Id.* at 19. The topic of the conversation quickly turned more explicit, as Ponsler wanted to “c [Ashley’s] butt,” but Ashley said her cell phone could not take and send photos. *Id.* at 22. Then Ponsler asked, “do u ever play with your breast?” *Id.* at 23. The following exchange ensued:

bubba_race: i want to [hear] you rubbing your breast when u call
indydiamondgirl08: how u hear that?
bubba_race: when u call I will tell you
indydiamondgirl08: im nervous
bubba_race: why
indydiamondgirl08: idk
bubba_race: what all u have experimented with on your body
indydiamondgirl08: some stuff
bubba_race: tell me about it
indydiamondgirl08: um, just a little bit of stuff
indydiamondgirl08: that ok?
bubba_race: do u play with your cutter
indydiamondgirl08: cutter?
bubba_race: your pu***

* * * * *

bubba_race: u want to talk about this on the phone
indydiamondgirl08: maybe later 2nite

* * * * *

indydiamondgirl08: I just get nervus
bubba_race: no need to get nervous
indydiamondgirl08: really?
bubba_race: yeah I am just another guy u talk to . . . just a lot older.

* * * * *

bubba_race: are your nipples hard

indydiamondgirl08: maybe
bubba_race: I want to lick them
indydiamondgirl08: wow
bubba_race: u would like it

* * * * *

bubba_race: yeah i would suck on them . . . gently nibbling on them . . .
squeezing them . . . running my [tongue] down your stomach

Id. at 24 (dates omitted).

Also on March 12, Officer Anderson was working the online investigation. She was posing as fourteen-year-old Taylor and using the screen name “CheerGirlIndy1234.” Tr. p. 98. Like Detective Odier, Officer Anderson signed into the Yahoo Romance Indiana chatroom and waited for someone to initiate contact with CheerGirlIndy1234. Officer Anderson was also contacted by juddlp1974. Taylor identified herself as “almost 15 f indy.” State’s Ex. 20, p. 59. Ponsler identified himself as a thirty-four-year-old male from Greensburg. Ponsler asked Taylor if she “mind[ed] talking to a guy that alot older than u.” *Id.* Ponsler then asked Taylor “how big [her] breast[s]” were and told her to “run [her] fingers around [her] nipples.” *Id.* Ponsler also directed Taylor to take her clothes off, “rub [her] pu***,” and “slowly slide [her] finger inside” her vagina. *Id.*

During this chat, Taylor sent Ponsler a picture of herself. In addition, Taylor gave Ponsler her telephone number. Ponsler called the number and spoke with Officer Grace Lopez, who posed as Taylor. During the conversation, Ponsler asked Taylor if she would let him kiss and lick her “breasts and nipples and kiss between [her] legs.” Tr. p. 115. Taylor said she was nervous “because [she] was only 14.” *Id.* The

conversation ended. Ponsler, however, called back thirty seconds later and asked Taylor if she was the police, to which Taylor answered no. *Id.*

Detective Odier used information learned during the online investigation to locate Ponsler. A search warrant was obtained and executed at his residence. Ponsler was present at the time. He was advised of his *Miranda* rights and gave a statement in which he admitted talking to both IndyDiamondGirl08 and CheerGirlIndy1234.

The State charged Ponsler with two counts of Class C felony child solicitation. Ind. Code § 35-42-4-6; Appellant's App. p. 37-38. Both counts were for the March 12, 2009, conversations. Count I was directed to a fourteen-year-old child, and Count II was directed to a fifteen-year-old child. The State later added a habitual offender count. Following a jury trial, Ponsler was found guilty as charged. Ponsler then pled guilty to being a habitual offender. Ponsler now appeals.

Discussion and Decision

Ponsler challenges the sufficiency of the evidence supporting his child solicitation convictions. When reviewing the sufficiency of the evidence, appellate courts must only consider the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it "most favorably to the trial court's ruling." *Id.* Appellate courts affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* at 146-47 (quotation

omitted). It is therefore not necessary that the evidence “overcome every reasonable hypothesis of innocence.” *Id.* at 147 (quotation omitted). “[T]he evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” *Id.* (quotation omitted).

