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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0418**

State of Minnesota,
Respondent,

vs.

Dawda Jeng,
Appellant.

**Filed January 22, 2019
Affirmed in part, reversed in part, and remanded
Worke, Judge**

Clay County District Court
File No. 14-CR-16-2226

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Worke, Judge; and Stauber,
Judge.*

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the sufficiency of the evidence supporting his attempted-prostitution convictions, and the district court's imposition of multiple sentences for offenses arising from a single behavioral incident. We affirm appellant's convictions, but reverse and remand for resentencing.

FACTS

On June 28, 2016, police conducted a sting operation targeting individuals attempting to engage in prostitution with minors. Officers posted an advertisement on Backpage.com titled, "Its [sic] beautiful outside But GOREGEOUS [sic] inside!!!! – 18." The advertisement stated: "[w]e want to show you how we have fun on a free day. Only here for today, u [sic] wont [sic] want to miss us. We take ur [sic] satisfaction seriously [sic]. Athletic, playful and funnnn! [sic] Two girls special[.] Pillow fights extra!!" Appellant Dawda Jeng responded to the advertisement and engaged in a text-message conversation with an undercover police officer.

The officer asked whether Jeng wanted to "play with one or both" girls; Jeng responded that he would "like both if possible." The officer asked Jeng if he was interested in "f--king," to which he responded, "Yes." Jeng agreed to a pay \$150 for a half-hour. The undercover officer then asked, "[You] ok with us being a lil [sic] younger than our ad? Just dont [sic] want truble [sic]." Jeng responded, "Yes that's fine with me. How old if I may ask tho [sic]." The undercover officer stated, "we are 15 and 16... u [sic] sure ur [sic] not the cops?" Jeng replied, "No not at all." Jeng continued communicating with the

undercover officer. When Jeng arrived at the meeting place, he was arrested with over \$2,100 in cash in his pockets.

The district court found Jeng guilty of two counts of attempting to engage in, hire, or agree to hire a minor to engage in prostitution. *See* Minn. Stat. § 609.324, subd. 1 (supp. 2015). The district court sentenced Jeng to two concurrent sentences of 12 months and one day in prison, stayed for five years. This appeal followed.

D E C I S I O N

Sufficiency of the evidence

Jeng argues that there is insufficient evidence to sustain his convictions. This court applies the same standard of review in bench trials and jury trials in determining whether the evidence is sufficient to sustain a conviction. *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011). In considering a claim of insufficient evidence, this court reviews the record to determine whether the evidence, viewed in the light most favorable to the conviction, is sufficient to sustain the verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court assumes that the fact-finder believed the state's witnesses and disbelieved evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

Intent

Jeng argues that, while the state may have proved that he intended to hire adult women to engage in sexual conduct, it failed to prove that he intended to engage in sexual conduct with minors.

The state had to prove that Jeng intentionally hired or agreed to hire individuals between 13-15 and 16-17 years old to engage in sexual penetration or sexual contact. *See*

Minn. Stat. § 609.324, subd. 1(b)(2),(c)(2). “‘Intentionally’ means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result.” Minn. Stat. § 609.02, subd. 9(3) (2014). “Intent may be proved by circumstantial evidence, including drawing inferences from the defendant’s conduct, the character of the [crime], and the events occurring before and after the crime.” *In the Welfare of T.N.Y.*, 632 N.W.2d 765, 769 (Minn. App. 2001).

Here, the state presented evidence that Jeng responded to an advertisement that listed the poster’s age as 18. Jeng agreed to pay \$150 for a half-hour with two girls. An undercover officer asked if Jeng wanted “f--king,” to which he responded “Yes.” The undercover officer asked if Jeng was “ok with [the two girls] being a lil [sic] younger than [the] ad?” and Jeng responded, “Yes that’s fine with me.” After learning that he was communicating with “15 and 16” year-old girls, Jeng continued exchanging text messages with the officer. Jeng was arrested when he arrived at the hotel with over \$2,100 in cash on him. Taking this evidence in the light most favorable to the convictions, we conclude that the state presented sufficient evidence to prove beyond a reasonable doubt that Jeng intended to hire, or agreed to hire, minors to engage in prostitution, as no other inferences are reasonable.

Substantial step

Jeng also argues that the state failed to prove that he took a substantial step toward hiring or agreeing to hire minors to engage in prostitution. To convict someone of attempting to commit a crime, the state must prove that the defendant committed “an act which is a substantial step toward, and more than preparation for, the commission of the

crime.” Minn. Stat. § 609.17, subd. 1 (2014). There is no definite rule for what constitutes a substantial step toward the commission of a particular crime. *State v. Dumas*, 136 N.W. 311, 314 (Minn. 1912). A determination is based on the particular facts of each case. *Id.* Our supreme court has said that if the steps towards the commission of the crime “are done with the specific intent to commit the crime, and directly tend in some substantial degree to accomplish it, they are sufficient to warrant a conviction.” *Id.*

Here, the evidence shows that Jeng responded to an advertisement and exchanged numerous text messages with an undercover officer to facilitate sexual conduct with two girls. Jeng learned that the two girls were supposedly 15 and 16 years old, continued exchanging text messages with the officer, and then drove to the hotel. Jeng exited his car and proceeded to the hotel, where he was arrested with over \$2,100 in cash. We conclude that the evidence shows beyond a reasonable doubt that Jeng took a substantial step toward hiring or agreeing to hire minors to engage in sexual conduct.

Sentence

Jeng argues that the district court erred by imposing two sentences for offenses that were committed as part of a single behavioral incident. Whether multiple offenses arose from a single behavioral incident is a question of fact, but when the facts are undisputed, we review that determination de novo. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001).

With few exceptions, if a person’s conduct constitutes more than one offense, he may be punished for only one of those offenses. Minn. Stat. § 609.035, subd. 1 (2014). To determine whether multiple offenses arose from a single behavioral incident, this court

considers the unity of time and place, and whether the conduct was motivated by a single criminal objective. *State v. Bookwalter*, 541 N.W.2d 290, 295 (Minn. 1995). Section 609.035 contemplates that the defendant will be punished for the most serious offense arising out of a single behavioral incident. *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006).

Here, the district court imposed two sentences for Jeng's two attempted-prostitution convictions. The state concedes that Jeng's convictions arose from a single behavioral incident. The record demonstrates that Jeng attempted to engage in prostitution with a 15 and 16 year old in a single encounter, and that his actions were unified by time, place, and a single criminal objective—to engage in prostitution. We conclude that Jeng's offenses occurred during a single behavioral incident and that the district court erred by imposing two concurrent sentences. We, therefore, reverse Jeng's sentences and remand to the district court to impose sentence on Jeng's most serious conviction.

Affirmed in part, reversed in part, and remanded.