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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0405**

State of Minnesota,
Respondent,

vs.

Jon Andrew Burlingame,
Appellant.

**Filed January 27, 2020
Affirmed in part, reversed in part, and remanded
Klaphake, Judge***

Wadena County District Court
File No. 80-CR-17-325

Keith Ellison, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Kyra L. Ladd, Wadena County Attorney, Wadena, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Rodenberg, Judge; and
Klaphake, Judge.

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Jon Andrew Burlingame challenges his convictions for electronic solicitation of a child to engage in sexual conduct, Minn. Stat. § 609.352, subd. 2a(1) (2014), and electronic communication with a child describing sexual conduct, Minn. Stat. § 609.352, subd. 2a(2) (2014), arguing that the evidence is insufficient on the solicitation offense, the district court erred by rejecting his entrapment defense, and he was erroneously convicted of both offenses when the electronic-communication offense was a lesser-included offense of the solicitation offense. Because the electronic-communication offense is a lesser-included offense of the solicitation offense, we reverse and remand for the district court to vacate that conviction, but we otherwise affirm.

DECISION

In considering a claim of insufficient evidence, an appellate court conducts a detailed review of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to support a guilty verdict. *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011). Applying both the presumption of innocence and the requirement of proof beyond a reasonable doubt, we will not disturb a conviction if the fact-finder could reasonably conclude that the defendant was guilty. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). For sufficiency claims, convictions resulting from bench trials apply the same standard of review as those resulting from jury trials. *State v. Levie*, 695 N.W.2d 619, 626 (Minn. App. 2005).

Burlingame was convicted of child-solicitation, which includes “soliciting a child or someone the person reasonably believes is a child to engage in sexual conduct.” Minn. Stat. § 609.352, subd. 2a(1). “Solicit” for purposes of this statute is defined as “commanding, entreating, or attempting to persuade a specific person.” *Id.*, subd. 1(c)(2014). Burlingame argues that the state did not meet its burden to prove that he solicited a law enforcement officer posing as a fifteen-year-old girl, “Sabrena,” to engage in sexual conduct because text messages he sent to Sabrena are “devoid of any commands, serious requests, or attempts to persuade [her] to engage in sexual conduct and he never attempted to meet with [her].” We disagree.

While the evidence does not show that Burlingame directly commanded or entreated Sabrena to engage in sexual conduct, it does show that he employed a persistent, indirect method to persuade her to engage in sexual conduct with him. As we have previously noted, solicitation is always “in some degree[,] ambiguous” and may be “implied by the defendant’s words” or acts. *State v. McGrath*, 574 N.W.2d 99, 102 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Apr. 14, 1998). During four days of increasingly sexually explicit electronic communications, Burlingame incrementally linked himself and his sexual desires to Sabrena, asking for an exclusive relationship, describing his penis to her, masturbating while he engaged her in conversation, sending and seeking “hot” photographs,¹ graphically describing their potential sexual liaisons, establishing that she

¹ Burlingame posits that the state “attempts to imbue meaning to [his] requests for photographs” that does not exist, suggesting that they were merely his attempt to verify Sabrena’s age. This view of the evidence is contrary to the district court’s finding of guilt

lived within driving distance, and, finally, suggesting that he “come over” while her mother was not home. His statements could only be intended to persuade Sabrena to engage in some form of sexual conduct with him. *See id.* at 101 (allowing “a plausible inference that [the perpetrator] intended to engage [the child victim] in some form of sexual conduct” when the perpetrator simultaneously bumped the victim’s hip and “stated that he was ‘horny’ when he was young and explained how he was able to ejaculate ‘five times in a ten minute period’”).

Burlingame next argues that the district court erred by determining that he did not meet his burden to prove that he was entrapped by law enforcement during his communications with Sabrena. “[O]fficers of the law shall not incite crime to punish its perpetrator, [and] shall not lead a man into crime” *State v. Boylan*, 197 N.W.2d 281, 281 (Minn. 1924). Entrapment is proven in two steps. First, the defendant must show by a fair preponderance of evidence that the government engaged in inducement. *State v. Garcia*, 927 N.W.2d 338, 341 (Minn. App. 2019). This is shown by “persuasion, badgering, or pressure by the state.” *State v. Olkon*, 299 N.W.2d 89, 108 (Minn. 1980). If this step is met, the state must then “prove beyond a reasonable doubt that the accused was predisposed to commit the crime charged.” *Garcia*, 927 N.W.2d at 341 (quotation omitted).²

and to the record evidence, which clearly shows that he requested the photographs for a sexual reason, and not an innocuous one.

² As set forth in *Garcia*, normally the issue of entrapment is addressed in a pretrial hearing. 927 N.W.2d at 341-42. Here, defense counsel agreed that the district court could take under advisement Burlingame’s motion to dismiss on the ground of entrapment, and the parties could present evidence relative to the issue at trial.

The conduct of law enforcement consisted of merely posting an advertisement as a 15-year-old seeking a friend, to which Burlingame responded and sent sexually explicit messages. The district court noted that the closest the state came to “persuasion, badgering, or pressure” was in asking Burlingame whether he “wanted more than just talk,” but that isolated statement occurred after Burlingame had sent her numerous sexually explicit communications. The district court correctly concluded that Burlingame did not meet his burden to prove that law enforcement induced him to commit the charged crimes. *See State v. Oanes*, 543 N.W.2d 658, 664 (Minn. App. 1996) (ruling that entrapment not shown when a police officer merely approached a prostitute, and the prostitute initiated a sexual exchange by telling the officer of the cost for “a woman of his choice,” brought him to a room, and told him to undress); *State v. Olson*, 361 N.W.2d 899, 905 (Minn. App. 1985) (requiring the defendant to establish that the state did more than merely solicit the subject crime), *rev’d in part on other grounds*, 379 N.W.2d 524 (Minn. 1986).

Burlingame’s final argument is that he was erroneously convicted of both charged offenses.³ The state concedes that the electronic-communication conviction is a lesser-included offense of the child-solicitation offense and should not have resulted in a second conviction. We agree. *See* Minn. Stat. § 609.04, subd. 1(4) (2018) (barring a conviction for a second “crime necessarily proved if the crime charged were proved”). We therefore reverse in part and remand for the district court to vacate the electronic-communication

³ Although the record is somewhat unclear regarding whether Burlingame was convicted of both offenses, we rely on the “official judgment of conviction” to make that determination. *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (quotation omitted).

conviction. *See State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999) (stating that when a defendant is found guilty of an offense and a lesser-included offense, the district court should make a determination of guilt as to both offenses but formally convict only on the more serious offense, allowing the district court to retain jurisdiction over the lesser-included offense if the more serious conviction is later vacated).

Affirmed in part, reversed in part, and remanded.