The child solicitation statute provides in pertinent part:

A person at least twenty-one (21) years of age who knowingly or intentionally solicits a child at least fourteen (14) years of age but less than sixteen (16) years of age, or an individual the person believes to be a child at least fourteen (14) years of age but less than sixteen (16) 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;

commits child solicitation, a Class D felony. However, the offense is a Class C felony if it is committed by using a computer network (as defined in IC 35-43-2-3(a))

I.C. § 35-42-4-6(c).

Ponsler first argues that the evidence is insufficient to prove that he believed that “Ashley” and “Taylor” were fifteen and fourteen years old, respectively. In support of his argument, Ponsler relies almost exclusively on the fact that Yahoo requires a person to enter a birth date when establishing an account and that the account holder must be at least eighteen years old or an account cannot be created. In fact, during the account creation process, Yahoo provides a message that it is intended for users eighteen years of age and older. Consistent with the above, Ponsler testified at trial that he thought Yahoo users had to be eighteen years old in order to have an account.

Detective Odier testified at trial that when he established the accounts for Ashley and Taylor in 2008, he input birth dates of 1910, meaning that the fictitious girls were ninety-nine years old, because Yahoo did not require him to send in birth certificates or other documentation. Detective Odier's actions show that Yahoo does not confirm the ages of its account holders. Thus, as long as any birth date is entered showing that the account holder is eighteen years of age or older, an account can be created, regardless of the true age of the account holder. *See* Tr. p. 157-58 (Ponsler's trial testimony acknowledging that Yahoo does not require proof of date of birth, such as a birth certificate or driver's license, in order to open an account).

Moreover, Ashley and Taylor presented themselves to Ponsler, on several occasions, as fifteen- and fourteen-year-old girls, respectively. Ponsler also confirmed with both girls that they did not mind talking to someone older. Ashley and Taylor also sent Ponsler photographs that depicted youthful-looking girls. *See* State's Ex. 8, p. 20 (comment to Ashley, "u are going to be a heart breaker when u get older."). Ponsler neither questioned the age of the photographs nor expressed surprise at the youthfulness of their appearances. Ponsler told Ashley that he would like to visit her as long as he would not get in trouble and asked Taylor if she was the police, thus implying that his contact with both girls was illegal. And when interviewed by Detective Odier during the execution of the search warrant, Ponsler admitted that he talked to underage girls about sexual matters because he did not "see any problem with it." State's Ex. 17, p. 50. Ponsler continued, "I know it's probably wrong. But if we're just talking, . . . I don't see any harm in that" *Id.* And as for Ponsler's argument that it is common for people to

role play in online chatrooms, Ponsler provided his true identity to both Ashley and Taylor. Although Ponsler asked Ashley to role play, she refused his request. And Ponsler made no attempt to role play with Taylor. The evidence is sufficient to prove that Ponsler believed “Ashley” and “Taylor” to be fifteen and fourteen years old, respectively.

Ponsler next argues that the evidence is insufficient to prove that he solicited Ashley. He makes no argument concerning the solicitation of Taylor.

“[S]olicit” means to command, authorize, urge, incite, request, or advise an individual:

- (1) in person;
- (2) by telephone;
- (3) in writing;
- (4) by using a computer network (as defined in IC 35-43-2-3(a));
- (5) by advertisement of any kind; or
- (6) by any other means;

to perform an act described in subsection (b) or (c).

I.C. § 35-42-4-6(a). Ponsler asserts that while he engaged in an “obviously inappropriate” discussion with Ashley—“something that might be found in a trashy romance novel”—he did not “command, authorize, urge, incite, request, or advise” her to do anything. Appellant’s Br. p. 10.

When Ponsler spoke to Ashley on March 12, he told her that he wanted to hear her rubbing her breast when she called. State’s Ex. 8, p. 24. When Ashley asked how Ponsler would hear that, he responded, “when u call I will tell you.” *Id.* This is certainly an urging from Ponsler to Ashley to fondle or touch herself. The evidence is sufficient to

support Ponsler's child solicitation conviction for fifteen-year-old Ashley.

Affirmed.

BAKER, C.J., and BARNES, J., concur.